SENATUS ACADEMICUS OF THE UNIVERSITY OF EDINBURGH, . . } APPELLANTS.

THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF EDINBURGH, . } RESPONDENTS.

1854.
16th, 17th, 20th, 21st, 24th, 27th March, and 24th May.

The University or College of Edinburgh stands on an entirely different footing from that of the other Collegiate institutions of Scotland. It is not an independent establishment, but is subject to the superintendence and dominion of the Town Council of Edinburgh.

It is, in fact, the College of the Town; and the Town Council have the government of it.

Hence the Town Council can regulate the character, course, and limits of study in the College, and they can rescind at their pleasure any rules or orders made by the Senatus Academicus.

In particular, the Town Council have the power of determining the qualification for degrees. And they may even declare that extramural teaching by qualified instructors shall, as part of the curriculum, be equivalent to collegiate instruction under the professors.

Semble—therefore, that although the Learned Body can alone grant the degree, it is the Civic Body that must fix the required qualification.

How far *Res Judicata* in the Court of Session binds the House of Lords—*Quære.*

To an action commenced in 1825 by the Lord Provost and Magistrates of Edinburgh, to have it declared that they had the exclusive right of prescribing regulations for study, more especially with a view to degrees, in the College of Edinburgh, the Principal and Professors of that institution put in a defence, stating that they, the Defenders, had all the

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privileges of an University;—and insisting that the regulation of study, more especially with a view to degrees, was inherent in their constitution, and beyond the control of the magistrates.

The *Lord Ordinary* (Lord *Mackenzie*) pronounced the following interlocutor: "Having considered the closed record, the revised cases for the parties, and whole process,—Finds that the Pursuers have right of making regulations or statutes for the College of King James, and that in respect to the studies to be pursued in the College, and course of study for obtaining degrees, as well as in other respects; Finds that the Principal and Professors of the said College have not right to make regulations, statutes, or laws for the College in contradiction to the Pursuers, or which may not be rescinded or altered by the Pursuers; and decerns and declares accordingly: Therefore finds that the resolution of the Defenders, of date 25th October, 1824, libelled, was *ultra vires* of the Defenders, and ought to be recalled; and ordains the Defenders to recall the same, and decerns: And finds that the order and act of Council, of date 26th October, 1825, libelled, and the act of visitation libelled, are valid laws of the College; and ordains the Defenders to give obedience to the same, and decerns; but finds that there are not good grounds for declaring that the Defenders have not right to make regulations or statutes for the College, without the express sanction of the Pursuers, which may be valid, provided the Pursuers do not previously forbid, or afterwards rescind or alter the same; and to that extent assoilzies the Defenders, and decerns: Finds no expenses due to either party." The *Lord Ordinary* added the following note: "It appears to the *Lord Ordinary* that the Town Council have claimed and exercised all along, from the first institution of the College, the power

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generally of making regulations, and that this power has never been resisted or denied until the present dispute about the midwifery class being added to the curriculum. An attempt is made by the Defenders to distinguish regulations of one kind, or certain kinds, from others; but the *Lord Ordinary* cannot see any sufficient grounds for this, nor indeed clearly see how the distinction could be drawn. The exercise of the power of making rules by the Principal and Professors, when not contrary to the will of the magistrates, is not inconsistent with the above powers in the Town Council. Under such a state of possession, the *Lord Ordinary* thinks it would be too much to hold that the Act of Parliament made in favour of the College and its patrons took away this power from the Town Council, or limited their power to the bare ordinary patronship—*i. e.*, the mere management of the funds and nomination of Professors; and yet, unless it did this, it is hard to see how it could limit the power at all. It will be observed that the finding in favour of the Town Council that they have such power generally, by no means implies that everything they may do in exercise of such power will be legal and valid; and so the finding in favour of the Defenders is by no means meant to infer that all they may do, or have done, when not opposed by the magistrates, or even when seconded by them, is legal. The *Lord Ordinary* gives no opinion on the competency of the Principal and Professors interfering at all as legislators on some occasions, where, for instance, they are personally interested."

The Principal and Professors considering themselves aggrieved by this interlocutor, reclaimed against it to the Inner House, and the following opinions were delivered on the 15th of January, 1829 (*a*).

Lord *Glenlee:* I think the interlocutor right. The situation of

(*a*) Fac. Coll.

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the College appears to me to be that of a minor corporation subordinate to the corporation of the Town. When you come to look at the practice of this University, it is plain that, from the date of its foundation to the present time, the Town Council has interfered and made regulations for the curriculum of study, and everything connected with the conferring of degrees; and the College has all along recognised this right by submitting to those regulations imposed by their patrons, and occasionally remonstrating against them and getting them changed; but it is quite evident that the right itself, as existing in the Town Council, was never disputed. The Senatus Academicus have no doubt made, and have a right to make, rules for themselves, which are binding so long as they are approved of, or unrepealed by the patrons.

