It certainly does not necessarily follow that because the machine was not properly fenced every accident thereby occasioned to those employed in working it can found a claim of damages against the mill owner. In the case I have referred to as decided by Lord Campbell it was found that although the machine was not properly fenced, yet that the injury having been caused by the improper act of the man injured he was not entitled to recover. But that, in the first place, was the case of an adult under the former law. It is obvious that the continuation of the former law, as regards children and young persons, necessarily implies that they are more likely to come in contact with the dangerous parts of the machinery than adults, and the object of the statute was to have the machinery so fenced that in the course of their ordinary employment they could not come in contact with it. Without saying that a boy under fourteen cannot be guilty of contributory negligence, where the statutory provision has been violated, I do not think that such is the case here. The evidence leaves it very much in doubt what the instructions were which the pursuer received. The defender says that he told him always to go round by the feeding end of the machine. The pursuer himself says that he received no such instructions; and the man Wallace, who fed the machine and was there all the time until the accident happened, says that he cannot tell whether the pursuer went round by the back—that is by the feeding end; and at last says that he sometimes went the one way and sometimes the other. The result of the evidence to my mind is, that the boy was in the habit of squeezing between the wall and the machine, as the shortest way, when he required to take the belt off; and that he never was checked for doing so by the man Wallace who stood at the other end of the machine. It is remarkable that although this man was present when the accident occurred he is wholly unable to tell where the boy was when it happened. Mr Nicoll thinks that the boy could not have gone between the machine and the wall from the place where he worked; but this, I think, is not supported by the evidence.

On these two points, therefore, I am of opinion that this machine ought to have been fenced, and that the pursuer being under fourteen, and engaged at the time in his ordinary occupation, has not liberated the defenders from their responsibility by taking that method of discharging his duty. It ought not to have been left open to him to do so. This being so, I am also of opinion that the responsibility of fencing the machine lay with the employer and not with any subordinate.

The machine has been since fenced; and, without giving undue weight to that circumstance, I think it shows that it was possible to fence it. I have no doubt that the employers thought that the machine was safe enough, and that they did not anticipate the mode of working which the pursuer adopted. But they ought to have performed their statutory duty, and must be liable for the consequences of not having done so.

Lord Cowan—I concur. I have carefully considered this case and the statutes, on the true construction of which the decision depends, and I have very few observations to offer, except that, from the first, it has struck my mind as a great peculiarity in this case, that the machinery left unfenced was part of the very machine at which the pursuer worked, and that in doing his ordinary work he was brought within two feet of this unfenced machine. Now, I consider that a dangerous machine.

Lord Benholme—I concur. I think the words of the Statute are clear, and do not allow any consideration of mere carelessness on the part of the boy to be taken into account. I think the Statute obliges us to give damages.

Lord Neaves—I concur. The object of the Legislature is clear. It is lawful for mill owners to employ children and young persons in their mills, which is a great advantage to them; but, in compensation, they are required to put their mills and machinery in such a way as, if accessible, they shall be safely guarded, so as to exclude the risk of children and young persons coming into contact with them. A machine which is inaccessible does not require fencing, but, as has been explained, that is only by a recent change in the law. It is no answer to say that a child or young person neglected instructions. The very fact of being a boy assumes that he is rash, and therefore the Legislature has required a physical precaution to be taken. I don't say that there may not be cases of contributory negligence by a boy, but this is not such a case; here the boy was employed near it, and it was accessible on both sides.

Counsel for Pursuer—Kilpatrick and C. Smith. Agent—R. A. Veitch, S.S.C.

Counsel for Defenders—G. Smith and P. Fraser. Agent—J. Galletly, S.S.C.

Friday, June 27.

SECOND DIVISION.

[Lord Gifford, Ordinary.

JEX-BLAKE AND OTHERS *v.* SENATUS ACADEMICUS OF THE UNIVERSITY OF EDINBURGH, AND THE CHANCELLOR THEREOF.

University — Deed of Foundation — Construction — Powers of University Court.

Held (by a majority of the whole Court)—(1) That in respect of the language of the deeds of foundation, and the uniform practice of the University of Edinburgh, female students are not admissible within it for matriculation and education; (2) That regulations passed by the University Court, which authorised the admission of women as students in the University, were *ultra vires* of the Court.

The circumstances out of which this suit arose were as follows:—On 20th March 1869, the pursuer, Miss Jex-Blake, addressed a letter to the Dean of the Medical Faculty of the University of Edinburgh, requesting permission to attend the lectures to the medical school during the coming session, under such conditions or reservations as might seem desirable. At their meeting on March 23, the Medical Faculty acceded to this request; and on 27th March 1869 the Senatus Academicus, by a majority of 14 votes to 4, sustained that decision, and granted the said pursuer permission to attend classes tentatively, and without matriculation, during the ensuing session. On appeal against this resolution, the University Court, on 19th April 1869, pronounced the following judgment—"The Court con-

sidering the difficulties at present standing in the way of carrying out the resolution of the Senatus, as a temporary arrangement in the interest of one lady, and not being prepared to adjudicate finally on the question, whether women should be educated in the medical classes of the University; sustain the appeals, and recall the resolution of the Senatus." On 21st June 1869 the pursuer Miss Jex-Blake addressed a letter to the Senatus Academicus, informing them that other ladies besides herself had expressed a desire to prosecute medical studies in the University, and requesting that the Senatus would recommend to the University Court to sanction the matriculation of women as medical students, and their admission to the usual examinations, on the understanding that separate classes should be formed for their instruction by the medical professors of the University, or by recognised extra academical lecturers. Of same date, the said pursuer addressed a letter to the Rector of the University, inquiring whether the Court would "remove their present veto in case arrangements can be made for the instruction of women in separate classes; and whether, in that case, women will be allowed to matriculate in the usual way, and to undergo the ordinary examination, with a view to obtain medical degrees in due course?" On 30th of June 1869 the said pursuer addressed a letter to the Dean of the Medical Faculty of the University, stating that in the event of the separate classes being established, she and her fellow students would be ready to guarantee to each professor whatever minimum fee might be thought right by the Medical Faculty, or to endeavour to meet the wishes of each professor individually in that point. On 1st July 1869, at a meeting of the Medical Faculty of the University it was resolved to recommend to the Senatus —(1) that ladies be allowed to matriculate as medical students, and to pass the usual preliminary examination for registration; (2) that ladies be allowed to attend medical classes, and to receive certificates of attendance qualifying for examination, provided the classes are confined entirely to ladies; (3) that the medical professors be allowed to have classes for ladies, but no professor shall be compelled to give such course of lectures; (4) that, in conformity with the request of Miss Jex-Blake's letter to the Dean, ladies be permitted to arrange with the Medical Faculty, or with the individual professors, as to minimum fee for the classes. At a meeting of the Senatus Academicus, July 2, 1869, the report of the Medical Faculty was read, agreed to, and ordered to be transmitted to the University Court.

At a meeting of the University Court on 23d July 1869, "Mr Gordon, on behalf of the committee appointed at last meeting to consider what course should be followed in order to give effect to the resolution of the Senatus in favour of the recommendations of the Faculty of Medicine regarding separate education in medicine for ladies, reported that the committee were of opinion that the matter should be proceeded with under section XII 2 of the Universities Act, as an improvement in the internal arrangements of the University." Mr Gordon then moved the following resolution, which was adopted:—"The Court entertain an opinion favourable to the resolutions of the Medical Faculty in regard to the matriculation of ladies as medical students, and direct these resolutions to be laid before the General Council of the University for their consideration at next meeting." This resolution was approved by the General Council on October 29th 1869, and was sanctioned by the Chancellor on November 12th 1869. The following Regulations were officially issued at the same date, and inserted in the Calendar of the University for the following years, 1870–71 and 1871–72:—(1) Women shall be admitted to the study of medicine in the University; (2) The instruction of women for the profession of medicine shall be conducted in separate classes confined entirely to women; (3) The professors of the faculty of medicine shall, for this purpose, be permitted to have separate classes for women; (4) Women not intending to study medicine professionally may be admitted to such of these classes, or to such part of the course of instruction given in such classes, as the University Court may from time to time think fit and approve; (5) The fee for the full course of instruction in such classes shall be four guineas, but in the event of the number of students proposing to attend any such class being too small to provide a reasonable remuneration at that rate, it shall be in the power of the professor to make arrangements for a higher fee, subject to the usual sanction of the University Court; (6) All women attending such classes shall be subject to all the regulations now or at any future time in force in the University as to the matriculation of students, their attendance on classes, examination, or otherwise (7) The above Regulations shall take effect as from the commencement of 1869–70.

In accordance with the above resolutions and Regulations, the pursuers, Miss Jex-Blake, Mrs Thorne, and Miss Pechey, were in October 1869 admitted provisionally to the usual preliminary examination in arts prescribed for medical students entering the University. Having duly passed, and received certificates to that effect from the Dean of the Medical Faculty, they, after the issue of the Regulations above cited, all matriculated in the ordinary manner at the office of the Secretary of the University. They paid the usual fee, inscribed their names to the University album with the usual particulars, including the faculty in which they proposed to study, and received the ordinary matriculation tickets, which bore their names, and declared them to be "Cives Academiæ Edinensis." The three pursuers aforesaid were at the same time registered in due course as students of medicine by the registrar of the Branch Council for Scotland in the Government Register, kept by order of the General Council of Medical Education, and registration of the United Kingdom, such registration being obligatory on all medical students, and affording the sole legal record of the date at which they have commenced their studies. During the sessions of 1869–70 and 1870–71, these three students completed the first half of the course of study required for graduation. They attended in the University the classes of Chemistry, Practical Chemistry, Institutes of Medicine, and Botany, and under extra-mural lectures, the classes of Natural History, Anatomy, Practical Anatomy, and Surgery. In these several classes they passed the same class examinations as the male students, and whenever they obtained class honours in the University their names were inserted and published in the prize-lists and in the University Calendar indiscriminately with those of the male students. On 9th April 1870 the Senatus formally decided that exactly the same University certificates of attendance should be issued to medical students of both sexes, irre-

spective of the fact that their studies were conducted in separate classes. The pursuers, other than those above named, matriculated in like manner in successive sessions, and have all taken one or more medical classes either in the University of Edinburgh or in the extra-mural school, as sanctioned by the ordinary University regulations.

The pursuers having ascertained, on application to the several professors whose classes it is necessary for them next to attend, with a view to completing their curriculum of study, and proceeding to the professional examinations required of candidates for degrees, that they were not prepared to conduct separate classes for their benefit, the pursuer, Miss Jex-Blake, addressed a letter to the Senatus, on 26th of June 1871, stating the position of matters, and suggesting as a means of overcoming the obstacles of the completion of their studies the following alternative measures:—(1) "That whenever a professor may be unable or unwilling to deliver a separate course of lectures on his subject, the Senatus should nominate for the approval of the University Court a special lecturer on the said subject, for the express purpose of giving us the requisite qualifying instruction, we undertaking to defray the expenses of such appointment; or (2) That the University regulations with respect to extra-mural classes be so far relaxed in our special case that, whenever a professor may be unable or unwilling to deliver a second course of lectures, we should be authorised to attend a corresponding class on the same subject in the extra-mural school, the said class being held to qualify equally for graduation." The obstacles referred to in this communication depended on the following facts—(1) That the University regulations of November 1869 *permitted*, but did not expressly *require* the professors to have classes for ladies; that they were forbidden to instruct them except in separate classes; and that some of the professors were unwilling to give separate classes; (2) That no candidates for graduation may attend more than *four* of the classes required for graduation, except in a university entitled to give the degree of M.D.; and (3) That no other university in the United Kingdom, except that of Edinburgh, is at present available to women for the purposes of medical study. In reply to the above communication, the pursuer was informed that the Senatus, at a meeting held on 28th July 1871, had resolved by a majority of one, "that having taken the opinion of counsel with reference to the proposals contained in her memorial, of date 26th June 1871, they find themselves unable to comply with either of those proposals."

In the month of October 1871 women who applied for matriculation tickets to the clerk of the secretary of the Senatus Academicus were told by him that he had received instructions from the Principal not at present to issue matriculation tickets to any women. On October 16, 1871, the pursuer, Miss Jex-Blake, also received from the clerk a letter in the following terms:—"University of Edinburgh, Octr. 16th, 1871.—Madam,—I am desired by the Dean of the Medical Faculty to inform you that he has been interdicted by the Faculty from giving examination papers to ladies on the 17th and 18th curt. Kindly communicate this fact to the ladies whose names you some time ago handed in to me for this examination.—I am, &c., Thos. Gilbert." In this letter no mention is made of any possibility of a special examination in arts for the new lady students; and, moreover, such examination being held by the professors of the arts faculty, the medical faculty had no power to promise a special examination. As three ladies had come to Edinburgh expressly for the purpose of undergoing this examination, who would, if prevented from doing so, be retarded in their studies to the extent of one year, these ladies, including the pursuers, Miss Anna Dahms and Miss S. J. Massingberd Mundy, obtained the opinion of counsel as to the legality of the interdict, and were informed that it was illegal. When this opinion was forwarded to the Dean of the Medical Faculty, he decided not to take the responsibility of obeying the interdict, and therefore admitted the said women to the examination provisionally. On Saturday, October 14, the pursuers, Mrs Thorne and Miss Edith Pechey, who had already paid for and obtained tickets of admission to the forthcoming professional examination, received notice from the Dean of the Medical Faculty, by order of the Medical Faculty, that they could not be admitted to such examination without express directions of the Senatus. The pursuer, Miss Pechey, thereupon addressed, and, on Oct. 20, sent the following letter to the Secretary of the Senatus Academicus:—"Letter from the Women Students to the Secretary of the Senatus Academicus. Sir,—We beg you to represent to the Senatus that, without any previous official notice, we were informed on Saturday last, by order of the Medical Faculty, that we cannot be admitted to the professional examination which takes place on the 24th inst. without the express sanction of the Senatus, and we therefore venture earnestly to request the Senatus to take into consideration the following facts:—(1) That we began our studies two years ago, and have diligently pursued them ever since, in the full belief that the permission granted to us to study 'for the profession of medicine' involved necessarily the permission to attend all examinations required for the medical degree, when we had complied with the ordinary requirements of the official regulations. (2) That in the first permissive resolutions passed by the Medical Faculty in July 1869, the admission of women to examination in the ordinary course was distinctly contemplated, as it was provided that they were to 'attend medical classes, and to receive certificates of attendance *qualifying for examination*.' (3) That in the Regulations sanctioned by the Senatus. University Court, and University Council, and approved by the Chancellor in November 1869, it was expressly laid down that women studying for the profession of medicine were to be 'subject to all the regulations now or at any future time in force in the University, as to the matriculation of students, their attendance on classes, *examination*, or otherwise.' (4) That the Medical Faculty must all along have been perfectly aware that in the ordinary course of study our first professional examination would become due at the end of two years after our first matriculation, and that yet no official notice has ever been given to us that objections would be made to our admission to this examination; and that, had any such objection been officially intimated to us, we should, many months ago, have made application to the Senatus to direct our admission to such examination. (5) That in the absence of all notice to the contrary, we have for some months past devoted ourselves to diligent

preparation for this special examination, and that we shall be placed at the greatest disadvantage if we are not now allowed admission to it. (6) That we have already paid our fees for the examination, and that the ordinary tickets of admission have been granted to us as a matter of course. We therefore beg, Sir, thus to lay before the Senatus our claim to admission to the ensuing examination, in respect of the considerations we have enumerated, and request that, as a matter of good faith towards us, matriculated students of the University, they will accordingly direct the Medical Faculty to admit us in the ordinary manner." At a meeting of Senatus, held on October 21, 1871, the above letter was submitted to the Senatus.

The Senatus decided that (1) women were to be allowed to matriculate and pass preliminary examinations in Arts as heretofore, so long as the present Regulations remained in force; (2) that the women then ready to proceed to their first professional examinations were to be admitted to it in the usual course, with the understanding that certain legal questions (relating especially to the qualification for graduation of certain extra-mural classes in which the women had studied with male students) were reserved. At a meeting on November 30th, the University Court agreed that the women's attendance at these classes should not be considered vitiated by the fact of their attendance with male students. The pursuers, Mrs Thorne and Miss Pechey, were accordingly admitted to examination, and passed successfully; and they and other women, to the number of 28, matriculated in the University.

On 30th October 1871 the Senatus again met to consider the question of providing further faculties for continuing the studies of those women who had completed the first half of their course.

The Senatus declined, by a majority, to take any measures by which the women might be enabled to complete their education, and therefore the pursuer, Miss Jex-Blake, addressed to the University Court the following letter:—"From Miss Jex-Blake, addressed to the Honourable the University Court. —15 Buccleuch Place, November 21, 1871.—Gentlemen,—It is now two years since you passed a series of resolutions, dated 12th November 1869, to the effect that 'women shall be admitted to the study of medicine in the University.' In the time that has since elapsed, I, and those ladies who matriculated with me at that date, have completed one-half of the studies necessary for graduation in the University of Edinburgh. Nearly five months ago, I ventured to point out to the Senatus Academicus that unless further arrangements were made it would be impossible for us to complete the studies which we have begun with your express sanction. After pointing out the existing difficulties, I ventured further to make two suggestions, either of which, if adopted, might enable us to complete our education in the University. In reply, however, I was informed that the Senatus, 'having taken the opinion of counsel with reference to the proposals contained in the memorial of date 26th June 1871, find themselves unable to comply with either of those proposals.' I understand, however, that since the date referred to, another legal opinion has been obtained, and has been laid before the Senatus, and by them forwarded to your honourable Court. As, however, the Senatus still appear unwilling to initiate any measure by which we may be relieved from our present difficulties, I feel constrained now to appeal to you, in my own name and that of my fellow students, to take such steps as shall enable us to complete our studies. I beg to represent to you that we have all paid matriculation fees for the present year, and are by our tickets declared to be 'Cives Academiae Edinensis,' and that yet we, who commenced our studies in 1869, are unable during the present session to obtain any further classes whatever towards completing our required course of study. We understand from those friends who have taken legal opinion on the subject—and doubtless such opinion will be laid before you simultaneously with this letter—that we are entitled to demand from the University the means of completing our studies, and that, failing any other alternative measures, we can claim the instruction of the medical professors to the extent needed to complete our curriculum. We beg, therefore, most respectfully to request that, unless any other mode of supplying our need seems preferable to you, you will vouchsafe to ordain that the professors whose courses we are bound by the University regulations to attend shall give us the requisite instruction.—I beg to subscribe myself, Gentlemen, your obedient servant,—Sophia Jex-Blake."

On November 11, 1871, the Senatus resolved, by 14 votes to 13, to recommend to the University Court that the existing Regulations regarding the instruction of women in the University should be rescinded. Before replying to the pursuer Miss Jex-Blake, the University Court resolved to hear parties on an appeal against this resolution. Reasons of dissent from it were signed and presented by 18 out of the 35 professors of the University. On 2d January 1872 the University Court adopted the following resolution:—"Having considered the appeal of Professors Masson, Bennett, and Calderwood against the resolution of the Senatus, of date 11th November last, representing to the University Court the propriety of rescinding their resolutions and regulations in reference to the admission of women to medical education in the University, without prejudice, however, to the rights and interests of those ladies who had already entered upon a course of study in pursuance thereof, and without prejudice to the right of professors to give separate instructions to ladies in such classes as the University Court might from time to time think fit and approve; and having heard the appellants in support of the appeal, and Professors Muirhead, Turner, and Lister against the appeal, find it inexpedient at present to rescind the said resolutions and regulations, and therefore decline to give effect to the representation of the Senatus.

"The Court must not be understood as indicating by this deliverance any opinion as to the claim of women to proceed to graduation, or as to the power of the University to confer on women degrees in the Faculty of Medicine."

On 8th January 1872 the University Court adopted the following resolution:—"The University Court have had under consideration the letters of Miss Jex-Blake and Miss Louisa Stevenson, of 21st November 1871, and other relative documents laid before them, on behalf of the women who have been admitted, by the regulations of the Court, of November 10, 1869, to study medicine in the University. In these it is stated that certain professors of the Faculty of Medicine have declined to give separate courses of instruction to women: and

the Court are asked either (1) to extend, in the case of female students, the privilege granted by ordinance of the Universities Commissioners to lecturers, not being professors in a university, of qualifying for graduation by their lectures, which privilege is now restricted to four of the prescribed subjects of study; or (2) to authorise the appointment of special lecturers to give, in the University, qualifying courses of instruction in place of those professors who decline to do so; or (3) to ordain that the professors referred to shall themselves give the necessary course of instruction to women. The second course suggested it is not in the power of the Court or other university authorities, singly or jointly, to adopt. The third course is equally beyond the power of the Court. The Act of 1858 vests in the Court plenary powers to deal with any professor who shall fail to discharge his duties. But no professor can be compelled to give courses of instruction other than those which by the use and wont of the University it has been the duty of the holders of his chair to deliver. The first of the proposed measures would imply an alteration in one of the ordinances for graduation in medicine . Such alteration can be made by the University Court only with the consent, expressed in writing, of the Chancellor, and with the approval of Her Majesty in Council. But to alter in favour of female students rules laid down for the regulation of graduation in medicine, would imply an assumption on the part of the Court that the University of Edinburgh has the power of granting degrees to women. It seems to the Court impossible for them to assume the existence of a power which is questioned in many quarters, and which is both affirmed and denied by eminent counsel. So long as these doubts remain, it would, in the opinion of the Court, be premature to consider the expediency of taking steps to obtain in favour of female students an alteration of an ordinance which may be held not to apply to women. Though the Court are unable to comply with any of the specific requests referred to, they are at the same time desirous to remove so far as possible any present obstacle in the way of a complete medical education being given to women, provided always that medical instruction to women be imparted in strictly separate classes. The Court are of opinion that the question under reference has been complicated by the introduction of the subject of graduation, which is not essential to the completion of a medical or other education. The University of London, which has a special charter for the examination of women, does not confer degrees upon women, but only grants them 'certificates of proficiency." If the applicants in the present case would be content to seek the examination of women by the University for certificates of proficiency in medicine, instead of for University degrees, the Court believe that arrangements for accomplishing this object would fall within the scope of the powers given to them by section 12 of the Universities (Scotland) Act. The Court would be willing to consider any such arrangements which might be submitted to them."

In these circumstances the present summons was raised at the instance of Sophia Louisa Jex-Blake, Mary Edith Pechey, Emily Bovell, Anna Dahms, Elizabeth Ireland Walker, Annie Reay Barker, Sophy Jane Massingberd Mundy, Jane Russell Rorison, Rose Anna Shedlock, all residing in Edinburgh; and Mrs Isabel Jane Thorne, also residing in Edinburgh, wife of Joseph Thorne, merchant, Shanghai, with consent and concurrence of her husband, the said Joseph Thorne,—against the Senatus Academicus of the University of Edinburgh, and also against the Right Honourable John Inglis, Lord Justice-General of Scotland, and Lord President of the Court of Session, and residing in Edinburgh, the Chancellor of said University; and concluding that "It ought and should be declared, by decree of the Lords of our Council and Session, (1) that the pursuers are entitled to attend the classes of any of the Professors of the University of Edinburgh, and to receive instruction from the Professors in said University, upon making due payment of all fees exigible from students at the University for said instruction; (2) that the pursuers are entitled to receive such instruction in the University as is required to qualify for graduation in medicine; (3) that, on compliance with the regulations of the University as to attendance on classes and otherwise, preliminary to examination for degrees, the pursuers are entitled to proceed to the examination for degrees in manner prescribed by the regulations of the University; (4) that the defenders, the Senatus Academicus, are bound to provide such instruction as aforesaid to the pursuers, and thereafter to admit them to examination as candidates for medical degrees, and on their being found qualified, to recommend them to the Chancellor of the University for having such degrees conferred upon them; (5) that the defender, the said Right Honourable John Inglis, as Chancellor of the said University, is bound, upon such recommendation being made by the Senatus Academicus, to confer such a degree upon any of the pursuers found qualified and so recommended: and the defenders, constituting the said Senatus Academicus, ought and should be decerned and ordained to make regulations whereby the pursuers shall receive instruction in the University of Edinburgh as is required to qualify for graduation in medicine, and, in particular, that they should direct and appoint the various professors whose duty it is to give instruction in medicine to permit the attendance of the pursuers upon their classes along with male students; or otherways to direct and order the various professors whose duty it is to give instruction in medicine to teach the pursuers, and any other women who may constitute themselves into a class separate and apart from male students, the pursuers always making payment of the proper fees for matriculation, and to the professors for such instruction as aforesaid; and the defenders, constituting the said Senatus Academicus, ought to be decerned and ordained to admit the pursuers to examination as candidates for medical degrees, and on their being found qualified to recommend to the Chancellor of the University for having such degrees conferred upon them; and the defender, the said Right Honourable John Inglis, as Chancellor of the University, ought to be decerned and ordained, by decree foresaid, upon receiving such recommendation from the Senatus Academicus, to confer degrees upon the pursuers; and in the event of any of the defenders appearing to oppose the conclusions of this action, then the defenders so appearing ought and should be decerned and ordained to make payment to the pursuers of the sum of £500, more or less, as the expenses of the process to follow hereon, conform to the law and daily practice of Scotland used and observed in the like cases, as is alleged."

