JULY 22, 1861.

JOHN WHITEHEAD, S.S.C., and CHARLES MORTON, W.S. (Assignees of the Edinburgh and Glasgow Bank), *Appellants*, *v.* D. STEWART GALBRAITH, J. CULLEN, W.S., and D. STEWART GALBRAITH, Junior (Trustees of M. M'Crummon), *Respondents.*

Appeal—Judgment of House of Lords—Diligence, Summary—Process—Expenses—*The House of Lords, having affirmed a judgment of the Court of Session, and awarded costs against the appellant, ordered, that if the costs were not paid within a certain time, "the cause should be remitted back to the Court of Session, or to the Ordinary officiating on the Bills during vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary;" and the amount of costs was certified by the Clerk of Parliament.*

HELD (reversing judgment), *That the Court of Session was bound to give instant decree for payment of the costs mentioned by the Clerk of Parliament, so that summary diligence might issue under the same.*[1]

The Edinburgh and Glasgow Bank was a creditor on the sequestrated estate of David Stewart Galbraith; and on 7th December 1853 John Thomson, as manager of the bank, raised an action of reduction of a bond for £5500 granted by David Stewart Galbraith, in favour of himself and Daniel Galbraith, as trustees of Malcolm M'Crummon. Thomson called, as defenders in the reduction, David Stewart Galbraith, Thomas M'Micken Crawford, George Henry Harper, John Cullen, and David Stewart Galbraith, junior, as the then surviving trustee and assumed trustees of Malcolm M'Crummon, and certain other parties, and among them David Stewart Galbraith, junior, for his own interest, as having or pretending interest in the bond.

M'Crummon's surviving trustee and assumed trustees lodged defences, and certain other parties called lodged separate defences. David Stewart Galbraith, junior, did not, as a defender called for his individual interest, lodge a separate defence.

In 1854 Thomson and the trustees of the Edinburgh and Glasgow Bank executed an assignation in favour of John Whitehead, S.S.C., and Charles Morton, W.S., as trustees in succession, of the claims of the bank on the estate of David Stewart Galbraith, and of, *inter alia*, their rights in the action of reduction; and on 24th June 1854, Mr. Whitehead and Mr. Morton were, of consent, sisted as parties to the cause.

On 1st February 1856 the Second Division of the Court pronounced an interlocutor reducing the bond, exhausting the cause, and finding neither party entitled to expenses; and the pursuers extracted the decree.

In February 1857 a petition and appeal against this judgment was presented to the House of Lords by David Stewart Galbraith, "only surviving, accepting, and acting trustee, and *sine quo non* nominated by the late Malcolm M'Crummon, formerly Sheriff Clerk of Skye, with consent of John Cullen, Writer to the Signet in Edinburgh, and David Stewart Galbraith, junior, third son of the said David Stewart Galbraith, assumed trustees by the said David Stewart Galbraith under the trust, and the said David Stewart, Galbraith, junior, for his own right and interest."

In the petition the procedure in the action of reduction and the judgment were set forth, and it was stated, that the petitioners, David Stewart Galbraith, only surviving trustee of M'Crummon, "with consent of the said John Cullen and David Stewart Galbraith, junior, assumed trustees foresaid, and the said David Stewart Galbraith, junior, for his own right and interest," were advised that the interlocutor was erroneous, and therefore, the petition proceeded, "your petitioners, as aforesaid," humbly appeal, &c.

Of this petition intimation was given to Messrs. Morton, Whitehead, and Greig, agents of the pursuers of the action, by John Cullen, agent of the petitioners. On 2nd March an order for service was pronounced, in which the appellants were described in the same way as in the petition. And David Stewart Galbraith entered in a recognisance for £400, and the condition of the recognisance being stated to be "that whereas David Stewart Galbraith, only surviving accepting, and acting trustee, and *sine quo non* nominated by the late Malcolm M'Crummon, with consent of John Cullen, Writer to the Signet in Edinburgh, and others, have brought their appeal" against an interlocutor of the Lords of Session in Scotland, of the 5th February 1856:

[1] See previous reports 23 D. 265; 33 Sc. Jur. 121. S. C. 4 Macq. Ap. 283; 33 Sc. Jur. 700.

