

locutor, by a great majority:—"Sustain the defences, and  
 "assoilzie from the declarator; prefer the petitioners to the  
 "right of administration of the rents of the lands purchased  
 "for a stipend to the minister, during a vacancy, and de-  
 "cern."

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 CUNNINGHAM  
 v.  
 WARDROBE,  
 &c.  
 Feb. 26, 1762.

Against this interlocutor the present appeal was brought to the House of Lords.

It was ordered and adjudged that the interlocutor of 26th February 1762 complained of, be reversed: And it is further ordered and adjudged, that the interlocutor of the said Lords of Session of the 21st of January 1762, be affirmed.

For the Appellants, *C. Yorke, Thos. Miller.*

For the Respondents, *Al. Forrester, Al. Wedderburn.*

WM. THOM, Esq., Advocate in Aberdeen, claiming the office of Civilian in the King's College of Old Aberdeen; Dr JOHN CHALMERS, Principal; Mr ALEXANDER BURNETT, Sub-Principal, and Mr RODE- RICK MACLEOD, and Mr JOHN LESLIE, Regents of the said College; GEORGE BURNET, Esq., Rector, and Messrs THOM- SON, ROBERTSON, SKENE, and BURNET, *Procuratores Nationum* of the University of Old Aberdeen, . . .

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 THOM, &c.  
 v.  
 DALRYMPLE,  
 &c.

*Appellants;*

DAVID DALRYMPLE, Esq., claiming the office of Civilian; Mr JOHN GREGORY, Professor of Medicine; Mr THOMAS GORDON, Professor of Humanity; Mr THOMAS REID, Regent in the said Col- lege; Mr JOHN LUMSDEN, Professor of Divinity, and Mr GEORGE GORDON, Pro- fessor of Oriental Languages in the said University; GEORGE MIDDLETON, Esq., pretended Rector, and Messrs FORBES, MOSSMAN, GORDON, and WILSON, pre- tended *Procuratores Nationum* of the said University, . . .

*Respondents.*

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House of Lords, 22d February 1763.

THOM, &C.  
v.  
DALRYMPLE,  
&C.

COLLEGE—ELECTION OF PROFESSOR—CASTING VOTE.—(1) Held, in the election of a Rector, &c., in King's College, Aberdeen, that the principal of the College was not entitled to a double or casting vote. (2) Held also in the election of a civilian of the College, that the respondent, Dalrymple, had the greatest number of votes, and that his election had been duly and regularly made. Affirmed on appeal.

The University of Old Aberdeen, was founded in 1494, by a bull from the Pope, at the request of King James IV., and by the advice of William Elphinstone, then Bishop of Aberdeen, who, and his successors, were, by the bull, appointed Chancellors of the University which was erected, with all the privileges and immunities of the Universities at Paris or Bononia. And the Chancellor, *with the Rector of the University*, called to their assistance, a competent number of doctors and students in the several faculties, and two of the King's Privy Council were appointed to make, from time to time, such laws as should be necessary.

King James the IVth, being a minor at the date of this foundation, confirmed it by a charter in 1498, after he came of age, granting to the University, *et in prefata Universitate incorporatis seu incorporandis*, all the privileges which the Kings of France had granted to the University of Paris, or which his Majesty's progenitors had granted to the Universities of St Andrew's or Glasgow, together with certain tythes additional to those granted by the Pope to Bishop Elphinstone, for the maintenance therein mentioned, and for other uses, with power to Bishop Elphinstone to fill up the places of those, and to divide and distribute the Donations to the University, as he should think fit.

In 1505, the bishop having, from his own and other contributions, raised a considerable fund for building and endowing a College within the University, by deed of the 7th September 1505, founded one, called by him *Collegium Sanctæ Mariæ in Nativitate infra Universitatem villæ veteris Aberdonen, in civitate ejusdem*, establishing it as a distinct body within the University, endowing it with certain revenues, subjecting it to certain rules, appointing thirty-six members who were to form the collegiate body, and conferring on the Rector of the University particular privileges and powers over certain members of the College, reserving to himself, during his life, the right of filling up vacancies, and of making

what alterations and additions he should think proper, but excluding his successors from all power of alteration. This foundation, with all its clauses and articles, were confirmed by the Pope's bull in 1506; but being, in after times, taken into the King's immediate protection, came to be called the King's College of Old Aberdeen.

