

Revised case for the Faculty of Physicians and Surgeons of Glasgow; in the conjoined processes of declarator and suspension, between them and the College of Glasgow, and others / W. Penney.

Contributors

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Royal College of Physicians of Edinburgh

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REVISED CASE

FOR THE

**FACULTY of PHYSICIANS and SURGEONS
of Glasgow;**

IN THE CONJOINED PROCESSES OF DECLARATOR AND SUSPENSION,

BETWEEN THEM AND

THE COLLEGE of GLASGOW, and OTHERS.

HOPKIRK & IMLACH, W. S. Agents for the Faculty.

W. A. G. & R. ELLIS, W. S. Agents for the College, &c.

BIBLIOTH
COLL. REG.
MED. EDIN.

INTERLOCUTORS.

25th January 1833.—Having heard the counsel for the parties on the closed record, and whole process; Appoints mutual Cases upon the whole cause to be given in by the first box-day in the ensuing vacation; to be then seen and interchanged, and lodged revised, by the second box-day in said vacation.

(Signed) J. H. FORBES.

28th February 1833.—Conjoins this process (*of declarator*) with a previous process of suspension connected therewith; In the conjoined process, of new, appoints mutual Cases to be lodged by the first box-day, and to be then seen and interchanged, and lodged revised, by the second box-day in the ensuing vacation.

(Signed) J. H. FORBES.

25th June 1833.—Avizandum with the Revised Cases, and whole process.

(Signed) J. H. FORBES.

27th June 1833.—The Lord Ordinary makes avizandum to the Lords of the Second Division of the Court, with the printed Revised Cases for the parties; Appoints the Cases to be boxed for the use of their Lordships; Grants warrant to the keeper of the Inner-House rolls to enrol the cause in the Inner-House rolls.

(Signed) J. H. FORBES.

Second Division.

24. June 1833.

REVISED CASE

FOR THE

FACULTY of PHYSICIANS and SURGEONS
of GLASGOW,

*In the conjoined Processes of Declarator and
Suspension between them and*

The COLLEGE of GLASGOW, &c.

HOPKIRK & IMLACH, W. S. Agents for the Faculty.

W. A. G. & R. ELLIS, W.S. Agents for the College, &c.

Mr Ferguson, Clerk.

BIBLIOTH.
COLL. REC.
MED. EDIN.

REVISED CASE

FOR THE

FACULTY of PHYSICIANS and SURGEONS of GLASGOW; and for JOHN MACARTHUR, Surgeon in Glasgow, President, and GEORGE HENDRIE, Physician and Surgeon there, Visitor of the said Faculty, for themselves and in name and behalf of the remanent Members of the said Faculty,
—*Defenders and Suspenders*;

In the conjoined Processes of Declarator at the instance of

The COLLEGE of GLASGOW *against* The said FACULTY of PHYSICIANS and SURGEONS; and of *Suspension and Interdict* at the instance of the said FACULTY *against* JOHN MACMILLAN, designing himself Surgeon in Glasgow, and OTHERS.

THERE are two processes now before your Lordship, which are conjoined. The first brought into Court was a Suspension and Interdict, raised at the instance of the Faculty of Physicians and Surgeons of Glasgow (who shall throughout the succeeding argument, be called defenders), for the purpose of preventing an infringement of their privileges, on the part of certain individuals who were practising as surgeons within the bounds of their charter, without being examined and admitted by the Faculty. The answer to this application for interdict was of a twofold description. It consisted, *1st*, of a denial, that the Faculty possessed the privilege which they claimed, of examining all persons desirous of practising the art of surgery within certain bounds, and of debarring all persons, not examined and licensed by them, from practising within these bounds; and, *2dly*, of an allegation, that, even supposing this privilege to be established generally, yet the individuals challenged were exempted from its operation, in consequence of their having obtained from the College of Glasgow, the Degree of Master in Surgery; which, it was contended, entitled them to practise as surgeons, without any license from the Faculty. The other of the two conjoined processes is a formal action of Declarator, raised by the College itself in support of the latter ground of defence, and brought into Court after the possessory question had nearly arrived at the length of a decision, concluding to have the same privilege for their degrees in surgery, which had been previously claimed by the holders of these degrees, solemnly found and declared to be attached to them.

The discussion arising out of these processes naturally divides itself into two great branches; the one relating to the rights intrinsically possessed by the Faculty, and the other to the claims made by the College in competition with the Faculty. The defenders shall advert, separately, to these two divisions of the subject. They shall, in the first place, throwing for the moment out of view the claims of the College, inquire how far the Faculty have on their side established the possession of the privilege claimed by them; and having shown that the privilege is truly possessed by them, they shall, in the next place, inquire how far the claims of the College to encroach on this privilege, by degrees such as those in question, are well founded.

I.—RIGHTS OF FACULTY.

The position to be humbly maintained by the Faculty, is, that they are a lawful corporation, possessing the exclusive privilege of examining and licensing all persons desirous of practising the art of surgery within certain specific bounds, and the right of debarring all persons from practising as surgeons within these bounds, under whatever pretext, without being examined and licensed by the Faculty.

1st Plea in
Defence.

There are, as is well known, various ways in which a corporation may be constituted, and exclusive privileges created. Perhaps the whole of these may be reduced to three general heads.—1st, A corporation may be created by express charter, specially pointing out its privileges and obligations. 2dly, It may have its foundation, on deeds and documents, which, although not containing any express terms creating the privileges sought, are interpreted by usage into a constitution of corporate rights. 3dly, Even without any charter at all, a corporation may be formed by prescription alone,—that is, by an immemorial exercise of corporate rights and privileges. In the law of corporations, prescription is expressly recognised, as by itself, one of the settled modes of forming a corporation; the theory of the law being, that the immemorial usage presumes the existence, at some anterior period, of a charter, now lost. It is well known, that many corporations, and these amongst the oldest and most respectable, exist upon no other footing than that of prescriptive usage. The validity of prescription to constitute a corporation, without any written charter, has, accordingly, been repeatedly recognised in this Court. And in one noted case, that of *Skirving v. Smellie*, decided with reference to the Corporation of Wrights in Dundee,—it was, after a very deliberate argument, solemnly determined that prescription alone was sufficient to confer the whole exclusive privileges claimable by any such association.

Kyd on Corporations, Vol. I. p. 41.

Wrights of Glasgow v. Cross, 8th March 1765. Morr. 1961. *Skirving v. Smellie*, 19th Jan. 1803. Morr. 10,921. *Feuars of Kelso v. Duke of Roxburgh*, 8th Jan. 1755. Morr. 1830. *Tailors of Perth v. Lyon*, 10th Dec. 1756. Morr. 1947.

Now, it appears to the defenders, that the privileges of the Faculty of Physicians and Surgeons of Glasgow rest upon all of the grounds on which corporate rights can ever be founded; being constituted, in the first instance, by an express charter, which is itself interpreted and fortified by a consistent usage of more than 200 years. And the defenders have now to call your Lordship's attention to the terms of their charter of incorporation.

