forward and not made out, I submit to your Lordships that the appeal should be dismissed with costs.

Sir F. Kelly.—Will your Lordships permit me, on the part of the appellant, to ask that he may be allowed an opportunity, if he should be so advised, of applying to your Lordships with reference to the form in which the judgment of this House shall be ultimately drawn up?

LORD ST. LEONARDS.—I omitted to make an observation upon that, but it is not for want of having formed an opinion upon it. I think it is quite right to assoilzie the defendant. It was upon preliminary defences; and I have already shewn to your Lordships that the result is the same as would have taken place in this House, if the appeal had been first made to this House. If this House had, upon your preliminary case, denied your right to go on, it is quite clear that the House would have made an order to put an end to your case altogether.

LORD CHANCELLOR.—I am much obliged to my noble and learned friend for mentioning this, which I had omitted to notice. My opinion is, that it is entirely right, because, the charge of fraud failing, that entirely concludes the case.

Interlocutors affirmed, with costs.

Spottiswoode and Robertson, *Appellant's Solicitors.*—Richardson, Loch and Maclaurin, *Solicitors for Respondent* William Patrick.—Dean and Rogers, *Solicitors for Respondents* Robert Shedden Patrick and William Cochran Patrick.

MAY 26, 1854.

THE SENATUS ACADEMICUS OF THE UNIVERSITY OF EDINBURGH, *Appellants*, *v.* THE LORD PROVOST, MAGISTRATES, AND TOWN COUNCIL OF THE CITY OF EDINBURGH, *Respondents.*

Royal Charter—Stat. 1621, c. 79—Clause—Construction—Res Judicata—Edinburgh Town Council—Edinburgh University—*In a question between the Magistrates and the Senatus Academicus of the University of Edinburgh, as to the rights and powers of the Magistrates, as patrons, in regulating the course of study of candidates for medical degrees:*

Held (affirming judgment), *that the Magistrates, as patrons, are entitled to prescribe conditions for the course of study qualifying for degrees in the University.*[1]

In the year 1566, Queen Mary granted a charter whereby she annulled a purchase of certain church lands made by the Town Council of Edinburgh with the view of founding a College; and of new granted all the church lands of Edinburgh to the Magistrates, for the endowment of an hospital and school.

In 1582, King James the Sixth granted a charter to the Provost, Bailies, Council, and Community of Edinburgh, whereby he confirmed the charter of 1566, and made over to them of new the whole subjects of conveyance. The charter of 1582 bore—"Ideo nos enixe cupientes ut in honorem dei et commune bonum nostri regni literatura in dies augeatur volumus et concedimus quod licebit præfatis præposito consulibus et eorum successoribus ædificare et reparare sufficientes domos et loca pro receptione habitatione et tractatione professorum scholarum grammaticalium humanitatis et linguarum philosophiæ theologiæ medicinæ et jurium, aut quarumcunque aliarum liberalium scientiarum quod declaramus nullam fore rapturam prædictæ mortificationis; ac etiam præfati præpositus, ballivi et consules ac eorum successores cum avisamento tamen eorum ministrorum pro perpetuo in posterum plenam habeant libertatem personas ad dictas professiones edocendas maxime idoneas uti magis convenienter poterint eligendi cum potestate imponendi et removendi ipsos sicuti expediverit; Ac inhibendo omnibus aliis, ne dictas scientias intra dicti nostri burgi libertatem profiteantur aut doceant nisi per præfatos præpositum ballivos et consules eorumque successores admissi fuerint."

A College was accordingly built, and a Principal and Professors were appointed by the Town Council.

By statute 1621, c. 79, entitled, "Ratification of divers infeftments granted to the Town of Edinburgh for sustentation of College ministers and hospitals," the grants previously made were confirmed and ratified, and the act proceeded—"Lyckas his Majestie, off his princelie and Royal favour, and for gude service done to him be the saidis Provost, Bailzies, Counsel, and Communitie

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[1] See previous report 14 D. 74; 24 Sc. Jur. 33. S. C. 1 Macq. Ap. 485: 26 Sc. Jur. 520.

