[16*th August* 1838.]

JOHN BOYLE GRAY, Appellant.—*Attorney General (Campbell.)*

The Rev. JOHN FORBES and others, as representing the Session of the Outer High Church, Glasgow, Respondents.—*Sir William Follett—Adam Anderson.*

Appeal.—In an action against a Town Council and the councillors, nominatim as councillors "and for themselves," decree was pronounced in terms of the libel, and for expenses,—Held, that one of those councillors was entitled to present a petition of appeal, although the Town Council declined to appeal.

1ST DIVISION.
Lord Fullerton.

THE Rev. Dr. Andrew Bell, by a deed of indenture dated 14th July 1831, executed between him and certain parties as trustees, invested in those trustees certain large sums of money, on the recital that "whereas "the said Andrew Bell, (the author of the system of "education called the Madras system,) considering "that the progress of the said system in his native "country of Scotland hath hitherto been slow and "imperfect, and that the greatest boon which he can "confer on that country is by taking measures for the "more effectual diffusion of the said system therein," &c.; therefore the trustees were taken bound to divide the funds into twelve equal parts, and to transfer one twelfth part to the provost, magistrates, and town council of Glasgow, upon this condition, that the money so

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transferred "be by them and their successors em-
"ployed 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 of every one of the said 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
"stock so to be transferred to it as aforesaid, upon trust
"for ever to apply the dividends and interest thereof in
"the support and maintenance, from time to time, of
"schools already founded or hereafter to be founded
"on the principles of the aforesaid Madras system;
"such funds either to remain as invested, or to be
"invested on any government, heritable, or other
"sufficient securities, as shall from time to time be
"thought fitting." They were required to make and execute a declaration and acknowledgment of the acceptance of the several trusts; and it was provided, that if they should refuse to execute such declaration of trust, then the share of the trust funds should be transferred to the provost, magistrates, and town council of Cupar in Fife, &c.

The magistrates and town council of Glasgow, having accepted of this trust on 18th November 1831, received 9,721*l.*, and executed a declaration of trust, binding themselves "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."

Thereafter separate contracts were entered into in October 1833 between the town council, on the one hand, and the kirk sessions of the established church in Glasgow on the other. By that, with the Session of the Outer High Kirk, it was " agreed between " the said first party and the several kirk sessions " of Glasgow, that, in order the more extensively " and effectually to promote the system of education " contemplated and prescribed by the Rev. Dr. Bell, " the annual interest or proceeds of the said two " sums not vested in government securities should " be equally divided among and paid over half-yearly " to the different kirk sessions upon their severally " executing these presents. Therefore the said second " party, as representing the foresaid outer high kirk " session, and as taking burden on them as aforesaid, " do hereby bind and oblige themselves and their " successors in office to lodge, in writing, with the " secretary of the said first party a distinct vidimus " or statement of the proposed application of the pro- " portion 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 " prescribed by the donor, the Rev. Dr. Bell, and " accompanied by an obligation binding the said kirk " session to apply the same accordingly; declaring, as " it is hereby provided and declared, that so long as " the said second party shall continue to furnish an " annual statement or vidimus and obligation before

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" mentioned, and shall from year to year satisfy the " said first party that the same have been followed out " and carried into practical 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 " these presents had never been executed. Farther, " the said second party bind and oblige themselves " and their successors in office to hold annual ex- " aminations of the schools to be established and main- " tained, either partially or totally, by the proportion " of the interest or annual proceeds payable to them as " before mentioned, and to give to the secretary 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 examinations, and becoming " satisfied of the bonâ fide and legitimate application " of the foresaid annual interest or proceeds, and par- " ticularly that the same are applied agreeably to these " presents, and strictly in terms of the deed of donation " executed in favour of the said first party by the said " Rev. Dr. Bell."

Nine other similar contracts were entered into with the kirk sessions of the remaining nine ecclesiastical

districts into which, together with the outer high church district, the town of Glasgow is, quoad sacra, distributed.

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Each of the ten sessions lodged with one of the depute clerks of the city a separate vidimus or obligation, in terms of the contract,—that lodged by the respondents (which was identical with all the others) being as follows:—"In terms of the contract entered "into between the lord provost, magistrates, and "town council of Glasgow, 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 "(*i. e.* one or more, but one at the least) 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*l.* 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 of and ratified by Dr. Bell's trustees.