Defences were lodged by the Senatus Academicus and the Chancellor of the University. The main statements in the defences lodged by the Senatus were as follows:—

The University of Edinburgh acquired the status of a University for the first time in 1858. Prior to that time it was merely a college or teaching body. The original supplication to Queen Mary in 1562 was for the purpose of building "ane schule," and Queen Mary's charter in 1566 merely authorised the application of the lands granted "in hospitalia aut alios similes usus legitimos." If the Act of Council of 1579 contemplated the founding of a University, that purpose was never carried out. King James' charter of 1582 makes no mention either of a College or University. In a subsequent charter of 4th April 1584, however, His Majesty refers to that of 1582 as one by which he had granted to the municipal authorities "libertatem collegium infra dictum burgum erigendi;" in another, of 7th August 1612, he speaks of the "collegium dicti burgi;" and in a letter from Paisley, of 25th July 1617, he requires the town "to order the said College to be called in all time hereafter by the name of King James' College." In the Golden Charter of 1603 it is spoken of as "collegium infra predictum nostrum burgum de Edinburgh, fundatum per prepositum ballivos et consilarios ejusdem." In the Parliamentary Ratification of 4th August 1621 there is a narrative of a royal concession of licence and libertie to erect ane colledge, and in Charles' Confirmation of 1636 there is a recital that James, in 1582, had granted "licentiam et libertatem erigendi collegium." In no charter or public document is it ever spoken of as a University, or invested with University privileges. The distinction between a University and a College was then fully recognised, as is shown by a letter addressed by the municipal authorities to Rolloch, "maister of the townis college," containing his appointment as principal, and in which they confer upon him all the powers "that to the said office is known to appertene, or that ony other principall or first maister of ony colledge within the Universities of this realm hes." St Andrews, Glasgow, and Aberdeen had each their College or Colleges distinct from the University.

The conferring of degrees is a privilege, not of a College, but of a University alone. The conferring of degrees by the College of Edinburgh was a usurpation of a right to which it was not legally entitled. No such power was conferred on it by any of its charters, or by the Act of 1621. The practice became legalised in respect of use and wont only.

The uniform practice of the University of Edinburgh has been in accordance with that of the other Universities of Great Britain. At no time since the foundation of the institution have women been received as students or admitted to graduation.

In none of the charters or other documents connected with the University of Edinburgh is there any mention or recognition of women as students or graduates. In the earlier charters language is used which does not admit of the distinction of gender being marked; but in later documents, when language which does admit of this is employed—such as the Acts of the Commission of Parliament of visiting Colleges, of date 15th May 1695, and the various reports of the Royal Commissions, specified in section 23 of the Universities (Scotland) Act 1858—students of the male sex only are alluded to or recognised.

In the Universities (Scotland) Act 1858, and especially section 6 thereof, language is used which implies that men only are recognised as graduates or students in the Scottish Universities; and in the general regulations for degrees in arts, being contained in ordinances Nos. 14, 18, and 69, and more particularly in the regulations for degrees in medicine in the University of Edinburgh, being contained in ordinances Nos. 5 and 8, provision is made for conferring such degrees on students of the male sex only. The ordinances were issued under the authority of the said Act, and were approved of by Her Majesty in Council. They are all specially referred to.

The resolutions of the Medical Faculty of 1st May, and agreed to by the Senatus of 2d July 1869, were tentative only. They were not, at least so far as the defenders, the Senatus, are concerned, intended to bind, and did not in point of fact bind, the Senatus, or the other University authorities, to admit women as a matter of right to all classes, or to graduation. On the contrary, on the said 2d July 1869 the Senatus refused to consider the question of graduation of women, as not then before them, nor calling for determination. Until the summer of 1871, the Senatus was never given to understand, and had no reason to understand, that the pursuers considered themselves entitled, in respect of the said resolutions, and the regulations published in the Calendar, to demand as a matter of right a complete course of medical instruction, ending with graduation in the University. Neither the resolution of the Court, nor the Regulations following thereon, set forth in Condescendence 11, have ever been approved of by Her Majesty in Council.

The examination in arts, referred to in Condescendence 12, or an equivalent examination, must be passed before any one can be registered as medical student in the Register of the General Medical Council. The date of the beginning of medical study is fixed by this registration. The examination is an introduction to medical study generally, and has no necessary or exclusive reference to study in the University of Edinburgh, or in any other, with a view to graduation. Persons are admitted to it who have not matriculated, and who may have no intention to matriculate or to graduate.

From an early period in the history of the University it has been the custom to admit students to matriculation. This at first consisted in the student signing a declaration to the effect that he would be diligent in his studies, and loyal to the University. No fee was originally paid at matriculation; but about the end of the 18th century a fee of 2s. 6d. was required. The fee was originally devoted to the maintenance of the library, to the use of which the student, in respect of his matriculation, became entitled. In the certificate given to the student he was described as "academiae alumnus et bibliothecae civis." The amount of the fee was raised, and the purposes to which it was devoted were extended, so as to include the payment of certain college officers, until the whole matter was the subject of consideration by the Town Council and Senatus in 1811, when the fee was fixed at 10s. In 1833, the sum was again raised by the Town Council to

£1, and it was ordered that the payment should be for the use of the library, museum, and the services of certain college officers. At this time the phraseology of the ticket was altered from "civis bibliothecae" to "civis academiae," but this alteration did not impart the acquisition by the students of any additional rights or privileges. At no time in the history of the University was the payment made in any sense for matriculation; but it was merely a sum paid by a student annually for the various special purposes to which it was from time to time directed to be applied. Down to a comparatively recent period, the theological students were not in use to matriculate, the reason being that they had a library of their own.

Students are matriculated each year of their attendance, and the payment of the above fee, together with the production of a class ticket, entitles them to the use of the library, &c., for one year only. For many years matriculation was not strictly enforced in Edinburgh, and a large proportion of the students, even of those who subsequently proceeded to graduation, never matriculated at all. The same was the case at other Scottish Universities, especially those of Glasgow and St Andrews. Matriculation, according to the usage of the University of Edinburgh, though recently it has been required as a condition precedent to admission to classes, confers no rights or privileges on the students other than those above mentioned. In particular, according to the above usage, it confers no rights upon students to demand instructions from any professor, nor to insist upon being admitted to graduation; nor does it entitle them to vote in the election of the rector, unless they are *bona fide* students in some class in the University.

The Senatus Academicus gave the pursuers no reason to believe that, because of their having passed the above preliminary examination, and been matriculated as aforesaid, they had acquired the same position and rights as other students. The resolution of the Senatus of 9th April 1870, with regard to the certificates of attendance to be granted to the pursuers, was arrived at for the reason urged by the pursuers, that certificates differing in any way might be refused by other examining and licensing bodies. A letter from Miss Jex Blake to the Senatus, of 8th April 1870, is referred to. At this same meeting the Senatus held that Miss Pechey was not legally entitled to obtain the Hope Prize, as not having been a member of "the general class of chemistry," and she was refused the prize accordingly. The pursuers were taught in separate classes by all the Professors whose lectures they attended in the University. The attendance in the extra-mural school was in mixed classes, but this was in violation of the Regulations laid down by the University, contrary to the understanding under which they had been admitted to matriculation, as stated in a letter from Miss Jex Blake to the Senatus of 21st June 1869, and was never sanctioned by the Senatus. At no time did the Senatus give the pursuers reason to believe that they regarded them as entitled to the full privileges of students, including graduation.

The defenders, the Senatus Academicus, have no power to compel professors to admit the pursuers to their classes, or to teach them in separate classes. Neither before the Universities (Scotland) Act 1858, nor since the passing of that Act, has the Senatus Academicus of Edinburgh possessed, or even attempted to exercise, any power to compel the obedience of the professors on such points, or to lay down and enforce any such regulations as the pursuers seek to have enforced. Nor has the Senatus any power to alter the Regulations for graduation contained in the ordinances issued by the Commissioners, under the Universities (Scotland) Act 1858.

The changes which the pursuers seek to introduce, and which are embraced in the conclusions of this action, are of a fundamental nature, and would have the effect of altering altogether the constitution of the University. They would, if carried out, change the whole character of the corporation, and the rights of every member of the corporation would, or at least might be, affected by their operation. In particular, the rights and privileges of the individual professors could not fail to be seriously affected by the changes sought to be introduced by this action.

The various professors in the University of Edinburgh have their rights secured to them, and their duties defined by the terms of the commissions which they hold, whether from the Crown or from the other patrons of their respective chairs. In some cases those duties are expressly indicated, as for example, that of "giving a course of public lectures," in others by reference to custom, and in all by reference to the place and office of the former professor, as being the measure of the duties which are to be required of the present holder of the chair. A decree in terms of the conclusions of the summons would impose on the Senatus Academicus an obligation to attempt to alter and extend the duties of the individual professors beyond the scope of their commissions. Their patrimonial interests are therefore involved to a serious extent in the results of this action.

The following statement was made on behalf of the Chancellor of the University:—"The defender has always been, and still is, willing and ready, as Chancellor of the University of Edinburgh, to confer degrees upon the pursuers, or any women duly recommended by the Senatus Academicus, upon its being ascertained by decree of a competent Court that they are entitled to demand admission as students, and to become graduates of the University."

The pleas in law for the pursuers were as follows:—"(1) According to the law and constitution of the University of Edinburgh, women are entitled, on payment of matriculation and professors' fees, to attend the classes of any professor as students, and are entitled to demand instruction from such professor, which he is bound to give to them. (2) According to the law and constitution of the University of Edinburgh, women are entitled to obtain degrees in medicine on proving that they are qualified in point of attainments and knowledge for that distinction. And the Senatus Academicus, whose province it is to regulate the teaching and discipline of the University, are bound to provide instruction to them, to admit them to examination as candidates for medical degrees, and, on being found qualified, to recommend them to the Chancellor, in order that he may confer such degrees upon them. (3) The pursuers having paid their matriculation fees, some for one, some for two,

some for three years, on the faith of being permitted to continue their course of study with a view to a profession, and having gone on with this course of study by attendance on the classes of professors, and this with the knowledge and consent of the Senatus Academicus, the latter are now barred from pleading that women are not entitled to receive instruction at the University, or to obtain medical degrees. (4) According to the laws by which Universities are governed, and apart from any special circumstances connected with the University of Edinburgh, women were entitled to demand and receive instruction from the professors in their ordinary classes, and also were entitled to graduate; and the University of Edinburgh being modelled on the constitution of such other Universities, and being subject to the same laws, women are entitled to all such privileges from the University of Edinburgh."

The pleas in law for the Senatus were;—" (1) All parties not called. (2) The pursuers are not entitled to decree in terms of any of the conclusions of the summons directed against the defenders, the Senatus Academicus, in respect that the said defenders have no power, either by the use and wont of the University, or according to the provisions of the Universities (Scotland) Act 1858, to make the regulations specified in these conclusions, or to perform any other of the duties therein sought to be imposed upon them. (3) The pursuers are not entitled to decree in terms of the first three declaratory conclusions of their summons, in respect that there are no conclusions in the summons whereby the said declarator can be given effect to. (4) From the tenor of the statutes and ordinances which have been from time to time laid down with regard to the internal regulations of the University of Edinburgh, especially in the matter of graduation, and having regard to the use and wont of Edinburgh and other Universities, the University of Edinburgh must, in law, be held as devoted exclusively to the education of male students, and in which males only can claim, or can be invested with the full privileges of students. (5) The Senatus have no power to admit to the said privileges of students any persons who are disqualified according to the tenor of the said statutes and ordinances, and the said use and wont. (6) The resolutions of the Medical Faculty of 1st July 1869, and the Regulations published in the Calendar, and quoted in condescendence 11, were not intended to confer, and are not in law sufficient to confer, upon the pursuers the full privileges of students, to the effect of entitling them to insist as matter of legal right on being taught by the University professors, or on being admitted to graduation. (7) According to the use and wont of the University of Edinburgh, the fact of being matriculated as a student does not confer a title to demand as matter of legal right the privileges of studentship, or the right to be taught by any professor, or to be admitted to graduation. (8) *Separatim*, and on the assumption that according to their true construction the said resolutions and Regulations of the University Court, published in the University Calendar as aforesaid, must be held as conferring, *inter alia*, upon women a right to demand that they shall be taught in the University and a right to graduate, to that extent the said resolutions and Regulations were illegal and *ultra vires*, and the matriculation which took place in terms of, and in compliance with, the said Regulations, was illegal and void in law, and cannot be founded on as investing the pursuers with the privileges of students, to the effect of entitling them to insist upon instruction within the University, or upon being admitted to graduation."

The pleas in law for the Chancellor were:—" (1) The conclusions of the action, in so far as directed against the defender, are unnecessary. (2) In any view, the action, as against the defender, ought to be sisted, in order to await the issue of the questions arising between the pursuers and the other defenders in the cause."

On 16th May 1872 the Lord Ordinary, of consent, sisted process *hoc statu* as against the Chancellor of the University; and on 27th June 1872 he pronounced the following interlocutor and note:—

"*Edinburgh, 27th July* 1872.—The Lord Ordinary having heard parties' procurators, and having considered the closed records, statutes, charters, and writs founded on, and whole process, recals the sist, repels the first plea in law stated for the defenders, the Senatus Academicus of the University of Edinburgh, that all parties are not called: Finds that the resolutions or regulations passed and enacted by the University Court of the University of Edinburgh, dated 10th November 1869, and approved of by the Chancellor of the said University, of date 12th November 1969, form part of the regulations now in force in the University of Edinburgh, and must receive effect as such: Finds that, according to the existing constitution and regulations of the said University of Edinburgh, the pursuers are entitled to be admitted to the study of medicine in the said University, and that they are entitled to all the rights and privileges of lawful students in the said University, subject only to the conditions specified and contained in the said Regulations of 12th November 1869: Finds that the pursuers, on completing the prescribed studies, and on compliance with all the existing regulations of the University preliminary to degrees, are entitled to proceed to examination for degrees in manner prescribed by the regulations of the University: Finds that the defenders, the Senatus Academicus of the said University, are bound, on the pursuers completing the prescribed studies, and complying with the said regulations, to admit the pursuers to examination as candidates for medical degrees; and on the pursuers being found qualified, to recommend them to the Chancellor of the University for having such degrees conferred upon them; and finds that the defender, the Right Honourable John Inglis, as Chancellor of the said University, is bound, upon such recommendation being made by the Senatus Academicus, to confer medical degrees upon any or upon all of the pursuers who are found qualified therefor, and recommended as aforesaid: And in terms of the above findings, and to the effect thereof, finds, decerns, and declares under the declaratory conclusions of the summons: Farther decerns and ordains the defenders, the Senatus Academicus, on the pursuers respectively completing the prescribed studies, and complying with the existing regulations of the University preliminary to degrees, to admit the pursuers to examination as candidates for medical degrees; and on the pursuers being found qualified, decerns and ordains the said Senatus Academicus to recommend the pursuers to

the Chancellor of the said University for having such degrees conferred upon them, and decerns and ordains the defender, the said Right Honourable John Inglis, as Chancellor of the said University, on receiving the requisite recommendation from the Senatus Academicus, to confer upon the pursuers respectively the medical degrees for which they are recommended. *Quoad ultra* dismisses the remaining conclusions of the action, excepting the conclusion for expenses, and decerns: Finds the defenders, the said Senatus Academicus, liable to the pursuers in expenses, subject to modification, and, in the circumstances, modifies the same by deducting one-fourth from the taxed amount: Remits the account of said expenses, when lodged, to the Auditor of Court to tax the same, and to report, and reserves all questions of relief as between the minority and majority of the Senatus Academicus: Finds no other expenses due in the cause, and decerns.

"*Note.*—It is not easy to over-estimate the importance of the questions involved in the present action. The decision may affect, in various ways, not only the interests of the pursuers, and of all who are similarly situated, but also the future welfare of the University, and indirectly the well-being of the community at large, who are interested in securing the services of thoroughly educated and accomplished medical practitioners.

"The Lord Ordinary has endeavoured to approach the consideration of the questions dispassionately, and free from all prejudices or prepossessions. He has also endeavoured to keep in view that his functions are merely judicial and not legislative, and that his duty is simply to declare and apply the law as it at present stands, and in no way to endeavour to amend it, however strong his convictions of what the law ought to be.

"The object of the present action may be shortly stated to be—*first*, to declare the right of the ten ladies, who are the pursuers of the action, to prosecute their studies as students at the University of Edinburgh, with a view to the profession of medicine; *second*, to declare their right, on finishing their studies and being found duly qualified, to obtain from the University, through its Senatus and Chancellor, the usual and customary medical degrees; and, *third*, and with a view to enforce these rights, to compel the Senatus to make arrangements for the complete instruction of the pursuers, and to do what is necessary for the examination of the pursuers, and for their reception as medical graduates of the University.

"The importance of the question to the present pursuers, and to all ladies who, like them, may contemplate the practice of medicine as a profession, lies in this, that by the provisions of 'The Medical Act' of 1858, no one is entitled to be registered as a medical practitioner without possessing a medical degree from one or other of the universities of the United Kingdom, or a licence equivalent thereto from certain established medical bodies mentioned in the Act. A foreign or colonial degree is not available, and does not entitle to registration, unless the holder thereof has been in practice in Great Britain previous to October 1858. Unless the pursuers, therefore, succeed in obtaining degrees, they will be practically excluded from the profession of medicine, for they are not in a position to demand licences from any of the authorised medical bodies, and it can scarcely be expected that they will prosecute their medical studies merely in order to be hereafter classed along with empirics, herbalists, or medical botanists, or with those who, in common language, are denominated quacks. Without legal registration under the Medical Act of 1858, the pursuers would be denied all right to recover fees; they would be incapable of holding any medical appointment; and they would be subject to very serious penalties if they so much as attempted to assume the name or title of medical practitioners.

"It is a fact, whatever may be its effect in law, that no university in Great Britain has ever yet granted a medical degree to a lady. The medical register of Great Britain only contains the names of two female practitioners—Dr Elizabeth Blackwell and Dr Garrett Anderson. Dr Blackwell obtained her degree in America, and being in practice in Great Britain before 1858, she obtained registration in virtue of the exception in the Act. Dr Garrett Anderson obtained a licence from the Apothecaries Hall, London, and is registered as such; but since her admission regulations have been made which prevent any other lady from hereafter obtaining a licence from the Apothecaries Hall. Accordingly, the course pursued by Dr Blackwell and Dr Anderson is not open to any of the pursuers, and their only hope of being allowed to practise medicine in Great Britain rests upon their being able to obtain a degree from one or other of the Universities.

"Practically, therefore, the questions are now raised for the first time—Can a lady obtain a medical degree? and, Is any lady to be allowed to practise medicine in Great Britain?

"The present action has, of course, only reference to the University of Edinburgh, and the pursuers have the advantage of certain peculiarities in the existing constitution and regulations of that University. At the same time, however, the form of the action is such that its scope is somewhat limited, and various large questions are excluded from the consideration of the Court.

"For example—and this is a peculiarity in the action which must be carefully attended to—the only parties called as defenders are—(1) the Senatus Academicus of the University, and the professors as individual members of the said Senatus; and (2) the Right Honourable John Inglis, the Lord Justice-General of Scotland, as Chancellor of the University. The University of Edinburgh itself, as a corporate body, is not called as a defender, and is not a party to the present proceedings. Neither are any of the governing bodies of the University, excepting the Senatus. Neither the University Court nor the University Council are parties to the action.

"This peculiarity in the action led to the first plea in law for the Senatus, that 'all parties are not called;' and this is the first question of which the Lord Ordinary must dispose.

"The attention of the Lord Ordinary was not called to this plea before closing the record, and as a preliminary plea it ought to have been disposed of *in limine.* But perhaps this is of little consequence, as the Lord Ordinary is of opinion that the plea cannot be given effect to as a prejudicial plea stopping process; and he has accordingly repelled it.

"The grounds upon which he has repelled this plea, however, are—that it is only sought in the present action to fix and define the duty of the Senatus and of the Chancellor under the constitu-

tion of the University as it at present stands, and to declare the rights of the pursuers in relation to the Senatus and to the Chancellor. The Senatus and the Chancellor are alone called, because they are the only parties complained of, or whose duties it is thought necessary to fix and define. The action assumes that the University itself, and all the other constituent members or parts thereof, are ready and willing to do their duty to the pursuers, and therefore none are called as defenders excepting the Senatus and the Chancellor. Indeed, it appears from the defence lodged for the Chancellor, that even he need not have been called as a party, for he states that he 'has always been, and still is, willing and ready, as Chancellor of the University of Edinburgh, to confer degrees upon the pursuers, or any women duly recommended by the Senatus Academicus, upon its being ascertained by decree of a competent court that they are entitled to demand admission as students, and to become graduates of the University.'

"The position thus taken by the Chancellor cannot fail to recommend itself to every one. He stands quite apart from the whole controversy, and is no way mixed up therein. He is ready as the representative and head of the University to confer its degrees upon all who may be found entitled thereto, and who are duly recommended for graduation by the Senatus.

"As the only question, therefore, is a question between the pursuers and the Senatus, the Lord Ordinary has repelled the plea that other parties are not called. But then it follows from the principle upon which this preliminary plea has been repelled, that there is in the present action to be no attempt to impugn in the slightest degree the existing constitution of the University. None of its existing regulations or ordinances are to be challenged to be illegal or *ultra vires*—the pursuers are not to seek to extend or alter any of its laws, but are only to ask that these laws, exactly as they stand, shall be enforced and applied. In short, everything connected with the existing constitution of the University is to be taken as right, and the Senatus are simply called upon to carry out that constitution, and to give effect to laws and regulations already enacted.

"It will be at once seen how much this view narrows the field of controversy. It is possible that in some respects this restricted view may operate to the disadvantage of the pursuers, but probably in other respects it will be for their benefit. The Lord Ordinary has no doubt that the point has been well and maturely considered by the pursuers and their advisers, and that they have adopted the course which, on the whole, seemed best suited to accomplish the object in view.

"Before proceeding to consider the merits of the action, the Lord Ordinary deems it proper to make one or two preliminary observations of a general nature.

"The Lord Ordinary is clearly of opinion that by the law of Scotland—indeed, he may say that by the law of every civilised country—there is no inherent illegality in women prosecuting the study of the science of medicine, using the word in its largest sense, or in their engaging in the practice of medicine as a profession.

"It would really be a waste of time to argue in support of this proposition, and it was not impugned by the counsel for the defenders.

"There is no natural impropriety in a woman becoming an educated and accomplished physician or surgeon, and no unsuitableness or impropriety in her practising the profession. Indeed, some branches of the profession are peculiarly appropriate to women, and peculiarly inappropriate and unsuitable to men. For example, in obstetric practice, and in numerous diseases of women, a male practitioner is singularly out of place, and nothing but the deadening effect of habit would ever reconcile the community to that anomaly both in name and in reality,—'A man midwife.'

"The practice of all civilized nations, indeed of uncivilised nations also, testifies most loudly at once to the fitness and to the suitableness of many if not most of the branches of the medical profession being undertaken by women. From the earliest times in Italy medical degrees were conferred upon and medical honours held by women, and at the present date women are allowed fully and freely to graduate in Italy, France, Spain, Switzerland, Russia, and America, as well as in several other countries. Indeed, Britain is almost the only country in which the right of women to graduate in and practice medicine has not been fully recognised. One object of the present action is to try whether the right accorded in other countries does not also exist in Scotland.

