

[13th June 1839.]

(Appeal from the Court of Session, Scotland.)

JOHN BOYLE GRAY¹, Appellant.

(No. 16.)

[*Knight Bruce—Hill.*]

The Rev^d JOHN FORBES and others (Outer Kirk Session of the High Church of Glasgow), Respondents.

[*Tinney—John Stuart.*]

Trust—Contract—Burgh.—(1.) Where funds were vested in the magistrates and council of a burgh as trustees, to apply the yearly produce in the support and maintenance from time to time of “schools” taught on the Madras system, and the town council entered into an agreement with the several kirk sessions in the burgh, binding themselves and their successors to pay over the dividends equally among the kirk sessions, each of the latter becoming bound to lodge annually with the council a vidimus, “showing definitely that the dividend was “to be strictly applied in the promotion of the system “of education proposed by the donor, and accompanied “by an obligation by the kirk session to apply the same “accordingly,” and so long as each kirk session did so, “and satisfied the town council” that the contract was duly performed, it should have right to its share of the dividend, and not otherwise, provision being made for admitting members of the town council to the annual examination of the schools “to satisfy themselves of the “bonâ fide and legitimate application of the dividend,”

¹ 15 D., B., & M., 628.

and the contract bearing that this was done strictly in terms of the deed of donation; The town council of a subsequent year having refused to implement the contract, — Held (affirming the judgment of the Court of Session) that the contract was strictly within the competency of the magistrates and town council as trustees, and that the performance of such contract was binding on all parties.

(2.) It having been determined by the House of Lords¹, that one member of the town council might competently appeal against the judgment of the Court of Session, the appellant was allowed to plead every objection to the performance of the contract urged in that Court, although the council as a body had acquiesced in the judgment appealed against, and had, by a farther agreement with the kirk sessions, arranged the details preparatory to the execution of the trust.

Costs.—Costs, including those incurred by respondent in unsuccessfully opposing, on the ground of incompetency, an appeal, which was afterwards dismissed on the merits, awarded against the appellant.

THE late Rev. Dr. Andrew Bell of Egmore, prebendary of the collegiate church of St. Peter Westminster, by deed of indenture, executed between him and the provost and certain clergymen and professors of St. Andrew's, dated the 14th day of July 1831, gave and transferred to these parties the two several sums of 60,000*l.* three per centum consolidated bank annuities, and 60,000*l.* three per centum reduced bank annuities, on the recital, “ that the said Dr. Andrew Bell, the author of the “ system of education called the Madras System, con- “ sidering that the progress of the said system in his “ native country of Scotland had hitherto been slow

1ST DIVISION.

Lord Ordinary
Fullerton.

¹ 3 Sh. & M'Lean, 381.

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“ and imperfect, and that the greatest boon he could
 “ confer upon that country would be by taking mea-
 “ sures for the more effectual diffusion of the said
 “ system therein;” and, therefore, the trustees were
 taken bound to divide the stocks or sums into twelve
 equal parts, and, inter alia, to transfer one twelfth part
 thereof to the provost, magistrates, and town council
 of Glasgow; but upon condition, “ that the sum so to
 “ be transferred to them should be by them, and their
 “ successors, employed for the founding or maintenance
 “ of a school or schools in that city for the instruction
 “ of children, whether male or female or both, in the
 “ ordinary branches of education, but so that the
 “ tuition at every one of the schools be upon the
 “ system of mutual instruction and moral discipline
 “ exemplified in the Madras school;” and that the
 magistrates and council “ should stand possessed of the
 “ said stock, so to be transferred to it as aforesaid, upon
 “ trust for ever, to apply the interest and dividends
 “ thereof in the support and maintenance, from time
 “ to time, of schools already founded or hereafter to be
 “ founded on the principles of the said Madras system,
 “ such funds either to remain as invested, or to be in-
 “ vested on any government, heritable, or other suffi-
 “ cient securities, as might from time to time be thought
 “ fitting;” and that, before any appropriation or appli-
 cation of the said stock, they should execute a declara-
 tion and acknowledgment of acceptance by them of the
 several trusts declared in the said indenture. The
 provost, magistrates, and council of Glasgow having
 accepted the shares of stock upon the terms men-
 tioned in his said deed, amounting to 9,791*l.* 13*s.* 4*d.*,
 which was transferred to them upon the 18th day of