As to the expediency of this state of matters, if we had any business to enter into that question, I really do not think it likely to be so inexpedient as the College represent. It is notorious that formerly the Universities of Europe assumed great and sometimes dangerous powers, and have occasionally given rise to much turbulence, under pretence of their privileges. It is not likely, perhaps, that this should again happen; but I do not see any good reason for indulging the College in the fancy they have now taken to vindicate their independence.

Lord *Pitmilly:* There is no such thing known in Scotland as a general constitution for Colleges. On the contrary, we find that every one of them stands on a different footing from that of the others.

I cannot wonder that the magistrates who have always watched over the interests of the University with care, and from a wish to promote learning, should not willingly yield this right of administration and control, if it belongs to them; nor, on the other hand, that the Senatus should think themselves fitter to decide such points, and should even think the interests and honour of the University at stake, and strenuously endeavour to emancipate themselves. We cannot, however, be guided by views of expediency, but must decide according to rights; and I am glad of it; for I do not consider the matter of expediency so clear as the Defenders do. I believe the greatest encouragers of learning have not always been themselves learned men.

Lord *Alloway:* I must agree with the opinion expressed by Lord *Glenlee*, that men of learning have not been always the best judges for directing the course of university study. In the history of the Universities of Europe, you find that, at different periods, they have been the greatest literary tyrants in the world.

The only question is, To whom were the powers and privileges granted? They were granted exclusively to the magistrates of

Edinburgh; and every one of the Professors is taken bound to obey the laws and regulations imposed on them by the Town Council.

The Act of 1621 was passed for the purpose of confirming the rights of the Town. Yet the College maintain, that it actually deprived the Town of the rights which had formerly been granted to them. This will not do. No doubt, as a University, they may have had right to confer degrees; as a University they were entitled to do so; and they were a University to the fullest extent; but were not the powers derived from the persons to whom the Crown had delegated its powers? and although, as a University, they may have power to confer degrees, yet that does not affect the right of the Patrons to say what course of study may be necessary before these degrees can be conferred. I think the *Lord Ordinary's* interlocutor right, so far as it goes.

Lord Justice-Clerk: I agree in the opinion expressed by Lord *Pitmilly*, that there is no such thing as a general constitution that applies to all the Universities in Scotland. There is nothing more different than those constitutions. The express object of all the grants in the charters was to enable the magistrates to found a College; and then his Majesty was so much pleased with what had passed under his own eye, that he gives the College his own name, and confers upon it all the privileges belonging to any free College. This is just what might have been expected. But the plea of the Senatus would go the length of putting the constitution of the College in the hands of the bursars and students; for the Act of Parliament mentions them, as well as the rectors and regents.

All, then, that remains, is to inquire, whether there has been any alteration in the circumstances. The commissions are all in the same terms, and continue so to the present day; and then the magistrates have uniformly, whenever they thought proper, or considered it necessary for the well-being of the College to interfere, made new regulations for the government of the Senatus; and their right to do so has never been disputed. I think the *Lord Ordinary* has drawn a very proper line.

So reasoning, the Lords of the Second Division adhered to the interlocutor submitted to their review, and decerned. From this decision no appeal was taken by the Senatus to the House of Lords, so that at the expiration of the period limited by statute, it became final, and formed, as was contended, an irreversible *res judicata*. Thus, therefore, matters stood till the year 1847, when the Senatus Academicus were advised to

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try the question again by a process of declarator, which they instituted against the Town Council, to have it declared that they had the exclusive power of conferring degrees, and determining the curriculum of study; and that the Town Council had no power to substitute (as they had attempted) extramural for intramural instruction as a qualification for collegiate degrees.

The Court of Session having regard to the decision of 1829, as well as to the merits of the question, which were very fully considered by the Lords of the First Division, gave judgment (*a*) on the 25th November, 1851, against the Senatus, who consequently tendered the present appeal.

The *Solicitor-General* (*b*), for the Appellants: This has been emphatically an University in the true sense of the term for nearly three centuries. It has been established by regal, and fortified by legislative authority. It is expressly recognised as one of the Universities of the kingdom by the Act of Union. The power of conferring degrees, and the right of determining the qualification of candidates, belongs inherently and exclusively to the Senatus Academicus, as the governing body of this learned corporation. It is liable to no control or interference. The Baillies of Edinburgh, with the Provost at their head, are purely municipal functionaries, given to civic and festive contemplations. They are not intellectual. Their attempted supremacy, therefore, involves an incongruity, abhorrent to the very nature of a great and flourishing school of learning. If we look to history, we shall find that before the Reformation, even the sovereign power of a state was insufficient to authorise

(*a*) Second Series, vol. xiv. p. 74.
(*b*) Sir R. Bethell.

the granting of degrees in their proper diffusive acceptation. Hence the Pope interfered; and by the universality of his jurisdiction, authorised certain favoured bodies to confer these remarkable, these catholic distinctions. This he did as master of the world. But is it to be endured, that a Scottish Town Council shall affect to issue bulls (*a*)? It is true that the University of Edinburgh is of more modern date than those of St. Andrew's, Glasgow, and Old Aberdeen. It stands on Protestant authority. But it has an all-sufficient foundation. The Town Council are but trustees for the Senatus Academicus; and this case must be dealt with on the well-settled principles which are acted upon in Chancery in cases of public endowed charities. Those principles are quite familiar in Scotland, and have been enforced in many cases. The Town Council are not the founders of this University: and the title of Patrons, which they claim, has a very different signification from that of a Visitor, who, in England, has often great and exclusive jurisdiction.

