the conveyance, even apart from the measurements by which the subject is defined.

It is not said that the conveyance was beyond the powers of the granter. On the contrary it is admitted that at its date the ground to the south of it was the property of Mrs Cameron Campbell.

It was not until 1892 that a title was given to the stance claimed by the pursuer. It was a feu-charter granted by Mrs Campbell, and the subject which was conveyed is described as bounded on the north by the defender's house. It follows that no part of that house or of the ground on which it stands is within the pursuer's feu.

I am, therefore, of opinion that the south gable is built entirely on the defender's property, and that it is not a mutual gable. The meaning of the titles is to my mind absolutely clear, and it is, therefore, I think, inadmissible to control them by any inference to be drawn from the manner in which the gable was built, or in which it was used by the pursuer.

It appears that in 1864 the pursuer's house was to a certain extent united with the south gable, and that in 1878 he commenced to use the fireplaces and vents, or at least one of them. I have said that these facts cannot affect the construction of the titles; but the pursuer founds on them as establishing that the defender has acquiesced in these uses of the gable and must therefore continue to submit to them. It is to be observed that the pursuer had no title till 1892, and his actings must be ascribed to the title of Mrs Campbell through whom he was in possession. The question therefore comes to be whether she acquired any right limiting the right which she conferred on the defender by the charter of 1878.

It is I think plain that that title could not be limited by any use prior to its date. It was granted by an absolute owner, and therefore must confer on the disponee the right of that owner. No reservation is expressed, and none I think can be implied. Being at the date of the charter the absolute owner, the defender could have pulled down the house if he was so minded, and as a necessary consequence he could have prevented Mrs Campbell, or anyone deriving right from her, from making any use of the south gable.

The use continued after the charter, and was in part enlarged. But it was a use beyond the right of the granter of the charter, and I do not see how it can derogate from the title of the defender. It cannot make the gable a mutual gable, when on the face of the title it is the defender's exclusive property. It cannot give the pursuer a right to use the defender's property, for the use is too short to create any such right, even if it were possible that it might be created by a longer use. It is said that the defender acquiesced in the use. He submitted to it at a time when it is probable it did him no harm. But I see no evidence of any agreement or consent on his part to surrender any legal right, and I think that a use which had no justification in title must be ascribed to tolerance. It is only in rare cases that a limitation on title can be created by acquiescence. It can never happen unless it be clear that there was agreement or consent to that effect, of which in this case there is no evidence. No such agreement or consent will be inferred when there is another reasonable explanation.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court found in terms of the Sheriff's interlocutor.

Counsel for the Pursuer — C. K. Mackenzie — Hunter. Agent — James Ross Smith, S.S.C.

Counsel for the Defenders — Rankine — Macphail. Agents—Forrester & Davidson, W.S.

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# HOUSE OF LORDS.

*Monday, April* 8.

(Before the Lord Chancellor (Herschell), Lord Watson, Lord Ashbourne, Lord Macnaghten, and Lord Morris).

## METCALFE AND OTHERS *v.* COX AND OTHERS (COUNCIL OF UNIVERSITY COLLEGE, DUNDEE).

(*Supra*, p. 182).

*Act of Parliament—Construction—University—Powers of University Commissioners—Affiliation of Dundee College to St Andrews University—The Universities (Scotland) Act* 1889 (52 *and* 53 *Vict. cap.* 55), *secs.* 15, 16, 19, and 20.

Section 15 of the Universities (Scotland) Act 1889 provides that the Universities Commissioners appointed under the Act may "make ordinances" to extend any of the universities by affiliating new colleges to them, subject, *inter alia*, to the condition that the University Court of the College shall be consenting parties.

Section 16 provides that, "without prejudice to any of the powers hereinbefore conferred, the Commissioners shall, with respect to the University of St Andrews and the University College of Dundee, have power (1) to affiliate the said University College to, and make it form part of, the said University with the consent of the University Court of St Andrews and also of the said college, with the object, *inter alia*, of establishing a fully equipped, conjoint university school of medicine, having due regard to existing interests, and to the aims and constitution of the said college as set forth in its deed of endowment and trust."

By section 19 it is provided that the draft of any "ordinance" prepared by the Commissioners must be submitted to the University Court, the Senatus

Academicus, and the General Council of the University affected, who are empowered within three months to state objections and to propose amendments.

Section 20 provides (1) that all "ordinances" made by the Commissioners shall be published in the *Gazette*, and laid before both Houses of Parliament, and if neither House presents an address praying the Queen to withhold her consent, it shall be lawful for the Queen in Council to approve of the ordinance; (2) that the University Court, Senatus Academicus, General Council, or any person directly affected by "any such ordinance" may petition the Queen in Council to withhold her approbation of the whole or any part thereof, and on hearing the petition, the Queen in Council may either declare her approbation of the ordinance in whole or part, or signify her disapproval thereof, "and no such ordinance shall be effectual until it shall have been so published, laid before Parliament, and approved by Her Majesty in Council.

*Held* (*rev.* decision of a majority of Seven Judges) that the Commissioners could only exercise the power, conferred upon them by section 16, of affiliating the University College of Dundee to the University of St Andrews by issuing an ordinance according to the procedure prescribed by the Act, which would not be effectual until it had been laid before Parliament and approved by the Queen in Council.

(In the Court of Session, December 19, 1894, *supra*, p. 182.)