November 1831, executed a declaration of trust, binding themselves and their successors in office, in all time to come, upon or for the trust following; viz. "That we
 " and our successors in office shall for ever apply the
 " dividends and interest of the foresaid sums, or of the
 " proceeds thereof, in the support and maintenance,
 " from time to time, of a school or schools already
 " founded, or to be founded, in the city of Glasgow,
 " on the principle of the system of mutual instruction
 " and moral discipline, as exemplified in the Madras
 " school, or in what is known by the name of the
 " Madras System." In October 1833 ten contracts or agreements were executed between a committee representing the magistrates and town council of Glasgow on the one part, and the committees of the ten kirk sessions of Glasgow, as authorized by the said kirk sessions respectively, on the other part, the contract with the pursuers bearing that "it had been agreed between
 " the said first party and the several kirk sessions of
 " Glasgow that, in order more extensively and effectually to promote the system of education contemplated and prescribed by the Reverend Dr. Bell,
 " the annual interest or proceeds of the foresaid two
 " sums now vested in government securities should be
 " equally divided among and paid over, half yearly,
 " to the different kirk sessions, upon their severally
 " executing the said contracts; therefore the said
 " second party, as representing one of the kirk sessions,
 " and, in particular, the pursuers, or some of their
 " number, as representing the kirk session of the foresaid Outer High Church and parish of Glasgow, and
 " as taking burden on them for the same, bound and
 " obliged themselves, and their successors in office, to

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“ lodge in writing with the secretary of the said first
 “ party, a distinct vidimus or statement of the proposed
 “ application of the proportion of the annual interest or
 “ proceeds of the said two sums falling to be paid to
 “ the said second party, showing definitely that the
 “ same is to be strictly applied in the promotion of the
 “ system of education proposed by the donor, the
 “ Reverend Dr. Bell, and accompanied by an obliga-
 “ tion, binding the said kirk session to apply the same
 “ accordingly; declaring, that so long as the said
 “ second party shall continue to furnish an annual
 “ statement or vidimus and obligation, to the effect
 “ before mentioned, and shall, from year to year,
 “ satisfy the said first party that the same has been
 “ followed out and carried into execution, the said
 “ second party, and their successors in office, shall be
 “ entitled to draw the proportion before mentioned of
 “ the foresaid annual interest or proceeds from the said
 “ first party; but in the event of the said second party
 “ failing to lodge the said annual statement or vidimus
 “ and obligation, or failing to satisfy the said first party
 “ of the same having been carried into effect, they shall
 “ forfeit their right to the proportion of the said
 “ interest or annual proceeds falling to be paid to the
 “ said kirk session, and the said first party shall be
 “ entitled to apply the same as fully and freely as if
 “ the said contracts had never been executed. And,
 “ farther, the said second party bind and oblige them-
 “ selves, and their successors in office, to hold annual
 “ examinations of the schools to be established or
 “ maintained, either partially or totally, by the propor-
 “ tion of the interest or annual proceeds payable to
 “ them as before mentioned, and to give to the secre-

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“ tary of the said first party at least six days previous
 “ notice of the time fixed for that purpose, so that the
 “ said first party, one or more of them, may have an
 “ opportunity of attending the said examination, and
 “ becoming satisfied with the bonâ fide and legitimate
 “ application of the foresaid annual interest or pro-
 “ ceeds; and, particularly, that the same are applied
 “ agreeably to the said contracts, and strictly in terms
 “ of the deed of donation executed in favour of the
 “ said first party by the said Reverend Dr. Bell.”