(*a*) The Papal sanction to universities was always by Bull. Thus the University of St. Andrew's was established by Bull in 1413. That of Glasgow by Bull in 1450. That of Old Aberdeen (King's) by Bull in 1494. Of course the Bulls became less potent after the Reformation. The University of Edinburgh, founded in 1582, and the Marischall College of Aberdeen, founded in 1593, must be content with a humbler derivation. The oldest Universities in the world are those of Bologna, 403, and of Paris, 1109; the former famous for law, the latter for theology. The great English Universities of Oxford and Cambridge are of extreme and unknown antiquity, viewed as mere seminaries of education attached to religious houses; but considered as Universities in the proper sense of the term, they seem both to be pretty nearly of the same standing, and are referable to the commencement of the thirteenth century. The Dublin University was founded by Archbishop Loftus in 1592. In our own day we have two new Universities. The University of London, 1836, having a constitution resembling that of the Scotch and German Universities; and the University of Durham founded in 1837.

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The Professors, who are here as Appellants, form component parts of a learned corporation. When once appointed, they have legal rights and duties, and are bound to prescribe rules and regulations for the execution of the great work committed to their care, not by the unlettered burgesses of Edinburgh, but by the general law and constitution of the country. It is a great error to describe the decision of 1829 as *res judicata*. Bind the appellate jurisdiction it cannot, whatever may be its effect in the Court below; and although the decree now under appeal is against us, we have Lord Jeffrey and Lord Fullerton on our side.

On these grounds, we confidently trust that your Lordships will reverse the decree now complained of; for we venture to assume, that the House will neither adopt the singular reasoning of the Scotch Judges, nor sanction this unworthy attempt to depress and to deride an illustrious institution, which has been for ages the pride and the glory of Scotland.

Mr. *Boyle*, of the Scotch Bar, followed the *Solicitor-General*.

Sir *Fitzroy Kelly* and Mr. *Rolt* were heard for the Respondents. Their arguments appear in the following opinions.

The LORD CHANCELLOR (*a*):

Lord Chancellor's opinion.

My Lords, this is an action of declarator seeking three different declarations of right. First, that the Senatus Academicus has exclusive power to determine what previous education is necessary to entitle a person to offer himself as a candidate for a degree, and of making rules for determining such qualification. Secondly, that the Provost and Council have not the power of prescribing the course of study or other quali-

(*a*) Lord Cranworth.

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fications necessary for entitling a person to offer himself as a candidate for a degree; and particularly, that they have not the power, by making rules or otherwise, to substitute as a qualification attendance on the instruction of teachers not belonging to the University, for attendance on the lectures of Professors in the University. Thirdly, that the order of the 26th of January, 1847 (*a*), was *ultra vires* and void, and that the Town Council ought to be decreed to recal and rescind the same, and ought to be restrained from interfering with the rights and privileges of the Senatus, and from assuming power to prescribe the course of study or other qualifications necessary for obtaining a degree.

The claim of the Senatus is resisted by the Town Council, first, because, as they say, the matter has been already decided in their favour in a former action; and secondly, because if this were not so, still the Pursuers must fail, because the Town Council has the right which is impeached, independently of their title arising from the question being a *res judicata*.

My Lords, the constitution of the University of Edinburgh depends first on a charter of King James VI. (James I. as we call him), dated the 14th of April 1582; and secondly, on a statute of the same King, dated 1621.

The charter, which is dated 1582, and which is to be found in the Respondents' Appendix, page 34, after reciting certain former grants which had been made by the King's mother, Queen Mary, to the same Council, on no trust except the obligation of providing ministers and preachers, and keeping in repair certain existing buildings, proceeds thus:—"Insuper, nos cum avizamento prædicto, pro diversis rationalibus causis, bonis et considerationibus nos moventibus, de novo, tenore

(*a*) This was an order whereby the Town Council had regulated the course of study for degrees.

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præsentium damus concedimus et disponimus præfatis præposito," and so on. Then it confirms the grant "in sustentationem," "ministerii," &c., and authorises the Provost and Council to build houses, &c., for the residence of Professors; to appoint and remove Professors, as may be expedient; and restrains all other persons not authorised by the Provost and Council from teaching.

It was therefore a charter granting to the Town of Edinburgh the right of electing and maintaining a College, and prohibiting all other persons from teaching within its precincts.