of the said burgh of Edinburgh, and for their further encouragement in repairing and re-edifying of the said College, and placeing thairin sufficient Professours for teiching of all liberal sciences, ordaning the said Colledge, in all tyme to cum, to be callet King James' College; and als, with advyse of the said estaittes, hes of new agene gevin, grantit, and desponit to thame and thair successouris, in favouris of the said burgh of Edinburgh, patrone of the said College, and of the said College, and of the rectors, regentis, bursaris, and studentis within the samen; all liberties, freedoms, and immunities and privileges, appertening to ane free College; and that in als ample forme and lairge manner as any College hes or bruikes within this his Majestie's realme; and, gif needs be, ordanes ane new charter to be expeid under his Hienes' gryit seal for erecting of the said College with all liberties, privileges and immunities, qlk any College within this realme bruiks, joises, or to the samen is knawn to apperten."

Since the foundation of the College, the Magistrates and Council were always in use to appoint regents and professors to vacancies, the parties appointed being taken bound, by their commissions, to observe the rules and regulations to be prescribed by the patrons. Rules and regulations were accordingly, from time to time, issued by the Town Council in regard to the government of, and order to be kept within, the College by the professors and students, and also in regard to the course of education to be followed preparatory to graduation, and to the mode of conferring degrees.

The first professorship of medicine was created by the Town Council in 1685, but it was not until 1726 that a proper faculty of medicine was instituted.

Previous to 1767, no curriculum of study for medical degrees had been prescribed; but in that year the first of a series of rules or *statuta solennia* relative to degrees in medicine, and in the course of study required in reference thereto, were promulgated by the Principal and Professors composing the body called the Senatus Academicus. Alterations were at various times made in these rules by the Senatus, and in particular, in the year 1819, the following provision was adopted:—" Nemo gradum doctoratus consequatur priusquam triennium in hac aut alia Academia per sex saltem menses quotannis medicinæ studio impenderit et sequentibus quas scientia medica complectitur disciplinis, vel pluribus singulis annis."

An alteration was made in this statute by another passed in 1823, whereby the Senatus provided, that all candidates for degrees must have studied for a certain period in a school having power to confer degrees.

In 1824, the Town Council passed an act requiring the Senatus to add the class of midwifery to those previously included in the curriculum, and on their refusal to do so, raised the action of declarator, the conclusions of which are set forth in the note of the Lord Ordinary. The Court decided in favour of the Town Council.

In 1833, certain statutes regarding the curriculum for the degree of M.D., which had been approved of by the Senatus, were, by order of that body, laid before the Town Council for their sanction, and were sanctioned by them.

In 1845, certain statutes, approved of by the Senatus, were transmitted by the Dean of the medical faculty to the Town Council in order that the same "may receive the sanction of the patrons."

By the proposed statutes, it was provided, § 3, that no one should be admitted to the examinations for the degree of M.D. who had not studied for four years in the University of Edinburgh, in the hospital schools of London, or in the school of the College of Surgeons in Dublin, unless, in addition to three medical sessions so constituted, he had attended, during at least six winter months, the practice of a general hospital, wherein at least 80 patients were accommodated.

The Town Council approved of and sanctioned the statutes, but under an alteration in § 3, to the effect that—"attendance on the lectures of teachers of medicine in Edinburgh, recognized as such by the Royal Colleges of Physicians and Surgeons of Edinburgh, (in accordance with regulations to be adopted by these Colleges jointly, and approved of by the Patrons of the University,) shall, to the extent of one third of the whole departments" requiring to be studied under existing regulations by candidates for medical degrees, be held equivalent, in qualifying for graduation, to attendance or study within the University itself.

It was subsequently resolved by the Town Council, that the fees of the extra academical teachers, to be recognized as above, should not be less than those of the professors.

The Senatus Academicus of the University thereupon applied for interdict against the respondents carrying these rules into effect, on the ground that they were *ultra vires* of the Town Council, the pursuers alone having the right and power to prescribe the course of study to be followed by intending graduates. With this process, a summons of declarator was subsequently conjoined.

The Lord Ordinary repelled the reasons of suspension, recalled the interdict, and sustained the defences and assoilzied the defenders from the whole conclusions of the libel. The First Division adhered.