"If, then, in Scotland there is no inherent illegality in women studying medicine and obtaining degrees therein, it is scarcely necessary to add that there can be no inherent illegality in women practising medicine as a profession. It would indeed be strange if women, merely on account of their sex, were by law excluded from a high and honourable calling, for most departments of which they are peculiarly fitted, and for some departments of which they seem to be by nature almost exclusively designated. The law of Scotland, like that of many other countries, has in many instances been unjust to women, but it has never gone as far as to exclude them from the legal practice of medicine as a profession.

"Keeping these general observations in view, the Lord Ordinary will now proceed to consider very shortly the constitution and existing regulations now in force in the University of Edinburgh, so far as they relate to women.

"I. It was broadly maintained by the counsel for the Senatus, in a very powerful and able speech, that the University of Edinburgh was founded, and existed, as an educational institute for male students exclusively—that none but males were entitled to be admitted or to matriculate as students; that males alone were entitled to become members of the University, or to receive instruction therein; and that the privileges and rights of graduation were reserved for males alone.

"If this proposition be well founded, there is of course an end of the whole case. The Lord Ordinary, however, has felt himself quite unable to affirm this proposition, but has come ultimately, without any hesitation at all, to the conclusion that there is no foundation for this first and general contention of the defenders.

"(1) The charters of the University give no countenance to the supposition that women were in all circumstances to be excluded from its benefits. The rights, liberties, and privileges conferred upon the University are all expressed in the most general terms, and are all quite consistent with

provision being made for the instruction of females as well as of males within the walls of the University, and by its professors duly appointed. Even where the masculine form of noun or pronoun is made use of in speaking of the students, the Lord Ordinary cannot doubt that this is done, not to exclude females, but merely in conformity with ordinary brevity of expression, detailed enumeration of sexes or of classes being avoided, and the masculine or first sex being used to include everybody. In truth, it is notorious that in common language, and long before Lord Brougham's Interpretation Act was passed, nouns and names of the masculine gender were often used as including females also.

"(2) The reference in the charters to other Universities, and the conferring upon the University of Edinburgh the whole 'liberties, privileges, and immunities quhilk any colledge within this realm bruikes,' though perhaps not very important, certainly favours the view that women were not excluded.

"There was much controversy on this point whether by reference the whole privileges which belonged to the University of Bologna were not confered, so far as the Crown had power to do so, upon the University of Edinburgh. The argument was, that as Edinburgh had all the privileges belonging to the older University of Glasgow, and as Glasgow, by the Papal Bull of Pope Nicholas V., had all the rights and privileges which belonged to the Pope's University of Bologna, and as in the University of Bologna women were instructed and women received degrees, so women must have the same right in the University of Edinburgh which they had in the fifteenth century in the University of Bologna.

"The Lord Ordinary does not attach much weight to this argument. He rather thinks that the privileges referred to in the Pope's Bull were chiefly immunities from local and other taxes, and exemption from the jurisdiction of the ordinary tribunals, and as it is certain that none of these privileges now belong to any Scotch University, not much assistance can be got by any party from the terms of the Papal Bull.

"At the same time, however, it seems sufficiently shown that the Universities of Scotland were to a great extent constituted upon the model of Bologna and similar institutions in Italy; and it seems a quite fair observation, and one entitled to considerable weight, that as women were never excluded from the Italian Universities, it cannot have been intended originally to exclude them from those founded in Scotland.

"(3) Much stress was laid by the counsel for the Senatus upon the past history and practice of the University of Edinburgh, and upon the fact that there is no recorded instance of a woman having ever taken a degree therein.

"It is impossible to deny that this argument has some weight—perhaps considerable weight—but the Lord Ordinary thinks it will not bear the stress which the defenders lay upon it. At best the practice is merely negative. There is no instance of a woman ever having been excluded or refused admission or instruction. If women had originally right to become students or graduates, their right will not be lost by mere non-usage—that is, by their merely neglecting to use their right. The right in them was one *mere facultatis*, like a man's right to build upon his own ground—a right which will not be loss though no building should be erected for hundreds or thousands of years. To extinguish such a right there must be a contrary usage—a possession inconsistent with the exercise of the right—and this does not exist in the present case.

"(4) If, then, there is no express exclusion of women, and nothing necessarily leading to their exclusion, it seems fair to fall back upon the inherent legality and appropriateness of the study and practice of medicine for women, and to infer that a medical school founded in the University cannot have as one of its conditions the exclusion of the female sex.

"(5) But passing from such general considerations, the Lord Ordinary thinks it quite conclusive of the whole question that, by regulations lawfully enacted by competent and sufficient authority, provision is actually and expressly made for the admission of women to the study of medicine in the University of Edinburgh, and actually detailed regulations have been enacted regulating their studies and examinations. These Regulations will be immediately adverted to, as they form a leading and, in the Lord Ordinary's view, a conclusive feature in the pursuers' case, and they are only noticed here as absolutely and utterly putting an end to the defenders' contention that the University of Edinburgh is a University for males only. The first words of the Regulations are—'Women shall be admitted to the study of medicine in the University.'

"The Lord Ordinary holds, therefore, that the defenders have entirely failed in their attempt to show that the University of Edinburgh is restricted to males exclusively.

"II. The Lord Ordinary is of opinion that the 'Regulations for the education of women in medicine in the University of Edinburgh,' enacted by the University Court on 10th November 1869, and approved of by the Chancellor on 12th November 1869, are valid and binding in every respect, and form an integral part of the constitution and regulations of the University as it at present exists.

"At the debate it was felt on both sides that these Regulations formed almost the turning point in the case, and the counsel for the Senatus, sorely pressed by them, boldly challenged their legality, maintained that they were *ultra vires* of the University Court to enact, and he asked the Lord Ordinary to treat them as a nullity. Here, again, the Lord Ordinary thinks that the position taken by the Senatus is absolutely untenable.

"(1) The Regulations in question were solemnly, after much discussion, after long consideration, and after due communication with the whole governing bodies of the University, enacted by the University Court.

"Under the Universities (Scotland) Act of 1858, the University Court has, under certain safeguards, very large and almost legislative powers. It reviews and can alter or reverse the whole decisions of the Senatus. It can (subject to approval of Her Majesty in Council) censure, suspend, or deprive any professor, or even the Principal. It can check and control the whole administration of the revenues, and—what is specially important in reference to the present question—it has full power (section 12, sub-section 2)—'To effect improvements in the internal arrangements of the University, after due communication with the Senatus Academicus, and with the sanction of the Chancellor, provided that all such proposed improvements shall be submitted to the University Council for their consideration.

"Nothing can well be broader than the power so conferred. The very care with which safe-guards are provided shows the extent of the authority. The admission of women and the regulation of their teaching is so plainly a part of the 'internal arrangements' of the University, that in support of the argument that the Regulations were *ultra vires*, the defenders had almost nothing to rely upon but the witty fallacy, that although the Regulations were 'alterations,' they were not in the sense of the Statute 'improvements.'

"(2) These Regulations were enacted with all the required statutory requisites—'Due communication' was had with the Senatus. The matter was submitted to and deliberately considered by the University Council, and the Regulations received the final sanction and approval of the Chancellor.

"The Senatus, the University Council, and the University Court, had all the benefit of the very highest legal skill and experience. Most eminent lawyers were members of all these bodies; and the Chancellor, who put the seal of his approbation and sanction to the Regulations, holds with universal acceptance the very highest judicial office in Scotland. It was very startling to hear the majority of the Senatus maintain, through their counsel, deliberately and strongly, that regulations to which they themselves had been a party—regulations enacted in such circumstances, and holding such high sanction—were absolutely null and illegal; and when it was seen how essential this contention was to a great part of the defenders' case, the weakness of that part of the case became very apparent.

"(3) Still farther, the Lord Ordinary is of opinion that the validity and binding character of these Regulations cannot be impugned or challenged in the present action. No reduction of the Regulations has been instituted. They have never been said to be illegal or invalid till this was maintained for the first time in the present argument, and the Senatus itself, as well as everybody else, has hitherto admitted their validity, and acted upon them. So satisfied have the Senatus been of the validity of the Regulations, that they have actually applied to the enacting power—that is, to the University Court—to rescind them; but saving the rights of those who have acted upon them. The attempt failed. The University Court refused to rescind the Regulations, and they still stand part of the law of the University.

"As has been already pointed out, neither the University itself, nor the University Court, nor the University Council, are parties to the present action; and it is quite clear that the Lord Ordinary cannot, without calling and hearing all these parties, even entertain a motion virtually to reduce and set aside part of their laws. A declarator of nullity of part of the University regulations will require to be brought in a very different way, and with very different parties from the present action.

"In short, the Lord Ordinary thinks that, looking to the form of the present action, and the parties thereto, he must hold that the ratified and confirmed Regulations of 10th November 1869 are in all respects valid and integral parts of the University constitution, and all that he has to do is to apply and carry them out according to their true meaning and import.

"It is almost superfluous to add that these Regulations have been in full force since their enactment. They have been regularly published in the University Calendar, and it is upon the faith of them that the pursuers have commenced, and to a certain extent prosecuted, at great expense both of money and of time, the professional study of medicine in the University of Edinburgh. It would be indeed a serious matter to find that regulations on which so much has followed are absolutely void.

"III. The Lord Ordinary is of opinion that, under the constitution and Regulations of the University, including therein the Regulations of 10th November 1869, the pursuers are entitled in substance to the declaratory decree which they demand in the present action. The Lord Ordinary, however, has found it necessary somewhat to alter the phraseology, and in one or two particulars to restrict the breadth of the decree of declarator sought.

"(1) The Lord Ordinary thinks that the pursuers are entitled to be admitted as students of the University for the study of medicine therein: that they are entitled to be matriculated as students, with all the privileges of students, subject only to the special condition that they shall be taught in separate classes, confined entirely to women.

"The first article of the Regulations is in these words—'Women shall be admitted to the study of medicine in the University.' The Lord Ordinary cannot read this otherwise than as entitling the pursuers to be admitted as students—members of the University, with the full privileges of students, subject only to the conditions specified in the Regulations.

"It was strongly contended for the Senatus that women were not entitled to matriculation, and that there was a distinction between admission to study and matriculation as a student. The Lord Ordinary has failed to see any substance in the distinction, and indeed he regards this dispute as little more than a difference about words. The origin of matriculation, or of the formal issue of matriculation tickets, seems to have been in the enaction of certain fees for the library and for janitors: but it has come to be regarded as the form in which a student is admitted. It rather appears that certain classes of theological students are or were exempt from matriculation; but surely that did not deprive them of the status of students of the University.

"The reality of the thing—and this is far more important than the name—undoubtedly is that women are to be admitted as students in the University, whatever be the form in which this is done. In point of fact, all the pursuers have matriculated repeatedly, and they all hold tickets as '*Cives Academiae Edinensis*.'

"(2) Now, if students of the University, the Lord Ordinary thinks that the pursuers must have all the privileges of students, subject only to the special conditions under which they were admitted relative to 'separate classes.' The Lord Ordinary cannot assent to the doctrine maintained by the Senatus, that the pursuers were only students by permission, and not students as matter of right. It is impossible to hold that ladies are students with no rights whatever, whereas males are students with legal and enforceable rights. The University has no power to make such a distinction, and, what is of equal importance, it has never attempted to do so.

"(3) It follows that the pursuers are entitled to attend all necessary classes, provided only they can be taught separately. To admit them as students,

and yet deny their right to be taught, would be absurd. The provision about separate teaching may create a difficulty; but this is a mere difficulty in detail, which, in the Lord Ordinary's view, ought to be easily and at once surmounted. But this point will be more fully adverted to immediately.

"(4) And lastly, it follows that the pursuers, on completing their studies, and complying with all existing regulations, are entitled, as a matter of right, to demand examination, and if found qualified, are entitled, equally as a matter of right, to demand full and complete medical degrees.

"The right to medical graduation is really at the foundation of the whole of the present dispute. If the ladies would be content to study as mere amateurs—as mere *dilettanti*—it rather appears that no question would ever have been raised. But their demand for degrees, and the announcement of their intention to practise as physicians, has aroused a jealousy which the Lord Ordinary is very unwillingly obliged to characterise as unworthy; and hence this strife.

"But the right to demand graduation is a necessary consequence of the right to study at the University: ordinary medical degrees are not matters of mere favour or of arbitrary discretion. They are the indefeasible right of the successful student—the fitting termination and 'crown' of his completed study. The idea that there may be some students who may study, and study successfully, but who may not graduate, was never heard of before the present controversy arose, and yet in high quarters a doubt upon this point seems to have arisen.

"The majority of the Senatus, both in their minutes and proceedings, and by their counsel at the bar, have distinctly taken the position that women may be allowed to study, but they must not be allowed to graduate; and the University Court have actually passed, on 8th January 1872, in reference to the present pursuers, the following minute:—'If the applicants in the present case would be content to seek the examination of women by the University for certificates of proficiency in medicine instead of for University degrees, the Court believe that arrangements for accomplishing this object would fall within the scope of the powers given to them by second 12 of the "Universities (Scotland) Act.'"

"The Lord Ordinary is of opinion, without any doubt at all, that the proposal to withhold from successful and fully accomplished female students the regular degrees, and to give them instead mere certificates of proficiency, is incompetent, as well as unjust. The proposal is not unnaturally stigmatised by the present pursuers as a 'mere mockery,' and the Lord Ordinary thinks it can only have arisen from an entire misconception of the legal rights of an admitted student of the University. The right to demand a regular degree is, and always must be, an integral part of the right of every lawful student who is found duly qualified, and who complies with all prescribed conditions. The regulations expressly provide that women shall be instructed not merely in medicine, but (section 2) 'for the profession of medicine.' Now, this implies degrees, for without a degree they cannot be registered, and without registration they cannot practise 'the profession.' Section 4, again, makes the matter quite clear, for it provides for the admission to certain classes of women who are 'not intended' to study medicine professionally, and the examinations to which women are to be subjected are plainly the examinations preliminary to degrees. The contention that examination means only class or private examinations might almost be characterised as a quibble.

"To the present Lord Ordinary, therefore, the right to demand degrees on all requisites being fulfilled seems indisputable.

"If the present judgment be affirmed, and the right of the pursuers to obtain degrees under the existing regulations be established, the Lord Ordinary feels confident that the Senatus, as well as all other members of the University, will gladly and at once do whatever is necessary to confer upon such of the pursuers as earn it, the well-merited 'crown.'

"IV. But while the Lord Ordinary has in substance affirmed the declaratory conclusions of the summons, he has found himself obliged to negative the leading petitory conclusions.

"The first petitory conclusion is to ordain the defenders, the Senatus, to make regulations whereby the pursuers shall receive such instruction in the University as is required for graduation in medicine, 'and, in particular, that they should direct and appoint the various professors whose duty it is to give instruction in medicine to permit the attendance of the pursuers upon their classes along with male students.'

"The Lord Ordinary can find no sufficient grounds for pronouncing any such decree, and there are conclusive reasons why no such decree should be pronounced:—

"(1) The defenders, the Senatus, have no power to make such regulations. The University Court, and not the Senatus—at least the University Court ultimately—is the body by whom such regulations fall to be made; and neither the University itself nor the University Court are parties to the present action. Before the pursuers can obtain an order upon the Senatus, they must show that the Senatus have power to do the thing to which they are to be compelled. This has not been shown, and, the Lord Ordinary thinks, cannot be shown.

"(2) The pursuers seek to have the Senatus compelled to make a regulation directly contrary to an existing regulation solemnly enacted by the University Court. But the University Court is the supreme, and the Senatus is merely the inferior tribunal in this matter. The University Court, under the statute (section 12), has power to review all decisions of the Senatus, and to be a Court of Appeal from the Senatus in all cases, but no power is given to the Senatus in any case to rescind or alter a regulation of the University Court. The University Court, as has already been so often stated, is no party to the present action, and its rules cannot be touched. When the University Court has prescribed that women shall be taught in separate classes, it is perfectly vain to attempt to compel the Senatus to make a regulation that women shall be taught in mixed classes, and 'along with male students.'

"(3) This last difficulty was so strongly felt by the counsel for the pursuers that he virtually abandoned the first petitory conclusion, and relied upon the alternative, viz., that the Senatus should be compelled to order the professors to teach the pursuers in separate classes. But here the same difficulty arises. The Senatus have no power to make such an order—at least their power to do so

has not been shown, and the University Court, which probably has the power, is not here. The Lord Ordinary would require to be perfectly convinced of the power of the Senatus to compel the professors to deliver double courses of lectures, before he could make an order such as is now asked.

"In short, the difficulty of getting professors to lecture separately to women is just one of the difficulties which arose upon the very face of the Regulations of 10th November 1869, and which the pursuers must be held to have had in view when they accepted the condition that they should only be taught in separate classes.

"The other petitory conclusions seem to follow from the declaratory ones, and the Lord Ordinary has given decree in terms thereof. They only come into play when the pursuers have completed the full requisite course of study, and have complied with all the regulations and conditions necessary for obtaining degrees.

"The Lord Ordinary has only to express, in concludings these observations, his earnest hope and belief that the judgment in the present action, whether affirmed or reversed, will terminate the unfortunate controversy which has raged so long. On the one hand, if the judgment is affirmed, and the right of the pursuers to study, and on being found qualified, to obtain degrees, is finally fixed, it surely cannot be doubted that the Senatus, the University Court, and the University Council will do whatever is necessary to enable the ladies to complete their course of study. At present there seems too much ground for the remark that by the regulations these ladies have been induced to enter upon their studies, and have been most unfairly stopped in mid-career. It seems to the Lord Ordinary that this has arisen from a misconception —a quite honest misconception—as to the pursuers' right to abtain degrees. If this misconception is removed, the Senatus and all the officials of the University will undoubtedly gladly combine to fulfil the honourable understanding on which the pursuers were induced to commence their studies.

"There is really no practical difficulty in doing so. If not the Senatus, at least the University Court, has undoubted power to recognise extra-academical teachers, whose courses will be reckoned sufficient for the purposes of graduation. Teachers of unquestionable standing and ability are ready to give the pursuers the instruction in separate classes, which state of health or want of time prevents the professors in the University from imparting. Let such Teachers be authorised to give part of the curriculum qualifying the pursuers for degrees. It is apparent from the correspondence referred to on record that this would have been done had not the doubt arisen whether the ladies were entitled to demand degrees, and whether medical degrees could be lawfully conferred upon them. That doubt the Lord Ordinary by the present judgment has endeavoured to dispel.

"On the other hand, if the present judgment is reversed, and if it be finally fixed that by the law of Scotland a woman cannot be a legal student at the University of Edinburgh, and cannot legally obtain a degree, then, though on the other side, the whole controversy will equally be settled. The ladies will only have to deplore that they have been misled by those most authoritative-looking Regulations of 10th November 1869, and to seek their remedy against the existing law from some new legislative enactment.

"As the pursuers have been practically successful, the Lord Ordinary has awarded them expenses, but only against the Senatus, not against the Chancellor. These expenses, however, are subject to modification, because the pursuers have failed in making good very important petitory conclusions. To avoid possible misconception, the Lord Ordinary has thought it right to reserve questions of relief between the majority and the minority of the Senatus who disclaim the present defence."

The defenders reclaimed to the Second Division of the Court.

Authorities cited—Digest, i, 3, 32; Ersk., iii, 7, 8; iv, 2, 22, Austin, i, 107, 110; M. 10,732, 10,737, 10,738, 10,777; *Senatus of University of Edinburgh* v. *Magistrates*, 7 S. 255, 14 D. 74, 1 M'Q., 485, 7 Macph. 281; *Chorlton* v. *Lings*, 4 L. R. C. P., 374; Charter by James VI. 1583; Parliamentary Ratification, 1621; Acts of Parliament, 1587, 1621; University Scotland Act, 1858, sec. 5–12; Report of Universities' Commissioners, 1826, and Appendices.

On 13th November the Lords appointed the parties to prepare Cases, which were boxed to all the Judges. The following Opinions were returned by the consulted Judges:—

The Lord President declined to give an opinion, being one of the defenders to the action.

Opinion of Lord Deas.

In the way this case has been pleaded by the parties, the first important question arising for consideration is, whether females are entitled, as matter of legal right, without the necessity of any express sanction from the authorities of the University, to become students at the University, and to obtain, on the same conditions with male students, such honours and degrees as the University can confer?

If the fact that, in the order of nature, no superiority, moral or intellectual, can be attributed to the one sex over the other, were pertinent to the present question, I should at once answer that question in the affimative. The development of the moral and intellectual faculties is no doubt moulded and varied by sex; and this variation contributes largely to the happiness of the human race. But, balancing what is most to be esteemed in the one sex against what is most to be esteemed in the other, the scales cannot well be said to preponderate on either side, or, at least, not on the side of the male sex. Nor can I doubt that there are at all times such a number of females who would profit by such studies as are pursued at universities as to make it desirable that means of prosecuting these studies should, as far as practicable, be available to them.

But the present question is altogether different. It is true that, in the Charters and Acts of Parliament which form the written constitution of the University of Edinburgh, there is no express exclusion of females from the privileges of the University. But, at the same time, it is clear enough that, down to the date of the recent Regulations quoted in the record, all the arrangements as to teaching and graduation in the University proceeded on the footing that the students were all male students, and, until one or more of the pre-

If they were to be held entitled, as matter of abstract legal right, to become students at the University with a view to the medical profession, without obtaining the sanction of the University authorities, it would seem logically to follow that they are entitled to claim instruction in all the classes, and to obtain all the honours or degrees which male students can obtain. The anomaly of being dubbed, in the masculine gender, doctors of laws, batchelors or masters of arts, or doctors of divinity, would, of course, be no greater than that of being dubbed doctors of medicine. The masculine gander must in either view continue to be used. Admittedly a lady cannot be a mistress of arts in the University, whatever she may be in the drawing-room. But if, as matter of legal right, she could claim to become a doctor of medicine, she would necessarily, I think, have the same right to claim all other University degrees, and consequently to become, in the language of Aikenside, "by commutation strange a reverend divine." My opinion, however, is that no such right can be claimed independently of recognition and regulation by the authorities of the University.

It is true that, in the view I take, it must be within the competency of the University authorities to extend still farther than they have yet done the privileges of females in connection with the University, and to afford additional facilities for the exercise of these privileges. I am not, however, startled by that being a legitimate consequence of the argument. The authorities of the University have, hitherto at least, done nothing so extravagant either in the way of admitting or restricting the admission of females as to justify the interposition of this Court, and it is not to be presumed that they are likely to do so. Their refusal in the mean time to sanction mixed classes is an instance of the caution and discrimination to be expected from them. I do not mean to suggest that the law could have pronounced such classes illegal if the University authorities had sanctioned them. But the small proportion of female students as compared with male students, of itself afforded a reasonable objection to such an arrangement. Somehow either sex feels uneasy when shut up with an overwhelming majority of the other, and if the regulation had sanctioned mixed classes only, the grievance might have been regarded by many females as greater than it is now. A central division of a class room, such as there is, or once was, in the chapel of Pentonville prison, whereby both sexes could see and be seen by the speaker, and neither sex could see or communicate with the other, or some analogous contrivance, might possibly have suggested itself to meet the difficulty, had there been funds at command, and a large enough number of female students to justify the necessary expenditure. But in the actual circumstances, the restriction to separate classes was not only within the competency of the University authorities, but was a fair and reasonable exercise of the discretionary powers with which I think the aw has invested them.

As to the expediency of ladies becoming medical practitioners, it is enough to say that it is a fair subject for difference of opinion. To suggest jealousy of the rivalry of women as entering into the objection would be altogether absurd. Those who entertain the objection, no doubt conscientiously believe that the result would be to diminish the delicacy and respect by which the female character in well-bred society is so advantageously surrounded. On the other hand, it must be admitted to be remarkable how, in trying circumstances connected with severe suffering, or with danger to life or health, nature throws a vail over delicacy and preserves it uninjured. The fictitious character of Rebecca, the Jewess, commented on in the argument, is not an inappropriate illustration. With consumate knowledge of human nature, the author makes the urgency of circumstances supersede all delicacy, and yet tempts his reader to say in the classical words of an older writer, "the starry fable of the milky way hath not her story's purity."

There still remains a third question: What are the rights of the individual pursuers under the existing Regulations?