On the election of a new town council under the reform act they declined to fulfil the contracts, alleging that they were not in accordance with the trusts under which the money came into the hands of the corporation. An action was therefore brought before the Court of Session by the respondents as representing

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the session of the Outer High Church of Glasgow, in which they concluded, that "although the pursuers have frequently desired and required the said "Lord Provost, 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 shares 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, Esqrs., "bailies, James Martin, Esq., dean of Guild, Archd. "M'Lellan, Esq., deacon convener, and Messrs. Hugh "Tennent, Robert M'Gavin, James Turner, John "Boyle Gray, Alexander Dennistoun, William Bankier, "John Ure, Alexander Johnstone, James Wallace, "Henry Brock, Robert Hutcheson, John Mitchell, "John Douglas, James Hutcheson, Robert Dalgleish, "Henry Paul, Henry Dunlop, William Dixon, David "Hope, Alexander Denny, George Orr, John Leadbetter, John Pattison, and William Robertson, councillors, for themselves and as representing the burgh "and community of 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 portion, 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 the terms of the contract between

" 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, with the
" legal interest of the said annual proceeds, interest, or
" dividends from and after the terms of payment
" thereof till payment; superseding the execution, so
" far as regards the proceeds or dividends not yet due,
" till the terms of payment shall be first come and
" bygone, and deducting the payment already made by
" the said defenders to the said pursuers as before
" mentioned: And farther, in respect the said defend-
" ers have violated their said contract or agreement,
" and have failed to implement the same, they ought
" and should be decerned and ordained by decree
" foresaid to make payment to the pursuers of 100*l.*
" sterling, being the liquidate penalty in that case
" stipulated and provided, together also with 100*l.*
" sterling, or such other sum, less or more, as our said
" Lords shall modify in name of expenses of process,
" over and above the expenses of the decree to follow
" hereon; conform to the said contract, laws, and daily
" practice of Scotland used and observed in the like
" cases in all points as is alleged."

The Lord Ordinary assoilzied the defenders from the action, but the Court on 21st February 1837 altered, and found " that the agreement libelled between the pur-
" suers 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 de-
" fenders in terms of the conclusions 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

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"this declaration, that no part of the expense of this "litigation shall form a charge on the trust funds of "Dr. Bell."[1]

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Thereafter the Court decerned against the defenders for the sum of 144*l.* 11*s.* as the amount of expenses found due, and for the expense of extract.

The magistrates and town council declined to enter an appeal against these judgments; but the appellant, who was a member of the town council and nominatim concluded against in the summons, presented a petition of appeal, whereupon the respondents applied to have it dismissed as incompetent. This question was ordered to be argued in cases and at the bar.

Appellant.—According to the sound construction of the trust deed each of the individual members of the town council is vested with the rights and duties of a trustee, and is therefore entitled to challenge all acts which he deems to involve mal-administration, and consequently to appeal against a judgment which he holds as sanctioning such acts. This rule was established in the case of Anderson and others v. the Magistrates of Renfrew[2], in that of the Merchant Company and Trades of Edinburgh v. the Magistrates[3], in Christie and others v. the Magistrates of Stirling[4], and in Johnston and others v. the Stentmasters of Kelso.[5]

The same doctrine has also governed the most recent

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[1] 15 D., B., & M., 628.
[2] 30th June 1752, Mor. 16122.
[3] 9th Aug. 1765, Mor. 5756.
[4] 6th July 1774, Mor. 5755.
[5] 25th June 1800, Mor. voce Title to Pursue, App. No. 1.

decisions. In the case of Mill v. the Magistrates of Montrose[1] it was held that an individual burgess had a title to pursue a reduction of a warrant by the King in Council for the restoration of the sett of the burgh after disfranchisement, which warrant made alterations upon the sett, and also of the elections under that warrant, although the first election under it was not challenged. So in the case of Bow and others v. the Magistrates, Town Council, and first Minister of Stirling, patrons of Cowan's Hospital[2] it was decided, that "when funds are mortified for the "benefit of a certain number of the members of a "corporation to be selected by the patrons and "managers of the charity, the corporation itself, or "any individual member of it, is entitled to pursue an "action of reduction and damages against the patrons "for mismanagement of the funds of the charity." And in Goddard v. the Leith Dock Commissioners[3] it was decided that a "member of a board of commis-"sioners elected under authority of an act of parlia-"ment is entitled to pursue a reduction of an act done "by the board, on the ground of its having been "carried by the votes of two commissioners who were "disqualified, without his being obliged to conclude "for reduction of the appointment or commission in "virtue of which these persons acted."

