[HEARD 23*rd*—JUDGMENT 27*th July*, 1849.]

The Reverend the MINISTERS of the CITY of EDINBURGH, *Appellants.*

The LORD PROVOST, MAGISTRATES, and TOWN COUNCIL of the said City, *Respondents.*

Trust—Corporation—Burgh Royal—A Parliamentary power given to the Magistrates and Council of a burgh to appoint persons to collect a tax for payment of the stipends of the Ministers of the burgh, and to apply it in payment accordingly, will not make the common good of the burgh liable for default by the Magistrates and Council in the execution of the power.

AN Act of the Privy Council of Scotland in regard to the maintenance of the clergy of the burgh of Edinburgh, bearing date the 18th of March, 1634, to which Parliament gave the force of an Act of Parliament, upon a recital that "as there is "nothing more consonant to equitie and reason than that all "such persons that dailie enjoy in plentie that blessing of the "word of God, and heares the same preached, and does "participat the benefit of the Clergy, should contribute to the "maintenance of the Ministri in these places where they "take the foresaid benifit. And Our Soverand Lord and "Estates of this present Parliament, understanding that ever "since the Reformation, the whole inhabitants of the said burgh "of Edinburgh has enjoyed the forsaid benifits and blessings, "and the common good of the Town, which has been given to "them for maintenance of policie, has been that way employed "through the inlaick of other sufficient means for entertaining

" the Ministrie of the said burgh, For remeid whereof, and to " the end that these who serve at the altar may be entertained " aff the altar, and the said common good may be rightly " applied to the use whereunto the same has been appointed," ordained that the sum of 12,000 marks should be uplifted yearly of the inhabitants of the burgh, and ordained " the " Provost, Baillies, and Counsell of the Burgh," " to appoint " and make choice of four sworn men of ilk parish within the " said burgh," to make a valuation of the houses within the burgh, according to their yearly rent, " and because that new " houses may be built, and other houses may likewise come to " dacay and ruine, so that the mailles thereof may be omitted " or defective, and the inhabitants of the said new houses free " of the foresaid burden: Therefore, ordain the Provost, Baillies, " and Counsell of the said burgh, ilk year, or ilk twa years, " as they sall think expedient, to appoint new stentors and " valuers for valuing of the said house maills," and declared the inhabitants to be liable to contribute according to the rolls to be made by the valuators, "and in case of refusal of any " person, ordains the said Provost and Baillies to direct their " officers to poind their goods, or ward their persons for the " same, without any farther sentence or process at law."

An Act of the Convention Parliament of the 2nd of March, 1649, proceeding upon this recital, " having considered the " petition of the Toune of Edinburgh ffor approving and " ratefeing the Act of the Committee of Estates for ane yearlie " imposition upon the house maills and uthers for the main- " tenance of the sex Ministers, Togedder with the report of " the Committee of Bills thairanent, and being verie sensible " of the constant affection of the guid Towne of Edinburgh to " religion, and their eminent and exemplarie zeal and desire " for provyding and establishing a sufficient number of guid, " able, and well qualified ministers for their several kirks: and " taking also to their serious consideration the vast charges

MINISTERS OF EDINBURGH *v.* LORD PROVOST, &c.—27th July, 1849.

"they have been at in building of thair kirks and uther "publick works, In advancing great soumes of money for "the use of the publick Towards the maintenance of the caus "and the promoting the Reformation, and the great loss they "have sustained from thair great troubles and distractions, and "being desirous to encourage and enable thame, towards the "maintaining and provyding of a sufficient number of able and "well qualified Ministers;" after increasing the aggregate sum which might be levied for the maintenance of the clergy of Edinburgh, contained this enactment in regard to the appointment of the valuators or stentmasters: "and because it is not "intendit that any prejudice or preparative should be hereupon "inferred to the privileges and Liberties of the College of "Justice, or that any member thairof should be unequally "burdened, Thairfore, for preserving the Lords of Secret "Counsell and Sessione, and the haill members of the said "College of Justice freed from any prejudice to thaimselves or "their privileges, It is ordained that the said Annuity and "Imposition shall be laid upon all the inhabitants, tennentis, "and possessors of the houses, chambers, buiths, and uthers "aforesaid, within the said burgh, after exact survey by four "sworne men in every paroche, Who shall survey and value the "house maills aforesaid, Quhairof three shall be citizens, To be "chosen and sworne be the Toune Counsell, and the fourt shall "be nominate, choysin, and sworn be the College of Justice, "or such as they shall appoint."

An Act of Parliament of the 6th of June, 1661, recited, "Forasmeikle as the city of Edinburgh being the cheiff and "principall citie of this kingdome, whither vpon occasion of "sitting of Parliaments for the most parte, the Secreit Council "and Session and other great Judicatories within the same, "The Nobility Gentrie and people of the kingdome of all "sorts and from all the corners of the cuntrie doe daylie "repair and resorte; Not only the inhabitants of the said

" burgh bot the whole kingdome is concerned that able and " faithful Ministers of parts and abilities suteable to the " eminency of the place & weight of the charge should serve " in the said city And for their encouragement competent " stipends should be satled and provyded for them And seing " the teinds rents and others belonging to the citie for the vse " and mantenance of the Ministers of the said citie Ar far " short and not proportionable nor sufficient for such ane " number of Ministers as is necessary ther; And the said toun " haveing been at vast charges for building of churches and " publict works vpon that & other occasions The Comon good " and Patrimonie therof is exhausted and overburthened and " vpon the considerations foresaid the inhabitants of the said " burgh who hes the comfort and benefite of the preaching of " the Gospell and ministerie within the same be the space of " diverse yeers vntil this tyme hes been in vse to pay for the " provision and stipend of sex of the Ministers of the said " burgh a yeerly imposition & anuitie at the rate and proportion " of sex merks for & effeirand to each hundreth merks of the " maills & rents of all the duelling houses chalmers booths " cellers and all other houses heigh and laigh inhabited within " the said toun And his Maiestie and Estates of Parliament " Considering that ther is not a more easie and effectuall way " for provyding and paying the stipends of the saids sex " ministers then in maner and be the imposition forsaid And " that it is iust and necessar that the same should be authorized " & satled be ane perpetuall law in all tyme comeing." After this recital the act regulated the proportion of the assessment which should be paid by the inhabitants severally, and declared that the assessment should be collected " by the deacons of the " kirks or by a collector to be appointed for that purpose by " the magistrates and council of the said burgh in their option, " and as they shall think fit and expedient for the time:" and that the assessment should be laid upon the inhabitants after