In 1529, by a second deed of foundation, confirmed by the Pope, Bishop Elphinstone granted farther revenues to this College, enlarged the number of members to forty-two, whose functions were prescribed, salaries settled, and rules laid down for the government of the whole. Concerning the Principal, who was considered throughout as the head or chief member of the College, and in the exercise of his privileges and functions was made answerable only to the Chancellor of the University, the deed contains the following clauses: "*Ex quibus* (*i.e.* of the forty-two members) *imprimis erint quatuor Doctores, primus, viz., Unus in Theologia, quem Principalem appellari volumus, cui omnes in dicto Collegio, obedire et obedientiam præstare, cum debitis honore et reverentia teneantur, &c., cujus officium erit dictum Collegium regere et gubernare in honestate custodire, &c., cæteris omnibus dicti Collegii præesse, et eosdem in moribus et disciplinis instruere, Regentium Leturas visitare, et, se opus sit, reformare, delinquentes quovis modo per se vel per alium punire,*" &c.

In this foundation, the Rector of the University, it was stated, was the second officer, in point of dignity, mentioned in the bishop's foundation. Four more University officers, called *Procuratores Nationum*, were also mentioned.

By the Bishop's foundation, the Principal and Sub-Principal were empowered to appoint, from time to time, as many out of the six students of divinity, as should be necessary for assisting them in the education of young students of arts, the persons so appointed to be called the *Regents of Arts*, and to go out at the end of six years. But, in 1538, the Chancellor of the University obtained a Papal bull, allowing him to continue the regents longer if he pleased, whereby, those regents who, by usage, were settled to be three in number, came to continue for life, and have constantly voted in all elections of College members, for 100 years back.

By the Bishop's foundation, certain rules were laid down for electing and admitting the College members. The election of the Principal was appointed to be made *per Rectorum Universitatis, quatuor Procuratores Nationum, Doctores in juri-*

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*bus Pontifici et civili, medicum, sub-principalem, Regentes Artium, Grammaticum, sex studentes in Theologia.*

The elections of the Sub-Principal, professors of canon law, physic, and grammar, were appointed to be made in the same manner, as the students of divinity and arts, *per sub-principalem, regentes artium, grammaticum, canonestam civicum et medicum, nominentur, et per principalem admittantur.* And the election and admission of a civilian (concerning which the present question arises), was “*per dictos Rectorem, Procuratores Nationem, Principalem, et sub-principalem, Canonistam, Medicum et Grammaticum, nominentur sive elegantur, et per cancellarium admittantur.*”

After settling the form of elections appointed by the foundation, the charter contains the following clause:—“*Volumus autem ut in omnibus istis electionibus, Principalis dicti Collegii habeat vocem Nominativam seu electivam et conclusivam.*”

It also provided that each professor, on their admission, should take the following oath, viz., “*Ego, A. B. tactis sacris Evangeliiis juramentum presto Corporali me omnem obedientiam et reverentiam debitam Universitatis Cancellario, ejusdem Rectori, et Collegii hujus Principali exhibiturum,*” &c.

The founding of other colleges in this University having been prevented by the troubles at the Reformation, Bishop Elphinstone's is the only college therein erected; but three separate professorships have been added, viz., one of Divinity, one of Oriental languages, and one of Mathematics, which last was soon dropt, for want of a fund to support it. The professorship of divinity was founded in or about the year 1630, by the Synod of Aberdeen, and Bishop of Aberdeen, by whose deed of endowment and charter following thereupon, the Professor was appointed to teach within the University, but to be always named by the Synod.

The Professor of Oriental Languages was founded by patent from King William in 1695, declaring him a member of the University, and giving him the University privileges of teaching, conferring degrees, &c.

The funds, out of which the salaries of these latter Professors arose, had no connection with those belonging to the members of the College, each of those Professors managing and receiving his own salary; but the revenues of the College were collected by an officer appointed for that purpose, called *Procurator Collegii*, out of a common fund, settled by Bishop Elphinstone, and by that officer divided among the members, agreeably to the deed of foundation.

Before the appointment of the Professor of Divinity, the members of the old foundation were composed both of the University and College, there being no other members; but, after the appointment of new Professors upon a different foundation, a distinction was made between the University and the College. Though those later Professors were, by their appointments, become members of the University, and thereby entitled to the common University privileges of voting in the election of University officers, and of teaching, and residing within the University precincts, and the like, yet they could have no right to the special privilege of electing the members of Bishop Elphinstone's College, and far less to any part of the revenues settled upon them.