Within a few days after the execution of the several contracts above mentioned a vidimus or statement was lodged by each of the said ten kirk sessions, and particularly by the respondents, to the following effect:—

“ In terms of the contract entered into between the
 “ lord provost, magistrates, and town council of Glas-
 “ gow on the one hand, and the session of the outer
 “ high church on the other hand, of date the 16th and
 “ 28th days of October 1833, the said session hereby
 “ undertake that there shall be conducted, under their
 “ inspection, a school or schools for teaching English
 “ reading, grammar, and religious knowledge, with
 “ such other branches of education as may be required,
 “ said school or schools to be divided into classes, over
 “ each of which a monitor shall preside, and under the
 “ charge of a master or masters appointed by the kirk
 “ session, and for whom they shall be responsible, and
 “ that the sum of at least 50% shall be expended in
 “ instituting and carrying on said school or schools,
 “ during the period of twelve months from this date.”

These contracts were approved and ratified by Dr. Bell's trustees.

The new town council, elected under a recent muni-

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cipal act¹ for Scotland, refused performance of contracts thus duly executed, alleging that the same were not in accordance with the trusts under which the funds had come into the hands of their predecessors in office. An action was brought by the respondents, as representing the kirk session of the Outer High Church of Glasgow, founding upon the contracts, and concluding “ that although the pursuers have fulfilled their part “ of the said contract in every respect, and are still “ willing to do so, and although, upon the faith there- “ of, they have expended considerable sums of money, “ and entered into various engagements, and matters “ are not now entire, yet the said magistrates and “ council refuse to comply with their part of said “ contract, and to pay over to the pursuers the share “ of the said dividends or interest, payable to them in “ terms thereof; and although the pursuers have “ frequently desired and required the said lord pro- “ vost, magistrates, and town council of the city of “ Glasgow to fulfil their part of the said contract, by “ making payment to the pursuers of their said share “ of the said dividends, in terms of the said contract, “ yet they refuse or delay so to do; therefore the said “ lord provost, magistrates, and council of the city of “ Glasgow, and the Hon. William Mills, lord provost, “ William Gilmour, James Lumsden, John Fleming, “ William Craig, and John Small, esq^{rs}., bailies; James “ Martin, esq., dean of guild; Archibald M’Lellan, “ esq., deacon convener; and Messrs. Hugh Tennent, “ John Boyle Gray, &c., as councillors, for themselves “ and as representing the burgh and community of

¹ 3 & 4 W. 4. c. 76.

“ Glasgow, ought and should be decerned and ordained,
 “ by decree of the lords of our council and session, to
 “ make payment to the pursuers of their proportion,
 “ being one tenth part or share of the annual interest,
 “ proceeds, or dividends which have already accrued
 “ or may hereafter accrue on the foresaid two sums of
 “ 4,895*l.* 16*s.* 8*d.*, making together 9,791*l.* 13*s.* 4*d.*,
 “ transferred to the said defenders as above mentioned,
 “ and that half-yearly, agreeably to and in terms of
 “ the contract between them and the said pursuers
 “ before narrated, in all time coming, so long as the
 “ pursuers shall fulfil and observe their part of the said
 “ contract,” together with interest, penalty, and ex-
 penses.

In defence it was pleaded, 1st, that the pursuers had no title to pursue; 2d, that the contract sought to be enforced was invalid and illegal, contained no proper operative obligations capable of being specifically enforced against either party, and ultra vires of the defenders predecessors, as trustees under Dr. Bell's trust, and still more of any committee of their number, to enter into, or at all events to enter into so as to tie up the hands of the successors. The sound construction and the true intent and meaning of the trust was, that “ the corporation of the provost, magistrates, and “ town council ” should, from time to time, and according to what they might themselves deem expedient and proper under every change of circumstances, at their own discretion, in their own judgment, and on their own responsibility, direct the application of the trust funds, and conduct the whole administration and management of the trust, so as might best answer for the time the ends and purposes of the truster;

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whereas the arrangement in dispute implies a surrender of all their most important rights and functions as trustees, and a delegation of these functions to others, permanently, and without the least control on their part, so far as regards the whole essential details connected with a proper discharge of the trust; 3d, in the circumstances the defenders, who are not satisfied that the arrangement in question is at all calculated to carry into effect the purposes of the truster, or even that it has been duly implemented in its own terms on the other side, were not bound by the contract libelled.