The pursuers appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, this action was brought to obtain reduction of an order made by the Commissioners appointed under the Universities (Scotland) Act 1889, and to have it declared null and void. The instrument in question, after reciting that, by section 16 of the Act just referred to, the Commissioners were empowered to affiliate the University College, Dundee, to, and make it form a part of, the University of St Andrews, with the consent of the University Court of the University of St Andrews, and also of the said College, and also reciting that the said University Court and the University College of Dundee had consented to affiliation upon the conditions set forth in the schedule thereunto annexed, proceeded as follows—"Therefore the Commissioners under the said Act have affiliated and do hereby affiliate, the said University College of Dundee to, and make it form part of, the said University of St Andrews, subject to the said conditions and in terms of the said statute."

The ground upon which the appellants impeach this instrument is, that the procedure which the statute prescribes in the case of ordinances made by the Commissioners, has not been followed. On the part of the respondents it is contended that the provisions relating to ordinances have no application to an order made under the 16th section of the Act affiliating University College, Dundee, to, and making it form part of, the University of St Andrews. The question turns upon the construction of that section.

The general powers of the Commissioners are contained in the 14th section of the Act. They are thereby empowered to make ordinances for a great variety of purposes specified under sixteen different heads. Then follow the 15th and 16th sections of the Act, which are grouped together under the heading, "Extension of Universities," and it cannot be disputed that the subjects with which they deal are closely allied. The 15th section provides that the Commissioners may, if they think fit, "make ordinances to extend any of the universities by affiliating new colleges to them," subject to certain conditions, one of which is that the University Court and the College shall be consenting parties. The 16th section enacts that, "without prejudice to any of the powers hereinbefore contained, the Commissioners shall with respect to the University of St Andrews, and the University College, Dundee, have power—(1) To affiliate the said University College to, and make it form part of, the said University, with the consent of the University Court of St Andrews, and also of the said College, with the object, *inter alia*, of establishing a fully equipped conjoint University School of Medicine, having due regard to existing interests and to the aims and constitution of the said College, as set forth in its deed of endowment and trust."

Leaving aside for the moment the means by which the object was to be accomplished, and the nature of the power conferred, which are in controversy, it is clear that the main object aimed at in this enactment was to enable a closer union to be brought about between the University of St Andrews and University College, Dundee, than could have been effected under the provisions of section 15. It contemplated something more than mere affiliation, namely, an affiliation of the nature of an incorporation. At the same time it must be borne in mind that it was an enabling section only; it did not treat such an affiliation as a foregone conclusion. Moreover, it left it open to the Commissioners to proceed to affiliate the College to the University under the provisions of section 15, if the University and the College, though unable to agree to the kind of affiliation contemplated by section 16, were consenting parties to an affiliation of a less intimate nature. Before criticising the language of section 16 and the arguments which were addressed to your Lordships with regard to it, I propose to consider the procedure which must have been followed if affiliation was to be effected under section 15.

It is not necessary to refer in detail to all the provisions of section 19. It will suffice to state that the Commissioners were required not only to send copies of the draft of any ordinance they proposed to the University Court, the Senatus Academicus, and the General Council of each

University to which the ordinance related, but also at the same time to cause it to be published in such manner as they thought sufficient "for giving information to all persons interested." During three months after the transmission of the draft ordinance to the University Court, the Commissioners were directed to receive any objections and any amendments submitted in writing, not only by the University authorities named, but "by any member or members of them, or by any public body or persons directly affected thereby," and after the expiration of three months the Commissioners were to proceed to consider such objections and amendments. The amplest security was taken by these provisions that no ordinance should be finally settled by the Commissioners until an opportunity had been afforded, not only to the University bodies in their collective capacity, but to every individual member of them as well as to all persons whose interests might be affected, to lay their views before the Commissioners, and until those views had been considered.

But this was not all; section 20 prescribed that "all ordinances made by the Commissioners" should be published in the *Edinburgh Gazette* for four consecutive weeks, and should be laid before both Houses of Parliament. If neither House within twelve weeks presented an address praying the Queen to withhold her assent from the ordinance, it was to be lawful for the Queen in Council by Order to approve of the same. Besides the power reserved to Parliament to pray Her Majesty to withhold her assent to an ordinance, the University Court, Senatus Academicus, or General Council of any University, or any governing body, or the trustees or patron of any endowment, or any other person directly affected by an Ordinance, were empowered to petition the Queen to withhold her approbation therefrom. Any such petitions were to be referred to the Universities Committee of the Privy Council, who might hear the petitioners by themselves or counsel, and report to Her Majesty in Council on the matter, and the Queen was thereafter, by Order in Council, either to declare Her approbation or Her disapproval of the ordinance in whole or in part. Section 20 concludes with this provision—"No such ordinance shall be effectual until it shall have been so published, laid before Parliament, and approved by Her Majesty in Council." I have referred to the provisions of sections 19 and 20, especially in connection with ordinances for affiliation made under section 15; but they, of course, apply equally to all ordinances made by the Commissioners, and therefore to the exercise by them of their power to deal with all the subjects specified in section 14.