Now, in the present instance, the acts which the judgment has sanctioned, and for which the appellant seeks redress, are unquestionably acts of extraordinary

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[1] 28th January 1824, 2 S. & D. 652, (new. ed. 549); and 1 Wilson & Shaw's App. Cases, p. 570.

[2] 6th Dec. 1825, 4 S. & D., p. 276, (new ed. 280.)

[3] 14th Feb. 1827, 5 S. & D., p. 355, (new ed. 329.)

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administration. He has also an interest as a trustee that all those acts, if unsound and injurious, should be so declared to be, in order that no detriment may arise to the trust, which he is bound to administer lawfully and beneficially. And he has an interest, not merely as a corporator or trustee, but as one of that community for whose benefit the trust was created; for the appellant was called in the action, both in his capacity of a councillor and trustee, and as an individual.

But separately the appellant is, both at common law and by statute, personally subjected to the responsibilities and liabilities of a trustee, and is therefore entitled to take all steps necessary for his protection; and accordingly the action is directed against the appellant as an individual, and by the judgment of the Court of Session he has been found to be, as such, subject to responsibilities and liabilities relating to the trust generally, and more especially for payment of the expenses of the action, which it is declared shall not be paid out of the trust funds.

Respondents.—The action was raised and executed, according to the forms of the law of Scotland, solely against the lord provost, magistrates, and town council of Glasgow, as a corporation, and no appearance was made except by this corporation, who are the sole parties to the record in the Court below; therefore it is not competent for any individual, whether a member of this corporation or not, to enter appearance for the first time in the House of Lords, and to bring the judgments up for review by appeal in his own name.

That this was an action directed solely against the corporation is manifest from the fact that it was founded upon a contract entered into with the corporation, relates exclusively to funds held by the corporation as trustees, and its conclusions are, that the defenders should be ordained to pay to the pursuers the interest or proceeds of those funds held by the corporation.

They are mentioned as lord provost, bailies, dean of guild, deacon convener, and councillors respectively; and it is in these characters alone that they are concluded against "for themselves and as "representing the burgh and community of Glasgow." The reason for the specification of the names and characters of the individuals is, that by the law of Scotland a summons against a corporation can only be served, either when the corporation is met for the despatch of business, by delivering a copy to the head or chief member of the corporation, in presence of the other members, or by serving a copy individually upon each member or office-bearer of the corporation. As a warrant to the messenger or officer for this last method of executing the summons, it is necessary to specify the names of all the individual members upon whom it must be served, so as to call the corporation legally into Court.[1]

Under such a summons no judgment could be pronounced against any member of the town council in his individual capacity, or in any other character than as a member of the town council.

So firmly has this practice been established that in

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[1] Juridical Styles, vol. iii. p. 6, ed. 1828.

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the case of Clarkson v. the Magistrates of Edinburgh[1], it was held a sufficient objection to a summons, that it was directed against the magistrates only in their official character, and not against all the other members of the town council.

It was even thought, in one case, to be a valid objection to an action raised against a corporation created by a British statute, that the corporation was called only by its corporate name as a defender. Murray v. York Buildings Company.[2]

In the case of the Burgesses of Rutherglen v. Leitch[3], "a summary complaint against magistrates of a burgh "was cast, in respect the whole names of the pursuers "and defenders were not inserted in the executions." Where it is the intention of a pursuer to raise an action, and to call into Court the magistrates of a burgh, both in their official character and as individuals, the form of summons adapted for this purpose is altogether different from that now in question. In such a case the conclusion is against the parties, "not only as magis-"trates, and as representing the community of the "said burgh and their successors in office, but as "individuals and their heirs and representatives."[4]

It is also shown by the execution of the messenger that the citation was against the corporation only; for the citation was given by delivering the service copy "to the Lord Provost, for himself and on behalf of the "said magistrates and town council, when they were "in council assembled, and met for managing or

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[1] 9th June 1743, Mor. 2538.
[2] Jan. 1733, Mor. 3780.
[3] 8th July 1747, Mor. 3689.
[4] Juridical Styles, vol. iii. p. 79.

"transacting the affairs of the said burgh and com-
"munity within the town hall or ordinary place of
"meeting," &c.