Accordingly, those Professors, from the time of their respective foundations, never pretended to more than the common University privileges, till at last they wormed themselves into voting at the elections of the College members.

The foundation laid down no particular method of electing the Rector, or any other University officer. But the usage had been for the members of the University and College together, to choose the Rector annually, and also to join in the choice of the *procuratores nationum*; but as to these, the time of the continuance has been various. From the foundation down to about 1634 (earlier than which there is no record of elections extant) they were probably chosen annually, being by the Bishop's foundation considered as constant University officers, and, like the Rector, eligible annually; but, since the year 1684, they have been chosen for forms' sake only *pro re nata*, and in order to fill up the vacancies of members in the College, though this irregularity was all along considered by several of the members as a direct departure from the founder's rules.

In the same year, 1759, Dr Catanach, the civilian of this College being in a bad state of health, the respondent, Mr Dalrymple, his Majesty's sheriff-depute for the county of Aberdeen, though residing almost constantly at Edinburgh, as an advocate at the bar of the Court of Session, formed the design of getting himself elected Civilian in case of Dr Catanach's death, being joined by the Professor of Divinity, and his friends. But the doctor returned from Bath to Aberdeen in 1760, much recovered. In case of an election of Civilian occurring, however, and much difference of opinion existing as to the mode of election, it was agreed that a reference should be made to counsel of certain points proper

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for their determination ; and at the same time it was resolved, by the majority of all parties, to elect a Rector of the University, agreeably to the foundation, who should continue in office for a year, and with a Rector, the four officers called *procuratores nationum* to continue also for a year. This was preparatory to the election of Civilian, supposing a vacancy to occur, but before any such had actually occurred.

Accordingly, upon the 13th May 1760, a meeting was called to make choice of these University officers, when there were present ten members, being all who could claim votes, good or bad. The Principal proposed George Burnet, Esq., to be chosen Rector for a year, and Messrs Andrew Burnet, James Thomson, Francis Skene, and John Robertson, to be *Procuratores Nationum*, also for a year. The Professor of Divinity, after entering a protest against the elections being made at this juncture, on pretence of the Rector and *Procuratores* being unnecessary officers ; and also another protest against the Principal's taking to himself a double vote, proposed George Middleton, Esq., to be elected Rector for a year, and Patrick Duff, David Dalrymple, Patrick Wilson, and Theodore Gordon, to be *Procuratores Nationum* also for a year. The votes of the electors being declared, stood thus,—five for the Rector and Procurators proposed by the Principal ; and five for the Rector and Procurators proposed by the Professor of Divinity.

The votes being thus equal, it came to the Principal's casting vote or *vox conclusiva*, which he gave for the Rector proposed by him (having already given an original vote for him, which was counted in the five). These parties were accordingly declared duly elected, to continue for a year.

The custom being, that the persons elected officers of the University should take an oath *de fidei*, but without limitation to any particular time, this was delayed till the gentlemen chosen should have an opportunity of attending a College meeting.

Thus matters stood on 24th November 1760, when Dr Catanach, the Civilian, died ; and a University meeting being held, on that day, to prepare an address of condolence on the death of his late Majesty, the Divinity Professor mentioned Dr Catanach's death, which had happened but a few hours before, and moved this meeting to adjourn to the 27th, in order then to fix a time for filling up the vacancy. The Principal objected to the Professor's motion, as precipitate and indecent, and urging that the appointment of meetings

for filling up vacancies within Bishop Elphinstone's College, being a matter not belonging to the University meeting, then convened for other business, but to the Principal, as head of the Collège, he stated that he would call a meeting in due time, whereof all parties should have notice, and then withdrew. But the Professor and his party made a pretended adjournment to the 27th, for fixing a day for the election of a Civilian.

At the meeting on the 27th, the Principal, insisted on his right, by the foundation and constant usage, to appoint the days and times for election meetings within the College, and he did accordingly then appoint the 9th December next ensuing, for the choice of a Civilian, that interval appearing to him a reasonable time for giving notice to all parties interested, wherein he was joined by four members, including Mr Burnet, elected Rector on the 13th May, and had the question been put, it must have been carried for the day appointed by the Principal, as he and the four members who joined him, were equal in number to the Professor and his party—who made but five—and the Principal's casting vote must have carried. But Mr Middleton appearing at the meeting, the divinity Professor and his friends insisted that he had been duly elected Rector on the 13th May, which conferred upon him all the powers known to pertain to the office. They then elected Messrs Theodore Gordon, Patrick Wilson, Charles Forbes, and Thomas Mossman (the two last being different persons from those they had pretended to elect on the 13th May), *Procuratores Nationum*, in hunc effectum to vote for the Civilian, and required the Principal to admit and swear in the said George Middleton, Rector, and the said *Procuratores*.