It is impossible to study the procedure laid down in the sections referred to without seeing that it was the scheme of the Legislature most anxiously to safeguard all interests that might be affected by the manner in which the Commissioners exercised the powers conferred upon them. It was not content with securing that all persons interested should receive due notice, and that their representations should be considered by the Commissioners; the control of Parliament was jealously reserved, and any person directly affected had the right of appealing to a Committee of the Privy Council, one member of which was to be a member of the Judicial Committee. I do not say that these enactments exhibit a distrust by Parliament of the Commissioners, but they do most clearly indicate that Parliament was not prepared to leave them to mould the universities, and to modify their constitution and arrangements except under the strictest control. The payments to be made by students, the course of study, the manner of examination, the preservation, administration, and maintenance of the property and fabrics of buildings connected with the universities or colleges, the custody and management of university libraries and laboratories, and the contents and furniture thereof, these and many other details of university management can only be touched by the Commissioners, subject to the supervision of Parliament and the Universities Committee of the Privy Council.

Turning again to the subject of affiliation with which your Lordships are now more immediately concerned, even though the University Court and the College be both consenting parties, the Commissioners can only carry out the affiliation according to the procedure and under the control to which attention has been called. Under these circumstances it is natural to ask whether the Legislature can have intended that, where the Commissioners decide upon a scheme, not of affiliation merely, but of affiliation involving incorporation, the matter was to be left to the unfettered discretion of the Commissioners, without any security that the objections of persons interested would be weighed and considered, and without Parliament having a voice in its ultimate determination.

It was argued that the affiliation could not take place under section 16 without the consent of the University Court and the College, and that this was a sufficient safeguard. But Parliament did not so regard it in the case of an affiliation by Ordinance under section 15, where the same consents are requisite. And this was only natural, for the University Court might give its consent although the Senatus Academicus and other persons directly affected were hostile to the scheme.

No reason at all satisfactory to my mind has been given why the Legislature should so carefully have subjected the action of the Commissioners to control when they were dealing with matters of comparatively trivial importance, and have left their powers absolute and free from supervision when they were dealing with so large and vital a subject as the incorporation of University College with the University of St Andrews. It is said that Parliament knew that negotiations were so far advanced between the two institutions that an agreement was imminent. I do not doubt that it was contemplated as probable that an

affiliation of the nature provided for by section 16 would be brought about. But the terms of the Act show that it was not regarded as certain. This appears not only from section 16, but from section 5 (1), which makes the Principal of University College, Dundee, a member of the University Court of St Andrews, only "if and when" the College is affiliated to and made to form part of the university. The affiliation was made dependent on consents which might never be obtained. It is common experience that the governing bodies of public institutions may be agreed upon the policy of a union between them, and may even be agreed upon the main lines which it should follow, and that, nevertheless, when details come to be discussed insuperable difficulties are found to arise. But even, if as anticipated, the University Court and College came to an agreement, why should the many persons vitally interested who might, though not hostile to the policy of a union, yet be strongly opposed to the details of the scheme, be left without protection, with no statutory right to represent their views, or to have them considered, and with no power to appeal, either to Parliament or to the Privy Council? No answer was really given to this question by the learned counsel for the respondents.

Then it was urged that this exceptional method of dealing with the affiliation of the two institutions affected was designed to obviate the delay which would have been invoked if the procedure indicated by sections 19 and 20 was to be followed. What is there to show that such delay would be any more prejudicial in this case, or would be so regarded by Parliament, than in many of the cases dealt with under section 14? On the contrary, it would seem more important that these should be dealt with speedily than a fundamental change of a far reaching character, and which must materially affect many interests. In short, I listened in vain for any adequate reason for the grave distinction which it is contended the Legislature has made.

The respondents insist that any arguments addressed to your Lordships for the purpose of showing that it is not likely that Parliament would enable the Commissioners to act under section 16 free from the control to which their proceedings under sections 14 and 15 would be subject, cannot have any effect given to them if the statute has enacted that they may do so. I entirely assent to this proposition. If, in unequivocal language Parliament had said that they might thus act, there would be an end of the case; but if this is not clear, if the language of section 16 is fairly capable of an interpretation which would avoid the anomalies to which the appellants point, then I apprehend the considerations to which I have been adverting may fairly weigh in determining what interpretation should be put upon the statute.

The respondents naturally rely on the circumstance that, whereas in sections 14 and 15 power is in terms given to the Commissioners to make ordinances for certain purposes, section 16 says that they shall have power to affiliate the College to the University, and nothing is said about an ordinance. That is perfectly true, but section 16 is altogether silent as to the means to be adopted for affiliating. The affiliation is not a physical act to be performed by the Commissioners; they can only affiliate and make the college a part of the university by some instrument declaring that it shall become so. It is not disputed that such an instrument was contemplated; it is only by means of it that the Commissioners can act. Looking at the close connection of sections 15 and 16, and at the fact that the power conferred by the latter was to be "without prejudice to any of the powers hereinbefore conferred," it seems to me natural to conclude (the enactment being silent on the subject) that the Commissioners were to exercise their power under section 16 by an instrument of the same nature and with the same incidents as would be employed for the exercise of their powers under the previous sections. The word "ordinance" has no technical signification; it means no more than an instrument embodying an order or direction.

If the word "ordinance" had not been used in the statute, it is, I think, the name which would naturally have been applied to all orders of the Commissioners determining, within the limits of their powers, what should be the future constitution, management, or arrangements of the universities or colleges. It is an apt word to denote the document which embodies the orders of a quasi-legislative body such as the Commissioners are.