So the matter went on until the latter period of that King's reign, when an Act (*a*) of the Scottish Parliament was passed, which extended the powers of the original charter. That is to be found in the Appellants' Appendix at page 96. It recites the charter and a number of other grants that were made to the Provost and Baillies, and refers to the great services which they had conferred on the King, and his granting to them certain privileges, lands, and so on. It also recites that, by that charter, the King had granted to the Provost the license to build a College, and to choose Professors, &c., and that they had built a great lodging, with the manse of the Kirk of Field, to the use of a College for the profession of philosophy, and which has since flourished for the space of thirty-five years. It recites various other grants, and states that the same are confirmed, and then it goes on:—"Likewise his Majesty, for good service done to him by the Lord Provost. &c., has granted to thame and thair successors, in favoures of the said Burgh of Edinbur^{t}, Patrone of the said Colledge, and of the said Colledge, and of the Rectors, Regentis, Bursaris, and Studentis within

(*a*) 1621 Jac. 6, c. 79.

the samen, all liberties, fredoms, immunities, and priviledges appertening to ane free Colledge, and that in als ample forme and lairge maner as any colledge hes or bruikis in this his Majestie's realme: and gif neid beis, ordanis ane new charter to be exped under his Hienes' gryit seal, for erecting of the said Colledge, with all liberties, priviledgis, and immunities qlk anye colledge within this realme enjoys."

It is upon those two documents that the constitution of this College depends.

In accordance with these charters a College was founded; officers and professors were appointed by the Town Council; and so matters went on until the year 1685. A medical faculty was then established. Degrees were conferred in medicine at least as early as 1726; but the time when medicine was first taught, whether in 1685 or some little time after, is not to my mind quite certain. That is not very important; but it is certain that, for a very long time afterwards, degrees in medicine were conferred.

In the year 1845 certain statutes were in force as to medical students, and by those statutes it was provided, "That no one shall be admitted to the examinations for the degree of doctor of medicine who has not been engaged in medical study for four years, during at least six months of each, in the University of Edinburgh, or in some other University where the degree of M.D. is given." So, my Lords, matters stood from the year 1833 to 1845; and in the year 1845 the Senatus Academicus, being anxious to make an alteration, by allowing as a substitute for study in the University, except for one year, study at any of the metropolitan schools of London or Dublin, submitted the matter to the Town Council for their approbation, and the Town Council substantially approved of their proposition, with this addition: they insisted that this extramural

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study should not be confined to the medical schools of London and Dublin, but that the extramural schools of Edinburgh should also be admitted to share the privilege. This was objected to by the Senatus; and the parties not having been able to settle the matter amongst themselves, this action of declarator was instituted for the purpose of getting a declaration in favour of the Senatus, who are the Pursuers, that they are entitled to make such a regulation whether the Town Council permit it or not.

My Lords, the substantial questions are—First, Whether the Senatus has the exclusive power of making regulations for degrees wholly irrespective of the Town Council? Secondly, if not, whether the Town Council was warranted in making regulations allowing extramural education in Edinburgh, to be in part available for degrees?

The first question seems to my mind to be concluded by the decree of 1829. A question arose at that time, in a claim made by the Town Council to have attendance on a course of lectures on midwifery made an essential requisite for obtaining a degree in medicine. To this the Senatus objected, at least in the terms and to the extent required by the Town Council. Accordingly, in the month of December, 1825, the Town Council raised an action of declarator against the Senatus, concluding that it "ought and should be found and declared, that the Pursuers have the sole and exclusive right and privilege of prescribing rules and regulations, and making laws and statutes for the studies to be pursued in the College, and the course of study for obtaining degrees;" —and that "the Principal and Professors of the said College of Edinburgh do not possess and enjoy, independently of the authority of the Lord Provost, magistrates, and Town Council, as patrons aforesaid, the power and privilege of enacting the regulations and course of

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discipline to be observed by the students at the said College in order to entitle them to the literary or scientific degrees and honours which students at the said College obtain by graduation thereat;"—and that "the Principal and Professors of the said College have no power, as a distinct and independent body, to frame any bye-laws, rules, or regulations, applicable to the general concerns of the College, which can be imperative upon the Lord Provost, magistrates, and council, as patrons and founders, to sanction;"—and that "no rules, regulations, laws, or statutes, made or to be made by them, are or can be of any force or strength if they shall not be approved of and sanctioned by the Pursuers."

That case was brought on, and was argued at great length; and the *Lord Ordinary* having considered the closed record, "finds that the Principal and Professors of the said College" have not the right to make regulations, statutes, or laws for the College, and therefore he "finds that the resolution of the Defenders, of the date 25th October 1824, was *ultra vires*." This interlocutor of the *Lord Ordinary* came on for argument before the full Court, and it was then fully affirmed. And the first question now for your Lordships' decision is, how far this decision governs the present question. It is evidently decisive as to the first point. The Pursuers say that they, the Senatus, have the exclusive right to determine what previous education is necessary to entitle a person to offer himself as a candidate for a degree. The finding of the *Lord Ordinary*, affirmed by the full Court in 1829, was, that the Town Council have the right of making statutes and regulations in respect to the course of study for obtaining degrees; and that the Senatus has not the power to make regulations which may not be rescinded or altered by the Town Council. This is a direct negative of the

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exclusive right now contended for by the Pursuers. It was the very point in controversy in the former suit, and was decided without any dissentient voice against the Senatus, in a suit between the very same parties who are now litigants. It is therefore to all intents *res judicata*. This was the clear opinion of all the judges below; for on this point Lord *Fullerton* agreed with the other members of the Court.