It may not be out of place to premise, that the practice of forming surgeons into corporate bodies, with a view to prevent all

persons from practising, except such as should become members of the recognised corporation, by being regularly examined and admitted, is of great antiquity. Its origin, indeed, plainly lies in a necessity which would be very early felt, viz., the necessity of preventing, by an ordinance of the State, the people from becoming the prey of empirical pretenders. It is not, therefore, wonderful, that the principle on which, in part at least, corporations were originally formed,—viz., that of restricting the right of practising a trade, to those who should prove themselves competently skilled in it, should very early have been practically exemplified in the case of surgeons; and that, in fact, in their body are to be found instances of amongst the oldest corporations that are known. There are some traces of such an incorporation of medical men existing in the later ages of the Roman law, under the Emperors. *Conringius*, a learned commentator on antiquities of this character, mentions a corporate body of a superior order, called *Collegium Archiatrorum*, into which, by the special edicts of the Emperors Valentinian and Valens, none could be admitted without a special examination by the members.—‘ Si huic Archiatrorum numero, aliquem, aut conditio fatalis, aut aliqua fortuna decerpserit, in ejus locum, non patrocínio præpotentium, non gratia judicantis, alius subrogetur, sed horum omnium fideli circumspectoque dilectu.’ And again,—‘ Non ante eorum particeps fiat, quam primis qui in ordine reperientur, septem, vel eo amplius, judicantibus idoneus adprobetur.’ The laws contained in one whole title of the *Codex*, (Lib. x. tit. 52), point very manifestly to the existence of this medical association. A College of Physicians and Surgeons was very early instituted in Papal Rome. In France, a corporation of exactly the same character with that of the defenders was founded so far back as 1311, by a charter of Philip the Fair. In England, King Edward the Fourth erected a similar body, forming one of the city companies of London, in 1461. In Scotland, the surgeons of Edinburgh show an incorporating charter from the town, dated 1505, confirmed by James the Fourth in the following year; the liberties of which were afterwards extended by a charter of William and Mary in 1694, to the Lothians, and to the shires of Fife, Peebles, Selkirk, Roxburgh, and Berwick.

It appears to have been in imitation of the earlier of these grants, and particularly of that in favour of the Surgeons of Paris, that King James the Sixth, in the year 1599, executed a charter, incorporating a similar body in the city of Glasgow. In forming this corporation, he proceeded in a way known to be very common

Conringius de Antiquitatibus Academicis, pp. 53. 116.

Bullarium Magnum, tom. I. p. 800.

Recherches sur la Chirurgie post. civitat.

Maitland's History of Edinburgh, p. 294.

in such matters,—that is, he did not himself name the persons who were to form the original members of the corporation, but he committed to two persons, in whom he had confidence, and who were themselves medical men, the power of selecting from amongst those professing the art of Surgery within certain bounds, the persons who, on examination, should be found worthy to become the original constituent members of the Faculty, and by whom, incorporated as brethren, the laws of the corporation should be made, and the admission of after members regulated. It will be obvious, on the slightest reflection, that this is indeed the only way in which a corporation, which may in some sense be called a scientific corporation, can be originally formed, because it is plain, that the monarch himself cannot know who are fit to be its original members, and can only ascertain this, by delegation to persons who are themselves men of skill. It is quite settled, that corporations may not only be constituted by the direct act of the King, but also by delegation of the power to another. ‘ It was formerly ‘ asserted’ (says Mr Kyd) ‘ that the act of incorporation must be ‘ the immediate act of the King himself, and that he could not ‘ grant a licence to another to erect a corporation. But the law ‘ has long been settled otherwise, and he may not only grant a ‘ licence to a subject to erect a particular corporation, but give a ‘ general power by charter to erect corporations indefinitely.’ And it is in fact only through such a general delegation, presumed by the law, that the Seals of Cause, and other charters granted by magistrates, become valid incorporating rights. This mode of forming a corporation by delegation was that adopted in regard to the Faculty of Surgeons in Paris, who were to be originally selected, under the charter of Philip, by the King’s own surgeon, John Petard. The words of King Philip’s charter are ; ‘ *Edicto pre-* ‘ *senti statuimus, ut in villa et vicecomitatu predictis, nullus ci-* ‘ *rurgicus, nullave cirurgica, artem cirurgiæ seu opus quomodoli-* ‘ *bet exercere presumat, seu se immiscere eidem publice vel oc-* ‘ *culte, in quacunque juridicione seu terra, nisi per magistros Cy-* ‘ *rurgicos Juratos, morantes Parisiis vocatos per dilectum magistrum* ‘ *Joannem Petardi Cyrurgicum nostrum juratum Castelleti nostri* ‘ *Parisiis, tempore suo, aut per ejus successores in officio, qui ex* ‘ *juramenti sui vinculo, cyrurgicos alios predictos vocare pro casu* ‘ *hujusmodi quoties opus fuerit, tenebuntur, prius examinati fuerint* ‘ *diligenter, et approbati in ipsa arte, ac ab ipso vel ejus successori-* ‘ *bus in officio, ut est dictum, juxta approbationem aliorum cyrurgi-* ‘ *corum vel majoris partis eorum, ipsius vocantis voce inter alias* ‘ *numerata, licentiam operandi in arte predicta meruerint obtinere ;*

Kyd on Corporations, vol. I. p. 50.

1st and 2d Pleas in Suspension.

Recherches sur la Chirurgie, Paris, 1744, p. 437.

‘ ad quem ratione sui officii, quod a nobis obtinet, et ad ejus suc-
 ‘ cessores in hujusmodi officio, hujusmodi licentie concessionem,
 ‘ non ad alium, volumus pertinere.’ In imitation of this charter,
 an appointment was made by King James the Sixth on Mr Peter
 Low, his surgeon, and Mr Robert Hamilton, Professor of Medi-
 cine, to form a corporation of skilled persons, with whom, and
 their successors in the corporate body, should lie the exclusive
 privilege of licensing all surgeons within certain specific bounds,
 in all time coming. In fact, as it appears from a work published
 in France, under the title of ‘ Index funereus Chirurgorum Pari-
 ‘ siensium ab anno 1315 ad annum 1729,’ that this Mr Peter
 Low, therein described as ‘ Magister Petrus Louvet, Scotus, Medi-
 ‘ co-chirurgus præstantissimus,’ was a member of the Parisian
 Faculty, the probability is, that the Faculty of Glasgow was
 intended to be in all points a transcript of that of Paris.

Append. No. I.
 page 31.