It is said that the power conferred by section 16 is "to affiliate" in the manner described, and not to make an ordinance for that purpose. But I think that the word "power" is used in reference to the thing to be done, and not to the method of doing it. I am confirmed in this view by the words with which the section commences, "without prejudice to any of the powers hereinbefore conferred." In reply to the question to what powers reference was there made, the answer given by the counsel for the respondents (and I think rightly) was, to the powers conferred by sections 14 and 15. But, in the view taken by the respondents, there was but one power conferred by those sections, namely, the power of making ordinances, and if that were so, it would be inappropriate to speak of "any of the powers" as if they were several in number. The language used indicates, to my mind, that reference was being made, not to the power of making ordinances, but to the different changes in university matters which the Commissioners had authority to make by means of ordinances. It is in the same sense, I think, that the word "power," which immediately follows the words upon which I have been commenting, is used.

I think the only purpose of section 16 (1) was to enlarge the objects which the Commissioners might accomplish by en-

abling a more intimate union to be created in the particular case than was provided for by the preceding section.

My Lords, I concur with the learned Judges who were in the minority in the Court below in thinking that it was not intended that this should be carried out by any different means from those which were to be employed in the case of the other changes in university constitution or management, the determination of which was committed to the Commissioners.

It is urged by the respondents that if this be so it cannot be correct to say that the Commissioners have power to affiliate the college and make it form part of the university, inasmuch as all the ordinances made by the Commissioners are ineffectual unless approved by the Queen in Council. I do not feel pressed by this argument. Although it is true that an ordinance might be disapproved of and might therefore never become effectual, yet, when approved of, that which is ordained by it takes effect by the Act of Commissioners, and it does not seem to me inaccurate to say that the Commissioners have power to do everything which they can direct to be done by an ordinance, merely because that ordinance is made subject to the approval of the Sovereign. It is a common case for appointments made by one public official to require the approval of another. Such appointments cannot take effect without that approval, but I do not think that anyone would hesitate to say that the appointment was made by the person who selected and nominated the appointee.

A further argument was addressed to your Lordships based on sub-section 2 of section 16. It was said that if the contention of the appellants were to prevail the University Court of the University of St Andrews might not be capable of being constituted in time for that Court to give notice of their determination to submit draft ordinances within three months after the commencement of the Act, and that therefore the machinery contemplated by the earlier part of the section must be such as would render this possible. The argument is an ingenious one, but I do not think it can prevail against the considerations which I have laid before your Lordships. It may be that the point was overlooked, and it is certainly not of much importance. The Order of the Commissioners, made in accordance with the respondent's contention, was dated only a few days before the expiration of three months from the commencement of the Act, and even if the University Court failed within three months to give the notice with reference to draft ordinances provided for by the 19th section, there is no doubt that the Commissioners, in framing any ordinance for a university, would give due consideration to the representations of its University Court.

For these reasons I think that the Order of the Commissioners, which the appellants impeach, cannot be supported.

It was contended for the respondents that even though this conclusion be arrived at, there had been such delay and change of circumstances in the meantime as to disentitle the appellants to relief. In view of the considerable time which was certainly allowed to elapse before proceedings were taken to question the act of the Commissioners, I should not be indisposed to refuse relief on this ground if I thought it could properly be done, but having carefully considered the matter I am unable to find any facts established which would justify such a course.

The summons in the action asks also for a reduction of the minute of the University Court of St Andrews of the 15th February 1890, and the agreement of the same date bearing to be made between the University Court and the Council of University College, Dundee. No argument was addressed to your Lordships upon the questions thus raised, and I pronounce no opinion upon them.

I think the appeal must be allowed.

LORD WATSON—My Lords, section 16 of the Universities (Scotland) Act 1889 gives the Executive Commissioners thereby appointed power to affiliate the University College of Dundee to, "and make it form part of" the University of St Andrews subject to the consent of the University Court of St Andrews, and also of the said College, "with the object, *inter alia*, of establishing a fully equipped conjoint University School of Medicine, having due regard to existing interests and to the aims and constitution of the said college, as set forth in its deed of endowment and trust."

In February 1890 the University Court of St Andrews and the Council of the College, entered into an agreement which embodied the terms and conditions upon which they were willing to become united, under section 16 of the Act. One of these terms was that the union "shall as regards duration be permanent and dissoluble only by Act of Parliament." The agreement was submitted to the Commissioners who made three slight alterations, two of them verbal merely, in its terms; and on the 21st of March 1890 they issued, what in these proceedings has been called an Order, by which they affiliated the University College of Dundee to, and made it form part of the University, in terms of the Act, and subject to the conditions expressed in the agreement which was annexed to and incorporated with their Order.

The Act nowhere makes mention of "orders," but section 19, which is headed "Procedure," and section 20, which is headed "Ordinances," made by the Commissioners, make careful provision for protecting the rights and interests of all public bodies and persons which might possibly be affected by the contemplated changes in the constitution and arrangements of the University. The first of these clauses requires that when the Commissioners have prepared the draft of any ordinance, they shall send printed copies of it to the University Court, the Senatus Academicus, and the General Council of each university to which it relates; and shall

also cause it to be published in such manner as they think sufficient for giving information to all parties interested. During a period of three months after the transmission of the draft ordinance (in which the months of August and September are not to be computed) the University authorities already mentioned, and any public body or private person directly affected by the draft ordinance, may send written objections to, or amendments upon, the ordinance to the Commissioners, by whom, after the expiry of the period, these objections and amendments must be duly considered. By the second of these clauses it is provided that "all ordinances" made by the Commissioners shall be published in the *Edinburgh Gazette*, and shall be laid before both Houses of Parliament, and shall thereafter be submitted for the approval of Her Majesty in Council. If either House presents an address praying the Queen to withhold her assent from an ordinance or any part of it, it is made lawful for the Queen in Council to approve of any part of the ordinance to which the address does not relate. It is also provided that the same bodies and persons who are allowed to make representations against a draft ordinance, may petition Her Majesty in Council against the whole or part of any ordinance; and it is declared that no ordinance shall be effectual until it shall have been so published, laid before Parliament, and approved by Her Majesty in Council.