survey by four sworn men, "whereof two shall be citizens to "be chosen and sworn by the town council, and other two "shall be nominat chosen and sworn by the College of Justice "or such as they shall appoint. And if the College of Justice "refuse or delay being required by the magistrates and council "of Edinburgh," in that case the remanent of those persons chosen and sworn by the town council shall have power to go on in the said employment, and act by themselves without the members of the College of Justice. The statute then "ordaines "all persons who are resting and have not made payment of "their Quota & proportion of the said anuitie or any parte "thairof since the same wes in vse to be payed To mak pay-"ment of the same of all yeers & termes bygone since the "tyme forsaid Requireing & Commanding the Deacons of the "kirk and Collectors ane or mae to be appointed be the "Magistrats & Councill of the said burgh To collect gather & "vplift the forsaid anuitie yet resting of all yeers & termes "bygone and in tyme comeing And that the Magistrats of the "said burgh sie this whole act and ordinance obayed and put to "dew execution according to the tenor thairof, And to doe all "things necessary for that effect And letters of horneing, and "all other executorialls necessary Are ordained to be direct "vpon this act in forme as effeirs."

The Acts 7 Geo. III, cap. 27, 25 Geo. III, cap. 28, and 26 Geo. III, cap. 113, which severally extended the royalty of Edinburgh, enacted that "the magistrates and town council" should have power to appoint stentmasters to levy from the possessors of houses within the extended district, "in the same "way and manner as the same are now levied within the present "royalty."

The Act 49 Geo. III, cap. 21, which further extended the royalty of Edinburgh, repealed the power to appoint stent-masters given by the different statutes which have been mentioned, and contained this further enactment:—"And to prevent

" all doubt respecting the legality of levying and applying to " this and similar purposes the annuity of six pounds per " centum on the rents of houses, shops, booths, cellars, and " premises, which the said Lord Provost, Magistrates, and " Council have been in use to levy within the city, along with " the other funds or revenues which are applicable, either in " whole or in part, to the payment of minister's stipends, be it " enacted and declared, That the said Lord Provost, Magis- " trates, and Council, and their successors in office, shall be, " and they are hereby authorized and empowered not only to " levy as they have hitherto been in use to levy, the said " annuity of six per centum upon the yearly rents of all inha- " bited houses, shops, booths, cellars, and premises within the " said city and royalty thereof, whether extended by the said " recited Acts or by this Act, and to apply the same as they " have been hitherto in use to apply it, along with the aforesaid " other funds or revenues, as far as those other funds or revenues " are so applicable, for the payment of the stipends of all the " ministers of the present churches of the said city and royalty; " but also to apply an equal proportion of the said annuity in " common with the aforesaid other funds or revenues, in so far " as these other funds or revenues are so applicable, for the " payment of the stipend or stipends of such minister or ministers " as may be appointed to the churches which are required to be " built under the authority of this Act, in manner before men- " tioned."

In October, 1838, Dr. George Baird and the other ministers of Edinburgh raised a summons against the Lord Provost, Magistrates, and Town Council, which, after reciting the enactments of the different statutes above mentioned, set forth that previous to the year 1818, stentmasters were regularly appointed by the Magistrates and Town Council in terms of the statutes, but that in that year a practice was commenced which continued till the year 1836, according to which, in violation of the

statutes, the Magistrates, as Commissioners of Supply, appointed the stentmasters without the concurrence of the Town Council. That in the year 1836 doubts were raised as to the legality of this practice of appointment, in consequence of which the collection of all existing arrears of the assessment for the ministers was thenceforth discontinued. That the illegality of the mode of appointment of the stentmasters was ascertained in the year 1837, in the course of a suspension of a charge against one of the inhabitants for payment of his proportion of the assessment. "That the said irregularities in the appointment of "these public offices were produced by the culpable neglect or "omission of the Magistrates and Council to perform the "statutory duty committed to them by the above-recited "statutes; and by their deviation from the course prescribed "by the said statutes, the said Magistrates and Council, in their "corporate capacity, are liable for all the consequence of their "said culpable neglect or omission, and their violation of the "provisions of the said statutes." And after stating the bankruptcy of the city of Edinburgh in the month of June, 1833, and a claim made in the bankruptcy for the arrears of the assessment previous to Whitsunday, 1833; the summons further set forth, that subsequent to June 1833, the irregularity in the appointment of the stentmasters continued till 1836, and in consequence all arrears of the assessment subsequent to June 1833, had become irrecoverable; that the arrears for this period amounted to 4908*l.* 4*s.* 9*d.*, and that the pursuers were entitled to recover this sum from the defenders "in their cor-"porate capacity and in satisfaction of the claim to attach all "and every estate or fund, which now pertains and belongs or "may hereafter pertain and belong to the defenders as a cor-"poration, that the defenders are bound out of their alienable "revenues and property to content and pay to the pursuers the "said sum of 4908*l.* 4*s.* 9*d.*" The summons, therefore, concluded that the defenders should be ordained to make payment to the

pursuers, "out of the free alienable revenues of the city," of the said sum with interest.

The Respondents, after pleading five dilatory pleas to this action, further pleaded the following defences upon the merits:

"6. But, holding it competent and expedient in this process "to enter upon the question, how far the objection that has been "taken to the validity of the annuity assessment is or is not "well founded, it is maintained that it is not well founded; and "that, on the contrary, the nomination of stentmasters com- "plained against, was, in its substance, and with reference "to the circumstances under which it took place, legal and "valid.

"7. At all events, even if it was otherwise, the defenders, "acting in *optima fide* and gratuitously in the matter, and "having followed the precise course which a previous practice "of nearly twenty years had established, and having no direc- "tions or instructions whatever to the contrary from the pur- "suers, were not liable in damage.

"8. Moreover, even if a claim for damage was maintainable "at all, it is not maintainable as a claim against the corporation "or the corporate estate.

"9. More especially, the particular conclusions levelled "against the specific fund of 8000*l.* cannot be maintained, in "respect of the enactments of 1 and 2 Victoria, as well as upon "other and more general grounds.

"10. Generally, and in the whole matter, the defenders are "not resting-owing the debt libelled, or any part thereof."

After a record had been prepared the cause was advised by the Lord Ordinary upon cases for the parties, when his Lord- ship "sustained the 7th, 8th, and 10th defences as sufficient to "elide the action, and therefore assoilzied the defenders *sim-* "*pliciter*." To this interlocutor his Lordship subjoined the following note:

MINISTERS OF EDINBURGH *v.* LORD PROVOST, &c.—27th July, 1849.