The charter, accordingly, which is dated the penult day of No-
 vember 1599, after the narrative of the usual inducement to form
 a corporation, viz. that of preventing unskilful persons from im-
 posing on the leiges, or in the words of the charter, ‘ understand-
 ‘ ing the grit abuses, quhilk hes bein comitted in tyme bigane,
 ‘ and zit daylie continueis, be ignorant, unskillit, and unlearnit
 ‘ personis, quha, under the collour of chirurgians, abuisis the
 ‘ people to their plesuir, passing away but tryel or punishment,
 ‘ and thairby destroyis infinite numbers of our subjects, quhair-
 ‘ with na ordour hes bein tane in tyme bigane, specially within oure
 ‘ burgh and baronie of Glasgow, Renfrew, Dumbartan, and our
 ‘ Scheriffdomes of Clidsdale, Renfrew, Lanerk, Kyll, Carrick, Air,
 ‘ and Cuninghame,’ proceeds thus:—‘ For avoiding of sic inconve-
 ‘ nientis, and for gude ordoure to be tane in tym coming, we have
 ‘ MAID, CONSTITUT, and ORDAINIT, and be the tenour of thir oure let-
 ‘ teris, MAKIS, CONSTITUTIS, and ORDAINIS Maister Peter Low, our
 ‘ chirurgiane and chief chirurgian to oure dearest son the Prince,
 ‘ with the assistance of Maister Robert Hamilton, Professoure of
 ‘ Medicine, AND THEIR SUCCESSOURES, INDWELLERIS OF OUR CITIE OF
 ‘ GLASGOW, Gevand and Grantand to thame and thair successours
 ‘ full power to call, summond, and convene before thame, *within the*
 ‘ *said burgh of Glasgow, or any uther of our saids burrows or pub-*
 ‘ *lict places of the forsaid boundis, ALL PERSONIS professing or using*
 ‘ *the said airt of CHIRURGIE, to examine thame upon thair litera-*
 ‘ *ture, knowlege, and practize, gif they be fund wordie, to ADMIT,*
 ‘ *ALLOW, and approve thame, give thame testimonial according to*
 ‘ *the airt and knowlege that they sal be fund wordie to exercise*
 ‘ *thairastir, resave thair aithis, and authorise thame as accordis.’*

In this way, the two individuals named had, *in the first instance*, the right of licensing those who, at that time, were to be admitted to practise as surgeons. But that the parties so admitted were also to constitute a corporate body, which was to exist in perpetuity, is manifest. For *1st*, the charter is expressly declared to be granted, with a view to secure an ‘ordoure to be tane in tym ‘cuming;’ which plainly points at a standing body of skilful persons, in whom is to be the power of examining and licensing. *2dly*, The charter goes on most expressly to provide, that the persons to be admitted were to be *added* to the individuals named, as a permanent association of brethren, having the right to make bye-laws, in regard to the regulation of those practising the art in question ‘within the said burgh of Glasgow, or any uthers ‘of our said burrows or publict places of the foresaid boundis.’ For it proceeds to declare, ‘that it sal be leisum *to the saidis visitouris*, WITH THE ADVICE OF THAIR BRETHEREN, to make statutes ‘for the common weill of our subjectis, anent the saidis airtis and ‘using thairof faithfullie, and the braikeris thairof to be punished and unlawit be the visitoures, according to thair falt.’ In the same way it also provides, ‘that the saidis visitoures, *with thair bretheren and successouris*, sall convene every first Monunday ‘of ilk moneth at some convenient place,’ &c. It also grants certain immunities and exemptions ‘to the saidis visitouris, indwellers of Glasgow, Professouris of the saidis airtis, and thair BRETHEREN, *present AND TO CUME.*’ And in its close, it calls upon all magistrates ‘to assist, fortifie, concur, and defend the saidis visitoures, AND THEIR POSTERITIE, PROFESSOURIS OF THE SAIDIS ARTIS, ‘and put the saidis acts, maid, and to be maid, to execution.’ The gift was therefore one which was plainly not made merely in favour of the individuals named, or of these individuals merely in conjunction with those whom they should in the first instance select, but was a gift in favour of a *permanent* association, selected in the first instance by the ‘visitouris,’ as the individuals specified are called, then formed of ‘the saidis visitouris, *with thair bretheren,*’ and continuing in their ‘successoures’ or ‘posteritie,’ that is, in those individuals who, by means of the same examination and admission, through which the original members were selected, should be afterwards added to their number.

Now, it humbly appears to the defenders, that even were nothing else to be regarded, than the mere terms of the charter itself, it is manifestly a charter creating a proper corporation, and conferring on that corporation the exclusive privilege of licensing all intending to practise surgery within the specified bounds, and

Kyd on Corporations, Vol. I., p. 62.

the corresponding right of debarring all persons from practising, who are not possessed of this license. Although some of its expressions possess the indefiniteness common in deeds of that early date; yet it is known, that all that is necessary, in order to erect a corporation is, that, as expressed by Mr Kyd, 'words of sufficient import be used, but there is no prescribed form nor appropriate words peculiarly requisite for that purpose.' The charter has all the characteristics of a proper incorporating charter. For, *1st*, Its declared object is to serve a purpose which could not be accomplished without constituting a standing body of skilful men. *2dly*, It accordingly does provide for an association being formed of persons, whom it describes by the well known corporate character of 'brethren.' *3dly*, It evidently contemplates this association having a perpetual succession,—perhaps of all things, that which is most truly of the essence of a corporation. *4thly*, It vests in this continuing association the power of making bye-laws, which is a characteristic power of corporations. *5thly*, It also adds the characteristic mark of an oath being received at the entry of its members; for the electors are required, on the occasion of the admission of new members, 'to resave thair aithis, and authorise thame as accordis.' *6thly*, It prescribes certain bounds, within which the association are to exercise their privileges, viz. 'the burgh and baronie of Glasgow, Renfrew, Dumbartane, and the Scheriffdomes of Clidsdale, Renfrew, Lanerk, Kyle, Carrick, Air, and Cuninghame;' this being just that other mark of a corporation, which consists in the limitation of the territory within which the exclusive privilege is to be exercised. *Lastly*, And with a more peculiar reference to the subject of the present discussion, the charter evidently confers upon the corporation an exclusive privilege within these bounds; for nothing can be more unlimited than the terms employed, to the generality of which, your Lordship's attention is particularly requested. There is given 'full power to call, summond, and convene before thame, within the said burgh of Glasgow, or any others of our said burrows or publict places of the foresaid boundis, *ALL PERSONIS professing or using the said art of CHIRURGIE*, to examine thame upon thair literature, knowledge, and practise; gif they be fund wordie, to *ADMIT, ALLOW, and approve* thame.' This manifestly implies the necessity of *ALL PERSONS WHATEVER*, being admitted by the corporation, before being entitled to practise surgery; and, of course, a co-relative prohibition against any person practising without such admission; for the one is necessarily implied in the other. There is no exception or

exemption whatsoever. The privilege of practising surgery within the specified bounds, is confined to those admitted by the corporation then created.