Accordingly the defences were put in "for the lord "provost, magistrates, and town council of the city of "Glasgow;" and when the record came to be made up the answers and revised answers were in like manner put in "for the lord provost, magistrates, and "town council of the city of Glasgow;" and the record was authenticated and closed by the Lord Ordinary, in terms of the statute, as between the present respondents and the lord provost, magistrates, and town council. No appearance was made or could competently be made in the Court below by the appellant Mr. Gray, or by any other individual member of this corporate body.

But, it has long been fixed in the law of Scotland, that no individual member of a town council can competently complain of any act of the corporation, whereby a benefit is conferred upon some third party. This was decided by the Court of Session in the case of Cuninghame v. Magistrates of Edinburgh, 3d December 1800.[1] It would seem to follow, a fortiori, that no individual member of such corporation can interfere in any litigation carried on between the corporation and any third party.

If the appellant could show, that as one of the defenders in the action, and interested as one of the trustees or guardians of the fund, or as a private individual, any claim could possibly be made against him, under the judgments in question, the respondents

[1] No. 7. Ap. Mor. voce Burgh Royal.

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could understand his title to bring these judgments under review, so far as he is concerned; and had he prayed this House to reverse or vary the judgments complained of, so far as they affect him, or could authorize any demand against him, either as one of the defenders in the action or as a private individual, the respondents could have had no interest in opposing such an appeal. But such is not the nature of his appeal. His object is to have the judgment pronounced against the corporation reviewed, although the corporation have acquiesced in it.

If the corporation have acted improperly in not bringing these judgments under review, or if the appellant could show that, either as an individual member of the town council, or as a private individual, he is entitled to complain of any undue benefit conferred upon the respondents, he may be entitled by an action at his own instance, directed against the corporation, or against the respondents, to have the rights which, he alleges, belong to him, declared; but he has mistaken his proper remedy in presenting an appeal.

LORD CHANCELLOR.—My Lords, there was a case which came before your Lordships sometime since upon a question of competency. The case arose upon a certain sum of money transferred to certain parties for the purpose of encouraging the establishment of schools in several of the large towns in Scotland. Certain sums were assigned to the town of Glasgow for that purpose, and the corporation of Glasgow carried that into effect by making a division of that money and appropriating it to certain kirk sessions of several of the parishes of the town. That was not allowed by the

individuals who afterwards constituted the corporation, and they withheld the payment from those kirk sessions, which gave rise to a suit by one of the kirk sessions for the purpose of recovering payment of what they considered to be due to them. The question turns entirely upon the form in which that suit was instituted, which was followed by an interlocutor of the Court of Session giving relief in the terms of the summons.

The summons prayed that the corporation of Glasgow by their legal designation, and also various other persons constituting the town council of Glasgow, and amongst others John Boyle Gray (who is the party appealing to your Lordships House), "for themselves, and as repre-" senting the burgh and community of Glasgow," should be decerned to pay that portion of the money which the kirk session thought they were entitled to receive, and that they might also pay the expenses which had been incurred in the attempt to recover it. When that case came before the Lord Ordinary an interlocutor was pronounced, and there was afterwards a reclaiming note to the First Division of the Court of Session, and the interlocutor as finally made by the Court of Session was as follows:—"Find that the agreement libelled " between the pursuers and defenders is in due con-" formity 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 conclusions 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."

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My Lords, the corporation of Glasgow have not appealed against that interlocutor. So far, therefore, as the corporation were defenders in that suit, there is no question before your Lordships. But one of the town-councillors of that town, namely, the present appellant Mr. Boyle Gray, presented an appeal, and a petition was then presented by the respondents, alleging that it was not competent to that individual to appeal against this interlocutor. The real question is, whether there is any thing in the interlocutor pronounced which gives Mr. Boyle Gray a right of appeal?

It was argued at your Lordships bar, and it was contended that he had a right to appeal as to the whole merits of the interlocutor. Another ground contended for was, that he had a right to appeal, because he was subject, personally and individually, to costs and responsibilities by the terms of the interlocutor pronounced. On the other hand, it was argued, that this was the usual form of proceeding against corporations in Scotland; that it is usual, not only to name the corporation, but to name the individual members of the corporation, and the reason of that was stated to be, because if the pursuer found the corporation sitting in their corporate capacity he had a right to serve the officer presiding at that meeting; but if he could not find him in that situation, then the only way that he had of bringing the matter before the Court was by serving each individual member constituting the corporation. And therefore it was alleged that a practice had prevailed in Scotland of naming the individuals who constituted the corporation; and undoubtedly there appears to be authority for that proposition. But to that it was answered, that if that were so the individuals

should be named as constituting the corporation; whereas in the summons here they are named, and then it is prayed that they, "for themselves, and as "representing the burgh and community of Glasgow," might be ordered to pay the sum of money claimed by the pursuers; and although the interlocutor does not in terms repeat those expressions, yet the interlocutor is in the terms of the summons. Your Lordships therefore must consider that the interlocutor adopts the terms of the summons, and that the interlocutor appealed from is an interlocutor which not only gives judgment against the corporation as such, but, after naming the individuals as parties to the suit, it gives judgment against them "for themselves and as repre-"senting the burgh."