"The Lord Ordinary, after repeated and most anxious con-
"sideration of the important questions stirred between the
"parties, has come at last to be satisfied that the action cannot
"be maintained.

"1. He is of opinion that the trust for behoof of the
"ministers, created by the statute, is not a trust in which *the*
"*general community or Corporation of the burgh* can be con-
"sidered as the trustee. In this view the analogy afforded by
"*Pearson of Balmadie's case* (Dict. 13,098) is important; the
"taxation here, as there, 'not being imposed upon the *town's*
"'*common good*, but upon the *inhabitants severally*, for their
"'money, and the magistrates not being countable *to the town*
"'for the taxation of money.'

"It is very true that the statute appoints, as trustees, the
"official persons constituting the *Magistrates and Council.* But
"from this it does not necessarily follow that these parties
"*represent the community* in administering the *trust* so con-
"ferred. If a private party were to mortify certain lands for
"behoof of the clergy, and vest the administration of this estate
"in the *Magistrates and Council*, it is clear that the latter
"would not represent *the community* in the discharge of their
"proper trust functions, and, consequently, that *the community*
"would not be answerable for the manner in which they should
"either execute or fail to execute their office. Does it make
"any difference that the trust is created, not by a private party,
"but by an act of the Legislature? In point of principle the
"Lord Ordinary cannot think it does. The Magistrates and
"Council represent, and are entitled to bind *the community*,
"only in what concerns the administration of the *common good*,
"which is the *estate of the community.* But they do not
"represent the community in the administration of such a tax
"as the *Annuity Tax*,—which forms *no part of the common good*,
"and affects *no direct interest of the community*, in that ordinary
"relation in which the Magistrates and Council stand towards

" them as their administrators,—but which, on the contrary,
" wholly and exclusively belongs to the *Ministers*, and as such
" falls to be administered in the sole and undivided right, not
" not less than for the sole and undivided behoof of these same
" ministers. In such a case, the Magistrates and Council
" properly are administrators for, and represent the *ministers*
" only. They are not administrators for, nor do they represent
" the *general community or corporation of the burgh.*

" On this ground, without going farther, the Lord Ordinary
" is prepared to adopt the rule laid down in *Balmadie's case*,
" that the community or corporation is 'not liable for their
" 'magistrates, who had not this power by their office (*i.e.*, *not*
" '*apart from the statute*, and as a natural adjunct and neces-
" 'sary condition *of their office*) but by *the commission of*
" '*Parliament therefor.*'

" And, indeed, when the whole frame and structure of the
" statute, as regards the duties thereby imposed, are considered,
" the conclusion thus arrived at comes out in the clearest light.
" For, by the terms of the statute, it is *not solely* upon the
" Magistrates and Council that the duty of appointing stent-
" masters is laid. It is laid upon them *in combination with the*
" *College of Justice.* And though no doubt from some cause
" foreign to the construction and intendment of the statute, the
" College of Justice has come practically to be dropped out of
" the combined trust, which the Legislature had it thus *in*
" *animo* to create; still that which is but an accident in the case
" does not and cannot affect the character of the trust itself, as
" that trust was originally constituted on the face and according
" to the conception of the statute. Now, just suppose that the
" College of Justice, instead of no longer taking a part, had been
" from the outset, and was still, in active co-operation with the
" Magistrates and Council as to this matter of the stent-masters;
" and it is asked, would it be possible to *separate* that mere
" *portion* of the duty which fell to the *Magistrates and Council*,

MINISTERS OF EDINBURGH *v.* LORD PROVOST, &c.—27th July, 1849.

" as if constituted by itself alone a *distinct trust* to be adminis-
" tered for the corporation of the burgh? On the contrary,
" is it not clear that the *statutory trust* implies the existence
" and combined operation of a complex and heterogeneous
" body, all the several parts of which are, in their respective
" places, to act for behoof, not of the burgh, but of the ministers
" as sole beneficiaries. Plainly, therefore, in this its first and
" original combination, the statutory trust was not a trust of
" which the burgh as *a corporation* (seeing the burgh could
" never be represented by any body whereof the College of
" Justice formed a part), was to be regarded as administrator.
" But if so, how is it possible that the mere disappearance of the
" College of Justice out of the combination should operate a
" change in this respect? If the burgh, *as a corporation*, was
" not administrator of the trust when the Town Council and the
" College of Justice were acting as they were intended to act, *in*
" *conjunction*, it surely is not more to be considered so, now that
" in carrying the very same trust into execution, the Council
" has, by an unlooked-for accident, got to perform both its own
" proper functions, and those of its co-trustee the College of
" Justice.

" This view clears the question of all difficulty which might
" otherwise seem to arise from an argument which has been
" rested on the supposed analogy of such cases as *Innes*,
" 6*th February*, 1798, Dict. 13,189, and those others referred to
" by the pursuers, where the corporations and common good of
" burghs have been subjected for *the escape of prisoners* from
" the burgh jails. For in all such cases the radical obligation
" lay upon the corporation itself, and the Magistrates and
" Council, &c., merely acted as the corporation's representatives
" and administrators in the special matter. Of course, if a cor-
" porate body, in a proper concern of its own, be compelled to
" use the *agency of its office-bearers*, it must, by familiar appli-
" cation of the maxim, *qui facit per alium facit per se*, be

" responsible for the actings of these office-bearers within their " delegated province. The distinction here is, that the statute " imposes no duty, and consequently no obligation on the *cor-* " *poration*, that the Magistrates and Council consequently do " not act by *delegated authority from*, or at all *as representing the* " *corporation*; and therefore, that the whole ground and basis of " liability *as against the corporation*, which existed in the cases " referred to, are here awanting.

" In truth, if there be an argument from analogy at all " afforded by the cases in question, it would seem to fix the " Magistrates and Council as representatives and administrators " not of the community but of the *Ministers themselves.* For " the Ministers being sole beneficiaries under the statutory trust, " and it being for their exclusive behoof that that trust is " operative, it follows, that on the same principle on which the " Magistrates and Council bind the corporation, in all matters " in which the corporation is their constituent, they must " equally bind the Ministers in matters connected with the " annuity, in which the proper constituent is the latter body. " For example, if in enforcing payment by diligence from any " of the tax-payers, an accidental error or irregularity were to " take place, whereby the diligence was rendered illegal, is it " possible to maintain that the damage thence arising should be " thrown on the common good, instead of upon the annuity " fund, which it was the object of the diligence, as a diligence " for behoof of the Ministers, and not at all of the community, " to enforce?