Whilst the defenders think the terms of the charter itself sufficiently conclusive, they have to add, that it received an interpretation from the usage which immediately followed on it, putting the privileges intended to be conveyed by it beyond the possibility of doubt. Before advertng, however, to this usage, it is necessary to notice one clause in the charter not hitherto mentioned, and to which it is material to allude, in anticipation of the argument to be maintained on the other side. It has been seen, that the charter most expressly subjected, 'ALL PERSONS professing the art of CHIRURGIE,' to the necessity of a special license from the Faculty. But the charter also contained a regulation, and vested in the corporation certain powers, with regard to a profession which was then, and is even now, held separate and distinct from the art of surgery, viz. the profession of a *Physician*, as distinguished from a *Surgeon*. It is well known as a matter of history, that, at the time of this charter, *Surgery* was regarded in the light of a mere art or trade;—and the surgeon as a mere manual and mechanical operator. The *Physician*, on the contrary, was a person who never operated, but who was merely consulted, as a learned man, for advice. In strictness of language, the same distinction, in fact, exists at the present day. It is, indeed, sometimes lost sight of, in every day life, from the circumstance of the same person very frequently sustaining the character both of a physician and surgeon. But in correct definition, the professions are totally separate. The very etymology of the name of surgeon, points to the fact of the profession being one of manual operation,—the term *Chirurgus* being well known to be derived from the Greek word, signifying the hand,—'Chirurgus (*χειρουργος*) ' *medicus vulnerarius; a manu operatione ita vocatur.* (*Stephani Thesaurus.*) What is, perhaps, in a question of law, conclusive as to the distinctness of the professions is, that in legal description and character, they are at this very moment held to be totally different, particularly in one point, of itself decisive. The physician may, as a scientific person consulted for advice, receive honoraries, but cannot, generally speaking, sue for them; the general rule of law, in both ends of the island, being, in the words of Lord Kenyon,—
Chorly v. Bolcot,
Term. Rep. iv.
317.
' The fees of a physician are honorary, and not demandable of 'right.' The only exception to this rule regards fees for attendance on deathbed; which exception does not proceed on any notion that these are more of matter of right than others; but rather

on some presumption of the patient, unable to pay these at the time, having *left* them with his executors, *on the physician's behalf*. With this exception, the general rule holds unlimitedly, which is expressed by Lord Kenyon; and cannot be expressed in better words than his Lordship's; that such fees 'are honorary, and not 'demandable of right.' The surgeon, on the other hand, is entitled to bring an action in a Court of law for his bill; and this on the express footing of his practising an art or trade. This sufficiently proves the distinctness of the two professions in a legal point of view, even in the present day. At the time of King James's charter, the two classes were not only legally, but also in education and in station, still more widely remote. The physicians were always the graduates of some University; and, to this day, indeed, the proper distinction of a physician is just to hold from a University the Degree of Doctor of Medicine. The surgeons, on the other hand, although it may be true, as stated by the pursuers, that there were distinctions amongst individuals, yet, as a class, were invariably regarded as an inferior, and comparatively uneducated description of men, who were understood to know little or nothing except their own immediate craft, to which they were trained by the same apprenticeship common in any mechanical trade. They were literally shop-keepers, selling drugs in shops, where also they bled and blistered, *secundum artem*,—or often very inartificially. Now, with regard to the profession of the *Physician*, as distinguished from 'the Art of Chirurgie,' the charter contains, in a separate clause, the following declaration of right in favour of the newly created Faculty:—' *Fourthly*, It sal not be leisome to *ony manner* ' *of persons within the foresaid boundis, to exercise MEDICINE with-* ' *out ane testimonial of ane famous universitie quhair medicine is* ' *taught; or at the leif of oure and oure dearest spouses chief me-* ' *dicinaris; and in case they failzie, it sal be leisum to the saids* ' *visitoures to challenge, perseu, and inhibit thame throu using* ' *and exercising of the said airt of medecine, under the pain of* ' *fortie pundis, to be distrebuted half to the judges, half to the* ' *pure, toties quoties they be fund in using and exercising of the* ' *same, ay and quhil they bring sufficient testimonial as said is.'*

There are thus quite manifestly two distinct and independent provisions contained in the Charter of King James, on the subject of these separate callings. The pursuers endeavour to confound these provisions, as if they related to one and the same thing, expressed in different language in different parts of the instrument. But independently of the well-known distinction existing at the time

between the two bodies of men, the words of the charter are quite conclusive, (and will be immediately seen to have been held by the Court quite conclusive), on the point of its intending to refer to two separate classes, which are the subjects of separate arrangements. The provisions are contained in *separate* clauses. The one is the first clause of the charter, giving the corporation power 'to call, summon, and convene before them, *ALL PERSONIS professing the art of CHIRURGIE*, to examine thame upon thair literature, knowledge, and practize, gif they be found wordie, to ADMIT, ALLOW, and *approve* thame.' The other is the fourth, *separately* providing, that 'it sall not be leisome to ony manner of personis, within the foresaid boundis, to exercise *MEDICINE*, without ane testimonial of ane famous universitie quhair medicine is taught.' The meaning of these separate provisions is obvious. In regard to '*ALL PERSONS professing the art of CHIRURGIE*,' it is imperatively required that they should be examined and admitted by the corporation. They must become members or licentiates of the corporate body. In regard to those '*exercising MEDICINE*,' or physicians, the privilege enjoyed by them on the ground of possessing a university degree, is preserved to them; and *all* the power vested in the Faculty is merely that of preventing any pretenders to the character attempting to practise without such a testimonial. Beneath this enactment, a *Physician* might set up as such, independently of the Faculty, on the bare possession of his degree. They have, in most instances, joined the Faculty for the sake of its collateral benefits; and the Faculty has thus become an association of physicians as well as surgeons. But, in the case of physicians, this was voluntary. In regard, however, to *Surgeons*,—*who, in the eye of the law, practised a mere manual art*,—an express and exclusive corporation is formed, and by an equally positive enactment with that reserving the privileges of the physicians, no one is entitled to practise the art of surgery without being regularly *admitted* by the corporation.

The defenders have now to confirm the evidence of their privileges afforded by the charter, by that of the usage immediately consequent on it, which, in the most triumphant manner, corroborates the interpretation which has just been given.

It appears, that on the 9th February 1600, the charter was presented to the Magistrates of Glasgow, and by them recorded,—and so far as they were concerned, ratified. In June 1602, the individuals specified in the grant exercised the power conferred on them, by *constituting* the corporation out of the persons whom they had selected to be its original members. The minute-book

3d Plea in
Suspension.

App. No. II.
page 33.