To that question I answer, that the pursuers are entitled to receive instruction from those of the medical professors who may arrange to teach them in classes separate from male students; and that if they can thus obtain and produce evidence of having completed the prescribed course of study, and shall successfully undergo the examination prescribed for male students, they will be equally entitled with male students to medical degrees. The right to eventual graduation is, I think, fairly implied under the second head of the Regulations, which provides for "the instruction of women for the profession of medicine," contrasted with the fourth head, which provides, conditionally, for the instruction of "women *not* intending to study medicine professionally. The pursuers have expended time and money on the faith of the Regulations, as set forth in their third plea in law, and a construction which would defeat the plain object of the Regulations is, I think, altogether inadmissible.

Upon the whole, I am for adhering to the specific findings in the Lord Ordinary's interlocutor, and to the intent and effect of these findings—but to no other or further effect—decerning and declaring in terms of the declaratory conclusions of the summons. *Quoad ultra*, I think the defenders should be assoilzied from the declaratory conclusions.

As regards the petitory conclusions with reference to examination and graduation, I think these should be dismissed as premature, in so far as directed against the Senatus Academicus, and as out of place in so far as directed against the Chancellor, who has all along been ready and willing to act upon such recommendations as may be duly made to him. From the remaining petitory conclusions I think there ought to be decree of absolvitor.

Opinion of Lord Ardmillan.

In this very interesting and important case we have had the benefit of ample and elaborate pleadings, prepared with great industry, learning, and ingenuity. If some of the questions which have been argued were necessary for decision of the case before us, the disposal of these questions would certainly be matter of great difficulty. I have felt much impressed by the literary and historical interest of these questions regarding the origin and early history of our own Universities, and of the seats of learning in other countries. But, in the view which I take of the cause immediately before us, the materials for decision are to be found within more narrow limits.

sent pursuers came forward, no female seems ever to have proposed to become a student in that University. That, I think, is of itself conclusive against now giving effect to the pursuers' claim as matter of pure legal right, because, without some regulations specially made for the purpose, the pursuers could not practically have been accommodated in the class-rooms and taught by the professors. And if, by the lapse of some centuries, regulations have become essential as a condition precedent to the admission and graduation of females, it seems to me to follow that the authorities of the University must have a discretion as to whether any or what regulations, with a view to such admission and graduation, are practical and expedient, consistently with the interests and discipline of the University. My opinion therefore is, that except in so far as this action seeks to vindicate the rights of the pursuers as recognised in the Regulations of 1869, no effect can be given to the conclusions of the action, either declaratory or petitory.

But this leads to the second, and not less important question, Whether the enactment of the Regulations of 1869 was within the power or competency of the authorities of the University?

I am not disposed to hold an action of reduction to be necessary to raise that question. The regulations were no doubt duly and formally enacted by the authorities of the University, in so far as they had power under the constitution to enact them; and I think it was the duty of the defenders, the Senatus Academicus, to act upon and carry out these Regulations according to their true spirit and intent, so long as they were not rescinded. Still, if it could be shown that these Regulations were *ultra vires* of the authorities of the University, I think there would be no incompetency in recognising that view in this declaratory action.

My opinion, however, is, that the Regulations were not *ultra vires*. There was nothing in the terms of the written constitution of the University to exclude females. If females had applied at the outset, they might or might not have been admitted, according to the views taken of the expediency and propriety of admitting them. But I fail to see that there would have been any illegality or incompetency in admitting them. The purpose of the institution was the education of the human mind,—a purpose applicable equally to males and females. The females of these days were apparently not desirous to relieve men of the heavy labour and responsibility they undertake in following the learned professions for the support of their wives, families, and dependents; and they refrained, perhaps wisely, from seeking that kind of education which, by fitting them for such labours, might have deprived them of the exemption which they happily enjoyed. There is no record of any resolution to exclude females. So long as none presented themselves, they could, of course, neither be refused nor admitted. But, on the very first occasion when they did present themselves, the Regulations now in question were issued to aid them in their object. It was the absence of any such Regulations, and not the absence of power to make Regulations, which stood in the way. So long as no females came forward as students, it was inevitable that the discipline, rules, and usages of the University should adapt themselves to the only body of students who then existed in the University, namely, male students. But the same power which enabled the authorities of the University to make Regulations suitable for the one set of circumstances, enabled, and still enables them, I think, to make Regulations suitable for the other.

The decisions finding women not entitled to the parliamentary franchise can, I think, have little weight here. Women must either have had the right to the franchise absolutely or not at all. There neither is nor ever was any regulating body in a position, with reference to the franchise, analogous to the position of the authorities of the University with reference to the matriculation and accommodation of students in the University. Does, then, the fact that the authorities of the University never had occasion till now to regulate the admission and accommodation of female students in the University, prove either that they never had any power in that matter, or that they have lost that power? The decisions as to the franchise do not seem to me to afford any solution of that question

A practical difficulty has been urged, with some force—that the authorities of the University not having authorised mixed classes, and having no power to compel the Professors to form separate classes for females, the Regulations are substantially useless and inept. This does not, however, appear to me necessarily to follow. The Professors may be willing. Many of them have been so; and to have all obstacles in the way removed except one, which is merely contingent, is a boon to females which cannot be treated as of no value. The tickets and certificates of extra-mural Lecturers, as well as of Professors in other colleges, have been, and I understand still are, accepted as sufficient with reference to certain branches of study, and it does not prevent this from being a substantial advantage to students that the authorities of the University have no compulsory powers over the teachers or Professors from whom these tickets and certificates are to be obtained.

The references made to Bologna, and certain other foreign Universities, although they do not appear to me to establish the plea of abstract legal right, have unquestionably a bearing upon the question of discretionary power. The defenders say, in their case that the statutes of the University of Bologna "do not in any way recognise or contemplate the existence of women in any capacity in the University, or the colleges which composed it. On the contrary, their whole scope and bearing, fairly considered, excludes any such idea." If that be so, the instances in which University honours and privileges have been conferred upon and exercised by women in that University, and in other Universities similarly constituted, become all the more palpably examples of the exercise of a discretionary power, under a constitution analgous to what the defenders allege to be the written constitution of the University of Edinburgh.

The existing Regulations bear that women shall be admitted to the study of medicine in the University. The pursuers, under the first conclusion of their summons ask to be found "entitled to attend the classes of any of the Professors of the University;" and although they specially claim to be found entitled to medical instruction, and to obtain medical degrees, the third conclusion of their summons seems broad enough to comprehend all kinds of degrees which the University can confer,

This action has been raised by Miss Jex-Blake and the other ladies who are pursuers against the Senatus Academicus of the Edinburgh University. The Chancellor of the University is a nominal defender. But the position which, with his wonted impartial dignity, he has taken, is one of neutrality; and the Senatus Academicus is to all intents and purposes the only defender. The pursuers can get no decree in this action except against the Senatus; and although this may be considered as only matter of form, I agree with the Lord Ordinary in viewing it as practically of some importance. On the one hand, if the existing constitution of the University does not support the pursuers' claim as against the Senatus, then the pursuers cannot succeed, whatever may be the grounds on which, if they had other parties in the field, they might challenge that constitution. On the other hand, if the existing constitution of the University does not afford grounds for resisting the pursuers' claim, then the Senatus, bound to accept that constitution, and acting in the administration of that constitution, cannot have a good defence against the pursuers' claim, even though a party in a different position might challenge some part of that constitution. In short, I am of opinion that the decision of this cause must turn, not so much on the more general questions which have been so ably argued in regard to the origin and history of the Scottish Universities, as on the more immediate and practical question—What is the meaning, the authority, and the effect, of the University Regulations of 1869?

The object of the action is to obtain declarator of the right of these ladies, the pursuers, 1st, to prosecute their studies as students at the University of Edinburgh with a view especially to the profession of medicine; and 2d, to obtain from the University, as the result and reward of successful study, the usual medical degrees on being examined and found duly qualified. To these effects and for these ends decree of declarator is craved. I do not at present advert to the further conclusion for enforcing the pursuers' right to instruction and graduation if so declared. In regard to the mode of pursuing their studies, if entitled to do so, a different question is raised, which I shall afterwards notice.

Whatever may be said in the way of illustration or argument, no question is here involved as requiring present decision, except the right of the pursuers to medical instruction and medical graduation in the University of Edinburgh. The pursuers declare this to be a very important question for them; and of course I assume it to be so. It is certainly a novel question. The claim on the part of women to such instruction, and to graduation as the crown of it, is in Scotland an absolute novelty. Never once during the centuries which have elapsed since the institution of this University has a woman ever taken a degree. Nor does it appear that a woman ever claimed it. It is true that no woman has ever been refused a degree. But there is force, and great force, in the remark that the claim, which might have been made at any time during the last three hundred years, has now been made for the first time, and that, in the argument before us, the claim has been maintained as matter of right existing at common law, in which, as your Lordships are well aware, it has always been held that the consuetudinary element has great weight. Still this argument from custom is not conclusive. The absence of women from the classes of the University, which is a mere matter of fact, is according to long and uniform custom. The exclusion or rejection of women, which implies power to exclude—power in existence and in exercise—has no support or authority in custom. If the University had rejected the claim, it may be that the uniform custom would have been viewed as supporting the rejection. But we shall see that this was not the case; for in regard to these pursuers there has been no rejection.

I am not prepared to concur with the Lord Ordinary in holding that there is such an original inherent legality, fitness, appropriateness, and expediency in the study and practice of medicine by women, as to be of itself sufficient to overcome the presumption arising from the contrary custom of centuries, and even sufficient to sustain a right to enforce admission, and to render the exclusion of women from the medical school of the University unlawful.

On the other hand, I do not perceive any necessary or natural impropriety, or any inherent and essential illegality, in the study and practice of medicine by women, supposing them to be duly qualified. The question, whether the practice of medicine by women is appropriate and desirable. is one on which difference of opinion may well prevail; and we have had much able and interesting argument to illustrate, as matter of history, the views on the subject which have prevailed at different times, and in different countries. I do not feel it necessary to enter on that controversy. Though I have carefully, and with much pleasure, perused the pleadings, I do not think it necessary to express an opinion on that point; and it is sufficient for me to say that neither argument nor authority has been adduced to satisfy me that such medical study and practice by women is essentially and necessarily wrong, and consequently must be held illegal. I do not think it is so. The uniform and long-continued custom of the Scottish Universities has created some presumption against it, which the pursuers must meet. But it is not, in my view, necessarily wrong, nor inherently opposed to moral or legal principle. It is possible that the claim which these ladies now make for present medical study, and ultimate medical graduation, may be supported by the authority of University regulation, if such regulation be clearly expressed, competently enacted, and capable of legitimate practical application.

It is on the solution of this question, touching the nature, authority, and effect of University regulation in Edinburgh, that the case before us must, in my opinion, really turn. I am prepared to negative both of the extreme propositions which have been presented. I do not think that, in the absence of University regulation, and in opposition to long and uniform custom, women are entitled to demand and enforce admission as students into the medical classes of the University with a view to graduation, merely because of any essential suitableness in their practice of medicine, or any inherent lawfulness and propriety in their claim. On the other hand, I do not think that their claim for admission to such study and such graduation is essentially and necessarily so inappropriate. unreasonable, and illegal, as to be beyond the reach of University regulation. There is nothing to prevent the rejection of the claim, or to prevent

the concession of the claim, by the University, I do not think that the University of Edinburgh is by law so exclusively devoted and restricted to the education of male students only, as to render incompetent and unlawful a resolution by the medical faculty, and a regulation by the University Court, sanctioning the admission of women as students of medicine, with a view to graduation under reasonable and legitimate conditions. I do not see that law has imposed on this Alma Mater the command, "Bring forth male children only." I see no reason to doubt that the University Court, acting in accordance with, and after due communication with, the Senatus Academicus, and with the sanction of the Chancellor of the University, and approval of the University Council, had power to resolve and enact by regulation, either that women should be excluded from the study of medicine in the University of Edinburgh, with a view to graduation and practice of medicine, or that women should be admitted to such study, and with such view. The matter is, in my opinion, within the scope of legitimate University Regulation. There is no such weight and power of inherent right as to entitle women to force their way into the medical classes. There is no such taint or noxious quality of wrong in the demand of women for such admission as to forbid admission, and to require an inflexible and inexorable exclusion.

Several illustrations occur to one. Application for the first time, and therefore contrary to uniform custom, may be supposed to have been, at different periods of our history, made by a Roman Cotholic, or by a Jew, or by an Indian or a Negro. Can it be said that the University could not by vote and resolution have admitted these persons? But the argument for exclusion in respect of custom alone implies that all these persons must have been inexorably shut out, and that the University could not have admitted them. I am not able to arrive at that conclusion.

I therefore proceed to consider the import and effect of the Regulations by the University Court in 1869; and I do not pause to comment on any of the objections which have been taken in point of form to these Regulations. None of the technical objections which have been urged by the defenders are, in my opinion, well founded. The procedure in regard to the proposal, consideration, and adoption of these Regulations was correct enough, and in accordance with the statutory requirements.

The University Court has under the Act of 1858 very wide and varied powers and discretion. In particular, the University Court has power under section 12 of the statute "to effect improvements in the internal arrangements of the University."

I do not say that every alteration in the arrangements of the University which the University authorities adopt is necessarily an improvement. It is possible to conceive a case, though scarcely possible to anticipate it from such a body, where an alteration might be proposed and adopted which is not an improvement. But certainly an alteration in the internal arrangements of the University in regard to the admission of students to the study of medicine—the alteration being embraced in a resolution of the Medical Faculty, agreed to by the Senatus Academicus, adopted and embodied in Regulations by the University Court, approved by the University Council, and sanctioned by the Chancellor of the University—cannot possibly be considered by us, sitting in the Court of Session, as otherwise than an improvement in the opinion of the University; and it is a matter of University administration on which the University Court was entitled under the statute to give an authoritative deliverance. By the approval and adoption of it, the University declared it an improvement. The Senatus are a Court of the University,—an official portion of the administrative power and authority of the University; and in my opinion they are bound by the existing constitution. They cannot repudiate and set at nought the resolutions which have been adopted by the legitimate University authorities.

"The claim of women for the Parliamentary franchise has in England and Scotland been rejected. The rejection has been founded on here.

I do not think that the decisions on the subject of the franchise are quite in point.

In the first place, the quality or character of the contrary usage was different. The franchise, sustained by whatever qualification the law required, is a public right; and for centuries that public right was exercised in accordance with universal national usages, and, both in England and in Scotland, was limited exclusively to men. That long and uninterrupted national usage, in such a matter as the elective franchise, assumed a constitutional character. The right to study medicine in a particular University is of a different character; and while contrary usage is an important consideration, it has not the same weight as in the case of the electoral franchise. Then, there are no direct institutional authorities adverse to the right to pursue medical studies, as claimed by these pursuers. But in England there were important authorities, such as that of Lord Coke and Mr Serjeant Heywood, adverse to the claim of women to the franchise. Therefore it appears that both usage and institutional authority were opposed to the claim for franchise.

In the second place, the right to sit in Parliament was recognised as a co-relative right to the right to vote for a representative. The case of a peeress in her own right, who cannot sit or vote in the House of Lords personally or by proxy, was considered as analogous and appropriate by Justice Willes, in whose very luminous and instructive opinion the question of the female claim to franchise is fully disposed of. The report of the decision of the franchise question in our own Court is very brief; *Brown* v. *Ingram*, 19th December 1868, 7 Macph. 281. But I was one of the three Judges who decided it; and I recollect, and have notes confirming my recollection, that I referred to the right to sit in the House of Commons, or the House of Lords, as not only cognate but relative to the right of franchise, and as substantially involved in the question raised. That also is an important distinction,—a peculiarity not here present.

In the third place, the meaning and result of the decision in the case of the franchise was—that it was a question for Parliament, and to be decided by Parliament. The view which I take of this claim for University study is, that it is a question for the University, which the appropriate University authority might dispose of by decision for or against the claim. In the meantime, and in so far as regards these pursuers, the University Court, having as I think sufficient power, has decided in favour of the claim. That decision may be reconsidered. But, in the meantime, it has been given;

and the effect should be the same as it would be in the case of the franchise if Parliament had resolved to confer the elective franchise on women. On these grounds, I think that the decisions on the question of the franchise are by no means conclusive on the question now before us.

Let us next consider what is the true meaning of the resolution and regulation of the University Court. The words are before us. I need scarcely quote them again. I cannot doubt that, according to these Regulations, the pursuers are entitled to admission to the study of medicine,—certainly not in mixed classes along with men, but in such separate classes as can be arranged with the professors of medicine. I am further of opinion that, under these Regulations women are entitled to matriculation as students (as I understand they have in point of fact matriculated) and that they also are entitled to be admitted to examination with a view to the medical profession; for that end or object qualifies the whole claim made, and the whole arrangements sanctioned.

Lastly, I am of opinion that women, being entitled to enter on such study, and to be admitted to examination with the view to the medical profession, are, on the completion of their studies, on their complying with all the conditions imposed by law, and on passing their examination, and being found duly qualified, also entitled to demand and obtain the usual medical degrees. I think that the University *gradus*, to which their title is recognised and their admission sanctioned, is incomplete without graduation, assuming that, as the end of the study and the result of the examination, the women who seek graduation are found qualified. I agree with the Lord Ordinary in holding that graduation is "the indefeasible right of the successful student,—the fitting termination and crown of completed study." To admit the pursuers to the study of medicine with a view to the profession of medicine, and to admit them to the testing of that study by examination, and then to refuse them graduation if duly qualified, would be to mock them after encouraging them to hope and stimulating them to effort. It would truly be to lead them into a delusion and a snare. There may be difficulty in taking the first step of admission. That difficulty—arising chiefly from the novelty of the claim and the prevalence of a long and uniform contrary custom— must be admitted. That difficulty I have felt, and fully appreciate. The import and authority of the University Regulations has from my mind ultimately removed that difficulty as regards this action and these pursuers. But if their admission has been sanctioned, and the first step taken, and their course of instruction regularly pursued, and their studies completed, and their qualification ascertained by due examination, I have little difficulty in arriving at the conclusion that the usual result must follow, and that graduation must crown the studies of those who have been thus admitted, and who have successfully laboured in University education with a view to the medical profession. If all are permitted to pursue medical studies, it cannot be that the University degree—the reward and token of success—is reserved for one sex only. I am therefore of opinion that the pursuers are, to this extent, entitled to succeed in the declaratory conclusions of this action.

Another question has however been raised, on which I must say a word before I conclude. I mean, the manner in which (assuming the rights of the pursuers to be declared as I have above explained) they can obtain the end they aim at.

I think that the Lord Ordinary has judged rightly in confining his interlocutor to the declaratory conclusions. I confess I do not see my way at present to go further.

In the first petitory conclusion the pursuers crave a decree ordaining the Senatus Academicus to make regulations for the instruction of the pursuers, and for their ultimate graduation; and particularly the pursuers crave decree ordaining the Senatus to direct the various professors whose duty it is to give instruction in medicine, to permit the attendance of the pursuers in their classes "along with male students." This proposed mode of prosecuting the study of medicine by women—this proposed attendance in classes along with male students—has been, I think, rightly negatived by the Lord Ordinary.

In the first place, I am of opinion that the Senatus (who are the defenders) have not the power to direct or effect an arrangement for the attendance of women in mixed medical classes, as here concluded for. It is not the part of the Senatus to direct a change of such importance; and it would be a change opposed to the express words of the regulation of the University Court —the very regulation on which the only case which the pursuers can present must stand. That regulation, which, as the pursuers must contend, and do contend, has the force of University law, declares in express terms that the medical instruction given shall be in separate classes; and I cannot discover any authority or any principle to support the conclusion against the Senatus for reversal of the regulation of the University Court.

But, even if the power of the Senatus to direct the arrangement for mixed classes, as desired by the pursuers, were conceded, I should still be of opinion that this Court ought not to ordain the Senatus to direct such arrangement.

I fully and respectfully recognise the high qualities, capacities, and vocation of women. I recognise especially the fact that the elevation of women in domestic and social position is one of the blessed fruits of Christianity. There are few, indeed, who hold intelligent and virtuous women in higher estimation than I do. It is very much for their own sake, and on account of the respect which I entertain for them, that on this particular point I feel it my duty to state my decided opinion, that the promiscuous attendance of men and women in mixed classes of medical study, such as anatomy, surgery, and obstetric science, with concomitant participation in dissection, demonstration, and clinical exposition, is a thing so unbecoming and so shocking—so perilous to the delicacy and purity of the female sex—to the very crown and charm of womanhood—and so reacting on the spirit and sentiment which sustains the courtesy, reverence, and tenderness of manhood—that the law and constitution of the University, bound to promote, and seeking to promote, the advancement of morality as well as knowledge, cannot sanction or accept such attendance.

I suggest no doubt in regard to the motives which impel the pursuers to make their present demand for attendance on mixed classes, in order to attain the educational ends which they have in view. I give them credit for the best motives; but I entertain the strongest opinion, that the welfare of the University, the character of the

medical school, and the best interests of the ladies themselves, would be put in peril by conceding to them the privilege—I would call it the fatal boon—of attendance in mixed classes in medical study.

The second or alternative petitory conclusion is for decree ordaining the professors whose duty it is to give instruction in medicine, to impart that instruction to the pursuers and other women in separate classes.

It is not quite so clear in this matter as in that of the mixed classes, that the Senatus has not the power to make an order on the professors to the effect craved in this alternative conclusion. But I am of opinion that they have not the power. I think that the University Court might probably have power to make such an order if it were right to do so. But the University is not a defender, and the University Court is not a defender, and, under these conclusions we can only pronounce a decree against the Senatus Academicus. Whether, having regard to the terms of the Regulations of 1869, in which a command or direction to the medical professors is scrupulously avoided, the Senatus can in this action be competently decerned to issue to the professors a command or order which the University Court refrained from issuing, seems to me extremely doubtful. But, even assuming the competency, I am, after some hesitation, now of opinion that, if there is no arrangement made, as "permitted" by the Regulations, between the pursuers and the medical professors, then the Senatus ought not, under this action, to be decerned and ordained by this Court to issue an order upon the subject. The Regulations have left it on a permission; and I think it was so left by the University Court advisedly, and in order to secure both to the medical professors and to the ladies the opportunity and the power of adjusting, by arrangement, the question of attendance in separate classes. It is an appropriate matter for arrangement; though it is certainly true that the inducements and facilities for arrangement may be diminished by the irritation of a lawsuit. Besides, there are obvious practical difficulties in the way of arrangement for securing medical instruction to a few ladies in separate professional classes, to be taught by eminent gentlemen, whose engagements within and without the University are numerous and important. Still, arrangements may not be hopeless. At all events, compulsion or authoritative direction was not contemplated in the resolutions.

Another suggestion for the prosecution of the medical studies of the ladies, and for their ultimate graduation, if their right shall be declared, has been adverted to in the pleadings, and is noticed by the Lord Ordinary. I mean the recognition by the University, and by the Medical Faculty, of extra-academical teachers, whose lectures and instructions might be reckoned sufficient for the purposes of female graduation, the ladies being ascertained by examination to be duly qualified. Such recognition, in the event of the failure of arrangement, and of declinature by a medical professor in the University to open a separate class for ladies, might perhaps meet some of the difficulties in the way of giving practical effect to a decree according to the declaratory conclusions of this action. But in regard to any such plan nothing can be done at present. It must be left as matter for arrangement.

I have only to add, that I think the leading questions presented to us so important to the administration, the good order, and the whole interests of the University, as to raise no doubt of the right of the defenders to insist for judicial determination of these questions; and I feel sure that, in the course which they have taken they have been actuated by no unworthy motive, and that if the law is declared against the pleas of the defenders, they will deal honourably and liberally with the pursuers.

Though not in all respects concurring in the views of the Lord Ordinary, I substantially concur in the result at which he has arrived; and I think we should adhere to his judgment, as limited to the declaratory conclusions of the action. Beyond these declaratory conclusions I cannot go; and in regard to the petitory conclusions, I think that the defenders are entitled to absolvitor.

Opinion of LORD JERVISWOODE.

I had an opportunity of perusing a proof-sheet of the opinion of Lord Deas in this case, and I have carefully reconsidered that opinion since it has been circulated.

I concur, without reservation, in the general course of reasoning of that opinion, and in the conclusion at which Lord Deas has there arrived; and I therefore prefer to refer to it as the basis of the judgment which ought, in my view, to be pronounced, rather than to run the risk of error in the course of unnecessary repetition.

Opinion of LORD ORMIDALE.