The Senatus Academicus appealed, maintaining in their case that the interlocutors of the Court of Session ought to be reversed—"1. Because the power of conferring University degrees,

and the right of determining the qualifications to be required of candidates, belong exclusively to the Senatus Academicus or other governing body of the University; and this power and right, when legally exercised, are not liable to be controlled by any party whatsoever.—*Magistrates of Edinburgh*, 7 S. 255; 10 D. 261. 2. Because, at all events, the power claimed by the respondents of compelling the Senatus Academicus to take on trial for graduation such students as they may choose to declare qualified is *ultra vires* and unconstitutional: and they ought to be ordained to rescind the order or resolution complained of."

The *respondents* in their *printed case* supported the findings of the Court of Session for the following reasons:—" 1. Because, it having been decided by a final judgment of the Court of Session, that the respondents 'have the right of making alterations or statutes for the College of King James, and that in respect of the studies to be pursued in the College, and course of study for obtaining degrees, as well as in other respects,' the judgment is *res judicata*. 2. Because, whether amounting in strict technical language to a *res judicata* or not, the said judgment is in itself well founded, and ought to be followed in the present case. 3. Because,—the act on the part of the respondents, against which the conclusions of the summons are directed, having been done in the exercise of the powers of government and administration vested in them as patrons of the College, and conferred upon them by royal charter ratified and confirmed by Parliament—decree in terms of the conclusions ought not to be pronounced. 4. Because no right of separate jurisdiction or administration having been conferred upon, or in anywise acquired by, the principals and professors of the College as a body not in subordination to the rules and orders of the founders and patrons, there are no grounds to warrant or support the action. 5. Because, assuming that the right of conferring degrees rests with the appellants, there is no ground for maintaining that that right implies a power of prescribing the course of study qualifying for a degree; neither is there any ground in fact for holding, that, unless the appellants are possessed of such a power, the right is incapable of being beneficially exercised. 6. Because the exercise of the right claimed by, conferred on, and vested in, the respondents, as aforesaid, is in no respect an invasion of the rights of the appellants under their commissions or otherwise."

Sol.-Gen. Bethell and *Boyle*, for appellants.—The charter of James VI. gives no pretext to the respondents for interfering with the internal management of the College. The respondents were no doubt constituted the patrons, but that only means, they are the trustees and managers of the property, and have the power of electing professors: but the moment the professors are appointed, they become a corporate body, and they alone are competent to make rules for their own guidance. But if the charter is not sufficient, the act of 1621 at least gives a separate and independent existence to the College. The grant is expressly stated to be for the benefit of the rectors, regents, bursars and students; and there is expressly conferred on the College all the liberties and privileges pertaining to a free College—that is, the same status is conferred on the College as that of Glasgow or St. Andrews possessed. The very fact of its being constituted a free College, implies the exclusive right to regulate its own affairs as regards the training of students and the conferring of degrees. The term University or College had at the time of the statute a definite meaning in the public law of Europe, and was well known to be applied to a literary corporation, having the inherent right of granting degrees. The very exercise of the power of granting degrees implies a separate and independent existence on the part of the corporation, and Lord Jeffrey, in *Macdowall's case*, in 1849, 10 D. 261, seemed to be of that opinion. It might in some respects be a corporation subordinate to the municipal corporation, but not as regards the power of self-government, and the power of defining the qualifications of students for obtaining a degree. This was obviously a power which the patrons could neither give nor take away. The College did not acquire the power of granting degrees from the charter, and therefore they must have acquired it from the fact of their incorporation as a learned body under a well known denomination, to which the public law of all countries then attached certain rights and privileges. The charter and statute being therefore clear and explicit in their terms, it is obviously incompetent to bring to bear on this question the subsequent usage or custom that has prevailed. It is only when a statute or charter is ambiguous in its terms, that it is competent to refer to contemporaneous interpretation, and a course of usage thereon, for the purpose of explaining what is otherwise obscure. But when there is no ambiguity whatever, as is the case here, no length of time or of acquiescence can sanction or justify a departure from the true purpose and design of the founders; but it is rather a more cogent reason for reverting to the original design. Though, therefore, it will be said by the other side, that a uniform custom has prevailed during two and a half centuries, of the respondents having intermeddled with the internal affairs of the College, and of the College acquiescing in the interference, yet, when rightly examined, these acts are neither uniform nor consistent—they favour the one side as much as the other,—and at best only demonstrate, that both parties were not quite aware of their proper place, and that they were in the habit of making mutual concessions without any definite idea of their legal rights. The course of usage must therefore go for nothing, and cannot be brought in aid of the respondents' contention. But even assuming that the respondents have a general power of making laws for the College, we contend they have committed a breach of trust in this