Now, if your Lordships should be satisfied, as is contended on the part of the pursuers who are respondents in this case, that it would not subject Mr. Boyle Gray to any personal responsibility, your Lordships probably would be of opinion that it was not competent for him to appeal. But I confess upon looking through the papers, and on referring to the authorities which have been cited, I cannot satisfactorily come to that conclusion. The whole proceeding is very different from that which prevails in this country. If it be the practice in Scotland to name the particular individuals, it cannot be necessary to name them as component parts of the corporation, except to pray relief against them for themselves as well as representing the corporation.

In the papers printed by the respondents they state a case in which it was held that the individual members were responsible; and they quote this as proof that,

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according to the terms of this interlocutor, the individual would not be responsible. Now, the way in which the interlocutor was framed in the case which they say made the magistrates the members of the corporation individually responsible was this: As against the magistrates, not only as magistrates and as representing the community and burgh and their successors in office, but against them as individuals. Now, the distinction between them as individuals and as parties for themselves, as well as representing the burgh, is undoubtedly very fine. No authority is quoted for the purpose of showing that that variation of phrase would make any difference in the liability of the parties; therefore I cannot say that I am at all satisfied that there is nothing in this interlocutor which can affect the individual who is now appealing; and if your Lordships should be of that opinion, then it will be a matter of course that the party should be permitted to come to your Lordships bar for the purpose of asking for some variation in the form of that interlocutor.

But, my Lords, I am anxious that the party appealing should not be induced to indulge any false hopes of success in that which appears to be the main point of his contention, because your Lordships do not think it expedient to dispose of this case on a question of competency. He comes here wanting, he says, to relieve himself from his personal responsibility; but he also comes here for the purpose of discussing the question which has been decided in the Court below between the two parties, namely, the kirk session and the corporation of Glasgow. Now I do not enter into that part of the case. It is probable that your Lordships may have that to consider at another time. But nothing

which your Lordships may do upon this question of competency ought to encourage any expectations in favour of the appeal which he, as an individual member of the corporation, is bringing to your Lordships bar for the purpose of raising a question, not as affecting himself individually, but as affecting a question between the pursuers, the kirk session, and the corporation of Glasgow, of which he is only an individual member. All that your Lordships have at present to do is to consider whether the case is so clearly made out that the individual in question is not liable to any responsibility from the interlocutor which has been pronounced; whether your Lordships can safely dismiss the case from your bar as being a case which the party is not competent to bring. My Lords, I come to the conclusion that there is evidence that he may be individually responsible for that which the Court of Session has done, sufficient to entitle him to come here in respect of that personal liability.

My Lords, I should have stated that the interlocutor of the First Division of the Court of Session not only decrees the payment to the kirk session of certain sums of money, and that as against the defenders generally, but it directs the payment of expenses, and then provides that those expenses shall not on any account come out of the charity fund devoted by Dr. Bell to the establishment of those schools. It appears, therefore, that whoever may come under the denomination of defenders must be the parties who are to pay the money, and who are to pay the expenses; and your Lordships find not only the corporation defenders, but the several individuals who are named, being the individual members consti-

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tuting the corporation. Under these circumstances it appears to me that the only safe course to take would be to dismiss the petition, which prays that the appeal may be dismissed as incompetent. But as the same question may come on to be heard again, and as it is uncertain what may then be brought under your Lordships consideration, or to what conclusion your Lordships may then come, I think that the right course would be to reserve the costs till the case be heard. If the party does not think fit to prosecute the appeal, then the other party will apply to your Lordships for the costs attending this petition.

The House of Lords ordered the respondents' petition to be dismissed, and the appeal to be sustained; costs to be reserved until the hearing of the appeal.[1]

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[1] Minutes of Proceedings, 16th day of August 1838.

ARCHD. GRAHAME—SPOTTISWOODE & ROBERTSON, Solicitors.