The Commissioners' Order of the 21st March 1890 was not communicated in draft, nor was it published, laid before Parliament, or submitted for Her Majesty's approval. It was issued, and has been treated as an order which was to take immediate effect, without any of these precautions having been observed. The present action was brought by three members of the University Court who were not parties to the agreement of February 1890, and by six members of the Senatus Academicus of the University, for the purpose, *inter alia*, of having the Order in question reduced and set aside upon the ground that the Commissioners had no statutory power to effect any union between the College and the University under section 16 except by means of an order or ordinance to be published, laid before Parliament, and submitted for the approval of Her Majesty in Council, as provided by sections 19 and 20 of the Act. They have also pleaded that it was *ultra vires* of the Commissioners to enact or sanction any condition to the effect that the union should not be dissoluble unless by an Act of the Legislature. The only parties called who have appeared in defence to the action are the respondents in this appeal, being the individual members of the Council of University College, Dundee, as such members, and as representing the Council.

The Lord Ordinary (Stormonth Darling) sustained the fourth plea-in-law stated for the present respondents, which is in substance to the effect that the order sought to be rescinded was authorised by the Act. He accordingly assoilzied the respondents with expenses. On a reclaiming-note, the learned Judges of the Second Division being equally divided in opinion, sought the aid of the other Division of the Court. At final advising, the Lord Justice-Clerk, with Lords Adam, M'Laren, Trayner, and Wellwood, agreed with the Judge of first instance, whilst Lords Young and Rutherfurd Clark were of opinion that the pursuers were entitled to decree of reduction in terms of their summons. The interlocutor of the Lord Ordinary was therefore affirmed.

Had it not been for the opinions entertained by so large a majority of the learned Judges in the Courts below, I should have had less difficulty in coming to the conclusion that, in effecting the union of the College with the University by means of a peremptory and final order, the Commissioners have exceeded the jurisdiction conferred upon them by the Act. But after careful consideration of the provisions of the Act, I have been unable to find any sufficient reason for rejecting the conclusion which was arrived at by Lord Young and Lord Rutherfurd Clark. It appears to me that not only the terms of section 16, but the whole context of the statute so far as it may have a bearing on that clause, tend to the inference that so important a change in the constitution of the University, necessarily affecting the status and interests of many members of the University, and it may be of the College also, whose collective or individual interests were not represented by the University Court or by the Council of the College, was not meant to be effected unless by an ordinance which was not to become operative until approved by Her Majesty, after those members had full opportunity of submitting their objections to the Commissioners, to Parliament, and to the Queen in Council.

Sections 15 and 16 are in my opinion cognate clauses, and they are classed together under the statutory title "Extension of Universities." Section 15 provides that the Commissioners may, if they think fit, "make ordinances to extend any of the universities by affiliating new colleges to them" subject to certain conditions specified in five sub-sections which it is unnecessary to notice in detail. The powers conferred by the clause are limited to affiliation, which, as interpreted by section 3, means nothing more than the establishment of such a connection between the university and the college as will not interfere with the separate and independent constitution of either body, and does not include their incorporation so as to make them form one body.

The provisions of section 16 are not general; they apply to one University and one College only. They empower the Commissioners in dealing with the University of St Andrews and the University College of Dundee to go beyond affiliation, and to make the College "form part of the said University." The clause is not a wholly independent enactment, but is connected with section 15 by its introductory words, which appear to me to have a material bearing upon the present question. It

commences thus—"Without prejudice to any of the powers hereinbefore conferred, the Commissioners shall, with respect to the University of St Andrews and the University College of Dundee, have power"—then follows an enumeration of the specific things which the Commissioners are authorised to do for the purpose of incorporating the College with the University. It is clear that the powers thus conferred were meant, not to supersede, but to be supplementary to the powers already given to the Commissioners of dealing with the University and College under section 15. In my opinion, the introductory reference to "the powers hereinbefore conferred" has exclusive relation to those changes in the University system which by section 15 the Commissioners are authorised to make, and does not extend to the manner in which these changes are to be accomplished. If that be so, it necessarily follows that the machinery provided for carrying into effect the powers added by section 16 must be the same with that provided in section 15. On the other hand, if it were assumed that a power to make ordinances is one of the powers referred to in the introductory enactment of section 16, it appears to me that the same result would follow. The powers conferred by section 16 are to be "without prejudice" to the powers already given. The plain meaning of an enactment in these terms is that the powers referred to are to be read in connection with the provisions of section 16, and are to remain operative except in so far as they are inapplicable to, or inconsistent with those provisions. I need hardly add that there does not occur in section 16 a single expression indicating the intention of the Legislature that the union of the University and College is to be carried out by some Act of the Commissioners other than an "ordinance" within the meaning of the Act.