It is not only unnecessary, but would be quite beside the legal question which the Court has now to determine, to consider whether it is, or is not, desirable that women should possess, equally with men, the rights and privileges claimed for them in the present action. The only question which the Court has to determine is, whether by law women do, or do not, possess these rights and privileges.

It is certainly a circumstance not a little remarkable that if women have always possessed the rights and privileges referred to, as maintained by the pursuers, no instance of their having been ever either claimed or exercised is alleged to have occurred before the present controversy arose, since the establishment of Universities in Scotland about four centuries ago. On the contrary, it is allowed by the pursuers to be taken as an acknowledged and indisputable fact that there has never been any such instance. Nor can the pursuers say that by Papal Bull, Royal Charter, or other instrument having reference to the foundation of the Scottish Universities, the admission of women as students at any of them is expressly recognised. The utmost the pursuers contend for is, that while by these instruments the right of women to be students is not expressly recognised, neither is there in any of them an express exclusion of women as students. But although this may be so, it is not unimportant to observe that the language, not only of the founding writs of the Scottish Universities, but also of some at least of their disciplinary regulations, are, according to their ordinary and natural sense, indicative rather than otherwise of an understanding, to say the least of

it, that males alone were contemplated to be admissible as students, as in point of fact they have hitherto exclusively been. This is of itself sufficient to raise a very strong presumption that the rights and privileges now claimed by the pursuers were never intended to be, and in reality never were, conferred on women.

It will not do to argue, as the pursuers do, that the turbulent condition of the times and state of society in Scotland satisfactorily account for this. That these causes may have to some extent retarded the progress of education and learning in the Universities in Scotland is intelligible enough; but that they should have operated adversely to the female and not to the other sex, is scarcely intelligible at all, and has certainly not been shown to have been the case. The fact, indeed, of the warlike struggles which prevailed in Scotland during the period referred to—engaging as they must have done the young men of the country—not having led to the education and training of the youth of the opposite sex to medical and other peaceful professions, might be founded on with more plausibility and effect by the defenders, in support of their view that females were not admissible as students at Universities.

Having regard, then, to what has been the long, uniform, and uninterrupted usage, not only of the Edinburgh but all the other Scottish Universities since their establishment centuries ago, it cannot well be questioned, I think, that it must hitherto also have been the general understanding of the country that women had not the right of admission as students at any of them. And if so, the presumption against the existence of any such right, or that it ever was intended to be, or was ever in point of fact conferred on women, seems irresistible.

It is a well-established principle of law that writings, even Acts of Parliament, more especially those of ancient date, the terms of which leave their true meaning and effect doubtful or obscure, may be cleared up and interpreted—not controlled or altered—by the usage or possession which has followed upon them. Not only is this principle well and firmly established, but it is also one of very general application. It has been held to operate alike in the interpretation of Acts of Parliament of an old date, ancient charters, and other writings, whether relating to contracts between individuals, or to the constitution of public rights and trusts affecting local as well as national interests. Thus, in the case of the *Magistrates of Dunbar* v. *The Heritors of Dunbar* (10th April 1835, 1 Sh. & M'L., p. 134), Lord Brougham, in reference to the question how far usage was admissible to interpret the true meaning and effect of a statute, observed,—"When the statute uses a language of doubtful import, the acting under it for a long course of years may well give an interpretation to that obscure meaning, and reduce that uncertainty to a fixed sense: *optimus legum interpres consuetudo*, which is sometimes termed contemporaneous exposition; and where you can carry back the usage for a century, and have no proof of a contrary usage before that time, you fairly reach the point of contemporary exposition." So also in the case of *Macdonald* v. *The Governors of Heriot's Hospital*, (7th April 1830, 4 W. & S. 98)—a case of contract between individuals—Lord Wynford in the House of Lords, in moving the affirmance of the judgment of this Court, observed that "old writings might be expounded by contemporaneous usage," and that "there can be no means of getting at the meaning of old instruments so satisfactorily as that of seeing how the parties acted under them at the time they were made, and have since continued to act. So also in the recent cases of *White* v. *The Kirk-Session Kinglassie* (14th June 1869, 5 M'P., 867), and *Flockhart* v. *The Kirk-Session of Aberdour* (14th November 1869, 8 M'P., p. 176), where the question was whether certain property and funds which had been constituted by ancient writs in trust "for behoof of the poor of the parish," without specifying particularly what description or class of poor was meant, it was decided, on interpreting the writs by the usage and possession which had followed on them that the property and funds in dispute fell to be administered under the Poor Law Amendment Act of 1845 by the Heritors and Kirk-Session for behoof of the legal poor of the parish,—Lord Curriehill, who gave the leading judgment in the former of these cases, concluding his observations as follows:—"I think that the usage which has followed on the title by which this trust was constituted, and under which it was held at the time of the passing of the Act of 1845, and the manner in which it has been possessed and dealt with, satisfactorily explain that according to its true import the trust thereby created was for behoof of the poor of the parish in the sense of the 52d section of the Poor Law Amendment Act." And in accordance with these precedents—and many more, in varying circumstances, might be cited in the law and practice of Scotland—there may be noticed, as illustrative of the same principle in the law and practice of England, the case of the *Attorney-General* v. *Drummond*, 1 Drury & Warren, p. 353, where, in reference to a question touching the objects of a trust and the parties entitled to participate in the benefits of it, Lord-Chancellor Sugden observed (p. 368 of the Report), "One of the most settled rules of law for the construction of ambiguities in ancient documents is that you may resort to contemporaneous usage to ascertain the meaning of a deed. Tell me," said his Lordship, "what you have done under such a deed, and I will tell you what it means."

What, however, is perhaps of still greater importance and applicability to the present case are the very recent decisions of the Courts, both of Scotland and England, on the right of women to the exercise and enjoyment of the electoral franchise. In the case of *Brown* v. *Ingram* (19th December 1868, vol. 7 of the 3d series of the Court of Session Cases, 281) in Scotland, and of *Charlton* v. *Lings* (9th November 1868, vol. 4 Law Reports, Common Pleas, 374) in England, it was determined, without any dissent on the bench, that women have no such right; and it is clear from the published reports of the cases that this determination was arrived at, not in respect of women being expressly debarred, by statute or otherwise, from exercising the electoral franchise, but mainly, if not entirely, in respect of the immemorial usage which had prevailed in the matter. The report of the case in Scotland, although very brief, expressly bears that "their lordships rested their decision upon the fact that there was a long and uninterrupted custom in Scotland limiting the franchise to males." And in reference to some exceptional instances to the contrary of a very old date, founded on in the English case, Lord Chief-Justice Bovill is reported to have remarked, "But these instances are of comparatively little weight as opposed to uninterrupted usage to the contrary for several centuries;

and what has been commonly received and acquiesced in as the law raises a strong presumption of what the law is, and at least throws upon those who have questioned it the burden of proving that it is not what it has been so understood to be."

I am unable, therefore, to see how, in the face of these authorities, and the well-established principle of law illustrated by them, that women are now for the first time, and after centuries of a uniform and uninterrupted adverse usage, to be found entitled to the enjoyment and exercise of the rights and privileges claimed for them in this action. Nor can I see that the usage of the Bologna, or any other foreign University, can affect a question which must be governed by the usage of this country alone. The reference in one of the founding charters of the Edinburgh University to the rights and privileges of the other Scotch Universities, and in that way indirectly, through the founding writs of the University of Glasgow, to a Papal Bull conferring certain rights and privileges on the University of Bologna, can, I think, be held, at most, merely to relate, in the words of the Lord Ordinary in the Note to his judgment in the present case, to "immunities from local and other taxes, and from the jurisdiction of the ordinary tribunals; and as it is certain that none of these privileges now belong to any Scottish University, not much assistance can be got by any party from the Papal Bull." Not only do I think that no assistance can be got from the Papal Bull referred to, but that the fact that, notwithstanding the reference made to it in the establishment of the University of Glasgow, and in the establishment of the University of Edinburgh to that of Glasgow, these Universities have not been saved even from local and other taxes, or from the jurisdiction of the ordinary tribunals, is very significant, as showing that it never was intended, and cannot be held, that a Scottish University, founded subsequent to the Reformation, as the University of Edinburgh was, should, in respect of a Bull issued by the Pope, in a country where at the time he was held to be all but omnipotent, stand in the anomalous and unconstitutional position of enjoying rights and privileges unknown to and inconsistent with the laws and usages of Scotland. Besides, the alleged usage of the University of Bologna and other foreign Universities, on which the pursuers so largely found, is not, on their own showing, so satisfactorily explained and established as to be relied on as evidence at all in the judicial determination of any litigated cause. In no view, therefore, can I see that the alleged foreign usage can be held in the present dispute to obviate the effect of the long and uninterrupted usage of every University in Scotland.

And just as little can it, in my opinion, be taken as sufficient to obviate the effect of this long and uninterrupted usage in Scotland adverse to the rights and privileges now claimed for women, that such rights and privileges are of the nature of *res meræ facultatis*, and therefore that, as it has not been shown that such rights and privileges have ever been claimed and refused, the non-exercise of them is of no consequence; for any such view as this obviously proceeds on the assumption that the alleged rights and privileges originally existed and still exist. But that is the question in dispute; and if my previous reasoning be sound, and the authorities I have referred to at all in point, there can be no foundation for any such assumption.

On the leading, and as it appears to me the fundamental question, therefore, involved in the present controversy, I can entertain no doubt that women are not entitled by and under the constitution of the Edinburgh University, as it existed prior to the Regulations immediately to be noticed, to the rights and privileges claimed by the pursuers.

It is maintained, however, and is apparently relied upon by the Lord Ordinary as the chief support of his judgment, that the right of women to be educated for the medical profession in the University of Edinburgh has been established, if it did not previously exist, by the Regulations of the University Court of 10th November 1869. Now, although it may be, and I think it is, matter of regret that anything should have occurred, however unintentional, calculated to mislead the pursuers, or to inspire them with expectations which are incapable of fulfilment, I am quite unable to see—giving to these Regulations all the effect that can legitimately or reasonably be ascribed to them—how the Senatus Academicus, who are the only parties besides the Chancellor called as defenders in the present action, have the power, even were they willing, to afford to the pursuers the University education and privileges they claim. The Senatus is subject to the control of the other governing bodies, and especially of the University Court. The latter again have, by the Regulations referred to, merely found that women may receive medical education at the University in classes by themselves, separate from the male sex; but the pursuers have entirely failed to show how in existing circumstances, or under the present constitution and establishment of the University, arrangements for that purpose could be made and enforced. Certain it is, at least, that according to the University Act of 1858, independently of everything else, the Senatus Academicus are by themselves powerless in the matter. It is impossible to assume, and assuredly it has not been shown, that the Senatus can, by any power or means they at present possess, provide separate classes for the education of women, and yet the Lord Ordinary in the Note to his judgment says, that he thinks "the pursuers are entitled to be admitted as students of the University for the study of medicine therein, and they are entitled to be matriculated as students, subject only to the special condition that they shall be taught in separate classes confined entirely to women." But how, and in what manner, such separate classes are to be for the first time established in the University has not been explained. Who are to be the professors or teachers of such separate classes? Surely not the present Professors of the University, who received their appointments upon a totally different footing. Again, if separate professors or teachers are to be appointed for such separate classes, who are to appoint them, and by whom are they to be paid? Surely not the Senatus Academicus, or the Chancellor of the University, or both together. And, as already explained, the Senatus Academicus have not in existing circumstances the power to admit women as students to be educated in the ordinary classes along with males, and accordingly the Lord Ordinary has himself remarked that "when the University Court has prescribed that women shall be taught in separate classes, it is perfectly vain to attempt to compel the Senatus to make a regulation that women shall be taught in mixed classes along with male students." In

short, the more the Regulations referred to are examined, the more clearly will they appear to be insufficient to support the action as laid by the pursuers.

It is, indeed, an important and very serious question whether these Regulations were within the competency of the governing bodies of the University—all, or any of them—to enact, and whether they can be recognised as having any effect at all. The University Court, by whom they were enacted, could have had no power to do so except under the Universities Act of 1858. Now, the only power bearing on the matter which they have, or are said to have, under that Act, is that which is contained in the 12th section, authorising them "to effect improvements in the internal arrangements of the University." But it appears to me to be very clear that this neither warranted nor contemplated any alteration of the previously existing constitution of the University. I think the words "improvements in the internal arrangements" must be taken to mean, as the words themselves necessarily import, not changes on or beyond, but within and in accordance with, the constitution as it existed. And it would be strange indeed if a power had been given to the University authorities, or any of them, to change the constitution of the University by the enactment merely of regulations from time to time as they saw proper—altering, it might be, one day what they had enacted on another. The University Court is only one of the governing bodies of the University, and it cannot be supposed that they were, either separately or in combination with the other governing bodies, intended to have had any power conferred on them by the Act of 1858 beyond its purpose, as expressed in its preamble,—viz., "To make provision for the better government and discipline of the Universities in Scotland—viz., the Universities of St Andrews, Glasgow, Aberdeen, and Edinburgh, and for improving and regulating the course of study therein."

If, therefore. it is to be held, as I think for the reasons already stated it must, that by the fundamental constitution of the University of Edinburgh, as it stood prior to and under the Act of 1868, women were not admissible as students, or had the other rights and privileges claimed by the pursuers, and that it were necessary to challenge the validity and binding nature of the Regulations in question as going beyond the constitution of the University, and as being *ultra vires* of the University Court to enact, I should think that this could be done, and may be held to have been effectually done, by the defenders, notwithstanding of there being no reduction at their instance, for I can observe no trace of such a technical objection or bar in the record. Be this, however, as it may, these Regulations, when closely examined, will, for the reasons already stated as well as others, be found to be of little or no efficacy. Most assuredly they create and impose no obligation or duty either on the Senatus or the Chancellor, who are the only defenders called in this action. So far as they relate to the teaching of women as students in the University, they merely enact (1) that "Women shall be admitted to the study of medicine in the University of Edinburgh; (2) that the instruction of women for the profession of medicine shall be conducted in separate classes, confined entirely to women; and (3) that the professors of the Faculty of Medicine shall for this purpose be permitted to have separate classes for women." Taking these Regulations together, as they must in order to be intelligible at all, it is very obvious that there is nothing enforceable in them as against the Senatus Academicus, the Chancellor, or the professors. The professors are merely "permitted" to have separate classes for women if they please, but that cannot be converted into an obligation upon them to have such classes whether they please or not. The pursuers do not maintain anything so absurd; and, accordingly, their action or complaint is not directed against the professors, or any of them. And what is their complaint or ground of action against the Senatus Academicus and Chancellor, the only defenders they have called? If they could have said, and had said, that either of these parties had improperly interfered to prevent the professors having separate classes for women, one could understand that an action, in some form or other, might lie against them, in order to put an end to such improper interference; but no allegation, or plea, or ground of action to this effect is to be found in the record. It is clear, indeed, from the pursuers' statements and pleas in the record, as well as from their argument in their written case, that their complaint is, not that the defenders or any other party had prevented, or attempted to prevent, them enjoying the full benefit—whatever that may be—of the Regulations in question, but that arrangements have not been made whereby the difficulties and obstacles in the way of their attaining their objects under these Regulations, as they stand, might be removed. They accordingly, finding that the professors did not choose to open separate classes for the education of women, would appear to have made various efforts, which they set out in the record, to have the difficulties thus arising obviated or overcome. But it also appears that these efforts of the pursuers proved unavailing; and, in particular, it appears, on their own showing in the 19th article of their condescendence, that the University Court—not the Senatus or the Chancellor, the only defenders here—on the 8th of January 1872, shortly before the institution of the present action, declined to assist the pursuers further than they had previously done in the attainment of their objects.

So standing matters, the present action was brought, containing several declaratory conclusions, in the broadest and most comprehensive terms, of the pursuers' right to be admitted as students and to receive education in the University of Edinburgh, not in separate classes providing the professors were pleased to open such for them in terms of the Regulations, but independently of the Regulations and the conditions they impose altogether; and these declaratory conclusions are followed by various petitory ones, intended, obviously, for the purpose of enforcing the decree asked for in terms of the former. In short, it is manifest, I think beyond all question, that the object of the pursuers—looking not only at the conclusions of their summons, but also at their statements and pleas in the record—was to obtain something quite different from what they could obtain under the Regulations. This, indeed, is sufficiently obvious from the Note itself of the Lord Ordinary. Thus, the pursuers in the first petitory conclusion insist that the Senatus shall be ordained to make regulations whereby they may receive instruction in the University "as is required to qualify

for graduation in medicine," and, in particular, to use the words of the Lord Ordinary, "that they should direct and appoint the various professors whose duty it is to give instruction in medicine to permit the attendance of the pursuers upon their classes along with male students." But the Lord Ordinary remarks upon this that there are "no sufficient grounds for pronouncing any such decree, and there are conclusive reasons why no such decree should be pronounced." The Lord Ordinary then proceeds to deal with another of the pursuers' conclusions—viz., that whereby they seek to have the Senatus compelled to make regulations contrary to those which have been already made by the University Court; and in reference to this conclusion he states, for reasons quite irresistible, that "this cannot possibly be done." And he adds that, "this difficulty was so strongly felt by the counsel for the pursuers that he eventually abandoned the first petitory conclusion, and relied upon the alternative that the Senatus should be compelled to order the professors to teach the pursuers in separate classes. But," the Lord Ordinary goes on to say, "here the same difficulty arises. The Senatus have no power to make such an order—at least, their power is not shown—and the University Court, which probably has the power, is not here." In this I entirely concur with the Lord Ordinary, except in so far as he seems to think that the University Court has the power. For my own part, I am unable to see that they have any such power under the existing constitution of the University. The only other mode by which it is suggested that the pursuers might possibly receive the University education and benefits they desire, is noticed by the Lord Ordinary towards the end of his Note, where he says that "If not the Senatus, at least the University Court has undoubted power to recognise extra academical teachers whose courses will be sufficient for the purposes of graduation. But in making this observation the Lord Ordinary would appear to have overlooked the fact, brought out by the pursuers themselves in the 19th article of their condescendence, that the University Court have refused, before this action was instituted, to adopt any such course. Nor do I see how the University Court could be compelled to do so, at least in this action, to which they have not been called as defenders at all, even supposing it were within their power. Clear it is, however, in my apprehension, that they have no such power; for, as explained by them when they refused the application which had been made to them on the subject before this action was brought, the proposed measure would imply an alteration in one of the ordinances for graduation, and that such alteration can be made by "the University Court only with the consent expressed in writing of the Chancellor, and with the approval of her Majesty in Council." It is not said, however, that the consent of the Chancellor, or the approval of her Majesty, has been obtained, or even applied for; and no compulsitor can be given, and none is asked for in the present action, whereby the University Court, or any of the other governing bodies of the University, could be compelled to take the requisite steps for obtaining for the pursuers the benefit of extra academical classes.

In no view, therefore, that I can take of the conclusions of the pursuers' summons, have I been able to see how they can be given effect to by any decree within the competency of the Court to pronounce in the present action. The Lord Ordinary has, no doubt, by assuming that the Regulations of the University Court of 10th November 1869 are valid and binding, and must be taken now as forming part of the constitution of the University, given effect to the pursuers' declaratory conclusions, subject always to the conditions imposed by these Regulations. But this, in substance and reality, amounts to no more than that the pursuers may, if they can get it, receive instruction in medicine in the University in separate classes. It has been shown, however, and is indeed made a prominent part of the pursuer's complaint, on which their action is founded, that they cannot get such instruction, as the necessary means for giving it, in the only way in which it can be given, do not exist. And it has also been shown, and is acknowledged by the Lord Ordinary, that neither the Senatus nor any other of the governing bodies of the University, or all of them together, have the power to supply the requisite means, and consequently that they cannot be compelled to do so by any decree in the present action, even had they been called to it as defenders, which they have not. To pronounce, therefore, in this state of matters, a mere hypothetical declarator—for it would be nothing more—to the effect that the pursuers are entitled to receive medical instruction in the University, provided a certain state of things is brought about to enable them to do so, appears to me to be a very idle and useless proceeding. Accordingly, the pursuers themselves do not appear to desire it. Such is not the nature of the conclusions of their action at all, and none of their statements or pleas in the record are to that effect. Nor have they at any time, or in any shape, so far as I can discover, proposed to amend, restrict, or modify the conclusions of their summons to any effect or extent. It is true that in their argumentative case it is stated that it might be "of some importance to the pursuers that their ground of action should be affirmed, even to the limited extent of having it found that they are under no personal disabilities to be the recipients of University degrees, because in that case the pursuers would have a moral claim to the intervention of the University to complete their studies, even if it should be held that the pursuers cannot legally compel the University to take the necessary steps." But while the pursuers make this incidental observation in their argumentative case, they immediately go on to state what the real objects of their action are—viz., those concluded for in their summons, and certainly not those which are given effect to by the judgment under review. I can, indeed, very well understand that such a decree as that which has been pronounced by the Lord Ordinary is calculated to operate prejudicially in place of favourably to the pursuers, for, in reference to any other steps they may find it necessary to take for the purpose of securing their objects, it might be urged against them that as they had already accepted or got a decree, it must be held to be the measure of their rights, beyond which they can have no further claim.

I must own, therefore, my inability to see any reason for thrusting upon the pursuers a decree for which they do not ask, and which can be of no practical use to them. And as to giving them a decree which is not concluded for—which may

possibly be prejudical to them—and which, at any rate, can only serve as a "moral" lever to assist them in obtaining in some other form what they cannot get in the present action—it appears to me that to do so would be contrary to sound legal principle, and, as I believe, unprecedented in the practice of the Court.

In the view I have taken of this case, as now explained, it is unnecessary to enter on the question whether, if the pursuers were to succeed in qualifying themselves by the requisite University education, they would be entitled to all the honours and privileges of graduation, for, obviously, matters are not advanced to the position which calls for, or admits of, the satisfactory determination of any such question.

I have only further to remark that, if the pursuers have failed, as I think they have, to support their claims consistently with the constitution of the University, whether considered in connection with the Regulations of the 10th of November 1869, or independently of these Regulations, it is unnecessary to inquire whether any other, and what, remedies are open to them. I may, however, be permitted to remark that if it be desirable, and for the interests of the country—and I do not say it may not—that women should receive University education to qualify them as medical practitioners, it rather appears to me that it is for the Crown or Legislature, and not this Court, to determine upon what footing, and under what arrangements, this should be done.

For the reasons I have now stated, I am of opinion that the interlocutor under view is erroneous; that it ought to be recalled; and that the defenders are entitled to absolvitor from the present action as laid.

Opinion of Lord Mure.

I am unable to view this case, as raised in the summons and record, as one in which the main question to be disposed of is, whether the pursuers, in respect of the Regulations passed by the University Court in November 1869, are entitled to decree to a qualified extent, in terms of some of the declaratory conclusions of this action, with a view to their admission to graduation in medicine in the University of Edinburgh, in the event of such additional regulations being made by the University authorities as will enable the pursuers to obtain, which they cannot at present do, that instruction within the University which is essential to graduation; and which, by assoilzieing the defenders, the Senatus Academicus, from the two leading petitory conclusions of the summons, it seems to be admitted that the pursuers, even under those Regulations, are not entitled to demand, and are therefore not in a position to enforce.

A larger question, and one of more general importance is, in my opinion, distinctly raised for decision under these declaratory conclusions, and in the pleadings by which they are supported, the question, namely,—Whether, according to the law and constitution of the University of Edinburgh, women are entitled, upon payment of the matriculation and other fees, to attend the classes of any of the professors, and are entitled to demand from the professors the instruction which is necessary to the obtaining of degrees, and which the professors are bound to give them. The case is expressly so put in the first and second pleas in law for the pursuers, as the ground on which decree is sought in terms of the leading declaratory conclusions of the action; and this question must, I think, in the first instance be disposed of, before dealing with the more limited one raised under the University Regulations.

Upon this new and very important question I have, without much difficulty, arrived at the conclusion that this demand of the pursuers to be admitted, as matter of legal right, to the full privileges of students in the University of Edinburgh, is not well founded. The claim is rested on the charters and Parliamentary Ratification of the 14th of August 1621, by which the University was established; and which, while they do not contain any express exclusion of females from University rights and privileges, conferred upon the College, as then constituted, all the rights, liberties, and privileges which pertained to any other College in the realm. And the pursuers' claim, as I understand it, is rested not so much on the express words of the charter and Parliamentary Ratification of 1621, as upon the fact that by these deeds there was conferred upon the College of Edinburgh all the privileges which pertained to the other Colleges in Scotland which were founded by Papal Bulls; by which it is maintained that these Colleges, and the University of Glasgow in particular, were placed in all respects on the same footing as the University of Bologna, in which females appear to have been occasionally admitted to corporate privileges and graduation.