"If, therefore, the said appellants, their heirs, executors, or administrators, shall well and truly pay, or cause to be paid, unto the Edinburgh or Glasgow Bank, and John Thomson, manager thereof, and others, respondents to the said appeal, their successors, heirs, executors, or administrators, all such costs as the said Lords in parliament shall appoint, in case the said interlocutor shall not be reversed, then this recognisance to be void and of none effect, or else to remain in full force and virtue."

The respondents (Edinburgh and Glasgow Bank and others) presented a counter petition to the House of Lords, setting forth, that, by the trust disposition of Malcolm M'Crummon, it was provided, that two of his trustees, while two remained alive, were to be a quorum, but, that the appeal was brought only by one of the trustees, viz., David Stewart Galbraith; and that the other appellant, David Stewart Galbraith, junior, appealing for his own interest, had made no appearance in the Court below in that character, but only as one of M'Crummon's trustees; that a pretence was made in the petition of a consent to the appeal by John Cullen and David Stewart Galbraith, junior, two other of M'Crummon's trustees; that that consent was not proved, and was denied, and, at all events, did not make them appellants; that the trust could not be represented in the appeal by one trustee only; and that it was incompetent for David Stewart Galbraith, junior, to appeal for his own beneficial interest, he not having appeared in that character in the Court of Session; and the petitioners prayed, that the appeal should be dismissed as incompetent. On this last petition, on report from the Appeal Committee, an order was pronounced by the House of Lords, "that the prayer of the said petition be not complied with."

Parties were then heard on the appeal, and the House of Lords pronounced the following judgment (see *M'Crummon's Trustees* v. *Whitehead*, *ante*, p. 822):—"*Die Jovis*, 24° *Martij* 1859.—After hearing counsel, as well on Monday and Tuesday last as this day, upon the petition and appeal of David Stewart Galbraith, formerly of Machrihanish, thereafter residing at Campbeltown, district Kintyre and county of Argyle, and now residing at Budleigh, Salterton, Devon, only surviving, accepting, and acting trustee, and *sine quo non* nominated by the late Malcolm M'Crummon, formerly Sheriff Clerk of Skye, with consent of John Cullen, Writer to the Signet in Edinburgh, and David Stewart Galbraith, junior, third son of the said David Stewart Galbraith, assumed trustees by the said David Stewart Galbraith, under the trust, and the said David Stewart Galbraith, junior, for his own right and interest, complaining of an interlocutor of the Lords of Session in Scotland of the Second Division, of the 5th of February 1856, and praying, that the same might be reversed, varied, or altered, or that the appellants might have such relief in the premises as to this House in their Lordships' great wisdom should seem meet; as also upon the joint and several answers of the Edinburgh and Glasgow Bank, and John Thomson, Manager at Edinburgh of said company, and of Charles Morton, Writer to the Signet, and John Whitehead, Solicitor Supreme Courts of Scotland, put in to the said appeal, (which said appeal was, by order of this House of the 11th of June 1857, heard *ex parte* as to John Campbell, Alexander Macdonald Lockhart, Eaglesfield Bradshaw Smith, and John Hunter, trustees and executors of Norman Lockhart, and the said John Hunter and George Greig, they not having answered the said appeal, though peremptorily ordered to do so,) and due consideration had of what was offered on either side in this cause:—It is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, that the said petition and appeal be, and is hereby, dismissed this House, and, that the said interlocutor therein complained of be, and the same is, hereby affirmed: And it is further ordered, that the appellants do pay, or cause to be paid, to the said respondents, the Edinburgh and Glasgow Bank, and John Thomson, manager at Edinburgh of said company, Charles Morton, and John Whitehead, the costs incurred by them in respect of the said appeal, the amount thereof to be certified by the Clerk of the Parliament. And it is also further ordained, 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."