App. No. III. of the Faculty, of 3d June 1602, runs as follows:—‘ The quilk
 page 34. ‘ day, within the Blackfrier Kirk of Glasgow, in presence of Sir
 ‘ George Elphinstoune of Blaithswood, Knight, Provost, James
 ‘ Forrest, John Andersoune, Will. Andersoune, Bailies thereof,
 ‘ compeirt Mr Peter Lowe, and Mr Robert Hamiltoune, quilk
 ‘ producit ane gift of our Sovereign Lord, anent their liberties,
 ‘ with the Provost and Bailies authoritie interponit thereto, as the
 ‘ samyn at lenth beirs, *and made convention with y^r breitheren*, viz.
 ‘ Adam Fleming, Mr Robert Allasone, William Spang, Thomas
 ‘ Thomsone, John Lowe; and the samyn being red, the said Mr
 ‘ Peter and Mr Robert, was content, of their ain consents, not-
 ‘ withstanding of their nomination of gift, that ilk yeir, ance at
 ‘ Michelmes, the samyn shall be lytit amongst the breitheren, and
 ‘ quha be maniest vottis, bes elected to remaine visitoure for ane
 ‘ yeir thereafter, and so forth yeirly in all tyme coming: And
 ‘ also is content, that the foresaids persons, *BREATHEREN OF CRAFT*,
 ‘ *presentlie admitted be them*, shall have power and libertie to use
 ‘ the craft and calling as free as themselves, after their knowlege,
 ‘ and that they shall not visit any of the foresaids bretheren’s
 ‘ patient’s, being on cuir, without their aune consent, and the pa-
 ‘ tients, first had and obtenit thereto;—quhilk bretheren, being pre-
 ‘ sent, consents to concure, assist, and had hand to: And ther-
 ‘ efter, the said Mr Robert, present visitour quhil Michelmes, be
 ‘ consent of the bretheren, has elected Robert Herbertsone, notar,
 ‘ clerk to them, who has given his oath of fidelitie: And also,
 ‘ creat George Bonnel officer, quhil Michelmes, and has given
 ‘ his oath;—and the said bretheren to conveine all such tymes as
 ‘ shall be appointit, being warnit be the officer, under the paines
 ‘ contenit in the ordinance to be set down thereanent. The bre-
 ‘ theren *has presently given their oathes*; and ordainit the rest, and
 ‘ John Hall, to be convenit, and that they shall concure and assist
 ‘ ilk uther as becomes.’

The brethren of the corporation thus formed, immediately
 proceeded to exercise their privilege of making bye-laws for the
 regulation of their craft. On the 17th of the same month of
 Append. p. 34. June 1602, at a meeting of ‘ Mr Robert Hamiltoune, visitour,
 ‘ *and the bretheren*,’ they elected quarter-masters, and imposed
 certain fines on non-attendance on their meetings. They also
 enacted certain rules, in regard to the right of admission to the
 corporation, *and also in regard to the dues of entering with it*,—in
 all of which rules, it will be seen to have been treated as a proper
 craft or trade. On the 22d June 1602, the minute bears:—‘ The
 ‘ said day, ordaines that all *prentises* to be entered shall remain
 p. 35.

' no shorter space nor seven yeares, and the last two for meal
 ' and fee; and at his entri, shall pay five pund to the craft, and
 ' to the clark 1 lib. 13/4d., give he be ane extraordinar ane; and
 ' give he be a burgess' son, to pay 2 lib. to the box, and to the
 ' clark 1 lib. 6s. 8d., and to the officer 12s.; and that ilk prentice
 ' shall be *examined*, after the first thrie yeares compleating, *upon*
 ' *his arte of craft*, and to pay 5 lib. for the denner at that time,
 ' and to every examiner 20s., and to the clarks 6s. 8d., at the
 ' day of examination; and the visitour to admonise the examina-
 ' tors, q'ron they shall examine to be wryten; and at the five
 ' yeares end to be examined lykewise, and to pay alyke: And at
 ' the seven yeares end, q'han he passes *master*, to be *examined up-*
 ' *on the whole particulars of his airt,—off the diffinitions, causes,*
 ' *signes, accidents, and cures of all deseisses pertaining to his*
 ' *airt, w't the composition of nature and fit medicaments, as shall*
 ' *be requisite, payand at the tyme for ane denner ten pund, and*
 ' *to the examinadores, and others, as is aforesaid.'* And again,
 '—*Eodem die.*—Being conveined, as said is, they have con-
 ' dishended, and be thir presents condishends, that give any per-
 ' son being qualified does enter, being a burgess' son, shall *pay*
 ' for his admission fortie pund; and give any burges' son be prentice
 ' w'tin the toun with a *freeman* of the said calling, entered
 ' freeman, shall pay thretie pundis for his admission; and a
 ' stranger that comes to enter freeman, shall pay 66 lib. 13s. 4d.,
 ' and none of the above named persons to be admitted till they
 ' produce the burges-ticket before the deacon and quarter-masters,
 ' according to the act of the Gildrie.'

App. p. 35.

The corporation also instantly commenced to enforce their
 right of debarring from practice, all who were not admitted and
 licensed. On the same 22d June 1602, at a meeting of the
 brethren,—' The quilk day, in respect that Thomas Thomsone
 ' having given his oath at his entrie, to beir burden w't the rest of
 ' the brethren, and discharging of his duty, he being synsine de-
 ' sired to compeir w't them to their assistance in doing their lea-
 ' some business, severall tymes, hes most wrongously and con-
 ' temptuously disobeyed; therefore, they ordain him to tyne
 ' whatsoever libertie he hes be y^m; *and to tak in his bassons.* Als
 ' also John Hall and others to be dischargit sicklyke; and to that
 ' effect requests the provest and baillies to interpon their autho-
 ' ritie thereto; and also condishendis to give up the particular
 ' persons names that any way usurps any libertie and privilege of
 ' the brethren to the provest and baillies, requesting them to cause
 ' them to convene, and to find caution for abstinence, conform

Ibid.

‘ to his Majesty’s commission, and the authoritie of the toune in-
 ‘ terponet thereto.’

App. p. 36.

On the same occasion, a resolution was entered into, not im-
 material to notice, with reference to one part of the argument on
 the opposite side. Every one is acquainted with the historic fact,
 that, in these times, *Barbers* were accounted subordinate mem-
 bers of the surgical calling, having certain of the pettier opera-
 tions confided to them; and being almost universally associated in
 surgical corporations, as inferior members of the craft. On the same
 22d June 1602,—‘ It is statute and ordained, that BARBERS, being
 ‘ a *pendicle* of chyrurgerie, shall pay at their admission fortie
 ‘ pundis Scots, and elk yeir twentie shilling to the puir, and *limit-*
 ‘ *ed not to midle w’ anything farder belonging to chyrurgerie, un-*
 ‘ *der the paine of five pund, toties quoties,* and shall pay to the clerk
 ‘ of the calling for his beuking thretie shilling Scots, and to the
 ‘ officer twel shilling.’

App. No. VII.
 p. 44.