My Lords, I confess I am strongly inclined to think that that judgment is conclusive on the other point also, that is, that it establishes the right of the Town Council to say that study for a portion of the four years, under certain extramural teachers in Edinburgh, shall be a sufficient substitute for intramural study. According to both schemes of regulation, one year of intramural study is required. Section III. of the old Statute, and Section IV. of the new one, both go to this point. It would be competent to the Town Council, of course, supposing them to be acting *bonâ fide*, to prescribe that year as the only necessary qualification, assuming the candidate to be found *idoneus*. If the Town Council could have said that the right of applying for a degree shall be open to all who have pursued one year's study within the walls, it is surely open to them to say that it shall only be open to them, if they have previously pursued certain studies without the walls. The Inns of Court have no right to confine the degree of Barrister to those who have obtained a degree in the University, but having an absolute power of saying how long a student shall have been a member of the Inns before he can be called, they have a right to say, —We require five years unless the candidate has graduated at the University, and in that case only three. This is precisely what is done here. The Town Council say—We require four years' intramural study, unless the applicant can show that he has prosecuted

for a stipulated time certain extramural studies; then we reduce the necessary intramural term to one year.

In my opinion, therefore, the whole question was decided by the judgment of 1829. But even if this question had been now open to consideration, I should have come to the same conclusion. The language of the statute relied on as giving an independent existence to the College is very obscure (*a*)—"And also with the advice of the said Estates, has given, granted, and disponed to them and their successors in favour of the said Burgh of Edinburgh, Patron of the said College, and of the Rectors, Regents, Bursars, and Students, within the same, all liberties, freedoms, immunities, and privileges, appertaining to a free College, and that in as ample form and large manner as any College" within his Majesty's realm. The Charter certainly does not give them an independent existence. The object of the Legislature, or of the Crown, in passing this statute, was to confer further privileges and benefits on the Town; and it is expressly so stated. The privileges of a free College are granted to the Town in favour, it is true, of the College and its officers, as well as of the Town,—but this must be taken to mean in favour of the College as it then existed, that is, as a dependence of the Town. The same observation applies to the provision that, if need be, a new Charter should be expede for erecting the College. That must be taken to mean, for incorporating it as it then existed—that is, as a dependence of the Town. In fact, however, no such Charter ever was expede. Nothing could be further from the whole scope and tenor of the Act, than an intention to take from the Town any of the controlling power which they then possessed over the College. This, my Lords, would have been

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(*a*) *Suprà*, p. 494.

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my construction of the Act, if I had been called on to interpret it in 1622. And if we look to contemporaneous and subsequent usage, this construction is strongly confirmed.

The extracts from the Minutes of Council afford strong evidence in favour of this view of the case.

In the first place immediately after the charter of 1582, the Town authorities proceeded to devise the order of teaching; and I find some of their most important acts fully confirmed by the Senatus. In the year 1604, on the appointment of Mr. Munro as Regent, he bound himself to observe whatever orders the Council should give. Then in the year 1626, there were certain regulations as to visitations to see if the rules (*i.e.* the rules made by the Town Council from time to time) have been obeyed; the Council appoint a Professor of Divinity, and give directions as to his teaching, which clearly shows the control exercised by the Town over the authorities of the College. The same happened in the next year with regard to the teaching of metaphysics, the taking the Communion, and so on. In 1627 there appear to have been further directions given as to teaching divinity. Then in 1628, there were a series of rules made for the government of the College. In the year 1638 two persons acting as Regents were removed. Then, in 1640, there is the first appointment of a Rector, who shall serve to be the eye of the Town Council, and the mouth of the College. Then this is continued, and directions were given in 1640 and 1645, as to laureation and the taking of degrees. By a regulation made in 1665, the Provost was to be *ex officio* Rector; and in 1685 the College was, as far as I can see, for the first time designated as a University; and then, for the first time, there is the appointment of a Professor of Physic. Then in the year 1703, there were great disputes as to

granting laureations privately; and after a good deal of discussion and dispute, it ended in the College being obliged to submit to the Town. Then in the year 1708, further regulations were made by the Town Council with respect to the course and duration of the studies to be pursued at the University. Then, in the year 1747, there was a new constitution of the Professorships of Medicine. In the year 1766 Dr. Black was appointed Professor, and he bound himself to observe all the laws and regulations of the Town Council. And in the year 1773 and 1776 other appointments were made with the like conditions. These extracts show, to my mind, conclusively, that from the foundation of the University, the Town Council has always appointed and removed the officers and regulated the course of studies in it whenever they thought fit.