particular instance. Whatever may be the exactrelation between the appellants and respondents, it cannot be denied that the respondents at least occupy the position of trustees. The relation of trustee and beneficiary exists between the parties, and therefore the trustees were bound to support and maintain the College to the best of their ability. Instead of maintaining, they are trying to destroy and undermine it, by rearing up rivals by its side, which rivals can only flourish at the expense of the College. It is therefore as much a breach of trust as it is *ultra vires* of the respondents. They have no right to say to us—"You must admit this student to a degree, though he has spent one of the four years in extramural studies." If they can dispense with one year's studies, why not two, and why not all the four? Why can they not equally well, of their own authority, at once grant a degree themselves to the student, without the necessity of any studies on his part?

[LORD CHANCELLOR.—You say they have no legal right to permit one year of the course to be spent in extramural studies anywhere; only you do not object to that year's studies being pursued in Dublin or London, so that it is not in Edinburgh.]

[LORD BROUGHAM.—Suppose the Town Council were to enact a law, that the whole of the four years' studies without the walls were to be equivalent to attendance within the walls, and the Senatus were to refuse to grant a degree on those terms, do the other side say there is any legal proceeding by which they could compel you to carry out their laws?]

They must so contend, and that is only a *reductio ad absurdum* of their argument. But then it is said, that the decree of 1829 is *res judicata* of the present question. But that was quite a different kind of power claimed there by the Town Council. They merely wanted to add a chair of midwifery to the medical faculty, and, considering the wide and undefined powers conferred by the charter, that claim might in some respects be supported, for it did not touch any vital exercise of self-government, such as consists in defining the qualification for degrees. As regards, however, the general conclusions of the summons in that action, in which the Town Council claimed a right generally to make laws for the College, we dispute the authority of that case. This House ought not to be bound by it, especially when the grounds of the decision are examined. The Court rested greatly on the long course of usage, but we say that that is at most the mere growth of usurpation, as is well illustrated by the practice of inserting in the commission of each professor a clause binding him to obedience to the Town Council, a practice which has no authority either in the charter or statute. The Judges also seemed to attach the most vague ideas to the word patron. The position of a patron is peculiar in Scotland, and has no analogy in England or Ireland; it does not correspond to the word visitor; but even if it did, a visitor in England has no power of making laws for the institution which he visits. All that is meant by a patron in Scotland, is merely one who has the right of appointment to an office, yet the Court, in 1829, confounded the patrons with the University itself, as if all the powers of the University were centred in and derived from the patrons, which was quite an erroneous assumption.

Sir F. Kelly Q.C., and *Rolt* Q.C., for respondents. The other side are driven to rely chiefly on certain abstract notions of what a University ought to be, and on mere arguments of expediency; but all we have to do is, to confine ourselves to the particular charter and statute, for there is no common law applicable to Universities, and each must stand on its own titles. The charter and statute were granted and made in favour not of any body or corporation, called a College or University, but to and in favour of the Town Council alone. The consideration moved entirely from the Town Council, which had conferred great benefits on the Crown. The grant of the privileges of a free College is accordingly made immediately and directly to the Town Council, with a view, no doubt, to a College being founded; but even that was left by the charter to their discretion. The statute does not constitute the Town Council trustees at all, but confers the privileges in question on them in the most ample and absolute manner.

[LORD BROUGHAM.—Then, do you say that the Town Council was itself empowered by the statute to grant degrees like a University?]