" 2. In the next place, even though the community (as " acting through the medium of the Magistrates and Council) " were to be regarded as the trustees, the Lord Ordinary would " still be of opinion, that in the admitted, or at least undisputed " circumstances of the case, there is no ground for subjecting " them *in damages.*

" To bring out such a result, a case would require to be

MINISTERS OF EDINBURGH *v.* LORD PROVOST, &c.—27th July, 1849.

" made against them, of such a gross malversation as would be " sufficient in the case of *an ordinary trust* to subject the indi- " vidual trustees in *personal liability*.

" The Lord Ordinary does not think it reasonable to visit " the blunder that has here been the ground of action, with such " extreme severity. The character of the trust, taking it in all " its bearings, he holds substantially to have been as regards the " proper corporation of the burgh, and the proper corporate " officers and estate, of gratuitous execution, and, as such, to " fall within the category, in reference to which it is laid down " by Erskine (3. 1. 21.), that ' where only one of the parties is " ' benefited by it,' the other ' is liable only *de dolo, vel lata* " ' *culpa, i. e.*, for dole or for gross omissions, which the law " ' construes to be dole :' or, as he elsewhere (3. 3. 36.) expresses " it, ' only for actual intromissions, or for such diligence as he " ' employs in his own affairs.'

" Now, tried by this standard, it is clear, in the first place, " that there was here *no dole* in the proceeding of the Magis- " trates and Council. In the next place, as it appears to the " Lord Ordinary, neither was there that *crassa negligentia quæ* " *æquiparatur dolo*. For how stands the facts ? 1, The *statute* " lays down no precise rule as to the nomination of stent- " masters ; and, 2, In the absence of any such, both parties are " agreed that *usage* has fixed—not that there shall be an *annual* " election to the effect of renewing *de anno in annum*, the entire " body, or even any stated portion of their number ; but, on the " contrary, that a stent-master, once elected, continues so in- " definitely, and that it is only when a vacancy happens to " occur, that it becomes necessary, in the individual case, to take " steps for filling up the blank. Now, keeping this in view, " observe—3, That, when subsequent to the city's bankruptcy " (and the present question does not carry back farther), the " Magistrates and Council of 1833 came to have charge, they " found the *roll of stent-masters complete*. There was no

" *vacancy* which called for any active interference on their part, " or which even had the smallest tendency to turn their attention, " directly or indirectly, to the matter. The existing stent- " masters, besides, were *in the full and unchallenged exercise of* " *their office*;—not a whisper of complaint or objection either " as regards the regularity of their appointment, or their com- " petency to discharge their duties, having been breathed from " any quarter. Add to all this, 4, That the system of nomina- " tion, such as it was, had itself stood unchallenged and uninter- " rupted from 1818 downwards,—*a period of fifteen years*,— " and 5, That the same system had been operative during all " this time, in regard to the stenting of *cess*, and the assessment " of *poor's rates*, not less than in regard to the Ministers' " *annuity*.

" The Lord Ordinary cannot conceive a case more thoroughly " exclusive of either dole or gross negligence, or rather a case, " on the contrary, more thoroughly conclusive of the most " perfect *bonâ fides* on the part of the Magistrates and Council, " than is here presented. It appears to him that even the " *acquiescence* of the Ministers in the system that had been in " action for so long a period is itself a sufficient excuse (if such " were wanted) for the Council's not interfering to upset the " machinery which had been handed over to themselves as a " thing already perfect, and answering all its proper purposes. " At all events, if the Ministers deemed a change essential, it was " surely their business—where *no vacancy* had occurred, to call " the Council's own attention to the matter—to intimate that " such was their wish. If the Council, being so put upon their " guard, had refused to comply, that might have raised a very " different kind of question. But they were allowed to go on " without requisition, or even the most distant hint or sug- " gestion of a wish that they should alter the existing course " of procedure. It has been said that the Ministers were them- " selves in ignorance that there was anything wrong, as they

MINISTERS OF EDINBURGH *v.* LORD PROVOST, &c.—27th July, 1849.

" knew nothing of the Council's proceedings, and had no power " to interfere with anything they did. But were they entitled " to be thus ignorant of what so nearly concerned themselves? " And was it not their duty, as it was undoubtedly their right, " to interpose if they intended to fall back upon the Council " with a claim of damages? The present action shows that the " means of an efficient controul were within their hands. And " so standing the case, the Lord Ordinary cannot regard fifteen " years of tacit acquiescence on their part as a matter so easily " to be got over, as has been attempted in the argument.

" The Lord Ordinary, however, is aware that in 1834 the " Magistrates and Council did fill up *one* vacancy, and, again, in " 1835, other *two*, which had by that time occurred in the list " of stent-masters. But this does not materially affect the " case. For, 1. As the stent-roll is made up by *separate* " survey and valuation '*in every parochin*,' it could only be as " regards those portions of the roll which applied to the parti- " cular parishes wherein these vacancies were filled up, that any " speciality of this kind could touch the argument; and if the " Defenders be right in stating that in these parishes 'there was " ' little arrear of annuity for the years libelled on left unpaid, " ' —indeed scarcely any that would in any circumstances have " ' been recovered,'—the thing could in any view be but of " little consequence. 2. The Lord Ordinary, however, is " rather disposed to refuse effect to the speciality altogether, on " the broad ground that any error committed by the Council, " as regards the vacancies in question, being in conformity with " the unchallenged system of appointment, which they found in " action when they came into action, was not in the circum- " stances, sufficient to lay the ground for *personal liability* (so " far as that expression can be applied to the case of a corpora- " tion), in the shape of a penal claim for damages.