Thereafter the expenses were taxed, and a certificate issued by the Clerk of Parliament, certifying that the costs amounted to £310 11*s.*

These expenses not having been paid, the present petition was presented to the Second Division of the Court by John Whitehead and Charles Morton, as assignees of the Edinburgh and Glasgow Bank, setting forth the procedure in the action of reduction and appeal, and praying the Court, "in terms of the judgment of the House of Lords, to decern and ordain the said David Stewart Galbraith as only surviving and acting trustee, and *sine quo non* named by the late Malcolm M'Crummon, and the said John Cullen and David Stewart Galbraith, junior, assumed trustees by the said David Stewart Galbraith and the said David Stewart Galbraith under the trust, and the said David Stewart Galbraith, junior, for his own right and interest, appellants, to make payment to the petitioners, as respondents in the said appeal, and as assignees of the Edinburgh and Glasgow Bank, for their own right and interest, and as the parties entitled to the sum of £310 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 per centum per annum on said sum, from the 4th day of July 1859 till payment, and to decern therefor; and further, to find the said David Stewart Galbraith, John Cullen, and David Stewart Galbraith, junior, as trustee and assumed trustees foresaid, and the said David Stewart Galbraith, junior, for his own right and interest, 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."

The petitioners afterwards stated in a minute that, although the judgment of the House of Lords made mention not only of the petitioners but also of the Edinburgh and Glasgow Bank and their manager, Mr. Thomson, as respondents in the appeal, and ordered the costs to be paid to "the said respondents," yet, that the petitioners, as assignees of the Edinburgh and Glasgow Bank, were the only parties having interest and entitled to the costs; that the whole interest of the bank in the action had been transferred to the petitioners as already mentioned; that the Edinburgh and Glasgow Bank was dissolved, and had ceased to exist, and that Mr. Thomson, formerly manager of the bank, had died.

To this petition and minute Mr. Cullen lodged answers, in which he stated—(1) that he was not a party to the appeal; (2) that the Edinburgh and Glasgow Bank, respondents in the appeal, had been dissolved and Mr. Thomson had died before the judgment of the House of Lords was pronounced, and that no person had been sisted in their stead; (3) that David Stewart Galbraith was resident in England, and David Stewart Galbraith, junior, in Australia. And he submitted, that the prayer of the petition should be refused, because—1. The process being extracted, did not depend before the Court, and it was therefore incompetent to give any judgment or pronounce any order in that cause, or in said petition. 2. The only proper mode for recovering the expenses awarded by the House of Lords was under the recognizance there found, to which the respondent was no party; and no decree could competently issue therefor in the Court of Session. 3. The respondent was not a party to the appeal to the House of Lords. 4. The judgment of the House of Lords was null and void in respect of the dissolution of the bank and the death of its manager prior to its date, and in respect that no new parties had been sisted in their place. 5. David Stewart Galbraith and David Stewart Galbraith, junior, had not competently been made parties to the present petition, and were not represented by the present respondent.

The case came on for debate on the 3d and 10th December 1859, when it was argued for Cullen, that there was no process; because, the former process having been extracted, there was no process to which the petition could be incidental; and that if, as was said by the petitioners, the petition was an independent application, there had been no citation of any of the respondents, the petition having been merely intimated to Cullen, who had ceased to be agent for the Galbraiths; that, in any view, it was incompetent, under a remit from the House of Lords, to enforce payment to the Edinburgh and Glasgow Bank and to Mr. Thomson, as well as to the petitioners to crave for decree in favour of the petitioners alone; that, besides, what the petition asked the Court to do was not what they were authorized to do under the remit.

The Court of Session held, that the remit was a direction to issue summary diligence for the costs of the appeal, as certified by the Clerk of Parliament, and that it was not competent for the Court of Session to pronounce decree therefor.