By the contributions of its members, the Faculty shortly ac-
 quired certain property, which was in part composed of heritable
 subjects; and following out the intentions of the original charter,
 this property was vested in the corporation *qua* such, in the same
 way with other corporate bodies, *and on the footing of its being*
a proper legal corporation. The defenders prove this, by pro-
 duction of a sasine, dated 8th July 1662, which establishes its char-
 ter to have been granted ‘ in favorem Jacobi Franck pro presente
 ‘ *visitoris medicorum et chirurgorum in dicto burgo et fratrum*
 ‘ *Facultatis ejusdem vocationis;*’ and the investiture is given,—
 ‘ *Memorato Jacobo Franck visitori seu decano dictæ vocationis*
 ‘ *medicorum et chirurgorum in usum et utilitatem dict. fratrum*
 ‘ *ejusdem vocationis seu Facultatis;*’—the notary declaring that,
 ‘ *eundem Jacobum Franck decanum ejusque dictos successores in*
 ‘ *officio in usum prescriptum in eodem tenemento debito investivit*
 ‘ *ac infeodavit.*’ It is almost needless to remark, that this is just
 the mode in which property is held by any corporation; and that
 it is only on the footing of established corporate rights, that the
 property could be validly so vested.

App. No. VI.
 p. 43.

These acts of the corporation are sufficient, in the very strongest
 manner, at once to explain and to confirm their charter. It is
 only to be added, that it was whilst the Faculty were exercising
 the possession just stated, *under their original title*, that there was
 passed an Act of the Scottish Parliament, ratifying the gift of King
 James, and to which the defenders now refer as completing the
 constitution of their body. This act of Parliament was passed on
 the 11th September 1672, and being thus long posterior to the

exercise of all the corporate privileges already described, and, indeed, after those privileges had been exercised for more than half a century, must be held specially to ratify, and to confirm the whole of these. The act is passed in favour of ‘the chirurgians, apothecaries, and barbouris;’—the *latter*, of course, only to the extent to which, under the gift, they had been admitted, viz. as ‘a *pendicle* of chirurgerie.’ By this act there is *in terminis* confirmed the letter of gift passed under the Privy Seal, of the date at Halyrudehouse the penult day of November 1599 years, whereby his Majestie’s grandfather, of blessed memorie, for avoyding of inconveniencies, and for good order to be tane in tyme coming, within the burgh and barony of Glasgow, gave and granted full power to the chirurgians and professors of medicine within the city of Glasgow for the tyme, and their successors, to call and convene before them, *within the said burgh of Glasgow, or any other place of the bounds foresaid, contained in the said gift*, ALL PERSONS professing or using the arte of CHIRURGEAN, to examine them upon their literature, knowledge and practice, if they be found wordie to ADMIT, ALLOW, and approve them, give them testimoniale according to their arte and knowledge to exerse thereafter, receive their oaths, and authorise them as accords.’ The other declarations of the charter are also generally referred to, including a provision also contained in it, ‘that no manner of persons sell any drogs within the city of Glasgow, except they be sighted *by the foresaid persons*, under the pain of confiscation of the drogs. And that no ratten poyson be sold except by the apothecaries.’ And the act closes after the usual manner,—His Majesty and Estates of Parliament, wills, grants, and declares, that this present general ratification shall be als valide and sufficient to the said chirurgians, apothecaries, and barbouris, and their successors allenary, as said is, as if the said gift were word be word herein engrossed, notwithstanding the samen be not so done, wherewith his Majestie and Estates of Parliament has dispensed, and be thir presents dispenses for ever.’

The defenders conceive, with great deference, that it would only be a waste of argument, to set about formally to prove, out of the circumstances now detailed, the *completed* establishment of a regular legal corporation; which is beyond all dispute. Now, the corporation thus completed, has continued in the exercise of all its privileges down to the present day; and all that remains for the defenders to do, is briefly to refer to the proofs in process of the *continued* existence of the corporation, and their continued

possession of exclusive privileges, all downwards. These consist of acts on the part of the corporation, and acknowledgments by others of their privileges, which would, *even by themselves*, and without any antecedent title, be sufficient to found a prescriptive right. But, when taken in connection with the title proved, afford a mass of evidence wholly insuperable. This evidence may be divided into two branches;—the first relating to the *exercise* of their privileges by the corporation itself; and the second to the *recognition* of these privileges by third parties, and more particularly by the Courts of law.

In the first place, with regard to the *exercise* of their privileges, the fact is not disputed, that down to 1816, when the encroachments of the College commenced, the Faculty exercised the *exclusive* right of licensing all surgeons within the specified bounds; which was also coupled with the exercise of the corresponding right of debarring from practice all unlicensed individuals. The records of the corporation are full of their practice in this respect. But it is also proved, most conclusively, by a list which the defenders have produced, of bonds of desistance granted by persons who had begun to practise without a license, and had been challenged by the Faculty, and of decrees, and, in many instances, hornings and captions against those who still continued contumacious. This list, which comprehends individuals having their residence in all the different localities of the charter, extends from the year 1659, down to 1759, inclusive.

But, *secondly*, this exercise of the exclusive privilege, appears in a still stronger light, when coupled with its express *recognition* by the Courts of law; and this, besides, frequently in the face of express opposition, and determined litigation. This recognition occurs at frequent intervals, during the whole course of the history of the corporation. It had begun so far back as the year 1635, when a proceeding took place, forming a very conclusive acknowledgment of the corporation by the law. Your Lordship is aware, that, until the practice was checked by the statute 1690, cap. 13, it was a common custom to issue *general* letters of horning in favour of corporations, which put it in their power to use execution in any individual case, on its being merely found, by a decree of the corporation, that the individual had infringed their rights, and incurred the corresponding penalty. To obtain such general letters of horning, was itself a proof of corporate rights. Now, the defenders have produced such letters of horning, in favour of the Faculty, dated 31st July, and signeted 14th August 1635. They proceed on the express narrative of the charter of

App. p. 49 to
p. 54 inclusive.

6th Plea in Suspension.

App. No. IV.
p. 36.