" 3. The Lord Ordinary has not in the preceding observa- " tions rested anything upon the principle recently so well

" illustrated by the decisions both of the House of Lords and " of the Court, as to the liability of such bodies as *road trustees*, " *police commissioners*, &c., though here, too, there is much that " has an adverse bearing on the pursuers' argument. For as, " on the one hand, the pursuers, upon this principle, could not " be subjected personally, or in the annuity fund, as their " peculiar and proper estate, for the consequences of any " illegal proceeding of the Magistrates and Council *as their* " *trustees*, carried through in face of *their statutory powers;* " so, on the other, neither ought the corporation or general " community of the burgh to be subjected *in their proper estate* " *or common good*, which the same Magistrates and Council are " not less bound to administer in a legal and correct manner, " and equally powerless to bind for any proceeding *in breach or* " *excess of their legal powers* as its administrators. In ad- " ministering the common good the Magistrates and Council " are just as much trustees for the corporation or general com- " munity as in administering the annuity they are trustees for " the Ministers. And, of course, this trust-estate must in their " hands, *pari ratione*, be protected from the consequences of " their illegal and unauthorized acts, just as much in the one " case as in the other. In truth, if the pursuers be right in " representing the proceedings of the Council, as proceedings " so deeply tainted by that *crassa negligenti quæ æquiparatur* " *dolo*, the estate of the corporation ought no more to be " involved in the consequences of this dole on the part of their " administrators than the estate of the Ministers. *Culpa tenet* " *suos auctores.*

" The Lord Ordinary is satisfied that under the present " libel the pursuers cannot avail themselves of any special " argument for the liability of the defenders, founded on the " *contract* 1815. The action is wholly made upon a breach of " *the statute.* But, at any rate, the contract was not intended " to enlarge or in anywise alter or affect the fundamental

MINISTERS OF EDINBURGH *v.* LORD PROVOST, &c.—27th July, 1849.

" ground of liability rested on the statute. It merely repeats " the obligation which the statute itself, as construed by the " judgment of the Court in 1814, had imposed, viz., to account " for the *produce* of the annuity as it shall be levied.

" 5. Neither has the Lord Ordinary found it necessary, " according to the view of the case on which the judgment " proceeds, to consider the effect of the decision pronounced " in the Bill Chamber in *Winter's* case. For all the purposes " of the judgment, it may be assumed that that decision would " in its substance have been repeated upon the expede letters. " Indeed were the Lord Ordinary to offer an opinion on the " subject, that opinion, as he is at present advised, would be, " that as regards the mere *charge* under suspension, the decision " must have been so repeated. At the same time it is perhaps " not wholly free from question, whether when the statute says " that of the stent-masters 'two shall be citizens to be chosen " 'and sworne be the Town Council, and *other two* shall be " 'nominat, chosen, and sworne be the Colledge of Justice, or " '*such as they shall appoint*,'—these words, 'such as they " 'shall appoint,' do not properly carry back and apply to the " Council as well as to the College of Justice,—in which case " there might be much to say in support of the appointment, " which was actually made by the Magistrates in the present " case, as being substantially an act of delegated power. Be " this, however, as it may, the Lord Ordinary is certainly not " prepared to hold, merely because there was in such a case as " *Winter's*, no legal warrant for the *summary charge* that was " brought under suspension, that therefore the *annuity tax*, as " imposed by the statute, became, to all intents and *in every* " *shape whatsoever*, unleviable. This is a most important " question, not merely as regards the annuity, but as it may " possibly come to touch both the *cess* and *poor's rate*, and " consequently it would deserve the most deliberate considera- " tion before pronouncing any definite judgment in regard to it.

MINISTERS OF EDINBURGH *v.* LORD PROVOST, &c.—27th July, 1849.

" At present it is fortunately unnecessary to enter farther into " the subject.

" 6. In conclusion, the Lord Ordinary has only farther to " observe, that had he taken a different view of the law of the " case from what he has done, he must have sent the whole " question *before a jury*, as in an ordinary claim of damage. " He has no idea that the pursuers could in any sense be " entitled to a decree, as for a liquidated debt, in terms of the " stent-roll, which they themselves repudiate and totally deny " to rest on any *actus legitimus*. At best, they could only have " such damage as, adopting Lord Kames's distinction between " the cases of debts liquidated and unliquidated, they could " reasonably and fairly qualify *on the whole matter*. But in this " view it is not doubted but that a jury would make all proper " and necessary allowance for such *ordinary deductions* as the " experience of former levies has from time immemorial shown " to be unavoidable.

" The defalcations inseparable from the most favourable " levy of a tax, which falls to be gathered from the whole members " of a large community, presents totally different considerations, " both legal and equitable, in a question of failure of diligence, " from anything that is or can be presented in the case of a " *messenger's* failure to execute as against one single individual " a specific legal writ, or of the liability of *Magistrates* for the " escape from the burgh jail of an individual debtor, with " reference to the one certain specific warrant on which he " stood incarcerated."

The Appellants reclaimed against the Lord Ordinary's interlocutor, and upon advising their reclaiming note the Court appointed the cause to be heard in presence of the whole Judges, and after the hearing requested the Judges of the other division and the permanent Lords Ordinary to give them their opinions whether the interlocutor of the Lord Ordinary ought to be adhered to. Afterwards, on the 28th of May, 1845, in

conformity with the opinions of a majority of seven to six of the consulted Judges, the Court recalled the interlocutor, "in so far as it sustained the seventh defence, *quoad ultra* "adhered to the interlocutor, and refused the desire of the "reclaiming note."

The appeal was taken against the interlocutor of the Lord Ordinary and of the Court.

Mr. Bethell, *Mr. Wortley*, and *Mr. A. McNeill*, for the Appellants. By the agreement between the Crown and the corporation of Edinburgh in 1625, the corporation undertook to pay the Ministers of the burgh a fixed stipend of 1200 merks, which, like all other payments undertaken by the corporation, was to be provided out of the common good of the burgh. The Act of 1634, followed as it was by the Act of the Convention Parliament of 1649 and the Act of 1661, came to the relief of the common good by authorizing the levying of a tax upon the inhabitants of the burgh; but that change of the source from which the payment was to be made, in no degree impaired the force of the obligation to pay. The history of the matter, therefore, shews that the maintenance of the clergy was part of the duty of the corporation. Accordingly power is given to the corporation to appoint the persons who are to levy the tax, and to "apply" the tax, when so levied, as they had been in use to apply their other funds for payment of the stipends.

[*Lord Brougham.*—You do not mean to say, that at common law every corporation is bound out of its common good, to maintain in the first instance the churches of the town. All you mean to say is, that under the special circumstances here, that liability exists in the city of Edinburgh; that the statutes create that liability?]