The Lord Ordinary, having advised cases for the parties, pronounced this interlocutor (29th November 1836): “ The Lord Ordinary, having considered the
“ revised cases for the parties, repels the objection to
“ the title of the pursuers; and on the merits finds
“ that the agreement libelled between the magistrates
“ and town council of Glasgow on the one hand, and
“ the pursuers on the other, cannot be held as a valid
“ execution of the trust created in them by the deed of
“ the late Dr. Bell, but truly imports a devolution of
“ that trust on the pursuers, for such time as the
“ pursuers choose to undertake it: Finds, that such
“ agreement on the part of the magistrates and town
“ council for the time was ultra vires, and cannot bind
“ their successors in office. Therefore assoilzies the
“ defenders from the general conclusion, that in all
“ time coming, the part or share of the annual interest
“ or dividend libelled shall be paid over to the pursuers;
“ but appoints the case to be enrolled, that parties may
“ be farther heard on the pursuers claims for reim-
“ bursement, out of the annual interest or dividends

“ falling due since the date of the agreement, of any
 “ expense that may have been incurred by them in the
 “ maintenance or establishment of a school or schools
 “ conducted in terms of that agreement, and de-
 “ cerns. (Signed) JOHN FULLERTON.”

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“ *Note.*—Whatever may be the peculiarity of the
 “ constitution of the kirk session of the Outer High
 “ Church of Glasgow, and of the other kirk sessions of
 “ that city, the Lord Ordinary has no doubt that the
 “ members of that kirk session, being the parties with
 “ whom the alleged contract was entered into, have a
 “ title to insist in the present action, seeking to enforce
 “ it. But, upon the merits, the Lord Ordinary thinks
 “ the action cannot be sustained.

“ By the deed of indenture entered into between the
 “ late Dr. Bell and the persons who may be called his
 “ general trustees, the magistrates and town council
 “ were appointed trustees for the special purpose of
 “ establishing or maintaining schools on the Madras
 “ system in the city of Glasgow. The words of the
 “ trust are very general, and the Lord Ordinary thinks
 “ that these trustees had full power to bind themselves
 “ and their successors in office, in all contracts entered
 “ into in the execution or furtherance of the objects of
 “ the trust; accordingly, it rather appears to him that
 “ a contract, binding themselves to pay annually the
 “ whole, or any part of the dividends or interest, under
 “ their management, to the pursuers, or any public
 “ body or individual having the power to undertake,
 “ and absolutely undertaking, for the permanent estab-
 “ lishment or maintenance of a school, taught on the
 “ Madras system, would have been a valid exercise of
 “ their power as trustees. If, by a transaction with

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“ parties invested with the management of an existing
 “ school, they could, at a comparatively small annual
 “ expense, have permanently secured the conducting
 “ of that school on the Madras system, such transaction
 “ would have evidently been a fair and most advan-
 “ tageous act of administration. But the agreement
 “ libelled is one of a very different kind; the kirk
 “ session of the Outer High Church and the other kirk
 “ sessions have no powers to undertake such an obli-
 “ gation, nor do they profess to undertake it by the
 “ alleged contract forming the ground of the present
 “ action; while, on the one hand, the magistrates and
 “ town council irrevocably bind themselves to make over,
 “ all time coming, the whole dividends and interests,
 “ in certain proportions, to the kirk sessions of the city
 “ of Glasgow, the pursuers, and those other kirk
 “ sessions, only undertake to furnish annually a
 “ ‘vidimus,’ showing that those shares of the dividends
 “ or interests are to be ‘applied in the promotion
 “ ‘of the system of education proposed by the donor,
 “ ‘Dr. Bell,’ which vidimus shall contain an obligation
 “ binding them to apply such annual payments accord-
 “ ingly. And the only consequence of their failure to
 “ furnish that ‘vidimus,’ and to satisfy the other party
 “ of the same having been carried into effect is, that
 “ the kirk sessions or kirk session that fails shall forfeit
 “ their right under the contract, and that the magis-
 “ trates and council shall be entitled to apply the funds
 “ so forfeited as if the said contract never had been
 “ entered into.