The petitioners appealed, maintaining in their case, that the interlocutors of the Court of Session ought to be reversed—1. Because the petition presented by the appellants was regular and competent, and in no respect liable to any of the objections relied on by the respondent, Mr. Cullen. Authorities:—*Clyne* v. *Clyne's Trustees*, 2 D. 242; *Ferrie* v. *Ferrie*, 15 D. 766. 2. Because the respondent, Mr. Cullen, was one of the appellants in the former appeal, and as such was one of the parties who were, by the judgment of your Lordships, ordered to pay the costs in question to the petitioners.

The respondents in their case supported the judgment on the following grounds:—1. The appellants' petition was incompetent, in respect, that, although decree had been extracted in the Court below, and the original cause exhausted, the petition contained no prayer for warrant to cite the parties against whom it was directed. 2. It was incompetent, in respect it prayed the Court of Session to pronounce a decree for costs in the original appeal, for which a judgment had already been issued by the House of Lords. 3. It was also incompetent, in respect its prayer was unnecessary, inconsistent with, and *ultra vires* of the terms of the remit to the Court of Session. *Wilson* v. *Fraser*, 3 S. 189.

Sir F. Kelly Q.C., *Anderson* Q.C., and *A. R. Clark*, for the appellants, contended that—The petition of the appellants to the Court below was in the regular course, as established by the following modern decisions:—*Clyne* v. *Clyne's Trustees*, 2 D. 242; *Ferrie* v. *Ferrie*, 15 D. 766; also *Elliot* v. *Minto*, 11 S. 770; *Clyne's Trustees* v. *Stewart*, 14 S. 815; *Clyne's Trustees* v. *Dunnet*, 1 D. 689; *Purves* v. *Landell*, 7 D. 810; *Cormack* v. *Erskine*, 7 D. 812; *Galbreath* v. *Armour*, 23 D. 270 (*n*); *Colquhoun* v. *Fisher*, 23 D. 270 (*n*); *Maxwell* v. *Maxwell*, 23 D. 270 (*n*); *North British Railway Company* v. *Tod*, 9 D. 1459; *Sawers* v. *Russell*, 23 D. 271 (*n*).

As to the objection that the petition asked too much, it was the duty of the Court to treat the excess as surplusage.

Lord Advocate (*Moncreiff*), and *R. Palmer*, Q.C. (*Solicitor General*), for the respondents.—There was no remit to the Court below, except as regards costs, and an original petition to the Court of Session was quite unnecessary to get diligence to recover those costs. The course is to go to the Bill Chamber, and by petition or plack bill ask for letters of horning. There was no necessity for the Court below to pronounce any decree, as there was already a decree of the House of Lords. The petition actually presented was quite inconsistent with the functions of the Court of Session, and it was properly rejected.

LORD CHANCELLOR WESTBURY.—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 pronounced an order upon that appeal, by which, in fact, the appeal was dismissed; and it was ordered, that the appellants 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 11*s.* 0*d.*, which certificate is dated on the 4th of June 1859.

Now, anterior to the statute, commonly called the Summary Diligence Act, which is the 1st and 2d of Victoria, cap. 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.

That, in point of fact, 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 twenty three years old; and during that period of time it has been, as I shall have occasion to shew your Lordships, frequently interpreted and acted upon judicially by the Court of Session, and it is in that form that the order in the former appeal in this case is worded.

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. Now the appeal has the effect of bringing the record of the cause into this House. By that form of words, the record is sent back to the Court of Session, which becomes thereby re-possessed of the cause, with this addition, that this House has introduced into that cause, or at least has given directions for the introduction into that cause of a particular order, viz., 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.