That is so. In consequence of certain powers given to the corporation it incurred certain duties. The corporation stood in the situation of trustee, and there has been wilful default in

the discharge of the duties of that office. The seventh plea of the Respondents is the answer given to this, but the Court below has rejected this answer by the alteration it has made upon the interlocutor of the Lord Ordinary. And from the opinions of the Judges it appears to have been held that the relation of trustee and *cestui que* trust did not subsist between the parties; but that assuming it to have subsisted, there was wilful default. The judgment below, therefore, is in truth confined to the competency of the action, directed as it is against the corporation, and is rested upon a distinction between the corporation and its officers; the argument seeming to be that the corporation cannot be sued, but that the magistrates may be sued in another capacity than their official, but this is in defiance of the decision of 1813, in Davidson *v.* Magistrates of Edinburgh.

There the summons was directed against the Provost, Magistrates, and Council of the burgh, and its competency was sustained by the Court in a judgment which found that the Ministers of Edinburgh have "the sole interest in and exclu-"sive right to the entire produce and benefit of the annuity," and that the defenders were "liable to hold count and reckoning "with the pursuers and their successors for the produce of the "said annuity." To say, therefore, that the present action is not competent, which is what the pleas of the Respondents amount to, is to say that the Appellants have no right to put a question to the party as to the state of the account between them.

[*Lord Campbell.*—This is not an action of account, as that in 1810 was, in which the Court said that all that had been received must be paid over. But it is one for culpable negligence, out of which liability may arise, but no account.]

A bill in Chancery in England would be framed on the model of this summons in the same circumstances, the relation of the parties being that of trustee and *cestui que* trust. The corporation has a duty to perform which they are called upon

to perform, and if they have not the tax ready to pay over, this is through their wilful default, for which the summons seeks to make them answerable. In Pearson *v.* Magistrates of Montrose, *Mor.* 13,098, action was not sustained against a corporation; but there the case rested on a mere contract between the party and the magistrates as individuals, and not as acting in the name and for behoof of the corporation. On the other hand, in Innes *v.* Magistrates of Edinburgh, *Mor.*, 13,189, the corporation funds were held to be answerable for damage sustained by a private party, through the culpable negligence of the magistrates. The doctrine of trust is certainly not, as yet, fully understood in Scotland, but it must be eliminated upon the same principles as it already has been in England.

In Corporation of Colchester *v.* Lowten, 1 *V.* & *Bea.* 246, *Lord Eldon* laid down, that a corporation is, in respect of property not dedicated to any particular charity, liable to be charged for wilful default. If it be ascertained that a corporation is the depositary of a power, then all the liabilities incident to a trust follow against the corporation as against any other trustee, Russell *v.* Men of Devon, 2 *Ter. Rep.*, 667; Mayor of Lynn *v.* Turner, *Cowper*, 86; Henley *v.* Mayor of Lyme Regis, 3 *Moo. & Pa.*, 278. There is a statutory relation created between the corporation and the ministers, that the corporation shall execute the power and perform the duty, and the ministers have a clear right to compel, by suit, a due performance of this.

Sir F. Kelly and *Mr. Anderson* for the Respondents.—The Appellants have not dealt with the question whether, assuming the breach of duty which they allege to have been really committed, the common good, by whomsoever the breach may have been created, can be liable for the consequences. At common law the common good of a burgh is not liable for ministers' stipend. Is there, then, anything in the present case to alter this as to Edinburgh? Previous to 1634 an illegal practice had

prevailed of applying part of the common good to the sustentation of the burgh ministers. The Act of 1634 recites this practice, and applies a remedy, by directing the levy of a tax upon the inhabitants. The two subsequent Acts no way vary this than by increasing the amount of the tax. Yet the Appellants seek to have their stipend paid out of the common good, because the council has neglected its duty in the collection of this tax. If this claim were to be sustained by an alteration of the judgment of the Court below, it would be virtually a repeal, *pro tanto*, of the statutes, and a revival of the illegal practice which they were intended to put a period to.

All the cases have, in substance, been attempts to compel compliance with conditions on which property vested in corporations; but it is quite a different thing when no property is vested in the corporation for the special purpose, and it is sought to make the corporate property liable for the defect in duty of the corporate officers. The statutes have expressly appropriated a fund for the purpose, and freed the common good. No action can lie against a corporation if the effect of the judgment in it is that the judgment must be satisfied out of the corporate funds applied by statute to special purposes. Were this otherwise, then, were the corporation to fail in appointing stent-masters for the rates for the poor, &c., the magistrates might, in this way, transfer the liability from the householders to the common good; and so it would depend on the conduct of the corporators, whether the corporate funds should be applied to their legitimate and appropriate purposes, Pearson *v.* Magistrates of Montrose, *Mor.* 13,098; Heriot's Hospital *v.* Ross, 12 *Clark & Fin.* 507; Duncan *v.* Finlater, *Mc L. & Rob.*, 935. If a statute impose a duty on certain individuals of a body it is against them and not against the body that proceedings for breach of the duty must be brought. The Statute, 1661, points only to the council without allusion to the corporation, and the stent-masters are to be appointed, not by the council alone, but by the College of

MINISTERS OF EDINBURGH *v.* LORD PROVOST, &c.—27th July, 1849.

Justice in conjunction with the council, so that if the action would lie at all it must be directed against the college as well as the council. If it be said the council are the agents of the corporation, how can that be shown? They may be the agents of the ministers to receive, or of the householders to pay, but how are they agents of the corporation? All that the statute shows is, that the council were selected to appoint the stent-masters, because of the guarantee which their position gave, that a proper appointment would be made by them, but the statute, in no way, gives the council the character of agents. If they are not the agents of the corporation, then the only argument that can be used, is, that they have undertaken a duty for a beneficial consideration, but that argument has not been attempted. The result, then, is, that the council have a Parliamentary power with a duty, and then the action must be directed against the persons on whom the duty is imposed, which is not the corporation, but only a part of that body.

LORD BROUGHAM.—My Lords, this case has given rise to very great anxiety in the capital of the sister kingdom of Scotland, on account of the importance of the principle, and not less on account of the importance of the body, namely, the Reverend Ministers of Edinburgh, who are the Appellants here, and who were the pursuers in the Court below; the Magistrates and the Town Council representing the city of Edinburgh as a corporate body, and representing and protecting the common or corporate funds of the city, being the opposity party, the defenders below, and the Respondents at your Lordships' bar.