King James, and of a general decret obtained before the Lords of Council and Session, by ‘ our lovite, Mr James Hamiltoun, chirurgian, burges of our said burgh of Glasgow, present visitor in the said airt and calling of chirurgerie within the samen brugh of Glasgow, for himself, and in name and behalf of the remanent breithern *and friemen* of the said airt and calling, and their successors,’ ‘ against all and sundrie persons quatever, professing or using the saidis airtes of chirurgearrie or medicine, within our said burgh and baronie of Glasgow, sherifdomes and burrows of Renfrew, Dumbartane, Clydesdaile, Lanark, Air, Kyle, Carrick, and Cuninghame; and also against the Provestes and Bailies of burrows, Sheriffs, Stewarts, Bailies of Regalities, and other Ministers of Justice q’tsomever, within the saidis boundis, decerning and ordaining thir our l’ters of horning, to be direct upon ane single charge of three days allenarlie, charging ALL AND SUNDRIE *the saidis personis qu’tsomever*, professing or using the saidis airtis of chirurgianrie or medicine, within the boundis foresaidis, in generale, or be ther name in speciale, as they shall be requirit, to *desist* and *cease* frae all using or usurpeing of the saidis airtis of chirurgianrie or medicine, within the boundis foresaidis of our said burgh and barronie of Glasgow, sherifdomes and burrowes of Renfrew, Dumbartane, Clyddisdail, Lanark, Air, Kyle, Carrick, and Cunninghame, *except* they be examined be the said Mr James Hamiltoun, present visitor foresaid, in the said airt and calling of chirurgearrie and medicine, within our said burgh of Glasgow, and be his bretherin in the said airt, and thair successors, upon their literator, knowlege and practice, and *admittit*, *allowit*, and approvit be them, as being fund worthy, and y^r testimonials given to them according to their knowlege, that they shall be fund worthie to exercise y’rafter, thair aiths resavit, and authorised be the said visitor and his bretherin of the said airt, and their successors, as accords; and also discharging them to use anie farder nor that they have knowlege, laist our leidges and subjects be abusit; and *sicklyke*, *dischargeing them to exerce any* MEDICINE in the boundis foresaidis, without the testimonial of ane famous Universitie, quhair medicin is taught, or at the lief of our, or our deirest spous chieff medicinaries, under the said paine of fourtie poundis, *toties quoties*, to be distributed, half to the poore and half to the judge: And also, that they on noways sell ony droges within our said burgh of Glasgow, except the samyn be syghtet be the said present visitor and his successores, visitors of the said airt, under the paine of confiscatione of the said droges.’ A warrant is given

App. No. IV.
p. 38.

on this narrative, to ‘charge all and sundrie the foirsaidis persons quhatsover, professing and useing, or usurping the saidis airtis of chyrurgeonrie and medicine, within the boundis above specified, in generall, or be their names in special, as they shall be requirit,’—and to do personal diligence on this charge.

App. No. XV.
p. 54.

In 1691, a decree of declarator of their exclusive privileges was obtained from the Court of Session, by the corporation, in an action against the Magistrates of Glasgow, and which the Magistrates appeared to defend. This action seems to have originated in an unwarrantable encroachment on the privileges of the Faculty, on the part of the Magistrates, who appear to have taken upon them, of their own authority, to admit, as surgeon, one Henry Marshall, who had been rejected by the Faculty. The history of this encroachment appears stated in an act of Council, dated 9th May 1691, by which, on the application of the Faculty, and also of the other corporations, who seem to have joined in regarding the infringement as one made on corporate rights generally,—the Magistrates *rescinded* their former act in favour of Marshall;—‘and the saides Magistrates and Counsell refers the said Mr Henrie Marshall to the said incorporation of chyrurgeons, and earnestly desires them to use him civillie and discretlie.’ Not content with this concession, the Faculty raised an action of declarator of their privileges, against the Magistrates. This declarator bears to be ‘at the instance of Robert Houstoun, present Deacone of the Chirurgeons of Glasgow, for himself, and in name and behalf of the remanent members of the said incorporation;’ or, in other words, was pursued upon a title *which could only be valid on the assumption of the Faculty being a legal corporation*. The Magistrates appeared, and contended upon grounds abundantly frivolous, ‘that no such declarator could be sustained.’

App. No. VIII.
p. 45.

— p. 60.

The judgment was as follows:—‘The Lords of Councell and Session has found, and hereby finds, and declares the said chyrurgeons of Glasgow, *their privileges*, in terms of the foresaid gift and ratification and possession, of *DEBARRING UNFREEMEN lybelled upon*. And particularlie, that the visitors of the chirurgeons, at the time of the said gift, and their successors ever since, and all tyme coming, had, *and have right to make rules and statutes anent the dispensing of the said airt*, and to ordour the manner of the election of their successors, and also to make rules anent the admission of fit and qualified persons for the practice of the said airt and trade, *and to debar ALL OTHERS from the exercise y’rof, who are not duly admitted CONFORM TO THE SAID RULES*; and par-

‘ ticularlie, to debar all such as have not served their apprenticeships in the town of Glasgow, or have not married the daughter of ane freeman of the said incorporation, and also tryed and found qualified; and to fyne all *unfreemen*, exercising the same, in the soume of fortie pundis Scots, *toties quoties*, conform to the said gift; and also, fynds and declares, that the Magistrates and Counsell of Glasgow, have no right, nor power, to warrand or authorise any person to exercise chyrurgerie, or pharmacie, within the city of Glasgow, except such as are duly approuven of by the visitors, conform to the rules and statutes made anent the admission of fit persons for yt effect; which rules do require due tryal of the qualifications of the persons to be admitted thereto; and sicklike, the said Lords finds and declares, that any warrand and allowance granted by the late Magistrates of Glasgow, in favours of any person quhatsomever, who was not duly admitted nor tryed, *to set up shop, and practise*, within the said burgh, is void and null; and that the saids Magistrates and Counsell could not give to the saids persons, legal warrand or power to set up ane shop, or exercise chyrurgerie or pharmacie, except by consent of the visitor, and conform to the rules appoynted to them.’

In 1762, the privileges of the corporation were again sustained in App. No. XVII. a litigated action with an unlicensed practitioner of the name of James Calder. On the side of the Faculty, the action was anew laid on their corporate title, and supported upon the original charter, with the subsequent possession. The Court of Session afresh confirmed their corporate privileges, by finding the party challenged liable in a penalty for infringing them, and declaring him bound to submit to the examination of the Faculty, before practising as surgeon.

In 1791, another litigation took place between the Faculty and Alexander Dunlop, Junior, who was also practising without a licence. App. No. XX. p. 77. The action against this party was raised before the Magistrates of Glasgow, on the same corporate title, being ‘at the instance of John Jameson, visitor, and Robert Simpson, Collector to the Faculty of Physicians and Surgeons in Glasgow,’ and was expressly laid on the charter of King James, and subsequent usage. The defence was in part founded on an objection to the title. But the Magistrates ‘found the libel relevant, sustain the charter and ratification as the pursuer’s title to insist in the action,’ and repelled the whole defences. And this judgment was, in a suspension, confirmed by the Court.

In the same year, 1791, another action of declarator was brought App. No. XVIII. p. 74.

against the Magistrates of Glasgow, chiefly with a view of having certain immunities from taxes, &c., found to belong to the Faculty, but which also comprehended and repeated the same conclusions as to their exclusive privileges, which had been sustained by the decree of 1691. The conclusions as to the immunities were contested by the Magistrates. But those as to the exclusive privileges were not resisted; and a decree conform to these conclusions was anew pronounced.

App. No. XXV.
p. 91.