“ The Lord Ordinary cannot hold this to be a
 “ contract; the only obligation on the pursuers and
 “ the other kirk sessions is to apply funds, to be

“ annually placed in their hands, ‘ in the promotion of
 “ ‘ the system of education proposed by the donor,’
 “ being just the general obligation imposed by the
 “ trust; and, in this particular, the pursuers do not
 “ disguise that they claim a very considerable latitude;
 “ for they fairly state in their condescendence, that it
 “ is neither required in the contract or the vidimus
 “ that a school or schools should be established in each
 “ parish; in short, they assert under the transaction
 “ a permanent right to a certain share of the trust
 “ revenue, under the single obligation of applying it to
 “ the purposes of the trust, and that only so long as
 “ they choose to undertake the duty. It appears to the
 “ Lord Ordinary that this is not a contract, in the
 “ proper sense of the term, but truly a delegation of
 “ the powers of the corporation, a substitution of ten
 “ trusts, to be vested in the ten kirk sessions of the
 “ city of Glasgow, for that single trust established
 “ by Dr. Bell. Whether or not the attempted trans-
 “ action might not secure a more beneficial employment
 “ of the fund is a different question, but that question
 “ has been determined by the truster himself, whose
 “ will must, in this particular, be the law.

“ Holding this opinion, the Lord Ordinary thinks
 “ the general conclusion to the action, that a particular
 “ proportion of the annual dividends shall be paid
 “ to the pursuers in all time coming, cannot be
 “ sustained. But there may be a question, whether
 “ the pursuers, if they have maintained a school on the
 “ Madras system since the agreement was entered into,
 “ may not be entitled to some reimbursement for any
 “ expense thence incurred, out of the annual interests
 “ or dividends fallen due since the date of the agree-

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“ ment, and now in the hands of the defenders; and
“ as that question has been hitherto little if at all
“ touched upon by the parties, the Lord Ordinary has
“ directed the case to be enrolled for further argument
“ on that point, before finally disposing of the cause.”

The respondents reclaimed on the merits, as did also the appellant and the other trustees, in so far as the interlocutor repelled the objection to the title of the respondents to pursue. The Lords of the First Division pronounced the following interlocutor (21st Feb. 1837) :

Judgment of
Court,
21st Feb. 1837.

“ The Lords having advised this reclaiming note, and
“ the reclaiming note for the defenders, refuse the
“ reclaiming note for the defenders, and adhere to the
“ interlocutor reclaimed against in so far as it repels
“ the objection to the title of the pursuers; quoad ultra,
“ alter the said interlocutors, and find the agreement
“ libelled between the pursuers and defenders is in due
“ conformity with the trust deed of the late Dr. Bell,
“ and a valid and effectual agreement, and therefore
“ decern against the defenders in terms of the con-
“ clusions of the libel: Find the defenders liable to
“ the pursuers in expenses, and remit the account
“ thereof, when lodged, to the auditor of court to tax
“ the same and report, with this declaration, that no
“ part of the expense of this litigation shall form a
“ charge on the trust funds of Dr. Bell.”

The details of the future arrangement of the funds were in consequence of this decision arranged, and a compromise was effected to the satisfaction of the members of the magistracy and town council, with the exception of Mr. John Boyle Gray, who appealed.

The petition of appeal having been presented and intimated in common form, an application was made by

petition, on the part of the respondents, praying that the appeal should be dismissed. The reasons relied upon were in substance that the appellant being only an individual trustee was not entitled to act against the vote of the council, or appeal against proceedings which it was alleged had been taken against the council in their corporate capacity only. The House of Lords ordered that the question of competency should be argued in cases; such pleadings were accordingly prepared and laid before their Lordships. After having considered these cases, and heard counsel, the House of Lords pronounced the following order:—"Die
 " Jovis, 16^o Augusti 1838.—Gray v. Forbes.—Respon-
 " dent's petition to dismiss appeal as incompetent con-
 " sidered, and respondent's petition dismissed, and the
 " appeal sustained. Costs to be reserved until the
 " hearing of the appeal."¹

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The cause having come on for hearing on the merits:—

Appellant. — The former argument on the competency was resumed, to the effect of showing the title as well as interest of Mr. Gray to resist the performance of a contract which he deemed illegal, and in the illegality of which he, as a councillor, would be implicated.