Now 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 such 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 will refer your Lordships to the expressions which you will find in the judgment of some of the Judges who were in the minority, and I think your Lordships will agree with me, that the words there used by the minority of the Judges exactly express what your Lordships intended in your former order. In the passage to which I am referring, it is said, "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 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 Medwyn and Lord Corehouse in a former case, that occurred some time ago, the case of *Stewart* v. *Scott*, 14 S. 692, and in the latter part of the extract from that opinion to which I have referred your Lordships, you will find the 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 expressed or implied, it imposes upon this Court the performance of the judicial acts requisite to complete the procedure; for, 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." Now 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. 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 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 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.

Now, if you will permit me, I will refer to instances which have been collected, and of which I will only cite one or two, in order to shew, 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. I will refer you, in the first place, to the first case, of *Sawers* v. *Russell*, 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* v. *Ferrie*, 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. I will next direct your attention to two other cases. In the case of *Clyne's Trustees* v. *Clyne*, 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, my Lords, you will find, in the case of *Colquhoun* v. *Fisher*, a similar form of language, and under similar circumstances. And no difficulty whatever was suggested about the language of your Lordships' order. And 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 *Elliott* v. *The Earl of Minto*, 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 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.

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 Parliaments; 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 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, to which I will for a moment direct the attention of your Lordships. In the case made by Mr. Cullen in answer to the petition, there does not appear 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 payment 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 Medwyn 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, 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 expressive of 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 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, after 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 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, resulting entirely from the act of the Court in taking a technical objection, in itself without foundation, which was not suggested by either party.

But 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; and supposing, that the expense of the present appeal is 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.

Now, 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 should 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 there was another thing involved in the petition. 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 right 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 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 was impossible for any one to fail to apprehend it.

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.

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, 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. My Lords, really the case of *Stewart* v. *Scott*, which has been referred to by my noble and learned friend, seems very much to dispose of this case. After looking at the opinion of Lord Medwyn and Lord Corehouse, it is material to observe, that Lord Jeffrey, who suggested and concurred in the view taken by the minority, gives no countenance whatever to the argument used against the judgment of Lord Medwyn 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.—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 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 shall be lawful and necessary for the recovery of the sum of £310 11*s.*, because, although it says "such costs," those costs, under your Lordships' order, are taxed at the sum of £310.

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 or 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.

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 twenty three 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.

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 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, his own costs being probably far beyond that amount, because the £175 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.—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 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 and 2 Vict. cap. 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 have given 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 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 have rejected 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, and properly anxious, to guard against any innovation upon their practice. If, therefore, it could have been shewn, 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, treated 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 indispensable 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 shew 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 case of *Brown* (M. 4042), 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 have converted 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 and 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. I apprehend we shall get the costs incurred in the Court below?

LORD BROUGHAM.—You mean the £175?

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.

The 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.

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.

Interlocutors reversed, and cause remitted, with declarations and directions.

The *order* was as follows:—"After hearing counsel, as well on Friday last as this day, upon the petition and appeal of John Whitehead, Solicitor Supreme Courts of Scotland, Edinburgh, and Charles Morton, Writer to the Signet, Edinburgh, assignees of the Edinburgh and Glasgow Bank, conform to assignation in their favour granted by the trustees of the said bank, and John Thomson, its registered officer, dated 20th and 21st February and 8th March 1854, and recorded in the Books of Council and Session the 10th day of March 1860, complaining of three interlocutors of the Lords of Session in Scotland of the Second Division, dated respectively the 11th of January and the 1st and 23d of February 1861, and praying, that the same might be reversed, varied, or altered, or, that the appellants might have such relief in the premises as to this House, in their Lordships' great wisdom, should seem meet; as also upon the separate answer of John Cullen put in to the said appeal, (which appeal was, in pursuance of an order of this House of the 7th of May 1861, ordered to be heard *ex parte* as to David Stewart Galbraith, and David Stewart Galbraith, junior, trustee and assumed trustees, accepting and acting under the settlement of Malcolm MacCrummon, and the said David Stewart Galbraith, junior, for his own right and interest, they not having answered the said appeal, though peremptorily ordered so to do,) and due consideration had of what was offered on either side in this cause: It is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, that the said interlocutor of the Lords of Session in Scotland of the Second Division, dated respectively the 11th of January and the 1st and 23d of February 1861, 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 Parliaments, 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 appellants' 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.''