We must put a reasonable construction on the language used, and look at it in connection with the previous power given to the Town Council to exercise their discretion whether to erect a University or not. The professors, when once appointed, must to a certain limited extent have the same rights as other professors; but there can be no pretence for going the length of saying they were constituted a distinct corporation. When a corporation is called into existence, the charter defines the officers and the constitution of the body; but here all is vague and general, plainly importing that it was to be left to the Town Council to define and limit the powers of the proposed College. There being no qualification to the power of the Town Council, and there being no separate existence in the College, it necessarily follows that the sole and exclusive right to make laws for the students, and prescribe the functions of the professors, was vested in the Town Council. So long, therefore, as we make bye-laws, which do not run counter to the laws of the land, there is no power which can control our discretion, for we are paramount and supreme over the College and its members. This agrees also with the law of England, for where there is no special limitation of the powers of a visitor, he has a general superintending power,

limited only by his discretion.—*Green* v. *Rutherfurd*, 1 Ves. Senr. 462. If, however, owing to the vague and indefinite language of the charter and statute, there should be any uncertainty as to whether we have the power claimed in the present instance, the best guide is to look at the course of usage that has prevailed since the date of those instruments. The records of the Town Council clearly establish a practice on our part of the most ample and comprehensive powers of controlling the management and internal affairs of the College in its most minute details. The course of studies, and the qualifications for obtaining degrees, have been often varied by the Town Council, and the professors have all along been appointed on the express condition of giving obedience to the rules and regulations enacted from time to time by the same authority. This practice has been uniform and unquestioned for nearly three centuries, and it cannot now be upset by any Court. It is said by the other side that we are trustees, and that we have committed a breach of trust in this instance. But if we are trustees, who are the beneficiaries? It must be science and learning. We know of no qualification to our powers except this, that we are not to violate any of the laws of the country; within these limits we are irresponsible. But whatever may have been the state of the law previously, we contend that the present case is concluded by the case of 1829. That was a declarator between the very same parties, and the subject matter was the same; and if the matter is not *res judicata*, then there can be no such thing as *res judicata*. That case was never appealed against, and cannot now be questioned even by this House.—Ersk. 4, 3, 1.

[LORD BROUGHAM.—The Judges below seem scarcely to have considered that case of 1829 as *res judicata* here; but of course you are at liberty to shew that the same subject matter, or a portion of the same subject matter, was then in dispute. We cannot overrule that case, but we may disregard it.]

The Judges below may have thought, perhaps, that that case did not govern the present in all its points; but we contend that it does. One conclusion in that action was, that the Town Council had the sole and exclusive right of making rules and regulations for the studies to be pursued, and the course of study for obtaining degrees; and the Court found in terms of that conclusion.

[LORD BROUGHAM.—In the case of declaratory conclusions—one being general and the other particular—when judgment is given, does the general, or merely the particular conclusion, become *res judicata?* for the parties often lay down a broader conclusion than the case requires. Now, do you contend for the whole of the general conclusion, or merely so much of it as was required to sustain the particular conclusion?]

We contend for both conclusions; they were both in issue—not merely whether the Town Council could place the midwifery chair in the medical faculty, but whether they had the general and absolute right to make laws as to the course of studies within the University. The very essence of an action of declarator is to establish such general conclusions.

Sol.-Gen. Bethell replied. The case of *Green* v. *Rutherfurd* related merely to the case of a visitor in England, which is on a different footing from that of a patron in Scotland. Nothing has been advanced by the other side to shew that a University, once erected, has not an inherent right to make bye laws for its own government, like any other corporation.—Bell's Pr., §§ 2169, 2193. It was said the Town Council had a discretion under the charter to found a College or not. That may have been so, but the discretion ceased when it was exercised; and the patrons were then in the position of founders of a charity and trustees, the law on which subject is the same in both countries.—*Jack* v. *Burnett*, 5 Bell's App. C. 409. As to the long course of usage, that is easily explained on the ground of mere officiousness and usurpation. As to the case of 1829, we contend that all that was decided there was the particular exercise of power, viz., that of placing the midwifery chair on a higher footing; but the vague and indefinite conclusion as to the right generally of the respondents to make laws is not *res judicata*. The fallacy lies in attempting to draw a general conclusion from a particular premiss.

[LORD BROUGHAM.—Is it not the other way, that they draw the particular conclusion from the general premiss? They have the particular right, because they have the general right?]

LORD CHANCELLOR CRANWORTH.—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 qualifications. *Secondly*, That the Provost and Council have not the power of prescribing the course of study or other qualifications 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 January 1847 was *ultra vires* and void, and that the Town Council ought to be decreed to recall 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.