The Lord Ordinary appears to have come to the conclusion that, in the absence of any mention of an ordinance in section 16, the Commissioners were right in assuming that they had power to effect the union of the University and College "by way of order and not by way of ordinance." Even if the words "by way of order" had occurred in the clause, it is by no means clear to my mind that they would have justified the result at which his Lordship arrived. "Order" and "ordinance" are really synonymous terms, and the provisions of sections 19 and 20, taken in connection with other clauses, appear to me to indicate so plainly the intention of the Legislature that all acts of the Commissioners altering the constitution of a university and necessarily affecting interests public or private, or both, should be attended with the safeguards which the statute provides, that I venture to doubt whether your Lordships could have recognised any distinction between an ordinance and an order unless the latter word had been followed by some such expression as "which shall be final and not subject to review." I may observe that the Lord Justice-Clerk and Lord M'Laren, in whose opinions the other Judges composing the majority of the Inner House simply concurred, in quoting and commenting upon the terms of section 16, omit from their quotation, and omit to notice, the introductory words of the section upon the construction of which the present question mainly depends. That omission, in my opinion, detracts very materially from the force of their reasoning. The connection which these introductory words establish between section 16 and the preceding clause was fully discussed by both the learned Judges of the minority, and forms one of the main, if not the main ground of their judgments.

Counsel for the respondents argued, in support of the judgments appealed from, that the Legislature knew or must be held to have known that the University and the Colleges were ripe for union, and must therefore have intended that its consummation should take place at once, without the necessity of imposing any of the safeguards which were deemed necessary in other cases. In my opinion, were the facts upon which that conclusion is rested fully proved, they would be insufficient to overcome the inference derivable from the language which the Legislature has employed. But the facts, if they can be so called, rest on the merest speculation, and are certainly not suggested by the terms in which section 16 is expressed. In that clause the affiliation of the College to, and its incorporation with the University, is described as an event which may or may not occur, and even if it should occur, it was obviously not contemplated that the Union should be immediate, because special directions are given to the Commissioners in case of its being unreasonably delayed. Again, in making the union, the Commissioners are directed to "have due regard to existing interests." It is not easy to understand how that direction could be fulfilled by following a course which denied to persons interested any opportunity of vindicating their interests before the Commissioners, or elsewhere. In view of these enactments there can be no probability that the Legislature, whilst giving all parties affected an opportunity of attending to their interests in all cases where mere affiliation is contemplated, should have withheld that opportunity in the case where a more radical change in the constitution of a university is in contemplation.

I do not think it necessary to express any opinion upon the question whether a union between the University and the College, duly carried out in terms of section 16, would or would not be dissoluble otherwise than by an Act of Parliament. But I am clearly of opinion that a condition declaring that it is only dissoluble by the Legislature, ought not to be inserted in any Act or ordinance effecting the union, because it must be either superfluous or illegal. If no provision is made by the Act for the severance of the two bodies when once united, the condition is mere surplusage. If such provision be made, the condition is in contravention of the statute.

I am accordingly of opinion that the judgment appealed from must be reversed, and that the appellants ought to have a decree reducing and setting aside the Order of the Commissioners dated the 21st March 1890, and also the consequential Order of the 10th April 1890. That decree will not exhaust the conclusions of the summons, which crave reduction of three other documents, these being (1) a minute of the University Court of St Andrews, dated 15th February 1890, consenting to the union, (2) an agreement of the same date, being the agreement upon which the Order of the Commissioners was based, and (3) a docquet appended to a letter of the clerk to the Commissioners, bearing to be a consent by five members of the University Council to the alterations made by the Commissioners upon the terms of the agreement. Your Lordships are not in a position to dispose of these conclusions, because the arguments addressed to the House had no bearing upon them, and the grounds upon which their reduction is sought are altogether different from those upon which the validity of the Commissioners' Order has been impeached. With the exception of the Lord Ordinary, none of the learned Judges of the Court of Session take any notice of these conclusions. In these circumstances they must be remitted to the Court below for consideration and disposal, if the appellants think fit to insist in them.

LORD ASHBOURNE—My Lords, I concur. The case turns upon the construction of section 16 so often referred to. I can see no reason of any substance for the serious distinction sought to be introduced into this section. I cannot see why Parliament should free the Commissioners, when acting under that section, from all the restraints and conditions to which their action was subject when acting under sections 14 and 15. In my opinion on the construction of section 16, the Commissioners were bound to exercise their powers in the same way and subject to the same control as were enacted in reference to the preceding sections.

LORD MACNAGHTEN — My Lords, the Universities (Scotland) Act 1889 appointed a temporary Commission charged with the duty of making provision for improving the administration of the Scottish Universities and extending their usefulness. Large powers were placed in the hands of the Commissioners for the purpose of reconstruction and reform—powers of inquiry, review, and legislation. But at the same time it was provided by section 20 of the Act that "all ordinances made by the Commissioners" should be published in a certain manner, laid before Parliament, and submitted to Her Majesty for Her approval. And then the section proceeds to declare that "no such ordinance shall be effectual until it shall have been so published, laid before Parliament, and approved by Her Majesty in Council." The previous section contains provisions calculated to ensure the fullest publicity for every ordinance prepared by the Commissioners while yet in draft. The draft was to be circulated in print. Then a period of three months was to elapse, during which all bodies and persons directly affected were to be at liberty to make objections and suggest amendments, and the Commissioners were bound to consider all such objections and amendments before the ordinance was made. Under this course of procedure all those interested in the matter had the opportunity of laying their case before the Commissioners, before Parliament (if their representatives thought fit), and before the Privy Council. Thus every precaution was taken against hasty and ill-considered action or any possible slip or inadvertence on the part of the Commissioners.