Thereupon, also, Mr Burnet required the Principal to admit him to his office of Rector, to which he was duly elected on the 13th of May, and Messrs John Robertson, Francis Skene, and James Thomson, three of the *Procuratores Nationum* duly elected by the majority of votes on the same day, being present, and declaring their willingness to accept the Principal, did admit and swear in the said George Burnet, Rector, and the said three *Procuratores Nationum*, but refused to admit or swear in the said George Middleton, as Rector, or the others as *Procuratores*, who pretended to be elected such, by the Professor and his party. The last were, however, sworn in by Patrick Duff, Commissary of Aberdeen (one of the pretended *Procuratores Nationum*, elected by the

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Professor on the 13th May), holding himself entitled so to do as surrogate of the Chancellor of the University.

Here the parties were brought to issue about their respective elections.

The Professor of Divinity contended that George Burnet's election of Rector on the 13th May, was void, on the ground of the subsequent death of Dr Catanach, one of the electors, for that *mortuo mandatore perit mandatum*, and his admission, and all acts done by him, must also be void and null; and then pretending to have a majority of his side, by the concurrence of four constituent members, with Mr Middleton, his supposed Rector, and his four *Procuratores Nationum*, adjourned the meeting to six o'clock of the evening of the same day, for the election of a Civilian.

On the other hand, the Principal objected to this election, and repeated his appointment as head of the College, of the 6th December, requiring all parties interested to meet on that day for the election.

Meanwhile, at the meeting at six o'clock in the afternoon of the 27th November, the Principal appeared, and after representing to the members the irregularity of this meeting, to which, he declared, he came only to prevent, as far as he could, any undue advantage being taken of his non-attendance, without acknowledging the authority by which the meeting was appointed, entered his protest, that his voting at this meeting should not prejudice the meeting for the election appointed by him for the 9th December, in which three constituent members, together with Mr Burnet, the Rector, and the *Procuratores Nationum* duly elected on the 13th May, adhered to him.

The Professor and his party, however, proceeded to the election. There voted for Mr Thom seven; for Mr Dalrymple, the respondent, ten.

Mr Dalrymple, thus supported by the Professor of Divinity, was declared duly elected, and they appointed him to be presented to the office of Civilian, but George Burnet, Esq., the other Rector, and those adhering to him, declared the appellant, Mr Thom, duly elected Civilian, and appointed him to be presented thereto.

On the 6th December, to which day the Professor of Divinity and his party adjourned, there was produced to the meeting, a letter of acceptance from the respondent, Mr Dalrymple, of the office of Civilian, and an act of admission from the Commissary of Aberdeen, which the meeting entered



on their journal; but neither the Principal nor any of the members who joined him, attended this meeting.

On the 9th December, the day appointed by the Principal for the election, all parties again appeared; the Principal and his friends insisting that the proceedings had by the Professor of Divinity and his party, on the 27th November, and 6th of December, together with the Commissary's admission of the respondent, Mr Dalrymple, were all void, and that Mr Dalrymple, being sheriff-depute of the county of Aberdeen, was incapable of holding the office of Civilian, those two offices being in their nature incompatible; and it was objected to the Professors of Divinity and Oriental Languages, that neither of them had right to vote in the office of constituent members of the College. Whereupon, the divinity Professor objected to Mr M'Leod and Mr Leslie's right of voting, regents not being appointed by the foundation to vote in the election of a Civilian. Then the Principal and his adherents re-elected the *Procuratores Nationum*, who had been chosen in May, and confirmed on the 27th November, under protest that the re-election of these officers should not prejudice their former election; and next they proceeded to the election of a Civilian. The votes of the members being declared, those for the appellant, Mr Thom, were the same as on the 27th November, that is to say seven good and lawful votes, and the Principal also declared his casting and conclusive vote for him. Those for the respondent, Mr Dalrymple, were also the same, except that three only of his *Procuratores Nationum* were present and voted. Thus, Mr Dalrymple's votes at this meeting were nine, of which three only were unexceptionable, or at the most five good, supposing for such those of the Professors of Divinity and Oriental Languages; the other four votes being of those elected Rector and *Procuratores* in the irregular manner above mentioned.