My Lords, 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 *res judicata*.

My Lords, the constitution of the University of Edinburgh depends, first, on a charter of James VI., dated 14th April 1582; and, secondly, on a statute of the same king, dated 1621. The charter which is dated 1582, 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 avisamento prædicto pro diversis rationabilibus causis bonis et considerationibus nos moventibus de novo, tenore præsentium, damus, concedimus et disponimus præfatis præposito" and so on. Then it confirms the grant "in sustentationem ministerii," &c., and authorizes 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 authorized 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 of the Scottish parliament was passed, which extended the powers of the former act. It recites the charter, and a number of other grants that were made to the Provost and Baillies, and refers to the great advantage 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 the College, for the profession of philosophy, &c., which has since flourished for the space of 35 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 them and their successors, in favour of the said burgh of Edinburgh, patrons of the said College, and of the said College, and of the rectors, regents, bursars, and students within the same, all liberties, freedoms and immunities appertaining to a free College, and that in as ample form and large manner as any College has or bruiks within His Majesty's realm; and, if need be, ordains a new charter to be expede under His Highness' Great Seal for erecting of the said College, with all liberties, privileges and immunities which any College within this realm bruiks, enjoys, or to the same is known to appertain."

Now, my Lords, 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 the 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 M.D., who has not been engaged in medical study for four years, during at least six months of each, either 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 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 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, on 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 to 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 foresaid, the power and privilege of enacting the regulations and course of discipline to be observed by 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."

My Lords, that case was brought on, and was argued at great length, and the Lord Ordinary considered that the record was closed, and he "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 a reclaiming note, before the Inner House, and it was then fully adhered to. 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 exclusive right 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 were now litigant. 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, 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 3 of the old statute, and section 4 of the new, 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 idoneous. 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 its 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 at law 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 Inn 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 shew 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,—"And also with the advice of the said Estates," &c.—(reads the portion previously read). The charter certainly does not give them an independent existence. The object of the legislature or of the Crown, in passing the 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 farther 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 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, the 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 1583, 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 shews the control exercised by the Town Council 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 years 1773 and 1776 other appointments were made with the like conditions. These extracts shew 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.

But then, my Lords, it is said that the power to regulate studies, and to fix proper tests for degrees, is a power inherent in a university *qua* university. In my opinion that is not so. Here the rights of the College ("University," if it differs, is merely an assumption of a name) depend entirely on the charter and the statute. The question is not one of an abstract nature as to 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 the Court below arrived was perfectly right, and I shall therefore move your Lordships that this interlocutor be affirmed.

LORD BROUGHAM.—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 of those learned Judges adopted the same view, and one only, a most respectable one undeniably, Lord Fullerton, held a contrary opinion; and we have also in support of the same conclusion the opinions of the Law Officers of the Crown, of the learned head of the Court, of the Dean of Faculty, and of another learned Judge, who, in the year 1830, formed one of the members of that 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 Officer of the Crown. 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 believe that the 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 on either hand by *res judicata*,—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 the year 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. This rests, first of all, upon a 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 1829, and the opinions of the learned members of the commission of 1830, as well as of the learned Judges of the Court below in the present case, I omitted accidentally to mention another very great authority—an authority, in my opinion, of the greatest weight—I mean that of the late most learned Professor Hume, a professor of Scotch law, and himself a party representing the Senatus Academicus in the course of that discussion; for although, without doubt, that discussion was confined to a question of fees, a financial question, yet it led to 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 Mr. 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 and not by the Senatus Academicus.

Now, my Lords, in the first place, as to the charter, as it is called, of foundation 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 my Lord Pitmilly and others, in the year 1829. Their opinion was, that it only conferred a power given to the Town Council to found a corporation of that nature, 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, my Lords, 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. My Lords, I think this would be a very extravagant construction to put upon that act, as will be seen by perceiving the result of it. The Town Council had been endowed by the charter of 1582 with extensive, I may say absolute, power of naming professors, and of appointing them. The power of removal had also been given to them. 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 Royal favour, and for gude service done to him be the saidis Provest, Bailzies, Counsel, and Communitie of the said burgh of Edinburgh, and for their further encouragement in repairing and re-edifying of the said College, and placing thairin sufficient Professours for teiching of all liberal sciences, ordaining the said Colledge, in all tyme to cum, to be callet King James' College; and als with advise of the said estaittes, hes of new agane gevin, grantit, and disponit to thame and thair successouris, in favouris of the said burgh of Edinburgh, Patrone of the said College, and of the said College, 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 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 future encouragement of the town in so acting—it 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 Solicitor-General) 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, and with what had taken place between 1582 and 1621.