Appellant's
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On the merits it was contended, that in terms of the trust deed, and deed of acceptance thereof, the trustees are themselves bound to exercise the whole powers, rights, and duties entrusted to them; therefore, they could not legally and validly devolve upon or delegate

¹ 3 Sh. & M'Lean, 381.

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to others those rights, powers, and duties, in anywise to restrain or fetter themselves; and, consequently, any such devolution, delegation, or restraint in the exercise of them was invalid and illegal.

In no case had the appellant discovered even an approach to that construction of discretionary powers for which the respondents contend. In the case of *Hill and others v. Burns and others*¹, decided by the House of Lords on the 4th of April 1826, the doctrine of discretionary power and the relative authorities were fully considered. Where powers of distribution amongst a certain class of persons not precisely described are conferred upon trustees, they have a discretionary power of distributing among such persons and in such a manner as they shall deem most in accordance with the implied will of the truster. This was held to be the import of the case of *Dick v. Fergusson*², 22d January 1758; of that of *J. Wharrie v. the distant relations of Edward Wharrie*³, 16th July 1760; and of that of the trustees of *John Burn v. his relations*⁴, 3d August 1762; and was rendered effective in the case of *Hill and others v. Burns and others*. In those cases discretionary powers to that extent were held to have been conferred; and the principle was sound, because necessary for explicating the will of the granter. But neither in those cases nor in any other were discretionary powers in the management of details held to confer a right to devolve or delegate the trust. A trust can no more be delegated in Scotland than it can in England; and this is not a trust the execution of

¹ 2 Shaw and Wilson's Appeal Cases, p. 80.

² Mor. 7446.

³ Mor. 6599.

⁴ Mor. 2318.

which can be performed by any parties except those expressly appointed by the deed. It is no answer that the court can control the trustees, for that is but an imperfect remedy. The true question is, what the donor intended; and in the consideration of that question it is to be borne in mind that the larger the powers it is less likely he meant that they should be devolved on others.

Assuming the contract to have been executed by parties invested with sufficient powers, the rights, powers, and duties of the trustees were devolved upon and delegated by them to the kirk sessions, whereby they ceased to be the administrators; or by the alleged contract, if valid and binding, they did so fetter and restrain themselves as to cease to have the rights, powers, and duties confided to them by the granter.

Farther, the magistracy presumed to act as a body corporate; if they are not so, then they have no power to bind their successors.¹

The respondents counsel were not called on.

The LORD CHANCELLOR moved, That the interlocutor be affirmed, with costs; stating, that if the appellant be right, that he has such an interest in the fund as to dispute the judgment, he cannot object to being made a party; and if properly a party he is properly made liable with the others. Upon the merits it was clear that the judgment of the Court was well founded. Although the appellant's right to appeal had been sustained, yet he had been recommended to consider of the propriety of pressing his appeal further on the merits;

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Ld. Chancellor's
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¹ Pollock v. Turnbull, 5 Sh. 195. 199.

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and he was clearly wrong on the merits of his appeal. The interlocutor appealed from ought to be affirmed, with costs, including the respondents costs of discussing the competency of this appeal.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal (which costs are to include the costs incurred by the said respondents in the matter of their petition touching the competency of the appeal, which last-mentioned petition was heard at the bar by one counsel of a side on the 12th day of March 1838, and considered on the 16th day of August 1838, and was dismissed, but the question of costs thereupon was reserved until the hearing of the said appeal), the amount of the said costs to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord 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.

ARCHIBALD GRAHAME — SPOTTISWOODE & ROBERTSON,
Solicitors.