As regards this reference to the usage at Bologna, it does not appear to me that the pursuers can take any benefit by it. Because, having regard to the conflict of evidence which there is in the information which has been laid before the Court in regard to the admission of females to graduation at Bologna, I am not satisfied that there is evidence sufficient to instruct that any usage existed in that University of the nature contended for on the part of the pursuers; and, even if there were such evidence, it appears to me that in considering the question of usage, as bearing upon the construction of the charter of a Scotch University, it is by the usage of Scotland, and not by that of Bologna or of other foreign Universities, that the question must be disposed of. Putting aside, then, this reference to the usage at Bologna as having no direct bearing on the present case, I do not think that the language of the Papal Bulls tends in any degree to strengthen the pursuers' claim. Because, while in the foundation deeds of the Edinburgh University, taken by themselves, there is no express exclusion of females, neither are there any words expressly descriptive of the male sex as those for whom alone the University was founded. The language of the Papal Bulls, however, is different in this respect, inasmuch as in the narrative and preamble of all these deeds men only are expressly mentioned as the parties for whom the Universities were founded; while the passages in each of the Bulls applicable to the granting of degrees rather appear to me to have been framed so as to apply to the male, to the exclusion of the female sex. If, then, the question now at issue had been raised upon the terms of these deeds taken by themselves, and apart from any question of usage, I should have had great difficulty in holding that they were either calculated or intended to found a Univer-

sity except for the education of male students. But when the foundation deeds of any of these Universities, or of the University of Edinburgh, are construed and read in the light of the uniform and uninterrupted usage which has followed upon them, they appear to me to be conclusive against the claim now made by the pursuers.

Upon this question, as to the weight due to contemporaneous and adverse usage, as interpreting the true meaning and effect of deeds or Acts of Parliament which are in any respect doubtful or obscure, I can add nothing to the views which are so fully explained by Lord Ormidale in his opinion on this branch of the case, in which I entirely concur, based as that opinion is upon the application of rules of construction which have been laid down in a series of decisions in the Court of last Resort of the most authoritative description, as well as upon the decisions applicable to the analogous question of the admission of females to the elective franchise to which he refers.

The pursuers having thus, as I conceive, failed to show that they have any legal right to demand admission to the privileges of students in the University, while it is beyond question, on the other hand, that under the foundation deeds males have that right; the remaining branch of this case must, I apprehend, be dealt with on the footing that the main fundamental object and purpose of the founders of the University of Edinburgh was to establish an institution for the education of the male sex; and that the University is, therefore, one which by its constitution is limited to males. And if that be so, it appears to me to follow that the defenders will be entitled to be assoilzied from the whole conclusions of the present action, unless it can be shown that, in respect of some Regulations which the governing body of the University was empowered to pass, the pursuers are entitled under this action to insist upon being admitted to the study of medicine to the extent that may be necessary to enable them to proceed to graduation, and are entitled to obtain a decree to that limited and qualified effect.

The disposal of this question, however, involves the consideration of the true meaning and effect of the Regulations passed by the University Court in November 1869; because two very different constructions appear to have been put upon them. In one view of these Regulations, they may simply mean that women may be admitted to study medicine in the University in separate classes if the Professors of the Faculty of Medicine see it to be proper to have separate classes for them, without laying down any rules relative to graduation or other University privileges. And if this be the true meaning and only import of the Regulations, they appear to me not only to afford no support to the pursuers' action as laid, but insufficient also to warrant a declaratory decree to any limited and qualified extent. And they are in that view, moreover, regulations which I am not prepared to say that it may not have been within the power of the University Court to adopt.

But there is another view which may be taken of them, and that is the one which, I understand, has been adopted and given effect to by the Lord Ordinary, viz.,—that they amount, and were intended to amount, to a declaration that women were entitled to be admitted to the study of medicine in the University as matter of legal right, and to all the rights and privileges of students, including graduation; subject only to the condition of the pursuers being able to obtain instruction in separate classes. And if this be the true meaning of the Regulations, they cannot, I conceive, be founded upon by the pursuers to establish the claim, or any part of the claim, made by them under the present action; unless it can be shown that the University Court, as the governing body of the University, had a discretionary power, either at common law or in respect of the provisions of the Act of 1858, to make regulations for the admission of females as well as males to the rights and privileges of students.

Now upon this point I am very clearly of opinion that at common law the governing body of a University of this description has no power to alter the constitution of the institution with the management of which they have been entrusted. And I have been unable to look upon the Regulations as so interpreted, and which are to have the effect of conferring upon females the right of admission to all the privileges of a University which was founded exclusively for male students, in any other light than [that of an alteration of the constitution of the University which it was beyond the power of governing body to enact. Neither have I been able to bring myself to see that, under the provisions of the Act of 1858 any greater powers in these respects were conferred upon the University Court. That Act of Parliament was passed for the better government "and discipline of the Universities in Scotland" as then constituted; and by the 12th section the University Courts are empowered "to effect improvements in the internal arrangements" of those Universities; but no power is given to change their constitution, which must, I think, be held to be that of Universities founded for the education of male students alone.

Upon these grounds, therefore, I am of opinion that the judgment under review ought to be recalled, and that the defenders are entitled to absolvitor from the whole conclusions of the action.

Opinion of Lord Gifford.

After fully reconsidering the whole case, with the benefit of the written argument which has been submitted, I adhere substantially to the views expressed in the Note which I appended to the Interlocutor now under review.

Looking to the views maintained in the written argument now before the Court, I may be allowed to make one or to explanations on points as to which perhaps there is room for misconception.

I did not intend to decide—I do not think it is competent in this action to decide—any general question as to the constitution of all the Universities in Scotland, or even any general question as to other studies or other curricula than the studies and curriculum enacted in the University of Edinburgh for the profession of medicine. The judgment which I pronounced applies exclusively to the University of Edinburgh, and is confined to the case of ladies studying therein "for the profession of medicine." It rests entirely and exclusively upon the Regulations passed by the University Court on 10th November 1869, and approved of by the Chancellor on 12th November following; and in my view the judgment does not and cannot go beyond these Regulations. I am of opinion, on the one hand, that the pursuers cannot claim anything which these Regulations do not give them expressly or by necessary implication; and, on the other hand,

that the Senatus of the University, who are the only defenders, cannot refuse to give effect to these Regulations according to their true and fair intent and meaning.

In pronouncing the judgment under review, therefore, I simply intended to find that the Regulations were valid and binding, and that the University Court, so far as the Regulations related to their functions, were bound to carry them out, and to give them effect; and I endeavoured to read the Regulations so as to ascertain what were the rights of the lady students and the duties of the Senatus under these Regulations. If the judgment in any respect goes beyond this, and beyond the enforcement of such rights and duties, then I have erred.

Apart from the Regulations, and independent thereof, I am of opinion that the ladies could not as a matter of right demand admission as students in the University. Without these Regulations the answer would be conclusive, that there were no arrangements made for the instruction of female students in medicine; and I know of no power short of statute which could compel the University authorities of any University to make such arrangements. Arrangements of this nature must almost of necessity be different in different Universities. It may be easy and expedient in one University to make arrangements for the instruction of females either in medicine or in music, or in any particular science, when it would be impossible or inexpedient to do so in another University. In all cases it appears to me the matter is one of arrangement to be effected by the constituted authorities of each University—an arrangement which cannot be compelled beforehand or forced upon any University, but which, when once made and validly enacted, must be obeyed and carried out by the individual members of the University, and by the subordinate bodies of which the University consists. A small University is often not in a condition to give even to male stutends a full curriculum in any particular science. It would be absurd to insist that such a University shall make arrangements for a full curriculum in medicine for ladies. A large University may, conceivably at least, easily and without violating either principle or propriety, arrange for giving a full medical education to ladies in separate classes or otherwise. It seems to me that there is no authority for holding that it is in all cases incompetent and illegal to do so.

For in the present case the question really is, Was it competent to—was it in the power of—the University Court, which is the highest authority of the University, to make the arrangements for female students in medicine which are contained in the Regulations of 10th November 1869? I can see no incompetency and no illegality in these Regulations. They transgress no statute, they offend no rule either of law or of morality; and if they introduce a novelty, this is no more than could be said of many improvements which are loudly called for in the interests of education. The University Court is the ultimate Court of appeal for the regulation of the whole studies within the University. To it is finally committed by statute the discretionary power "to effect improvements in the internal arrangement of the University," certain safeguards being provided under which this power shall be exercised. I am of opinion that the University Court legitimately exercised this power in enacting the Regulations now in question. I think they did so in due and competent form. I think the formal objections taken by the defenders, the Senatus, are quite unfounded; and it humbly appears to me that to refuse to give effect to these Regulations would be virtually to interfere with the final discretion vested in the University Court, and to review a decision of that Court upon its merits. I think the Court of Session cannot do this; for it is not to the Court of Session or to the civil courts of the country that the internal regulations of the University are committed.

Still further, if it be intended to challenge the abstract legality of the Regulations of 10th November 1869, I think it very unfortunate that this question should arise in the present form. The legality of these Regulations was unchallenged for nearly three years. They have been acted upon by the pursuers, and it may be by others. Their validity and their legality has been assumed even by the Senatus itself; for the attempt to get the Regulations altered or repealed, which was made by the Senatus on 11th November 1871, implies that until repealed the Regulations were effectual. On the faith of these Regulations the pursuers have been allowed to prosecute their studies, to spend their time and their money; and now, without any action of reduction, without any declarator of illegality, and without calling the University Court or the University Council, or the University itself as a corporation, it is demanded that these Regulations shall be utterly disregarded and treated as an absolute nullity. I am not prepared to do this. I think that to do so would be unjust as well as illegal.

I am quite aware that in the argument and pleadings for the pursuers they have maintained rights independent of the Regulations. They have put forward some claims not warranted by the Regulations, and some claims inconsistent therewith. They have pleaded their case much too high: for example, in their demand for mixed classes instead of separate ones, and in various other particulars. The conclusions of the action are far too broad. But this is no good ground for throwing out the action altogether. Because a pursuer asks too much is no reason for refusing that to which he is justly entitled.

In reference to this point, however, I may remark that perhaps the judgment under review falls short in not giving *absolvitor* from some of the conclusions of the summons instead of merely dismissing them. I certainly intended to decide as emphatically that the pursuers are not entitled to demand or compel teaching in mixed classes, as to decide that they are entitled to attend separate classes, when such are provided, and to all the privileges which successful students can claim. This, however, is matter of form rather than of substance, and while it may modify the form of the interlocutor, it would not affect the grounds upon which I think judgment should proceed.

I have only one other remark to make. It is true that the judgment does not contain in itself, and cannot contain, the means for securing to the pursuers, or compelling the defenders to give to the pursuers, a complete medical education. This may require the appointment of additional professors, or the sanction of extra-academical teaching, and the Senatus, who are the sole defenders, have no power by themselves to do this. It is possible, therefore, that the ladies, for want of teachers, may be hindered in getting their degrees,

but this seems to me to be no reason for not enforcing the Regulations so far as they go. Above all, it seems to me no reason for negativing the demand of the ladies that if they procure the teaching, and if they successfully complete their studies, they shall be entitled to the degree which is the natural and appropriate reward of the successful student.

The Opinion of LORDS MACKENZIE and SHAND.

The rights claimed by the pursuers, and which they have raised the present action to enforce, are distinctly set forth in the conclusions of their summons.

By these conclusions the pursuers seek to have it found and declared, *first*, that they are entitled to attend the classes *of any of the professors* in the University of Edinburgh, and to receive instruction from the professors upon payment of the usual fees; *second*, that they are entitled to receive such instruction in the University as is required to qualify for graduation in medicine; *third*, that on compliance with the University regulations as to attendance on classes and otherwise, they are entitled to proceed to examination for *University degrees; fourth*, that the Senatus Academicus is bound to provide such instruction to the pursuers, and thereafter to admit them to examination as candidates for medical degrees, and, on their being found qualified, to recommend them to the Chancellor of the University for such degrees; and *fifth*, that the Chancellor is bound to confer such a degree upon any of the pursuers found qualified, and so recommended. The pursuers further conclude that the Senatus Academicus should be ordained to make regulations whereby they may receive such instruction in the University as is required to qualify for graduation in medicine; and, in particular, that they should direct and appoint the various medical professors to permit the attendance of the pursuers upon their classes along with the male students, or otherwise to teach the pursuers, and any other women who may constitute themselves into a class, separately from the male students, upon payment of the proper fees; and that the Senatus Academicus should be ordained to admit the pursuers to examination for medical degrees, and, on their being found qualified, to recommend them to the Chancellor for such degrees; and that the Chancellor should be ordained to confer such degree upon any of the pursuers who may be so recommended.

Under these conclusions the pursuers maintain that they are entitled to the whole rights and privileges competent to male students in the University of Edinburgh, subject only to the condition that their instruction in medicine shall be conducted in classes confined entirely to women, should the Senatus Academicus so direct. The question thus raised for the decision of the Court is,—whether the pursuers, being females, are by the law and constitution of the University of Edinburgh entitled to the rights and privileges claimed by them?

In order to arrive at a satisfactory conclusion upon this question, it seems to be necessary to consider, *first*, what the rights of women are, according to the law and constitution of the University of Edinburgh, independently of the Regulations passed on 10th November 1869, by the University Court, for the education of women in medicine in the University; and *second*, whether by these Regulations any rights were conferred upon women which can support the pursuers' claims.

I. It cannot, we think, be disputed that when the University was founded, and its charters were granted and ratified, the sole object contemplated was the education of the male youth of the community in languages, philosophy, theology, medicine, law, and the other liberal sciences, and that the education of women in the University was not thought of or provided for. The education of women in the various branches taught in Universities was contrary to the social conditions of all classes and the opinions of the time; and the arrangements contemplated by the charter founding the University of Edinburgh, and common to the other universities of Scotland, rendered the admission of women at that time impossible. The charter of 1582 shows that it was intended that the professors and students should dwell within the University; and, accordingly, the students at first lived a collegiate life.

The usage which has followed is in accordance with the view that the University was founded for the purpose of conferring a University education upon the male youth of the community only, because, from the time that the University was founded down to the year 1869, when the abovementioned Regulations were passed by the University Court, no woman has been admitted, or has even claimed to be admitted, within its walls as a student. In none of the other Scotch Universities have any women ever been admitted as students. This long-continued and uninterrupted usage of nearly three centuries shows, in our opinion, what was the intention of the founder, and what is the true interpretation of the general words in the charters and Act of Parliament establishing the University of Edinburgh, *nam consuetudo est optima legum interpres.* An illustration of the force and importance of long-continued usage is to be found in the cases which occurred in this country and in England regarding the right to the franchise claimed by women after the passing of the Acts, in 1867 and 1868, to amend the laws relating to the representation of the people. The decisions in these cases appear to us to be direct authorities on the question now under consideration, and against the view entertained by the Lord Ordinary, that the right of women existed in abeyance, or depended only upon the University authorities making regulations and arrangements for its exercise.

Having regard, then, to the terms of the University charters and of the Act ratifying the same, and to the long and uninterrupted usage which has followed thereon, we are of opinion that women are not entitled by the law and constitution of the University of Edinburgh, as the same existed in 1869 before the Regulations of the University Court were passed, to attend the classes of the professors, or to receive instruction within the University as students, or to obtain University degrees.

The pursuers in support of their claims have founded upon what they allege to have been the practice of the University of Bologna, and of other foreign Universities from the earliest times. It appears to us that the pursuers have failed to establish that women were admitted as students in any of these Universities until very recently; and further, that even although this had been estab-

lished, such practice could not affect the decision of the question now raised by the pursuers, which must be determined by the law and constitution of the University of Edinburgh, and not by the constitution or by the practice of any foreign University.

II. The next question for consideration is—Whether the pursuers are entitled to prevail in the conclusions of their summons, in respect of the Regulations for the education of women in Medicine, passed on 10th November 1869 by the University Court? In dealing with this question we think it right to say that these Regulations are contained in the extract from the Minutes of the University Court, of date 10th November 1869, which were approved of by the Chancellor on 12th November 1869, and that these Regulations are not to be extended by the previous resolutions of the Medical Faculty or of the Senatus Academicus. It is only the University Court which is empowered by the Universities Act to make improvements in the internal arrangements of the University.

1. By the Universities (Scotland) Act 1858, section 12, the University Court is empowered "to effect improvements in the internal arrangements of the University, after due communication with the Senatus Academicus, and with the sanction of the Chancellor." But there is no power conferred upon the University Court to make any change upon the law and constitution of the University. The power given is to improve the internal arrangements of the University. This is administrative, not legislative, power—power, recognising existing rights, to make suitable arrangements for their exercise, but not power to confer the rights of students on a class or division of the community who had not such rights before.

By the Regulations of 10th November 1869 the University Court enacted that "women shall be admitted to the study of medicine in the University;" that "the instruction of women for the profession of medicine shall be conducted in separate classes confined entirely to women;" and that "the medical professors shall for this purpose be *permitted* to have separate classes for women." Considering, as we do, that women were not then entitled by the law and constitution of the University to be admitted as students of the University, we are of opinion that the University Court was by these Regulations (limited as their extent in our opinion is) going beyond their legitimate province of effecting an improvement in the internal arrangements of the University, which was alone within its statutory power, and was proposing to make a fundamental change upon that law and constitution, and accordingly that these Regulations are *ultra vires* and illegal. The University was founded by Royal authority, and by Royal authority alone can its constitution be altered and extended.

2. But even on the assumption that the University Court could competently make these Regulations, we are of opinion that they do not support the pursuers' claims. All the rights and privileges competent to University students are not thereby conferred upon women. These Regulations must be read as a whole, and so dealing with them, all that was thereby conferred upon women was the permission to receive instruction in medicine in separate classes in the University from such of the medical professors as chose to give them such instruction. No professor was enjoined to give them such instruction, and the whole medical professors might have refused to give it. A number of them did so, and unless they change their minds the pursuers cannot, as they admit, complete the course of study within the University required for a degree. Further, nothing is said in these Regulations as to the right to a degree; and, so far as we can see, there are no provisions which, even by implication, confer upon women, who may receive a full University course of instruction in medicine, the right to a degree on passing the usual examinations.

3. It appears to us also, although we do not rest our opinion upon it, that, under the ordinances of the University Commissioners, enacted under the powers conferred by the Universities Act with reference to the University of Edinburgh, men are alone entitled to receive degrees in arts and medicine. These ordinances can only be altered under section 19 of the Universities Act by the University Court, with consent of the Chancellor of the University, and with the approval of Her Majesty in Council.

On these grounds, we are of opinion that the Interlocutor of the Lord Ordinary should be recalled, and that the defenders should be assoilzied from the conclusions of the summons.

At advising—

Lord Cowan—The opinion which I have formed in this important case, after repeated consideration of the very able written pleadings now before the Court, is in conformity with that adopted by those of the consulted Judges who consider that the defenders should be assoilzied from the conclusions of the summons.

The main propositions, sought to be established in this action are clearly enough stated in the 1st and 2nd pleas in law set forth in the record, viz., (1) That according to the law and constitution of the University of Edinburgh women are entitled, on payment of matriculation and Professors' fees, to attend the classes of any professor as students, and are entitled to demand instruction from such professor, which he is bound to give them; and (2) that according to such law and constitution women are entitled to obtain degrees in medicine on proving that they are qualified in point of attainments and knowledge for that distinction. The conclusions of the summons distinctly raise these matters for the decision of the Court, on the ground of legal right in the pursuers to have decree of declarator—(1) that they are entitled to attend the classes and to receive instruction from any of the professors on the same footing with other students; (2) that they are entitled to have instruction for graduation in medicine; (3) that they are entitled to have such instruction as will qualify them for examination for degrees; and (4) that the defenders are bound to act so as to give full effect to the rights of the pursuers thus to be judicially declared. Then follow petitory conclusions, in which, as the necessary sequence, decree against the defenders to give effect to these rights is demanded—without which the mere declarator sought would be useless for any practical purpose.

Two questions are thus raised for consideration, on both of which we have the opinions of the consulted Judges. The primary discussion relates to

the legal rights maintained by the first and second pleas; and the second question has regard to the special position in which the pursuers are placed under the Regulations of November 1869 and relative proceedings of the University authorities. To some extent these questions run into and affect each other, inasmuch as it may be said that the Regulations of November 1869 have affected, and now form part of, the law and constitution of the University. But the course of pleading and the opinions of the consulted Judges require that the more general question should be in the first place separately considered.

On this all-important question, however, it is unnecessary for me to dwell, seeing that all the consulted Judges, without exception, have returned opinions to the effect—that the legal rights asserted by the pursuers cannot be maintained or enforced irrespective of the Regulations and their effect on the constitution of the University. In this view I entirely concur. I cannot hold it to be doubtful that by the original charter and Parliamentary ratification in 1621, and the other documents forming the foundation of the University of Edinburgh, the institution was framed on the footing of providing for the education of male students alone; and that any doubt suggested as to the true effect and meaning of these constitutional documents, because of the non-express exclusion of females, has been removed by the usage that has followed for three centuries. The reasoning on this point contained in the opinion of Lord Ormidale has my entire concurrence.

On this essential part of the argument, it requires to be kept in view, that the exclusion of females does not rest, as some of my brethern consider, on the mere want of regulations enacted by those who had, prior to the statute of 1858, authority to determine the internal arrangements for the education of students, *i.e.*, the Magistrates and Council of the city. I cannot concur in the view that if females had presented themselves for matriculation their demand was open to refusal solely on the ground that no regulations existed such as those recently passed: Nor can I accede to the proposition—which is at the basis of the opinions of Lords Deas and Jerviswoode—"that it was the absence of any such regulations, and not the absence of power to make regulations, which stood in the way." The objection, as I view it, does not rest on so shallow a ground, but springs from a deeper source, viz., that no power was conferred by the original foundation of the University on any parties connected with its government to admit females for education within its walls. Being an institute for male students, and actually regulated and managed accordingly, it formed an inherent part of its constitution that females could not be admitted to its benefits. A radical change behoved to be made by the Legislature or the Crown ere the admission of female students could have been or can be sanctioned by the University authorities.

On this branch of the argument, however, I may observe that the proposition referred to is scarcely consistent with the denial of the legal claims asserted in this action. Supposing the Magistrates and Council prior to 1858 to have had power to pass regulations for the admission and education of female students in the University—it would seem to me that they were under obligation to have exercised that power, and might have been compelled to do so. It cannot be thought that the non-exercise of powers of regulation actually possessed should be permitted to exclude from instruction any part of the community, for whose behoof the University was established. The possession of the power to make regulations with regard to the education of females as much as of males may fairly enough be held to lead as a necessary inference to the recognition of a legal right in female students to have instruction. Had I been able to adopt the proposition that the University authorities all through its existence had power to pass such regulations as are before us, I would have been inclined to sanction rather than to refuse the legal right.

This leads directly to the second matter for discussion, viz., the legality and effect of the Regulations of 1869. Viewing this question in its purely legal aspect, some matters have been stated in the argument which require to be eliminated from its true merits.

I cannot consider it at all legitimate to bring into this argument a discussion as to the intellectual superiority or inferiority of the sexes. And it appears to me equally inadmissible to urge the more peculiar fitness of females for certain departments at least of medical science and practice. However weighty such considerations may be in estimating the propriety of a new institute, they are quite out of place in a discussion like the present, which depends so entirely on the enquiry whether by the Regulations a change so important as the admission of females within its walls has been effected on the constitution of the University.

Again, some observations have been made in the course of argument for the pursuers, and also in some of the opinions, with regard to the competency of questioning the legality of these Regulations on the ground of their being *ultra vires* of the University Court, unless there had been instituted a proper action of reduction to which all the University authorities had been called as parties. The Lord Ordinary in the Note to his interlocutor makes special mention of this as objectionable, and adheres so far to the same view in his supplementary Opinion. It is essential that there should be no mistake as regards this matter. My understanding is that the pursuers themselves plead no such formal objection, and it would indeed have been singular had it been otherwise, seeing that the defence of all parties not having been called was specially repelled at an early stage of the litigation. Although the Senatus Academicus be alone called as defenders, this discussion must be held to proceed on the same footing as if the University Court, or the University Council, or the University itself as a corporation, had been called as parties. The question whether what was done by the University authorities was beyond or within their power, is not to be put aside or in any way affected by the form in which the action has been brought. The effect of any other conclusion would merely be to delay the decision of the cause till these parties were in the field. And this certainly is not desirable for any of the parties interested, least of all for the pursuers.