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But then, it is said that the power to regulate studies, and to fix proper tests for degrees, is a power inherent in every University, *qua* University. In my opinion that is not so. Here the rights of the College (University, if it differs, is a mere assumption of name) depend entirely on the charter and the statute. The question is not one of an abstract nature, what the term "University" generally means, but what are the powers given by the charters to this body, call it College, or call it University. The question is, what rights do those instruments confer? My Lords, I have already stated that, in my construction of them, the College is a mere dependence of the Town.

Upon the whole, therefore, I am of opinion that the interlocutor appealed from was perfectly right. In truth, my opinion is, that the whole matter is *res judicata*. But if it were not so, and we were now adjudicating upon it for the first time, the College being a dependence of the Town, I think the decision at which

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the Court below arrived was perfectly right; and I shall, therefore, move your Lordships that this interlocutor be affirmed.

The Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, I entirely agree with my noble and learned friend in the opinion which he has formed upon this case, that after the very full consideration and able argument which it has undergone, we have no other course to take but to affirm these interlocutors.

My Lords, in affirming these interlocutors, we certainly go with the great majority of the learned Judges in the Court below, for eight out of those learned Judges adopted the same view; and one only, a most respectable authority undeniably, Lord *Fullerton*, held a contrary opinion; and we have also in support of the same conclusion, the opinions in 1830 of the Law Officers of the Crown, of the learned and venerable head of the Court, of the Dean of Faculty, and of another learned Judge who in that year was a Member of the Commission which inquired into this subject, and came to the conclusion, that the University or College of Edinburgh stands upon an entirely different footing from the other Collegiate Establishments in Scotland. The Lord President Hope was one of the Members of that Commission. Lord Moncreiff, then Dean of Faculty, and the Law Officers of the Crown, Sir William Rae, and Mr. Hope, the present Lord Justice-Clerk, came to a very clear opinion upon the subject of the diversity existing between the other Collegiate Establishments in Scotland and that of Edinburgh.

Nevertheless, my Lords, if upon looking into the case, and well weighing the arguments that have been urged before us, we had found reason to think that the

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conclusions arrived at by those great authorities in Scotland were erroneous, we should no more have hesitated in delivering our judgment for the purpose of setting them right, than we have done on former occasions. However, after examining the arguments and the documentary evidence before us, I certainly have come to the conclusion with my noble and learned friend, that if we were not bound either by *res judicata*, or by the authority of a decided case, that if we considered this question now open to us, we should arrive at the same conclusion as that at which the learned Judges in the Court below have arrived, both in the year 1829 and in the present case; and at which the Commission arrived in 1830; namely, that the Town Council have the exclusive right of framing regulations for the government of the College, and that the Senatus Academicus has not even a concurrent jurisdiction. I am prepared to say certainly, that the Senatus has not a concurrent jurisdiction in such wise as to give them a right to make regulations without the assent of the Town Council.

My Lords, this rests, first of all, upon the charter of 1582, which is represented by some as the charter of foundation; and next upon the confirmatory Act of 1621.

When I mentioned the authorities of the law of Scotland, which favour this view, namely, the decision of the decided case of 1829, and the opinions of the learned members of the Commission of 1830, as well as of the learned Judges in the Court below, in the present case, I omitted, accidentally, to mention another high authority,—an authority, in my opinion, of the greatest weight,—I mean that of the late most learned Professor Hume, professor of Scotch Law, and himself a party representing the Senatus Academicus in the course of the discussion which took place in 1810. For although,

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without doubt, that discussion was confined to a question of fees, a financial question, yet it led into a full and minute, and most able, as well as elaborate, investigation of the whole question of the relative rights of the Town Council and the University, and Professor Hume came to a very clear conclusion, that the College was dependent in legislative matters upon the Town Council, and that the laws must be made by that body for its government, not by the Senatus Academicus.

Now, my Lords, in the first place, as to the charter of foundation, as it is called, of 1582, I entirely agree with the learned Professor that it is not a foundation charter,—that it does not found the University or the College. That seems to have been the opinion of another most learned Judge, Lord *Glenlee*, as well as of Lord *Pitmilly* and others in the year 1829. Their opinion was, that it only conferred a power upon the Town Council to found a corporation or sub-corporation, which they might have done, as the Professor says, in the usual way in which a sub-corporation is founded in Scotland. They could only exercise the power given by the charter of 1582. But they did not exercise that power; they did not found a College or University; they merely established a seminary for teaching, and did not incorporate another body with separate privileges and jurisdiction under that charter.

Then comes the Act of 1621, which is said to have extended the powers of the College, by incorporating them with the rights of the Town—and it is urged that by so much they have encroached upon the rights of the Town. My Lords, I think this would be a very extravagant construction to put upon that Act, as will be seen by perceiving the results of it. The Town Council had been endowed, by the charter of 1582, with extensive—I may say absolute—power of appoint-

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ing Professorships, and of naming Professors. The power of removal had also been given. It was to be the College of the Town. Then the Act of 1621 proceeds upon the statement, that the King "off his princelie and royale favour, and for gude service done to him be the saidis Provost, Bailzies, Counsell, and communitie of the said burgh of Edinburgh, and for their further encouragement in repairing and re-edifeying of the said Colledge, and placing therein sufficient Professours for teiching of all liberal sciences, ordaning the said Colledge in all tyme to cum to be callit King James' Colledge: And als, with advys of the saidis Estattis, hes of new agane, GEVIN, GRANTIT, aud DISPONIT to thame and thair successors, in favoures of the said Burgh Edinbur^{t}, patrone of the said Colledge, and of the said Colledge, and of the Rectors, Regentis, Bursaris, and Studentis," and so on.