But, my Lords, suppose there is a doubt about this—suppose it is not clear—suppose it is capable of argument, that it might be, that the act gave a power to the University, to 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 acts done under it?

Now, when we come to look at that, there can be no doubt whatever about it. There may be much absurdity in the existence of a University acting under the entire control of a municipal corporation—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 is the law? and that is to be decided. If there is 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 shewing after 1582 what they deemed their rights to be, and how they enforced their 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 afterwards other instances. There was one, I think, in 1604, of a person of the name of Monro, 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 that those lectures were to be given; and provision was made for disputations in divinity, and on other subjects; provision was also made for examination in Latin and 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 upon the sacramental ordinances of the Church to be given by the students. Nay, in one instance (whether it is 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 the degree should be conferred, and care was taken to pay due respect to the Town Council, even in framing the words of the degree which shall 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 almost the greatest name to be found in modern chemical science—I mean that of Dr. Black, who, in the year 1766, took his professorship, which he afterwards made so illustrious, upon the 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 illustrious man Dr. Robertson, who was then their principal, in order that the College might know the laws under which they were to act. This appears to be merely declamatory, but there are various other instances to which my noble and learned friend has adverted which have 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 examination, laureation, as it was called, or graduation. Immediately they call upon the parties who are considered to have been the wrong-doers, and those parties proposed to pass from—to abandon—the regulations 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 a committee of the Council might be appointed to see the masters "pass from their said act as unwarrantable, and submit themselves entirely to the Magistrates and Town Council; to 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 resisted, and successfully resisted; and it was then abandoned by those who 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 40 or 50 years, at 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 be observed that, contemporaneous with those acts, other acts were done by the Town Council, and yielded to by the College, and acts were done by the College themselves, shewing their submission to the superior jurisdiction of the Town Council, of which I will give an instance. Between the years 1763 and 1767, which are the dates of two of those acts done 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 appli-

cation made by the reverend 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 professors should be paid by salary and not by fees, the principal applies to the Town Council to make an 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 they 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 that, at the very time when some of their acts might lead to some doubt as to their pursuing a different course, cannot be imagined. It is then clear, that, since the beginning of the present century, those acts which might have raised some little doubt upon the question, can leave no doubt when coupled with the admissions and 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 is 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, and my 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. The College, in many respects, no doubt, is subordinate to the patrons, but it has powers and privileges quite independent of theirs," (no doubt that is so,) "as, for instance, that of conferring degrees." 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 them, 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. Andrews, Aberdeen, and Glasgow—have the power to confer degrees by express grant—by grant of the Pope, in the case of St. Andrews and Glasgow, and by grant of the Estates of Parliament in a much later case, at the end of the sixteenth century —that of Marischal College, Aberdeen, founded by the Earl Marischal. It is quite unnecessary to enter upon that here, for this is perfectly independent of all question of the power of granting degrees; it is totally different. The question here is as to 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 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 the 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 what shall be the qualification for professorships, where the 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 that College.

Interlocutors affirmed, with costs.

Richardson, Loch and Maclaurin, *Appellants' Solicitors.*—Maitland and Graham, *Respondents' Solicitors.*

JUNE 12, 1854.

ROBERT KERR, *Appellant, v.* THE MARQUESS OF AILSA, *Respondent.*

Entail Amendment Act (1848)—Process—Petition to Sell—Pupil—Tutor ad Litem—*An application under this Act, for authority to sell part of an entailed estate, to pay off debt affecting the fee, was served on the three next substitutes, the first of whom was in pupillarity. Fifteen months after moving the petition in Court, and subsequent to various material steps, preparatory to fixing the price of the lands, a* tutor ad litem *was appointed to the pupil, who, after entering on his office, judicially stated his approval.*