Among the subjects entrusted to the Commissioners was the extension of the universities by the affiliation of colleges hitherto unconnected with them. Affiliation for the purposes of the Act is defined to be "such a connection between an existing university and a college as shall be entered into by their mutual consent under conditions approved by the Commissioners, or after the determination of their powers by the Universities Committee." The subject is dealt with in sections 15 and 16 under the head of "Extension of Universities." In both sections the condition of mutual consent is repeated and enforced. Section 15 is of general application. It authorises the Commissioners, and after the expiration of their powers the University Court, to make ordinances to extend any of the universities by affiliating new colleges to them subject to certain specified conditions, including a condition that the connection should be dissolved on a resolution to that effect being passed either by the University Court or by the College. Section 16 appears to be in the nature of a rider to section 15, and subsidiary to it. It deals only with the special case of the University of St Andrews, and a College recently founded and endowed in Dundee called the University College of Dundee. It begins with the words—"Without prejudice to any of the powers hereinbefore contained," and it declares that the Commissioners shall, with respect to that particular University and that particular College, have power to affiliate the College to and make it form part of the University with the consent of the University Court and of the College "with the object, *inter alia*, of establishing a fully equipped conjoint University School of Medicine, having due regard to existing interests and to the aims and constitution of the said College as set forth in its deed of endowment and trust."

There seems to have been some difference of opinion in the Court below as to the precise object of section 16 and the reason for its insertion. It is enough, I think, to say that it appears to provide for a connection somewhat closer than that involved in affiliation, and to dispense with the condition that the connection should be dissoluble at the will of either party. It is more

important to observe that there is nothing in the section about making an ordinance for the purpose of effecting the object which the section had in view. Whether that omission (if it be an omission) affects the powers of the Commissioners, or the way which these powers are to be exercised, is the principal question in the case.

Except for certain special purposes the Act did not come into operation till the 1st of January 1890. On the 21st of March 1890 the Commissioners under their common seal executed an instrument in writing by which they declared that they had affiliated and did thereby affiliate the University College of Dundee to and make it form part of the University of St Andrews, subject to certain conditions set forth in the schedule thereto. The schedule contained an agreement purporting to be an agreement for the union of the College with the University on terms arranged by mutual consent between the College and the University Court.

The instrument of the 21st of March 1890 was not published or laid before Parliament or submitted to Her Majesty for her approval as required by section 20 in the case of all ordinances made by the Commissioners. For want of due compliance with those requirements its validity is impeached by the appellants. On the other hand, the respondents contend that the instrument in question is not an ordinance within the meaning of that term as used in the Act. It is an order, they say, not an ordinance —an order deriving force and efficacy from the act and fiat of the Commissioners alone, requiring neither publication nor presentation to Parliament, nor the approval of Her Majesty in Council to make it effectual.

My Lords, I have listened attentively to the able argument on behalf of the respondents, and I have carefully read the judgment of the Lord Ordinary and the opinions of the learned Judges of the Court of Session who agreed with him. But I must say I am quite at a loss to appreciate the distinction taken between an order and an ordinance in this case. There is no statutory definition of the word "ordinance." It is not a cabalistic formula. It is a common English word with a well-known meaning. Taking it in its ordinary signification, I cannot see that anything is lacking in the instrument of the 21st of March 1890 to constitute an ordinance properly so termed. It seems to have all the essential elements of an University Ordinance or Statute. It was intended to be, and if valid it would be, part of the body of law governing the University and regulating now and in time to come the relations between the University and an affiliated College incorporated with it.

If this view be right, it seems to me that there is no escape from the conclusion for which the appellants contend. No exemption of any sort or kind is to be found in section 20. The language is perfectly general—"All ordinances made by the Commissioners,"—all ordinances without exception—must follow the prescribed course, otherwise they are not effectual.

The learned counsel for the respondents did not, as it seems to me, seriously grapple with this part of the argument. They dwelt mainly on the difference in language between section 15 and section 16. In the latter section they pointed out that the power of affiliation is given directly to the Commissioners. In the former the Commissioners have only the power of making ordinances to extend any of the universities by affiliation, but the ordinance is inoperative without more. The real power they said is in Her Majesty in Council. But there is a fallacy I think in that view. The power is in the Commissioners though they do proceed by ordinance. The power no doubt is in suspense until the ordinance is duly published, laid before Parliament, and approved by Her Majesty in Council. But when the final stage is safely reached, whatever the ordinance does is the doing of the Commissioners; and moreover, though the power be given to the Commissioners in direct terms, they can only act by some instrument in writing, which cannot, as it seems to me, by any ingenuity be distinguished in substance and effect from an ordinance. Some stress was laid on the inconvenience which it was suggested would arise if the Order of the Commissioners must follow the regular course of an ordinance. The arrangement it was said was all but complete when the Act passed, and so Parliament must have meant it to be finished off-hand without the usual formalities. But Parliament has certainly not said so. No doubt one may gather from the Act that there was every reason to hope that the incorporation of University College, Dundee, with the University of St Andrews would not long be delayed. But at the same time, in view of the first election of assessors, we find that provision is made for the event of the incorporation not taking place within a reasonable time, so that contingency was certainly not regarded as beyond the bounds of possibility; and, after all, the inconvenience of some little delay (during which it must be remembered that old powers of the University Court could be exercised, though its new powers were suspended) is not to be weighed against the immense advantage of settling, as far as possible, to the satisfaction of everybody, and after everybody interested had been heard, a complicated arrangement on which the future of the University in a great measure would depend. It would indeed be strange if in a case of great importance, of greater importance probably than any other measure contemplated at the time, and one in which the Commissioners are expressly directed to have regard to existing interests, Parliament should have thought fit to dispense with those precautions and safeguards without which the most trifling change in the details of University administration could not be effected. I cannot think that that could have been the intention of Parliament. If it had been, I have no doubt Parliament would have said so plainly, and therefore, thinking as I do that the