Now, it is contended that this being granted by the special favour of the Crown, in consideration of the services rendered by the Town, first to the King, and next to the College, in having performed the duty imposed upon it by the charter of 1582, and for the further encouragement of the Town in so acting, Parliament does what? It takes away the supreme power vested in the Town before, by sharing it with the College, and making the College no longer the College of the Town, but an independent body, with powers in conflict with and superior to (for that is the argument of the Appellants) the powers of the Town Council.

My Lords, I hold that this would be a most absurd construction to put upon the Act of Parliament; that it is not warranted by anything in the Act, either taken by itself, or compared with the charter of 1582, or with what had taken place between 1582 and 1621.

But, suppose there is a doubt about this,—suppose it is not clear,—suppose it is capable of argument, that

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the Act gave a power to the University, the learned corporation, at the expense of the municipal corporation, —how can we better decide the question, if it still remains doubtful, than by resorting to the practice under the Act?

Now, when we come to look at that, there can be no doubt whatever about the matter. There may be much absurdity in the existence of a University acting under the entire control of a municipal corporation; there may be great anomaly in this; there may possibly be much inconvenience, though I do not believe that in fact any such inconvenience has been experienced, but speculatively we may assume that much inconvenience is possible to arise under such a constitution. But that is not the question for us. The question is, what says the law, and that alone is to be decided. If there be a doubt as to the construction of the charter of 1582, and of the Act of 1621, taken together, that is to be decided, and can only be safely decided by what has been done under that charter and under that Act. Upon this no doubt whatever can exist that, as my noble and learned friend has stated, no time was lost in showing after 1582 what the magistrates deemed their rights to be, and how they enforced those rights. I think in 1583 occurred the case of a person of the name of Rollock, who was endowed with the office of Professor upon the condition of entirely submitting himself to the government of the Town. Then came other instances. There was one, I think, in 1604, of a person of the name of Munro, which has been spoken of by my noble and learned friend. Then, in 1626, a set of rules and regulations were made for the government of the College, all in minute detail, whereby the days of lecturing on divinity were fixed, and the number of times a-week those lectures were to be given, and provision was made for disputations in divinity

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and on other subjects; provision was also made for examination in Latin and in Hebrew. Then the discipline of the College was provided for, both as to religion and morals; severe denunciations as to certain acts of immorality were pronounced, and a positive regulation was made with regard to certain attendance, to be given by the students, upon the sacramental ordinances of the Church. Nay, in one instance (whether it be in those regulations, or in another set, is immaterial), you will find that there is even a provision made as to the terms in which degrees should be conferred, care being taken to pay due respect to the Town Council even in framing the words of the degrees to be conferred.

Then as we go on, we, time after time, find Professors receiving their appointments upon the express condition that they shall in all things be obedient to, and observant of, the regulations made by the Town Council. One of these Professors has been mentioned by my noble and learned friend, perhaps the greatest name to be found in modern chemical science; I mean that of Dr. Black (*a*), who, in the year 1766, took his Professorship, which he afterwards made so illustrious, and took it upon the express condition of, in all respects, obeying whatever orders or regulations should be made by the Town Council. Other instances of the same sort, to which it is needless to advert, are given; and then comes a general statute of the Town Council, made in the year 1780, requiring that regular teaching shall be held in the College, and that the Professors and all in the College shall be observant of all laws made or to be made by the Town Council for the regulation and government of the College; and a notice of this statute was served upon the College through that great man, Dr. Robertson, then their

(*a*) See the Memoir of him by Lord Brougham.

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Principal, in order that the College might know the laws under which they were to act. This set of laws appears to be merely declaratory; and there are various other instances to which my noble and learned friend has adverted, and which show that those rules had been acted upon before.

Then as to the Acts of the Town Council and the attempts of the University at different times to take to itself a power which the law did not give it—we have a very remarkable instance in 1703. A complaint was made to the Town Council that a rule had been laid down by the College for private laureation as it is called, that is graduation. Immediately they called upon the parties who are considered to have been the wrong doers, and those parties proposed to pass from, to abandon, the regulation which they had made. But the Town Council would not be satisfied with that; they did not consider that enough. They not only required them to appear, and to abandon what had been done, but they also required that the College should "pass from their said Act as unwarrantable, submit themselves entirely to the Magistrates and Town Council, and order the foresaid laureation as to time, place, and manner, as the Council shall think fit, as also to take up and withdraw their said protest taken against the electing of a Commissioner for the Assembly, and that a Committee of the Town Council might be appointed for revising the laws of the College, prescribed to them by the Town Council, and for making such other laws, after the Council's hearing of the said masters, as may be thought proper for preventing the like mistake in time coming, for the weal and benefit of the College." So that here was an attempt to interfere with the legislative power of the Town Council; and that attempt having come to the knowledge of the Town Council, was immediately

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resisted, and successfully resisted;—and it was then abandoned by those who had made it;—and a subsequent provision was made for rules and regulations to be propounded after consideration, and to be made, not jointly by the Town Council and the College, but by the Town Council alone, for the benefit of the College.