For Appellants, Dodds and Greig, London; Morton, Whitehead, and Greig, W.S., Edinburgh. —*For Respondents*, J. F. Elmslie, Solicitor, London; John Cullen, W.S., Edinburgh.

JULY 24, 1861.

THE MAGISTRATES AND TOWN COUNCIL OF DUNDEE, *Appellants*, *v.* THE PRESBYTERY OF DUNDEE, *Respondents*.

Trust—Charity—Royal Charter—Construction—Church—Poor—*Circumstances in which, with reference to a charter granted to the Magistrates of Dundee, by Queen Mary in* 1567 (*afterwards confirmed by James* VI. *and Charles* I.), *and to various documents:*

HELD (affirming judgment), *That a trust of certain property was validly created in the Magistrates of Dundee, "for the sustentation of the ministry of the Word of God, and the support of the clergy" of the Established Church within the burgh.*

HELD further (reversing judgment), *That, a will dated* 1638 *having given a legacy to the Magistrates for aged and impotent poor, part of which sum was invested in land without apparent authority, the land must be treated as confined to the purpose of the legacy and not to the support of the clergy.*[1]

The Magistrates of Dundee appealed, maintaining in their case, that the judgments of the Court of Session of 4th July 1856 (interlocutor signed 18th July) and 18th March 1858, should be reversed—1. Because the hospital fund is not an incorporated trust, and does not owe its existence to, and is not dependent for the laws of its administration and distribution upon, the charter of Queen Mary. 2. Because, if it be held that such a trust as is described in the interlocutors appealed against was originally constituted in the town of Dundee, by Queen Mary's charter, the trust, as so constituted, was subsequently altered by competent authority. 3. Because, on the true construction of Queen Mary's charter, even without the aid of extrinsic evidence, but still more the aid afforded by such evidence, the ministers of Dundee had not any primary claim, or any claim preferable to that of the poor, in regard to any subjects acquired under that charter. 4. Because, having regard to the conclusions of the summons, and the averments made by the pursuers in the record, the whole findings by which mortifications or bequests subsequent to the date of Queen Mary's charter, and the purchases and investments made by means thereof, are found applicable for behoof of the ministers of Dundee, are not only unsound, but are *ultra petita*, and incompetent in the present action. 5. Because, whatever may be held with respect to the subjects specifically conveyed by Queen Mary's and subsequent royal charters, and the savings and accumulations from such subjects, and the investments made with such savings and accumulations, at all events the old hospital, and its property, "Monorgan's Croft," and the whole other properties and funds constituting what is commonly known as the hospital fund, are derived from mortifications, legacies, or bequests for totally different objects, —at all events for objects in which the ministers of Dundee are in nowise interested,—and cannot be held to be funds or property held under Queen Mary's and other royal charters, or to be applicable to the support and maintenance of the ministers of Dundee. 6. Because the two interlocutors appealed against, in so far as they admit the clergy to participation in the revenues of Monorgan's Croft, are at variance with the terms of the title on which that property is now, and for the last two centuries has been held; the more especially as that title has never been, and is not now, impeached in the present or any other competent process; and because, even supposing that title to have been originally open to challenge, which is not alleged, all right and claim of action, having for object to subvert the terms and conditions of the trust appearing *ex facie* of that title, are now barred and cut off by prescription. 7. Because, in the absence of countervailing evidence, where the minutes of council or conveyances to the hospital master bear that any purchases, or mortifications, or investments, were for behoof of the poor, without mention of any other object, such purchases, investments, and mortifications must be held as applicable for behoof of the poor alone, and not to form part of the common estate, applicable

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[1] See previous reports 20 D. 849 : 28 Sc. Jur. 592 : 30 Sc. Jur. 452. S. C. 4 Macq. Ap. 228 : 33 Sc. Jur. 707.