My Lords, the Judges below were divided, and it was by a narrow majority, seven to six, alone, that this decision was given, which is now brought here by appeal. In ordinary cases, it would give rise to great anxiety on the part of your Lordships if it were a question of purely Scotch law,—Scotch conveyancing for instance,—to find the greatest lights of that law so equally

divided. Even if it were a question not free from doubt in itself, though not peculiarly touching Scotch law or practice, an equal or a nearly equal division would cause the decision of the case to be attended with anxiety. But when I look into the Act of Parliament of the year 1661, and when I look into the arguments of the bench below, weighing respectfully and anxiously the opinions delivered on either side by the learned Judges, and weighing also the decisions cited on either side, but particularly the decisions cited by the majority, I do confess that there remains in my mind little or no doubt upon the subject-matter in question, and I also may feel some little wonder that there should have been so great a discrepancy of opinion below.

My Lords, it is perfectly clear law in England and in Scotland, and must be so in every country, that a trust may be constituted in the person of A. B. and C. in their individual capacities, or of A. B. and C., magistrates and town council of a burgh, and that that trust may be in them *quasi* trustees, for the purposes of fulfilling the obligations imposed upon them in executing that trust, and may vest them with the powers of such trustees, and subject them to the duties of such trustees, in their capacity of A. B. and C., magistrates and town council, without making the corporation of which they are the head in another capacity, and without making the city, whose affairs they administer as the magistrates of that city, a party to that trust; and, consequently, without involving the funds of that city, or the funds which those parties administer, not in the capacity of trustees under this particular trust, but in their other capacity of governors administering the funds as magistrates of that corporate town. I hold it to be perfectly clear that the two things may be kept separate; that the two capacities may be severed; and that they may be trustees, not as representing the town generally, not as dealing with the town's funds generally, but trustees under that particular limited and restricted trust, with which the town has no concern.

MINISTERS OF EDINBURGH *v.* LORD PROVOST, &c.—27th July, 1849.

My Lords, this does not appear to me to have sufficiently received the attention of the minority in the Court below; and yet if you look into the Act of Parliament, it is impossible to read it with due attention, and to have any doubt upon the subject. In the first place, I may say in passing, that if the common good of the town, previously to the Act of 1661, had been liable, and if the magistrates *quasi* magistrates administering that common good, and at the head of the town whose common good and whose property it was, had been liable before, another question might have arisen, with which it is unnecessary here to deal. But it is perfectly clear that the town was not previously liable; it is perfectly clear that the common good was not previously liable; and it is perfectly clear that this was an Act which did not make the common good liable. It says nothing of the kind; but it is an Act imposing upon the inhabitants of Edinburgh a certain amount of money to be paid as stipends to those twelve reverend clergymen; and then in order that they may be paid that sum, and in order that it may be collected, the provision is, that it shall be collected by the deacons of the kirks (that appears in practice to have been dropped, but it is part of the Act, and not at all an immaterial part of the Act), or by a collector to be appointed for that purpose. By whom? By the magistrates and town council of the burgh, in their option, as they shall think fit and expedient for the town; and the same magistrates are to appoint four sworn men in every parish to survey and value the house-mails aforesaid, whereof two shall be citizens, to be nominated, chosen, and sworn, by the town council (as stent-masters, I believe they are called), and the other two shall be nominated, chosen, and sworn, by the College of Justice.

That shews perfectly clearly, therefore, that the appointment to stent and assess, and afterwards the appointment to collect, is given to them, no doubt, in their capacity of magistrates and town council; but it is not given to them as repre-

senting the town, and having the command of the common good of the town, but they are merely appointed office-bearers and trustees for the purpose of seeing this act carried into execution.

Admitting that they have committed a breach of their duty for these three years in question, namely, from 1833 to 1836, which is the period complained of, and that they have failed to collect the sum which they ought to have collected, does it follow, because they are trustees, and are appointed to do this, being the magistrates and town council,—because it happens, accidentally, that the magistrates and town council are the persons upon whom that trust has devolved,—and that they have broken that trust,—does it follow, I say, that the common good is to be answerable for their having broken that trust? Most undoubtedly not, and if any case were wanting to prove that which the words of the Act quite sufficiently prove to my mind, I have only to refer to a very old case, but one of very high authority in the law, because Lord Stair, who mentions it, was a great lawyer, and an eminent authority;—I mean the case of Pearson of Balmadies *v.* The Town of Montrose, a case, which is nearly, as far as principle is concerned, on all-fours with the case at your Lordships' bar. There are two other cases,—Duncan *v.* Findlater, before this House, and the case of Heriot's Hospital, which go to the same point. My Lords, just see the difference (though I do not think much reference is made to that below) between this Act of 1661, and another, a much older Act, of 1579, chapter 273, to which we were referred in the able and learned argument of Mr. Anderson. In that case, there are mentioned not only the "magistrates and town council," but also "the common good" or "community," which comes to the same thing. The community is there made liable, which makes it a totally different case from the present.

My Lords, I have looked through all these opinions, and I

think nothing can be more judicious than Lord Ivory's interlocutor, and the note appended to it. The Lord Ordinary, without going further, says, that "he is prepared to adopt the "rule laid down in Balmadie's case (which is Pearson *v.* the "Town of Montrose), that the community or corporation is not "liable for their magistrates, who had not this power by their "office (*i.e.*, not apart from the statute, and as a natural adjunct "and necessary portion of their office), but by the commission of "Parliament therefor." And I find, in several other parts of the decision, similar and very judicious comments made upon that case, and upon that view of the present question.

I have, therefore, my Lords, no doubt whatever, that I shall best discharge my duty by recommending to your Lordships, subject to what my noble and learned friend may have to add, to affirm the decision of the Court below; which proposition I make, let me add, with all possible respect to the learned Judges below, without any doubt whatever.

My Lords, I ought to have stated that a great deal has been said at the bar, and a good deal in the Court below by several of the Judges, who seem to have relied upon it, with respect to the decision of 1813, and the contract of 1815 following thereupon. If you look into that, you will see that it has not, and cannot have, the least bearing upon the present question. If the magistrates had received the money, if the produce had been vested in them, then, past all doubt, they would have been answerable in a count and reckoning for that money.

LORD CAMPBELL.—My Lords, I am likewise of opinion that the interlocutors appealed from ought to be affirmed. In considering whether this action can be maintained against the Lord Provost, magistrates, and town council of the city of Edinburgh, in their corporate capacity, so as to render the common good of the city of Edinbnrgh liable for any damages recovered against them, we must strictly ascertain

what the nature of the action really is; and for this purpose we must look to the summons, the condescendence, and the pleas in law. Is it, then, like that of 1810, an action of count and reckoning, seeking to make the Defendants, as trustees, liable to the Pursuers for money received? Quite the contrary, my Lords. The *gravamen* stated in the summons and condescendence is a breach of a statutable duty, in not appointing stent-masters, whereby large sums of money which ought to have been collected for the Pursuers never were collected, and have been entirely lost to them. All doubt upon the subject must be removed by the Pursuers' plea in law,—"that the "defenders and their predecessors in office, having failed in the "performance of their statutory duty, and having, by their "culpable neglect and omission, rendered permanently irre-"coverable large arrears of the assessment which they were "bound, under the statutes, to levy for behoof of the Pursuers, "are liable officially and in their corporate capacity, for the "consequences of their said culpable conduct and neglect of "duty."