My Lords, it certainly did happen (and this is referred to by Mr. Hume in his very able opinion), that for about forty or fifty years in the latter part of the last century, there had been acts done by the Professors of the College which seemed to encroach a little more upon the province of the Town Council than might have been expected from the previous practice. Nevertheless it is to be observed, in the first place, that these acts were chiefly respecting matters which might be considered to be peculiarly within the province of the Professors, namely the payment of certain small fees for matriculation, and so forth. But it will further be observed that, contemporaneous with those acts, other acts of authority were done by the Town Council, and yielded to by the College, and that acts were done by the College itself, showing its submission to the superior jurisdiction of the Town Council, of which I will give one instance. Between the years 1763 and 1767, which are the dates of two of those acts of authority exercised by the College, and not by the Town Council, there occurs a very remarkable instance of submission by the College to the Town Council, namely, an application made by the Rev. Principal, the great man whose name I have before mentioned, Dr. Robertson, to the Town Council, for leave to enable the Professor of Moral Philosophy to take fees, instead of being dependent solely upon his salary. The Town Council having directed that the Professor should be paid by salary and not by fees, the Principal applies to the Town Council to make an

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exception in favour of this gentleman as a Professor, and to allow him for some special reasons, in exception to the rule laid down by the Town Council, to be paid by the fees of the students. Now, observe this was done by the Principal as representing the Senatus Academicus; —it was done of course after full consideration by the Senatus Academicus;—it was done because they knew that without the leave of the Town Council their Professor could not legally accept fees;—it was done because they knew that they could not infringe upon the regulation of the Town Council, which directed the Professors to be paid by salary and not by fees;—therefore anything more clear than this, at the very time when certain of their acts might lead to some doubt as to their pursuing a different course, cannot well be imagined. It is then manifest that before the beginning of the present century (since which there has been nothing of the kind), those acts, which might have raised some little doubt upon the question, can leave no doubt when coupled with the admissions of the College—with the proceedings not only of the Town Council but of the College itself.

My Lords, I have nothing more to add to the observations of my noble and learned friend, and the arguments which have been urged by the learned Judges in the Court below upon both the occasions when this question came before them, except this, that I see that an attempt was made to represent Lord Jeffrey as having differed from the other Judges in respect of the decree of 1829. A case arose, that of *Tullis* v. *Macdowall and the Magistrates of Edinburgh* (*a*); and Lord Jeffrey said,—"I am inclined to think, that the charter and the Act of 1621 do constitute the College as apart from the Patrons,—the Patrons have great and extraordinary powers; but they are not the College.

(*a*) 18 December, 1847. New Ser. x. 261.

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The College in many respects no doubt is subordinate to the Patrons, but it has powers and privileges quite independent of theirs, as for instance that of conferring degrees." No doubt that is so. It must, however, be observed, that some of the Judges seemed to think, and Lord *Glenlee* among others, that the mere appointing of the Professors gave the College, from the fact of their appointment, the power of conferring degrees. I should doubt that; and certainly the instances of the other Scotch Universities would rather go against it, for every one of those which have been cited, St. Andrew's, Aberdeen, and Glasgow, have the power to confer degrees by express grant;—by the grant of the Pope in the case of St. Andrew's and Glasgow, and by grant of the estates of Parliament in the much later case, at the end of the sixteenth century, that of Marischal College, Aberdeen, founded by the Earl Marischal. It is, however, quite unnecessary to enter upon that here, for this case is perfectly independent of all question as to the power of granting degrees. The question here is upon the power of making rules and regulations for the government of the College.

My Lords, much has been said in this case respecting the difference between intramural and extramural interference. For my own part, I am inclined to think that the power of the Town Council to make regulations for the government of the College, the detailed arrangement of its business, and the discipline of its members is much greater considered merely as to their intramural authority than as to their extramural. I think it is a much greater stretch of power for a municipal body to interfere with the details of the discipline and conduct of a University within its own walls, which this Town Council most clearly has done from the very first, than to exercise the mere power of prescribing

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what shall be the qualification for degrees, where the studies of candidates are extramural.

Upon the whole, therefore, I have no doubt whatever that the College of Edinburgh, differing from the other Colleges in Scotland, stands upon this footing, that it is the College of the Town, and that the Town Council have the government of the College.

Interlocutors affirmed, with Costs.

RICHARDSON, LOCH, & MACLAURIN.—MAITLAND & GRAHAM.