instrument of the 21st of March 1890 is an Ordinance and nothing but an Ordinance, and finding that the requirements of section 20 have not been complied with, and not finding anything in the Act to lead one to think that those requirements were to be dispensed with in the case contemplated by the 16th section, I can only come to the conclusion that the judgment under appeal is erroneous.

For these reasons I concur in the motion which has been proposed.

LORD CHANCELLOR—My noble and learned friend, Lord Morris, who is unable to be present to-day, has asked me to say that he entirely concurs in the judgment your Lordships are about to pronounce.

Decided that the interlocutors appealed from be reversed: Declared that the appellants were entitled to a decree reducing and setting aside the Orders of the Commissioners, dated respectively the 21st March 1890 and the 10th April 1890: Cause remitted to the Court of Session with directions to pronounce decree to that effect: The respondents to repay the appellants the costs received by them in the Court below: Remitted to the Court below to dispose of the conclusions of the summons with respect to the documents 1st, 2nd, and 3rd called for and sought to be reduced: No costs of appeal allowed.

Counsel for the Appellants—Finlay, Q.C. —Dickson — Pitman. Agents—Grahames, Currey, & Spens—J. & F. Anderson, W.S.

Counsel for the Respondents—Sir Henry James, Q.C.—Asher, Q.C.—A. Robertson. Agents—Martin & Leslie—J. Smith Clark, S.S.C.

## COURT OF SESSION.

*Friday, March* 15.

### SECOND DIVISION.

[Lord Wellwood, Ordinary.

### GIBSON *v.* NIMMO & COMPANY.

*Reparation—Master and Servant—Mine—Manager—Defective Plant—Child Employed by Manager at Dangerous Work—Responsibility of Master.*

A boy, twelve years of age, brought an action of damages at common law against his employers, a firm of coalmasters, on account of injuries received by him while in their service. The case was sent to trial by jury. The pursuer led evidence to the effect that he had been employed by the certificated manager, who in terms of the Mines Regulation Act had control of the defenders' mine, to grease hutches at the pithead; that the work was dangerous for a boy of his age, and that the accident, which had caused the injuries complained of, had been occasioned by the defective condition of the defenders' plant. The pursuer led no evidence to show that the defenders knew of the alleged defects in the plant, or of his being employed at the alleged dangerous work. At the close of the pursuer's case the judge, on the defenders' motion, directed the jury that the pursuer had adduced no evidence sufficient to prove his contention under the issue, and that they should return a verdict for the defenders. The jury, in respect of this direction, found for the defenders.

The pursuer having presented a bill of exceptions, the Court (*diss.* Lord Wellwood) *allowed* the exceptions.

*Opinions* by the Lord Justice-Clerk and Lord Trayner that the jury would have been entitled to find the defenders liable on the ground that their representative had employed the pursuer at work which was dangerous for a boy of his age.

*Opinion* by Lord Young that, *prima facie* and in the absence of evidence to the contrary, the defenders were to be dealt with as traders attending to their own business, and were responsible if their system and works were in a dangerous, unusual, or faulty condition, or if they employed children at work at which they should not be employed, and that there was evidence to support both these grounds of liability.

*Process—Jury Trial—Withdrawal of Case by Judge.*

*Opinion* by Lord Young that a judge has no authority to withdraw a case from the consideration of the jury.

*Opinion* by Lord Trayner that it is competent for a judge to withdraw a case from the jury, if he is of opinion that no evidence has been led to support it.

*Process — Expenses — Jury Trial — Withdrawal of Case by Judge—New Trial—Expenses of First Trial and Bill of Exceptions.*

After the pursuer in a jury trial had closed his case, the presiding judge, on the defenders' motion, directed the jury that the pursuer had led no evidence sufficient to support his contention under the issue, and that they must return a verdict for the defenders. The jury having returned a verdict as directed, the pursuer presented a bill of exceptions.

The Court, having allowed the exceptions and granted a new trial, *found* the pursuer entitled to the expenses of the first trial in so far as not available for the second, and to the expenses of the bill of exceptions.

William Gibson entered the employment of James Nimmo & Company, coalmasters, at one of their pits near Coatbridge, on 7th March 1893. He was twelve years and three months of age, and was employed to grease the wheels of the hutches on the pithead frame. In the afternoon of his first day's employment a hutch at which he was working fell over the frame, dragging him with it, with the result that he sustained serious injuries.