The question, then, is, Whether the eighth defence, which amounts to what in England we call a demurrer, "that this "claim is not maintainable against the corporation or the "corporate estate," shall prevail?

I conceive that if the individuals who filled the offices of Lord Provost, magistrates, and councillors, when the stent-masters ought to have been appointed, were guilty of the breach of duty imputed to them, they are only liable in their individual capacity, and their fellow-citizens cannot be punished for their default.

The liability of the parties is to be ascertained by the Act of 1661 and the subsequent Acts, extending the area over which the annuity tax is to be levied, and not by any usage or contract which could not be permanently binding on either side.

MINISTERS OF EDINBURGH *v.* LORD PROVOST, &c.—27th July, 1849.

Looking to these statutes, in what relation do the Lord Provost, magistrates, and councillors, stand in the appointment of stent-masters? Only as parliamentary commissioners to do an act. They might have been compelled, by legal process, to do that act, and for any wilful refusal to do the act, or gross negligence in doing it, they would be personally answerable.

There seems to me to be no pretence for saying, that in the performance of this duty they were trustees any more than the College of Justice, on whom a similar duty is cast. The summons, in what may be considered its *major proposition*, alleges, as the foundation of the action "that, under the provisions of "the statute above recited, the magistrates and council are "bound to the performance of a certain important ministerial "duty, in the election of stent-masters."

It would be very strange if, for the neglect of a duty so imposed upon them, the common good of the city should be liable.

At the bar the case of the Appellants was chiefly rested on the assumption that the Defendants are here sued as trustees for not paying over the stipends of the ministers of Edinburgh. But this assumption is entirely gratuitous. The interlocutor pronounced in 1813, in the suit commenced in 1810, is relied upon as an authority. This interlocutor merely proves that the Provost, magistrates, and council, having got the proceeds of the annuity tax into their hands, they were liable to the ministers for the amount, without being entitled to appropriate any part of it to their own use. The form of action and the facts of the case were there totally different from those which we have here to deal with.

The only decision that has any aspect of an authority in favour of the Pursuers is that of Innes *v.* the Magistrates of Edinburgh. But that case was materially shaken by Duncan *v.* Findlater, in which the strange notions that had prevailed in Scotland about making a trust-fund liable to a stranger for the

default of the trustees were corrected, and it can only be supported on the supposition that there is a duty on the part of the corporation of a royal burgh to repair the streets as there is to maintain a prison.

On the other hand, the case of Pearson *v.* the Town of Montrose, to which my noble and learned friend has referred, decided so long ago as the year 1669, when jurisprudence flourished in Scotland quite as much as at the present day, seems to me to rest on sound principle, and to be expressly in point. Under similar circumstances, the Court of Session found "the town and present magistrates not liable, *but*" (that is, *without*) "prejudice to the Pursuer to insist against the then "magistrates, their heirs and executors;"—thereby establishing the doctrine, that for breach of any such statutory duty the remedy is against the individuals, and not against the corporation, although in respect of their being office-bearers in the corporation the duty had been imposed upon them.

I conceive that in England the remedy would be at law against the individuals, instead of being by bill in equity for a breach of trust. The Court of Queen's Bench would grant a mandamus to compel members of the corporation to do the act, and they would be liable individually for refusing to do the act, or for doing it negligently, whereby damage accrued to the party for whose benefit the act was to be done.

I feel less diffidence in forming my opinion against so large a minority as six Judges, because their reasons seem to me to be wholly untenable. They do not treat the case as one of a fiduciary nature, but as one of contract for onerous cause, considering that by the statutable establishment of the annuity tax, the common good was relieved from a legal obligation to which it was before subject. There is no ground for contending that this is an action of contract, or that any burgh was bound at common law to support the clergy out of the common good. Nor can the circumstance be of any importance in

deciding this case, that the patronage of the city livings is vested in the corporation, nor that the corporation had been in the habit for many years before 1810, of illegally collecting the annuity tax, and appropriating a considerable part of it. I am exceedingly surprised to find Lord Moncreiff, whose judgments I have long been accustomed to admire and to reverence, saying, "It is just a process of accounting, in which the "Pursuers say that the Defenders, as representing the corpora-"tion, either have or ought to have in their possession funds "appropriated by statute to their use." This is *not* a process of accounting, and the Pursuers, instead of saying that the Defenders have funds in their possession, complain that the Defenders, in violation of the statute, did not appoint stent-masters, *whereby the funds were entirely lost.* His Lordship likewise argues as if the legality of the annuity tax were in question, and as if the reverend fathers of the kirk who were induced to give up country livings for the purpose of bestowing their pastoral care on the citizens of Edinburgh, were in danger of being defrauded and starved. No doubt is raised, or can be raised, respecting the legality of the annuity tax. My regard for the clergy of Edinburgh induces me to wish that by some equitable arrangement it could be commuted, so that they should be fully provided for in a manner less likely to cause discontent (although a groundless discontent) among those who do not take the benefit of their ministry. In the mean time, they are as much entitled to the produce of the annuity tax as any landholder is to the rents of his estate. But they must enforce the collection and payment of it by legal means. The corporation of the city is not cautioner for it; and if is lost by the misconduct of the office-bearers of the corporation, it cannot be recovered from the common good. *Culpa tenet auctores suos.*

For these reasons I agree in the motion of my noble and learned friend, that the interlocutors be affirmed, with costs.

MINISTERS OF EDINBURGH *v.* LORD PROVOST, &c.—27th July, 1849.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the interlocutors therein complained of, be, and the same are hereby affirmed: And it is further Ordered, That the Appellants do pay, or cause to be paid, to the said Respondents the costs incurred in respect of the said appeal, the amount thereof 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, and is hereby 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 processes or diligence for the recovery of such costs as shall be lawful and necessary.

LAW, HOLMES, ANTON, and TURNBULL—SPOTTISWOODE and ROBERTSON.