Another observation I must make, in reference to the jurisdiction of this Court in such matters as the present. The Court have no power to review or to interfere with any legitimate regulations passed by the University authorities regarding the internal arrangement or management of

the institution. It is only when it is alleged by individuals or by corporate bodies whose rights or interests are at stake that these authorities have gone *ultra vires*, and enacted Regulations which they had no power at common law or under their statutory constitution to enact, that their proceedings can be at all interfered with judicially. And if the Regulations of 1869 were within their powers, they are altogether beyond the control or review of this Court. There is no jurisdiction here to that effect. And assuming the admission of females to the medical classes to have been within the power and competency of the University Court, the Regulations might have sanctioned the education of students, male and female, in mixed classes; or might have been made applicable, and may still be, to the admission of females, not to the medical faculty only, but to their admission as students in the faculty of arts, or of law, as well as of theology. In short, assuming always the power to admit females to the University, no regulation passed by the authorities with regard to their education, whether along with or separate from the other sex, could be reviewed or in any respect controlled by this Court. To say that hitherto the power has been acted on with so much discretion as not to call for "judicial interposition," is entirely to mistake the matter. No such interposition could legally take place. And here, in my apprehension, lies the chief importance of the inquiry whether the Regulations of 1869 were or were not within the power and competency of the authorities by whom they have been sanctioned.

Keeping these observations in view, I observe *first*—As the basis of this inquiry, it must be held, if the foregoing reasoning be well founded, that anterior to the Act 1858, and according to the law and constitution of the University as then established, male students alone could be received within its walls for education. And taking this to be clear, it is for consideration whether the statutory powers conferred upon the University Court by the Statute 1858 confer on that Court authority so far to alter or modify the established constitution of the University as to admit female students to be matriculated with a view to examination and graduation, whether for the medical or any of the other faculties. This seems to me to be the issue on which the decision of this case depends.

Now, *second*, the statute 1858, which conferred so great a boon on the higher educational seminaries of Scotland, sets forth in its preamble—that it is expedient for the advancement of religion and learning "to make provision for the *better government* and *discipline* of the Universities in Scotland," "and for *improving* and *regulating* the *course of study therein.*" All the statutory enactments and provisions which follow are in strict accordance with the object of the statute thus announced. The better government and discipline, and the improvement and regulation of the course of study, are alone within the purview of those enactments. A Chancellor is to be elected and a University Court to be constituted in each of the Universities. The powers of the Senatus Academicus are regulated, and a General Council is appointed to be constituted, to consist of the members having the qualification specially set forth. Then by section 12 the powers conferred on the University Court are enumerated, to which it is not necessary to refer for the purpose of this argument, farther than to notice the 2d and 3d sub-divisions of the section. By these the Court is (2) to effect improvements in the internal arrangements of the University, after due communication with the Senatus, and with the sanction of the Chancellor, and (3) to require due attention on the part of the Professors to regulations duly enacted as to the mode of teaching and all other duties imposed on them. The University Court has no other power or authority whatever conferred on it by the statute. Assuming the passing of the Regulations of November 1869 to have been within their power, I do not think that there is any well-founded objection to them in respect of the steps taken, or of the mode adopted in their enactment, as is contended for by the defenders. The radical, and to my mind fatal, objection to which they are exposed, is that the Court exceeded its statutory power in recognising by these Regulations the right of female students to matriculate with the view to examination and graduation, as the inevitable result in the event of success in their studies. I consider this to be an essential innovation on and change of the law and constitution of the University as then established. Such enactment cannot be regarded as falling within the objects of the statute, and as little in my apprehension can it be regarded as an "improvement in the internal arrangements of the University." Taking the condition of things as they stood under the existing constitution, and, *inter alia*, the fact that the only students admitted within its walls were male students, the Court are authorised to effect all manner of improvements on the internal arrangements made or to be made for their education; and for that end to take care that the Professors pay due attention to such regulations as are enacted by the Court as to the mode of teaching and their other duties. In all this I do not perceive a trace of intention on the part of the Legislature to confer any authority, or of power actually conferred, to innovate on the established constitution of the Universities of Scotland in a matter so essential and inherent as that with which these Regulations have dealt, and so to change their whole character as to recognise a right in females to matriculation, or, in the words used by the senior counsel for the pursuers at the oral pleading, and not abandoned in the written argument, to make provision for boys and girls being equally eligible for matriculation in all or any of the faculties. I seek in vain for any expressions that can be held to have that import; and I see no provision empowering the Court to compel the Professors to instruct any other class of students than such as have from the institution of the University been admitted within its walls.

And, *third*, the admitted inability to give practical operation to the regulations by judicial decree, may be fairly enough viewed as a conclusive test in the present inquiry. The proposal is that the Court should to a certain extent and effect recognise the rights claimed by the pursuers, but, *quoad ultra*, assoilzie the defenders from the declarator, and dismiss the conclusions which seek enforcement of those rights. The Senatus has no power to compel the Professors to give the required instruction; and we have seen that the University Court has no authority to pass regulations to secure such instruction at the hands of the Professors. Hence it is that an operative decree cannot be pronounced, and thus it is a purely innocuous declaratory judgment which is suggested as fitting in the circumstances to be pronounced. It appears to me

quite inadmissible, both in form and in principle, so to deal with such an action as the present; and, so far as I can recollect it as a course quite unprecedented. However this may be, the conclusion at which I have arrived makes it unnecessary for me to say more than that any such limited decree would, as I think, be inconsistent with the grounds of judgment applicable to the case.

For the reasons which I have thus shortly stated, and the other grounds of judgment referred to in the opinions of the consulted Judges who have arrived at the same conclusion, I am of opinion that the defences stated to the action should be sustained.

Lord Benholme—Many questions have been discussed in this case which do not appear to me to advance the true solution of the claims of right involved in the pursuers' summons.

That there is nothing improper or unbecoming in women, if duly qualified, practising medicine: That women who are so employed, especially in midwifery, ought to receive a scientific education beyond that which mere empirical practice can secure for them—are questions which I conceive can be answered only in one way. From the earliest times of which there is any record, such female practitioners have been not only admitted, but found necessary. And in this department, as in every other, knowledge is power; and the welfare and even the safety of the patient may be measured by the skill of the attendant. The present summons raises no such questions; nor are its conclusions to be dealt with by any such considerations. Females may obtain medical instruction by means of what has been termed extra-mural teaching, without intruding into those institutions which are appropriated, and necessarily appropriated, to the other sex.

The main and most important question we have to determine in the case is, whether women are entitled to matriculate, and to obtain their education in the University of Edinburgh just as if they were males? Whether women, if duly qualified, are incapable of holding degrees, or of receiving academical honours, are totally different, and, in my opinion, altogether subordinate questions. It is true that in the present summons the latter question is put only in connection with and as a consequence of the former. But I think it necessary to distinguish those two matters of inquiry, because I observe that in the argument for the pursuers it seems to be maintained that because foreign universities have in several instances conferred degrees upon women, therefore it must be concluded that they allowed the matriculation and instruction of female students at these universities. But if I mistake not, there is no well authenticated instance of the latter practice, although undoubtedly there are many instances of the former.

The two things are in themselves altogether different; and have no necessary connection. The Universities of the continent might well have the privilege of marking out for honors and distinction accomplishment and learning in females as well as in males. But that females should be entitled to qualify themselves for such honors by obtaining their education in Universities, is a totally different matter. Now that is the primary object of this summons, without which the pursuers would place no value upon any other concession. No one conclusion of their summons embraces the matter of degrees except in connection with University education as a preliminary to the attainment of such distinctions.

The argument in this case has been divided into two parts—*First*, as to the original constitution of the University; and *secondly*, as to the effect of certain modern Regulations, passed in 1869 by the University Court, under the supposed sanction of an Act of Parliament in 1858.

As to the first point, I am clearly of opinion, both in respect of the language of the deeds of foundation and also the uniform practice of the University, that female students were not admissible within it for matriculation and education. I subscribe in general, on this part of the case, to the able and exhaustive judgment of Lord Ormidale. I have no idea that the former Governors of the University, the Magistrates and Town Council of Edinburgh, or any others, could have had power to authorise the admission of women as students in the University.

In regard to the Regulations of 1869, I am of opinion that the Act of Parliament passed in 1869, under which the Senatus professed to act in passing these Regulations, gave them no power of so far subverting the original constitution of the University as to admit female students within its walls for matriculation and regular education in any of its faculties. On this branch of the case I have had the privilege of seeing and deliberately considering the judgment which my brother Lord Cowan has just now delivered, and I concur with his Lordship in all that he has said.

To conclude, I agree with him, and with a majority of the whole Judges, in thinking that the defenders ought to be assoilzied from the whole conclusions of the action.

Lord Neaves—I am of opinion that the interlocutor under review ought to be recalled, and that the defenders ought to be assoilzied from the whole conclusions of the action.

I am of opinion that the Universities of Scotland—and, by the nature of the case, I feel compelled to look incidentally to the whole University system—were instituted and maintained for the special and exclusive purpose of conferring the benefits of the higher education upon male students without the necessity of their resorting for that purpose to foreign countries. The three earlier of the Scotch Universities, which were established in different parts of Scotland and at different periods during the fifteenth century, and that of Edinburgh, more immediately here in question, which had its origin about the time of the Reformation, and was ultimately established in the beginning of the seventeenth century, had all the same object—one which Themistocles declared to be so noble—that of converting a little state into a great one. That object was successfully attained in Scotland, and attained mainly, as I conceive, by means of those great educational arrangements which were designed to produce able, learned, and accomplished men, for the salvation of the state and the advancement of the public welfare—Learned and able divines for the service of religion, learned and able lawyers for the practice of the law, skilful and enlightened magistrates and judges for the administration of justice, and wise and prudent politicians and statesmen for the great purposes of national legislation. The purpose, I

take it, was to confer a complete and generous education, which Milton has defined to be, "That which fits a man to perform justly, skilfully, and magnanimously all the offices, both private and public, of peace and war."

I need not dilate upon the considerations which lead me to take this view of the original design of these institutions, for the real evidence on that subject must impress itself on every one; and I think I may say that the whole of the consulted Judges have arrived at the conclusion that the purpose contemplated in founding these Universities was the education of young men. That view seems to be confirmed by a general reference to the charters of the Universities, to the history of the country, to the state of public feeling upon such subjects; and I agree with the majority of the consulted Judges, that the long usage which has followed, and which all of our brethren admit to be an important element, is here a conclusive consideration. From the year 1411 to about the year 1860, a period of 450 years, there is no instance producible of a woman having been educated at any Scottish University. I need not dwell on the legal importance of that fact, which is so well demonstrated and enforced in some of the opinions we have received; and I do not think that any satisfactory or even plausible answer has been made to it.

The attempt at an answer consists in this, that the resort to an University is merely optional—what is called in law *res meræ facultatis*, a mere privilege—which the party entitled to it may enforce or not as he pleases, and which cannot be lost *non utendo;* and the case is put of an abstinence from University study by Roman Catholics, Jews, Indians, or Negroes. It is asked, "Can it be said that the University could not, by vote and resolution, have admitted these persons?" In my view of the matter, no vote or resolution would be needed for such persons; they would be admitted as a matter of course, because no legal principle could be assigned for excluding them. The general law does not make any distinction of religion in matters of right, and, where the national will does so, it operates by imposing a test upon admission. Where there is no test there is no foundation for a plea of exclusion. As little, and perhaps even less, can it be said that there is any ground for excluding students in respect of the colour of their skin. But the material element of consideration here is, that the law does recognise the difference of sex as an established and well known element, leading sometimes to the exemption, and sometimes to the absolute exclusion, of women from a variety of duties, privileges, and powers. The Roman law, the great parent of our own system, laid this down in the clearest and strongest manner:—"*Feminæ ab omnibus officiis civilibus, vel publicis remotæ sunt: et ideo, nec judices esse possunt, nec magistratum gerere, nec postulare, nec pro alio intervenire, nec procuratores existere.*"

To a great extent this has always been our own law. In some points it has been relaxed from special considerations; in others it has even perhaps been extended. Women could not be tutors by the Roman law, but they are allowed to be so by our law, from our having come to consider that tutory is not, as the Romans regarded it, a public office, but merely a private and domestic charge, for which women might be perfectly well qualified. They were long excluded with us from being witnesses except in cases of necessity, and they are now competent as instrumentary witnesses only as the result of recent legislation. From judicial offices they have always been excluded, and are neither compelled nor qualified to act upon juries,—unless it be on that limited kind of jury which must consist entirely of females. Generally speaking, it will be conceded that no political office can be held by any female, with one illustrious and solitary exception.

In this state of the law—there being an undoubted category by which females, in consequence of their sex, are excluded from certain functions competent to males—it becomes a question depending upon the general evidence, and upon the actings of parties, whether the privileges, honours, and functions connected with University education were designed for men alone, as they have been so enjoyed, or were designed for young men and women indiscriminately.

This seems to me to be the first and great question in the case. I am inclined to think that it is the only question, but it is certainly the leading question, and it is put forward as such by the pursuers in their first declaratory conclusion—namely, that it should be declared "that the pursuers are entitled to attend the classes of any of the professors of the University of Edinburgh, and to receive instruction from the professors in said University, upon making due payment of all fees exigible from students at the University for said instruction." This is a very clear proposition, and one which, if decided in the pursuers' favour, would be conclusive of the whole cause. It is very plain what is its meaning, and what would be its effect. The Universities were undoubtedly instituted for the education of male students. Were they also and equally instituted for the education of females? If so, every female presenting herself as a student at the door of the College is entitled to be admitted to any class on the usual terms. If there is not this equality, have male students a preference, and to what extent and effect, and on what clause or rule of law does that preference rest? It seems to me impossible to take any middle course in this matter as to abstract right, or to draw a distinction at all between male and female students, except by declaring that, while males have a right to a University education, females have none. This accordingly seems to be the opinion unanimously arrived at by all the consulted Judges, though I cannot say that the statement of their views, or the grounds of their opinions, appear to me to be clear or consistent. The Lord Ordinary who decided the case has now explicitly stated, what he had not said before, that, apart from the recent Regulations, he is of opinion that the ladies could not, as a matter of right, demand admission as students into the University; and he remarks that perhaps the judgment under review falls short in not giving absolvitor from some of the conclusions of the summons, instead of merely dismissing them. I infer from these passages that the Lord Ordinary now thinks the defenders entitled to absolvitor from the ladies' claim to attend the classes of *any* of the professors, on the ground that the general right is not supported by the Regulations, which are confined entirely to the medical classes. But in speaking of the claim to a general right, the Lord Ordinary seems to give, as his reason for negativing it, that without the Regulations there were no arrangements made for the instruction of female students

in medicine. Now, this may or may not be a good reason for having excluded females from the medical classes prior to those Regulations. But it seems wholly irrelevant, at least I cannot follow its connection with the question of general right. Had ladies from the first a right to admission to the general classes of the University—to the Humanity and Greek classes, to the classes of Logic and Moral Philosophy, to the Law and Divinity classes? Certainly those branches of instruction needed no special arrangements—at least some of them did not. A woman bent upon learning Greek and Latin needed no special arrangement for following in the footsteps of the many distinguished women who have successfully applied themselves to those studies. If they had no right to attend those classes the exclusion must have rested, not upon matters of mere mechanical arrangement, but upon the principle that the *University life* was not intended for them, but for the other sex.

This leads me to the consideration that very weighty reasons may have operated on the national mind in constituting and continuing the Universities as exclusive schools for the academical education of young men. It is not necessary that we should adopt all the views of our ancestors in this respect. It is enough if we see that such views existed, and were entertained with an earnestness that acted forcibly on the *national will*, which, after all, is the great foundation of all laws and public institutions. It is a belief, widely entertained, that there is a great difference in the mental constitution of the two sexes, just as there is in their physical conformation. The powers and susceptibilities of women are as noble as those of men; but they are thought to be different, and, in particular, it is considered that they have not the same power of intense labour as men are endowed with. If this be so, it must form a serious objection to uniting them under the same course of academical study. I confess that, to some extent, I share in this view, and should regret to see our young females subjected to the severe and incessant work which my own observation and experience have taught me to consider as indispensable to any high attainment in learning. A disregard of such an inequality would be fatal to any scheme of public instruction, for, as it is certain that the general mass of an army cannot move more rapidly than its weakest and slowest portion, so a general course of study must be toned and tempered down to suit the average of all the classes of students for whom it is intended; and that average will always be lowered by the existence of any considerable numbers who cannot keep pace with the rest.

Add to this the special acquirements and accomplishments at which women must aim, but from which men may easily remain exempt. Much time must, or ought to be, given by women to the acquisition of a knowledge of household affairs and family duties, as well as to those ornamental parts of education which tend so much to social refinement and domestic happiness; and the study necessary for mastering these must always form a serious distraction from severer pursuits, while there is little doubt that, in public estimation, the want of these feminine arts and attractions in a woman would be ill supplied by such branches of knowledge as a University could bestow.

In all this I assume that regard is to be had to the average powers of the female mind, and not to the different position of remarkable and exceptional women; and, in reference to this subject, it may be noticed that we are apt to get a false view of the question by comparing extraordinary women with ordinary men, whereas the true rule is, to compare together the ordinary run of both sexes, and then, if we please, to compare the rarer examples of superior excellence among men and women—the Agnesis, the Lady Jane Greys, the Martineaus, and the Somervilles, with the Galileos, the Bentleys, the Adam Smiths, and the Isaac Newtons.

There is no reason why a false delicacy should prevent us from considering the effect which in the public mind must always have been given to the special element of sex in this question. In the first and most elementary schools designed for children there is no reason why both sexes should not be taught together, and in some of these schools there has been thought to be no incongruity in teaching in union not only both sexes, but all ages, as in the General Assembly's school in the Highlands, of which Principal Baird used to tell that a little boy, when complaining bitterly of the schoolmaster's unfairness, and being asked to state particulars, said, "That he had trapsed grannie at her spelling, but that the master would not let him up."

When we come to schools of a higher kind, designed for the more advanced education of pupils of riper years, it has been the uniform tendency to make a divergence, and to keep the education of the two sexes distinctly separate. So far as I know, it has always been the rule in our grammar schools to exclude females. This has certainly been the case in the distinguished Grammar school with which we are all acquainted in this city, and to which many of us owe so much. The same rule has unquestionably been observed in all our Universities, and surely there are very cogent reasons for such a system.

The period of life attained by the youth who are there educated, say from sixteen to twenty-two, is the most of all susceptible of the more tender feelings of our nature; and, without the slightest suggestion of anything in the least degree culpable, how is it possible to feel secure that, with a number of young men and women assembled together at a University, there shall not occur hasty attachments and premature entanglements, that may exercise a blighting influence on all their future life? What effect it might exercise upon their immediate studies it would be hazardous to conjecture. It might, in some cases, produce a strange emulation; it might in others lead to total idleness among these mixed schoolfellows. In any view, he would be a bold man who would collect together at a College, and send out some hundreds of young men and women,

"Inter sylvas Academi quærere verum,"

with whatever number of *chaperons* he might try to guard them.

One other consideration I must here touch upon, as likely to have influenced public feeling in this matter.

Our Universities were necessarily corporations. Our individual Colleges were generally so as well, and it deserves to be remembered that this mediæval kind of corporation was very different from those modern associations on which corporate privileges have been conferred by statute or otherwise. A joint-stock company now-a-days is little better than a trading partnership, and its members require little

that any such innovation would be disregarded by a Court of law as utterly null, just as much as if a regulation had been made by which the wholesale admission of women was accompanied with the total exclusion of men.

Considering, as I do, that these Regulations are beyond the powers of the University Court that passed them—that is to say, in the sense which the pursuers have put upon them—I consider it quite unnecessary in order to set them aside that a reduction of them should be brought. The University Court has no authority over the University or over the Senatus Academicus, except within the province which the statute has assigned to it. Beyond those limits it has no standing, and its dealings and declarations are mere waste paper.

I ought, at the same time, to advert to the view that these Regulations do not import in any practical form what they are said to infer; and in that aspect they are liable to the observation, that they do not at all support the conclusion sought to be deduced from them. Accordingly, the declarator which the Lord Ordinary has pronounced comes, on the face of it, to be a mere *brutum fulmen*, that can have no effect, and can lead to no result.

Women, it is said, are admitted to the study of medicine, but that is only if they find classes that they can attend; they are only to be taught in separate classes, and professors are permitted to have separate classes; but none of the Professors are enjoined to have such classes, and it cannot be said that any Professor is bound to have them, while, as to graduation, nothing whatever is said. This, then, is a decree which is wholly unenforceable, and can establish no legal or available right. It is not the business of a Court of law to pronounce declarators that lead to nothing, and this Court has always refused to do so.

It is clear that the pursuers themselves see the case in this very light, and hence it is that with strict logical propriety they rested their action upon the first of their conclusions, namely, that they are entitled to attend the classes of any of the Profesors upon payment of student's fees. Had they made out that proposition, they would have had a plain and enforceable right, because any Professor refusing tó receive them would then have been guilty of a breach of duty. But as that general right seems now universally given up, and the Regulations alone relied upon by the Lord Ordinary and those Judges who agree with him, there seems no solid ground left on which the action or decree can stand.

Before concluding, I shall make one or two observations on some miscellaneous points that have been referred to in the argument.

I agree in thinking that the examples which have been cited of women connected with foreign Universities have no bearing on the case. Those examples after all come to very little, and chiefly amount to this, that, besides some honorary titles conferred on women, it has happened that in one or two instances a wife or daughter was allowed to read her husband's or father's lectures, an indulgence which might be easily conferred by the autocratic authority of the Pope or Emperor for the time being, to whom the Universities were subject. There is no evidence that at any time there was a resort of female students to the foreign Universities. I think the exposition of the state of the facts on this subject by the Senatus in their case is conclusive to show that any such occurrences were quite exceptional, and besides that consideration, this is a matter affecting social habits and national manners, as to which the practice of our own country is not to be overruled by that which might be adopted among foreign nations.

I may take this opportunity of saying that I consider the attempt of the pursuers to explain the absence of females from our Universities by the condition of women in Scotland and the course of our national history generally, to be wholly unsuccessful. Though naturally and willingly keeping aloof from public life, the condition of Scottish women in the 15th and 16th centuries was anything but slavish or degraded, nor were they considered as very timid or submissive. The evidence of Don Pedro d'Ayala, who was the Spanish Ambassador at the Court of James IV., is conclusive on this subject, and it is acknowledged that he was a keen and correct observer, as his character of that noble but unhappy monarch too plainly shows. The Scottish women, he tells us, "are courteous in the extreme," and, he adds, "they are really honest, though very bold." "They are absolute mistresses of their houses, *and even of their husbands*, in all things concerning the administration of their property, income, or expenditure." Such women could not easily have been stopped from asserting a legal right intended for them, but they were doubtless aware that their proper place was at home, learning to rule their husbands, and bring up their children with those happy domestic results of which Scotland has so much reason to be proud.

In deciding this case, as I am bound to do upon strict legal grounds, I do not take up the time of the Court in saying much as to the personal feelings which it is calculated to excite. I will say this, however, that I have felt great sympathy with these ladies, both as to the object they had in view and as to the position in which they have been placed. I think that, from very natural motives and with the best intentions, but with unfortunate results, their friends have led them to form expectations which could never be realised in the way contemplated. Again, I think it very natural for those ladies who feel a vocation in that direction to wish to make themselves useful, and to earn an honourable independence, and I have no doubt there are departments of medical or surgical practice in which women may be fitly and successfully employed. There was an important branch of surgical practice in which their sex was long exclusively engaged, and which continued indeed to be their appanage from the time when Moses was found in the ark of bulrushes down till the beginning of the sixteenth century, for in 1522 a doctor was burnt alive in Hamburg for personating a woman in an obstetric case. That branch of practice in women's hands may now be looked upon with some contempt, but this I think a great mistake, and it might probably with great advantage be associated with other branches of domestic practice, for which women would be well adapted. This might surely be done without any material change in the constitution of the Universities. The rules of the London University, with its advanced notions, throw some light on this subject, for they refuse to accord to women the honour of graduation. In fact, any grievance of the pursuers arises out of the Medical Act of 1858. It is for the Legislature to determine the matter; but, if it was thought right, that Act might be

or no personal qualification, the great object being to club together their funds and to get a good return from them, with certain special facilities for transference or transmission. A Corporation of that more ancient type to which Universities and Colleges belong was a very different institution. It might well be called a body *politic*, for its functions, its benefits, and its reason for existence were much more of a public than a private character. Many, indeed, of those corporations were, directly and influentially, political, as connected with our municipal institutions.