The Principal declared Mr Thom again elected Civilian by a majority of legal electors, and appointed a presentation to be made out to him. But the respondents resisted.

The appellant, Mr Thom, thereupon brought before the Court of Session a suspension of the respondent, Mr Dalrymple's admission, and he also with the concurrence of the other appellants, brought an action of reduction of Mr Dalrymple's pretended election and admission, and for establishing and confirming his own, praying to have it declared that neither of the Professors of Divinity or Oriental Languages, though members of the University, could be proper members

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of the College founded by Bishop Elphinstone, and were not entitled to vote in the choice of College members, nor entitled to any part of the revenues or funds belonging to the College; that the Principal of the College, in all elections of Professors, had a double vote; that the appellants had, respectively, been duly elected Rector, *Procuratores Nationum*, and Civilian.

Arguments of  
Parties.

The appellants insisted that the Rector, being chosen at such time of the year, as the members of the University think fit, to continue for a year, becomes entitled to vote in the election of the *Procuratores Nationum*, as well as in the election of Professors and Masters. That the four *Procuratores Nationum* were proper officers of the University also, being elected, at any convenient time, to continue in office for a year, and that they, by virtue of their election, became entitled to vote in all elections for supplying vacancies happening during that year. That in all elections and resolutions, whether in University or College meetings, the Principal presiding, is entitled to give one vote as a member, and also, in case of an equality, a conclusive or casting vote; and further, that the Principal has the only legal power and authority of calling and adjourning the meetings for election within the College. That Mr Burnet was duly elected Rector on the 13th May 1760, for a year, and that Messrs Burnet, Thomson, Skene and Robertson, were duly elected *Procuratores Nationum* on the said 13th May, to continue for a year, or at least at one or other of the meetings on the 27th of November or 9th December 1760, and entitled to vote and act accordingly. That the Professors of Divinity and Oriental Languages have no title to vote in the election of a Professor of Civil Law, or any other master or member of the College. And as a consequence, from the premises, that the appellant, Mr Thom, and not the respondent, Mr Dalrymple, was duly elected.

The respondents argued that the Principal had no right to a double vote in the election of a Rector, because the words *istis electionibus*, in the deed of foundation, did not refer to the election of a Rector, and because it had never been the practice so to vote—that the President of the Court of Session had not a double vote in the judicial determinations of the Court, and as a consequence that Mr Middleton was duly elected Rector in May and in November 1760. They farther insisted, that the *Procuratores Nationum* ought to be named, only in the event of an actual vacancy

*in hunc effectum*, for the more formal proceeding to an election, and that their office ceased immediately after the election. That the *Procuratores*, chosen by means of Mr Cattanach's vote, on the 13th of May, must be rejected, and those chosen on the 27th of November, after the vacancy had actually happened, were the only legal *Procuratores* entitled to vote at the election; and in support of this, they produced a particular form of record of elections of several instances where *Procuratores* were chosen *in hunc effectum*, after the vacancies had happened.

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The following interlocutor was pronounced:—"On report of the Lord President, in place of Lord Alimore, the Lords repel the reasons of suspension, and find the letters orderly proceeded; and with respect to the reduction and declarator, they sustain the defences, assoilzie the defender, and decern."

On reclaiming petition, the Court adhered.

Against these interlocutors, the present appeal was brought Mar. 10, 1762. to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors herein complained of be, and the same are hereby affirmed, and that the appellant do pay to the respondent £50 costs for the suit.

For the Appellants, *W. Blackstone, Al. Forrester.*

For the Respondents, *C. Yorke, Tho. Miller.*

NOTE.—Unreported in the Court of Session.

JOHN SPOTTISWOODE of Spottiswoode, . Appellant;

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JAMES BURNETT, Esq. of Craigend, . Respondent.

SPOTTISWOODE  
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House of Lords, 22d March 1763.

SUPERIOR AND VASSAL—NON-ENTRY—PENALTIES.—In a declarator of the right of superiority combined with an action of non-entry. Held (1), That the right of superiority was in the Crown and not in the appellant. Reversed in the House of Lords. (2) In the House of Lords the vassal was held not to