Now, it appears to me that, as a general rule, the members of such corporations were exclusively male, and that no woman could be a corporator. It is possible that in some peculiar cases, as in some trading Guilds, there may have been a custom of extending, at least partially, the benefits of some corporate privileges to the widows or even to the daughters of guild brethren, but, if so, the exception was both created and limited by the custom. In the higher corporations, I have no idea that any such exception existed. I never heard it suggested that a woman could be a member of the College of Justice—though it has been alleged that the elderly part of the sex is not unrepresented in high quarters. As little do I believe that a woman could claim to be a member of the University; more especially that she could demand to be made a doctor of any Faculty. The Doctorate, it will be remembered, is not a mere trade—it is an office, and in law, I think, a public office—a *munus publicum*. It involved originally the power and the right to teach, and is not a mere license to practise, but a *status* inferring certain privileges of precedence and otherwise, and, as such, recognised by the law.

Upon all these grounds, I am satisfied that the non-attendance of women at the Universities in times past, which is an indisputable fact, was not a mere accident, or a mere arbitrary abstinence from the enforcement of a legal privilege, but arose from a consciousness, shared by them with the whole community, that the Universities were not instituted for them, though women would undoubtedly receive indirectly the benefits the Universities were calculated to confer, in making better men of their fathers, their brothers, their husbands, and their sons.

I have dwelt thus long on a point virtually conceded by all the consulted Judges because I think the condition of matters prior to the late Regulations is of the utmost importance, and because the strength and solidity of the considerations which determined the old practice and constitution of the Universities enable us better to decide whether these could be, and have been, effectually changed in the case of the University of Edinburgh.

The argument here in favour of the ladies' claims arises out of the power given by the late Act of Parliament (21st and 22d Vict. 1858). The University Courts there established have this power conferred on them, videlicet, "To effect improvements in the internal arrangements of the University, after due communication with the Senatus Academicus and with the sanction of the Chancellor;" and on 10th November 1869 the University Court of Edinburgh made a regulation that "Women shall be admitted to the study of medicine in the University."

It is upon this and other relative Regulations that the interlocutor under review must now be considered as exclusively based. This view of their case does not seem to be satisfactory to the pursuers, who complain of it as evading their just legal demands, and leaving their position to rest on a very precarious and slippery foundation. I do not wonder at this feeling, and I confess that, if the pursuers' claims were to be held as entirely dependent on the Regulations of the University Court, I should consider this state of things as a great calamity to all concerned. If the admission of women to the study of medicine is to be held a mere matter of regulation, it is, of course, liable to be changed, modified, or repealed from time to time, as the enacting body may think proper. This is inherent in the nature of such regulations, and the consequence would be that no reliance could be placed on the continuance of the privilege or permission thus given, which might be suddenly withdrawn or curtailed, to the great disappointment and injury of those interested. There could be no fixity of tenure in such circumstances. No class in the community, no individual woman, could trust to medicine as an available professional opening, and no justice could be done to a system thus imperfectly introduced. In the meantime, the question, involving as it does important interests and exciting considerations, would remain a subject of keen and bitter contention, and make the University Court a permanent battle-field between the partisans of the opposing factions. How far this would conduce to the interests of science, and to the peace or prosperity of our Universities, it is not difficult to conjecture.

But, apart from these views, I consider that the Regulations in question, admitting women to the study of medicine in the University of Edinburgh, are wholly illegal, and palpably beyond the statutory power conferred upon the University Courts. Those Courts are empowered to effect improvements in the internal arrangements of the University; but the proposal to confer on women a right of admission to the study of medicine, not previously possessed by them, appears to me to be not an internal regulation, but an external innovation, and that, too, of the most serious kind. I cannot consider it to be mere matter of arrangement whether one-half of the population has or has not a right of admission to the University. To admit those who, in consequence of their sex, had no legal claim to University study, and to declare that they now should have such a claim, appears to me to be an essential and fundamental alteration, or rather subversion, of the established consuetudinary constitution of the University, which it is wholly beyond the power of a University Court to effect.

I do not suppose it can be maintained that the University Court can make any change they please. I should think, even that if the University Court here had enjoined a system of mixed classes of medical study, some of our brethren who are favourable to the interlocutor under review would hold such a regulation as incompatible with "the law and constitution of the University." Nor do I suppose the objection to it would be removed by the adoption of the Pentonville Prison partition, which has been suggested. Or, suppose that the University Court had enacted that any Professor who refused to have separate classes for the sexes should be bound to devote his single class to the exclusive instruction of women, so as to enable them in some degree to make up their lee-way, as in competition with their male friends, I take it

amended by opening a somewhat wider door for medical qualification. The case certainly affords no ground for subverting the constitution of our Universities, or affecting the dignity and weight which belong to the highest honour attending the medical profession. The national object here is, and ought to be, to accomplish and adorn the character of a British physician, not only with all medical and physiological science, but also with the highest philosophy, intellectual and moral, and with all the resources of literature and learning which can aid him in his high functions. Any change that would incur the risk of lowering the standard that now exists, and which we have seen exemplified in so many of our great physicians and professors, is infinitely to be deprecated, and such a danger I think would be incurred by the revolution in the medical teaching of our Universities that has here been attempted to be brought about; while at the same time it would otherwise affect and, in my opinion, deteriorate our Universities in a way unknown to any period of their history.

LORD JUSTICE-CLERK—As I was a member of the University Court of the University of Edinburgh during the period to which part of the proceedings refer, I should gladly have been relieved of the duty of judging in this case. But as your Lordships and the rest of my brethern have not thought that circumstance sufficient to excuse the discharge of my judicial duty, I shall shortly state the opinion which I have formed in this case, which, although not as I think of the general importance attributed to it, is of great importance to the pursuers, and is in itself of considerable novelty and interest.

I may say, in the outset, that I have no opinion to express on the general policy of the admission of women to university instruction or degrees. Whether it is desirable that women should study medicine or any other science in our universities—whether their study there should be in separate or in mixed classes—or whether it is expedient for themselves, or for the University, or for the other students, that they should be so admitted, are questions which we have no occasion and no qualification to decide. On matters such as these, depending on no juridical principle or practice, but on sentiment, on academical experience, or social expediency, our individual views are merely units hardly appreciable on the sum of public opinion. The question of expediency, as far as this case is concerned, has been settled for us by the only competent authority.

On the merits of this action my opinion coincides with that of Lord Deas and the other consulted Judges who adhere to him. Lord Gifford, in the short addition to his Note, has very concisely expressed the views which I entertain. I think this is a question of purely academical administration, and that it should be relegated to that department from which it is unfortunate for all parties that it ever was removed.

I am anxious in the outset to bring the case back from the wide and discursive dissertations by which it has been adorned—and obscured—to the true questions which are raised in this summons. It is an action which has for its scope and its limit to define and enforce the duty of the Senatus Academicus and the Chancellor of the University towards the pursuers, as matriculated students, in the matters raised in the summons. No decree which can be pronounced in the action can go beyond this, and any such decree can only affirm an existing and operative duty on the part of the defenders under the existing rules, by which their authority is regulated and defined.

However wide, therefore, the demands made in this summons may seem to be, they must be read in the light of the position and obligations of the subordinate executive body of the University. This has been brought to an issue by the plea stated for the defenders,—that all parties were not called; by which they meant that they could not be required to do any act which was not sanctioned by the existing rules of the University, and that the summons raised questions in which their academical superiors were the proper contradictors. The Lord Ordinary, on the ground that no such question could be raised under the present summons, repelled that plea; and I do not understand that it is now proposed to sustain it. It therefore may be held as fixed that the summons can receive no farther effect than to enforce the duty of the defenders as defined by the existing rules of the University.

Although, therefore, such a course would have excluded an interesting and most elaborate discussion, I greatly regret that the argument has not been confined within these limits. The pursuers manifestly could not challenge the existing laws of the University without bringing into Court those who were entitled to defend, and had power to enforce them. The Senatus Academicus, on the other hand, who justly pleaded that their duty was obedience to existing laws, and that they were not bound to answer to a challenge of them, while they are entitled to insist on the question being confined to their present duty, cannot question the legality of the very laws which they plead they have no function to defend.

What then are the practical questions raised in this summons? We shall best appreciate these by attending to the origin of the controversy. In the year 1869 the University Court, on the application of the pursuers, or some of them, enacted the Regulations which are quoted on the pursuers' condescendence. I have no doubt that these Regulations, so far as mere form is concerned, were regularly passed. They were passed under the general power which the Court possess—under certain forms and conditions, to introduce improvements into the University—and such we must assume them to be. They permitted women to matriculate as students with a view to the prosecution of the study of medicine, provided their instruction was conducted in separate classes confined entirely to women; and for this purpose the Professors were permitted to have separate classes. The sixth of these Regulations was as follows:—"All women attending such classes shall be subject to all the regulations now or at any future time in force in the University *as to the matriculation of students, their attendance on classes, examination, or otherwise.*"

Under these Regulations the pursuers passed the preliminary examination in Arts prescribed for medical students, matriculated in the ordinary manner, and received their tickets of matriculation; were registered as students of medicine in the Government Register; and finished the first portion of the medical curriculum by attending the prescribed classes. Some of them passed the examination in the middle of the curriculum; but at

this point their farther progress was arrested by two elements. The first was, that they could not find Professors willing to teach them in separate classes. This difficulty might perhaps have been got over had not the Senatus Academicus raised the second, by intimating very clearly that they intended to resist the admission of any of the pursuers to graduation, and raised doubts whether to do so would not be contrary to law. They ultimately applied to the University Court to rescind the Regulations of 1869. The University Court declined to rescind the Regulations, but finding the legal question raised, although not indisposed to aid the pursuers, they held their hand, and the pursuers accordingly raised this action.

The conclusions of the action accordingly raise these two practical questions: The first is, whether the Professors in the medical faculty are bound to teach the pursuers, either in separate or in mixed classes, under the existing laws of the University? The second, whether the defenders are bound to admit the pursuers to graduation on their complying with the other regulations of the University?

Although the pursuers, driven as they thought to vindicate their legal rights, have endeavoured to solve their difficulties by the first of their conclusions, I think there is manifestly no ground on which it can be supported. The University Court has defined the conditions under which alone they can be admitted to study within the University, and these conditions leave it optional to the professors to teach or not, but prohibit them from teaching in any but separate classes. There is therefore only one practical question which remains to be considered, and that is, whether under the Regulations of the University Court, and subject to the conditions therein expressed, the defenders were bound to admit the pursuers to graduation? On that question I entertain no doubt whatever. These Regulations had no object, and no meaning as regarded those women who intended to follow medicine as a profession, but to enable them to qualify for graduation, nor do their terms in my opinion admit of any other interpretation. On the faith of these Regulations the pursuers have entered on the course of study prescribed, and incurred the delay and expense of going through a considerable portion of the curriculum. To deny them the degree which was essential to their entering the profession, with a view to which they studied, on the pretext—for it is no better—that no such end was ever contemplated, is in my opinion entirely unjust and unwarranted: and that all the more, that the evils said to be connected with the admission of females to the University attach only to the study which is permitted, while the honour can injure no one, and is only valuable as the passport to the medical profession, with which as a body the defenders have no concern.

That this question of graduation, from whatever cause, is in reality the sole matter in dispute, is sufficiently evident from the pleading of the defenders themselves. No doubt they devote a large portion of their argument to prove that women never have been and never ought to be admitted to University study; but in the sequel they disclose with sufficient clearness that if the pursuers would have contented themselves with mere certificates of proficiency, and would have abandoned their claim for graduation, they might possibly have fared better; and they suggest that a charter like that granted to the London University might have removed all the difficulty as long as the right to graduation was denied. [*Reads pp. 45 and 46 Defender's case.*]—All these alternatives imply University study, and therefore the cardinal point of the case is the right to graduation. My opinion is that on completing the curriculum as matriculated students, the pursuers are entitled by the existing rules of the University to be admitted to graduation, and indeed I have found little in the shape of argument addressed to prove the contrary.

This, in my opinion, is sufficient for the decision of this case. It is, however, maintained by the defenders that the University Court had no power to pass these Regulations. They say that by the constitution of the University no woman can be admitted to enter within its walls either for study or for graduation; and that the Regulations themselves, and all that has followed on them, are a mere nullity, and can receive no effect.

I think this answer entirely irrelevant. Questions may no doubt arise between the superior and the subordinate powers in the University as to the legality of orders given by the former; and that these may be legitimately called in question I do not doubt. But when a student has entered the University, and has duly conformed to the rules on the faith of which he entered, it can be no defence on the part of the Senatus Academicus to his claim to graduate that the rules under which he was admitted are liable to legal objection. The duty of the Senatus is to obey the *de facto* law of the University, and any other principle would be not only subversive of academical discipline, but would lead to the greatest injustice, as I think is the case here. The matriculation of the student creates an implied contract between him and the University authorities that if he comply with the existing rules they will confer the benefits in the hope of which he resorted to the University. They cannot, after the student has performed his part of the engagement, refuse to fulfil theirs on the pretext that the contract was made under rules which it was beyond the power of their academical superiors to make. They cannot compel the student, as a condition of his obtaining graduation, to take upon himself the defence of the laws of the University. His sole duty is to obey them; and if their lawfulness is to be disputed, that must be done in a question with those who made them, not with the student who trusted to them.

I have therefore no difficulty in finding this defence wholely irrelevant as against the present pursuers, and inconsistent with the academical position of the defenders. But as the question of the legality of these Regulations has been so largely discussed, I shall shortly state the views which I entertain in regard to it.

The challenge has been founded on two grounds—the original constitution of the University, and the usage of many centuries. The latter element has some plausibility; the former seems to me quite unsupported; but, on the best consideration I have been able to give them, I think both grounds are fallacious.

On this part of the question both parties have resorted to extreme propositions, which, while they have added to the interest, have been far from increasing the pertinency of the argument. The contention of the pursuers—that females are entitled at once, and subject only to the same regulations as male students, to be admitted to the University, and that the authorities are bound to make needful

preparation for their reception—is in my opinion a hopeless one, against which the long-continued usage is conclusive. On the other hand, it has surprised me to find it contended in the name of the Senatus Academicus that it is a mistake to suppose that the University of Edinburgh ever had, by its original constitution, a legal right to confer degrees on any one, and that the practice to the contrary was probably a mere assumption. We must reduce this controversy within more reasonable limits.

I am of opinion that it is clear from the terms of its foundation that the University of Edinburgh was intended, like that of Glasgow and that of Bologna, the prototype of both, for the instruction of the community. I can give no weight to the criticisms, which are failures even within their own narrow limits, on the use of masculine nouns and adjectives in these foundations. One example will suffice. The words of the Bull of Pope Nicholas V. founding the University of Glasgow, were actually pleaded to us as indicating that the education of males was alone contemplated, because one ground of granting was said to be "ut viros producat consilii maturitate conspicuos, virtutum redimitos ornatibus," &c.

But this purpose would continue to be as true as it was then, were the pursuers to succeed in all, for which they have contended. It will always continue to be the main object for which this and the other universities were founded, to train up worthy men for the service of the State But the words which immediately follow truly express the generality of the objects in view, "Sitque *ibi* scientiarum fons irrigans, de cujus plenitudine hauriant universi literarum cupientes imbui documentis," which includes every member of the community who is desirous of profiting by the fountains of knowledge. It is a public highway, along which all who are anxious enough and strong enough are at liberty to travel, without distinction of age, or rank, or creed, or sex, or nation,—such is the import of the words, and such is admitted with one exception to be their import. Does it signify that from time to time the regulations of different universities have varied, sometimes introducing domiciliary regulations which might exclude one class, or financial regulations which may exclude another, or religious observances which may exclude a third? These, and such like, may limit, and practically do limit, the members of the community who immediately profit by these institutions to the merest fraction of those for whom they were intended. But this detracts nothing from the catholicity of the institution itself. If the same words of foundation were applied to any public object—an infirmary or hospital, a public library, an institute of science, of language, of painting, or of music — would they necessarily include one sex only, and exclude the other? Many actual instances of the reverse will occur to everyone, in which even the joint study of adults of both sexes is not unknown. The important fact in the present case is, that as the University of Edinburgh is at present constituted, the Regulations are entirely consistent with its practical administration, and have been found by experience to be so.

With regard to the argument drawn from usage, it is sufficiently plain that had there been any usage the other way this question never could have arisen. That no woman has ever been admitted, or has ever asked to be admitted, to graduate in a Scotch University is quite true. But I think the weight due to that fact is considerably misapprehended.

In the first place, before usage can be held to restrict or limit powers which are otherwise general, the usage must be reasonably connected with the limitation. Before a University could admit a woman to graduation some woman must have applied for graduation, and if the universities never had the opportunity of exercising the power, it is difficult to see how the fact of its never having been exercised can limit the generality of the grant. But it is quite certain that the non-application of women to be admitted as students in the University had no connection whatever with the power or want of power on the part of the University to admit them, but on social considerations, obvious enough in themselves, and which, whatever our judgment in this case, will continue to limit the number of female students to a fraction. If the Universities originally were intended for the benefit of the whole community, the use of the public right by any one of the community preserves it for all the rest, and it is of no moment that hitherto the benefits have only been claimed by the sex or the class or nation or creed who found it suit their objects in life to take advantage of them. As members of the community, females were not excluded by the original grant, or rather there was no limitation laid on the University which prevented them from admitting any member of the community, and the power, in my opinion, remains as unrestricted as it was at the first.

While, however, those members of the public who take advantage of these institutions preserve the right for the rest, in like manner the course and habit of administration may come materially to restrict those who demand that that course of administration should be altered to suit their views. Persons placed in circumstances which have hitherto prevented them from availing themselves of University instruction, are not entitled to require the University either to alter their rules to suit their circumstances, or to admit them on conditions prejudicial to the interests and discipline of the great mass of the students. If the domiciliary character which at one time prevailed in the other Universities had continued to prevail in Edinburgh, it would of course have operated a practical exclusion of the demands of the pursuers. The same thing would have excluded all who resided beyond the University limits. A non-resident could no more have demanded a relaxation of the rule to meet his case than could a woman. So in the English Universities, which have preserved this kind of character longer than any others in Europe, the same rule would unquestionably apply. But time has abrogated these customs which were engrafted on the original general powers of the Scotch Universities, and it has been found to be possible and expedient, without any relaxation of academical discipline, to introduce this new arrangement into the University system. But I apprehend that was a matter entirely within the discretion of the University authorities.

I attach but little weight to the argument drawn from the franchise, or to the notion that a University degree implies a public function. As to the first, the distinction is manifest—as wide as the distinction between the education and cultivation of the intellect on one hand, and political power

on the other. It was the nature of the subject-matter which alone gave pertinency to the allegation of usage in the case of the franchise. The franchise is a public function from which, from its nature, the presumption is that women are debarred unless there be a specific law to the contrary. The usage was justly held to prove that the general terms of the Act of Parliament could not be regarded as a specific law to the contrary. The presumption in the present case is exactly the reverse.

Lastly, as to the supposed public nature of a University degree. The argument on this head, although very able, runs into untenable refinements. There is nothing cabalistic or mysterious in a University degree. It is simply an attestation of academical merit. It may, like the ownership of property, be taken as a test for civil functions, but it does not follow that a woman, although a graduate, is competent to discharge them. While the analogies drawn from the continental practice do not greatly aid the general argument, I think it has sufficiently dispelled the notion that it ever was the academical law of Europe that a woman could not be a graduate. On the contrary, in the cases which have been handed down to us, the European Universities of yore hailed and proclaimed the successes of those of the gentler sex who were thought worthy of the honours of the learned. I find in Bayle, in his notice of the works of Ronaldini, an Italian mathematical writer, published in 1684 (Bayle Ouvres, i, 361), that that author published a treatise in which he discussed the question, "If it be competent to confer on women the degree of Doctor in Theology" (Caroli Ronaldinii, Mathematica Analyticæ, pars tertia. 1684). His theme was taken from the case of Helen Piscopia Cornara, "of glorious memory," as the writer says, on whom the University of Padua wished to confer this distinction, but who found, as the pursuers have found an antagonist, in the shape of Cardinal Barbarigo, the Bishop of Padua, who protested successfully against that theological honour being conferred on a woman, and she was accordingly obliged to content herself with the degree of Doctor of Philosophy. The account of this lady (Cornara) in Moreri's Dictionary says that this honour was conferred upon her in the presence of many Venetian nobles and other grandees of Italy, and more than a hundred ladies of rank who had come express to Padua to witness so unusual a ceremony. We may smile at the enthusiasm of the seventeenth century; nor is it for us to judge which of the two ancient Universities might best maintain the true academic spirit—one in throwing open their gates with acclamation to these aspirants to their honours, the other in sternly shutting them. But, on the whole, I think the defenders have entirely failed to prove that graduation is, or has ever been held to be, among the great Continental Universities, beyond the ambition of a woman; or that there exist any solid grounds, even could the question be raised in this action, for questioning the power of the University authorities to pass the Regulations in dispute.

The Court pronounced the following interlocutor:—

> The Lords having resumed consideration of the cause, with the written opinions of the Consulted Judges, in conformity with the opinions of a majority of the whole Judges, recall the interlocutor of the Lord Ordinary of date 27th July 1872; assoilzie the defenders from the whole conclusions of the summons, and decern; find the defenders, the Senatus Academicus, entitled to expenses, and remit to the Auditor to tax the same and to report; and in respect it is stated for the defender the Chancellor of the University that he makes no claim for expenses, find no expenses payable to him.

Counsel for Pursuers—J. M'Laren, P. Fraser, and Solicitor-General (Clark). Agents—Millar, Allardice, & Robson, W.S.

Counsel for Senatus Academicus—H. H. Lancaster. Agents—W. & J. Cook, W.S.

Counsel for the Chancellor—W. Watson. Agent—James Allan, S.S.C.

Wednesday, July 2.

FIRST DIVISION.

[Lord Mure, Ordinary.

DRUMMOND-HAY *v.* TOWN OF PERTH.

Fisheries—Local Custom—Boundary.

> *Held* that in certain river fishings the privilege derived from local custom must be fixed by the boundary line laid down by the Court, not the boundary line by the privilege.

This case came up by Reclaiming Note against the interlocutor of the Lord Ordinary, which stated the circumstances, and was as follows:—

"*6th March* 1873.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process: Finds and declares that in the existing state of the river Tay, and of the *alveus* thereof *ex adverso* of the pursuers' lands and barony of Seggieden, the pursuers have the exclusive right of fishing for salmon and fish of the salmon kind in the river Tay *ex adverso* of the said lands and barony, to the eastward of a line drawn from a point on the north bank of the river, 118 yards to the westward of the centre of the Seggieden burn, to another point on the south bank of the river, 34 yards to the westward of the west gable of a lodge known as 'Lower Mary Lodge,' and including therein the exclusive right of fishing, as in a question with the defenders, from the bank lying in the said river opposite to the said lands and barony to the eastward of the said line; and that the defenders have no right to fish for salmon or fish of the salmon kind in the said river *ex adverso* of the said lands and barony to the eastward of the said line; and before further answer, remits to Mr John Young C.E., Perth, to mark off the said line upon the plan No. 7 of process; and also to put down upon the north bank of the river a march stone, or other distinctive mark at the point to the westward of Seggieden burn, from which the said line is drawn; and, in the meantime, reserves all questions of expenses.

"*Note.*—There are certain points which appear to the Lord Ordinary to be clearly established in the evidence in this case, viz.:—

"(1) That at and for long prior to the date when the north channel of the river Tay was shut up by the Navigation Commissioners at the upper end of Darry Island, in or about the year 1840, the tenants of the pursuers' fishings were in use to