In 1815, another action occurred, the whole course of which it is most material to trace, with reference to the present question. It is an action *laid, as formerly, on their corporate title, viz.—*‘ at the instance of Doctor John Balmanno, President of the Faculty of Physicians and Surgeons of Glasgow, and Moses Gardner, Esq., their visitor, for themselves, and in name and behalf of the remanent members of the said Faculty,’ against a person of the name of Steel, and others, who were practising surgery, without a licence from the corporation, for the purpose of having them compelled ‘ either to submit themselves to the necessary examination before the pursuers, so as, if found qualified, they may obtain the requisite licence or diploma, on paying the prescribed fees, or to desist from the practices before specified, within the city of Glasgow, and the territory described in the letter and gift of King James the Sixth.’ A keen defence was maintained, renewing, amongst other topics, the old objections to the title of the corporation. Another defence set forward for certain defenders, it is most material, in the present question with the College to notice, viz. ‘ that they have all regularly studied medicine at the Scottish Universities, and in testimony of the success with which they prosecuted their studies, they have been each honoured with the degree of Doctor of Medicine.’ The effect of possessing this degree was contended by them to be, that they were entitled not merely to practise as *Physicians*, but also to practise as *Surgeons*, without the necessity of any admission by the corporation. It was at once conceded to them, that under the charter of the Faculty itself, their degrees entitled them to practise as *Physicians*. But they demanded something more, and maintained that the degree of Doctor of Medicine was a supereminent title, giving them the right of practising all the subordinate branches of the science. The argument on the other side was, that neither this, nor any academic degree, could give a title to practise, for hire, a craft or art protected by the privileges of a corporation; and that the charter was quite express in excluding ALL PERSONS WHATEVER from practising surgery within the bounds, without an admission by the Faculty.

p. 95.

On 14th November 1815, the Lord Ordinary 'having considered the memorials, and additional memorials for the parties, writings produced, and whole proceedings; Found *that the titles produced by the pursuers, as explained and confirmed by the acts of possession condescended on by them, afford a sufficient title to carry on such an action as the present*: Found that, in virtue of the diplomas and other testimonials produced by the defenders, James Steel, James Watt, Peter M'Dougal, John Cross, and Andrew Reid, *these parties are authorized, without challenge, to practise MEDICINE within the district specified in the Royal grants founded on by the pursuers*: Found that NO PERSONS can, within the said district, practise SURGERY, or carry on the business of an APOTHECARY OR DRUGGIST without such an examination as is there prescribed: Found that the defender, Roderick Gray, has been properly prohibited from carrying on the profession of medicine or surgery, or that of an apothecary, as not being sufficiently qualified; and decerned and declared accordingly.'

This interlocutor was brought under review of their Lordships of the Second Division; before whom the case appears to have been further argued in Informations; and ultimately, the judgment of the Lord Ordinary was adhered to, by two consecutive interlocutors. Notes are preserved of the opinions of the Judges at the successive advisings. From these, it appears that the Court was unanimous in regard to the Title of the corporation. The only point on which there was, for a time, any doubt, was, how far the privilege attached to the degree could be held to extend; and upon that point, the Judges came at last to be agreed, (with the single exception of Lord Robertson, who merely 'wished some further information on the subject' before deciding), that the possession of this degree gave no title to practise as a Surgeon, within the bounds of the Faculty's charter. Lord Glenlee said, 'I think it reasonable, that even a physician should be examined as to surgery, before he be allowed to practise. I am inclined to hesitate therefore, whether he, who has a diploma, should not be examined in surgery? I think he should.' Lord Bannatyne said,—'As to the power to practise surgery, I agree with Lord Glenlee, that *quoad* surgery, within the district specified by the grant, they must submit to an examination on surgery. A person may be qualified to act as a physician, but he may not be skilled to practise as a surgeon.' Lord Craigie, who was the Ordinary in the case, adhered to the opinion express-

App. p. 96.

App. No. XXIV
p. 86.

— p. 88.

— p. 89.

App. p. 90.

ed in the interlocutor. The Lord Justice-Clerk, who had, at the first advising, (from the notes of which the pursuers take care exclusively to quote), been inclined to entertain an opposite opinion, came to be of the same sentiments at the second advising, and said, — ‘ The question is, whether, in consequence of this grant, there is
 ‘ not existing an actual monopoly, (no matter whether odious or
 ‘ not), in favour of the Faculty, to which we are bound to give ef-
 ‘ fect. It is clear that there are in the grant three distinct classes
 ‘ of persons pointed out as exercising branches of the healing art ;
 ‘ —1. Surgeons. 2. Professors of Medicine. 3. Compounders of
 ‘ Drugs, in which “ ratoun poison ” is specified. These three
 ‘ classes are all recognised ;—and the Faculty are entitled to take
 ‘ care *that NO PERSON exercises the art of surgery without undergoing*
 ‘ *an examination.* We were formerly clear, that the objections of
 ‘ the University not being “ famous ” was ill-founded ; and we
 ‘ gave full effect to the diplomas of these four defenders. But as
 ‘ the healing art was exercised by those having such diplomas be-
 ‘ fore the grant, can we shut the door against their practising sur-
 ‘ gery ? My opinion is, *that if we give effect to the grant in one re-*
 ‘ *spect, we must give it in all.* It is said that it would be a degrada-
 ‘ tion for these M. D.’s to submit to an examination on surgery.
 ‘ Why, it may be said to be a degradation for an M. D. to *prac-*
 ‘ *tise* surgery at all ; but it is no degradation for one, who has
 ‘ made up his mind to do so, to shew himself to have the requi-
 ‘ site skill. You will observe, that it is only within a particular
 ‘ district that this monopoly, (if it is one, but with this we have
 ‘ nothing to do) has effect, and so existing, we must give it ef-
 ‘ fect ; and these gentlemen must submit to examination. It is
 ‘ presumed the examiners are skilful ; but if not, it is so much
 ‘ the better for them. ’

The judgment in this case forms an appropriate termination to the historical deduction, by which the defenders, as they humbly conceive, have conclusively established the existing rights of the Faculty. The *subsistence* of their charter, and of the privileges conferred by it, is expressly fixed. Their existing association, *as a legal corporation*, entitled to reception, and support, as such, in all Courts of law, is settled. Their possession of the privilege of debarring ALL PERSONS, *even though possessed of the highest University honors in medicine*, from practising within their bounds, without being admitted by the corporation, is solemnly declared.

The defenders may merely notice, before concluding these de-

tails, that besides these judgments in their favour, in the civil Court, there have been repeated recognitions of their Faculty in the Acts of the legislature, and the proceedings of other tribunals. The defenders may refer, in particular, to the act 55, Geo. III., cap. 69, for regulating mad-houses, in which ‘ the Faculty of Physi-^{App. No. XIX.}
‘ cians and Surgeons of Glasgow ’ is recognized as a corporate body, ^{p. 76.}
and has most important duties devolved on it, being put upon the same footing with the Royal Colleges of Surgeons in Edinburgh and London. In several Acts of Adjournal of the Justiciary Court, the Faculty has been also mentioned as a body legally incorporated by the charter of King James. So far back as 12th October ^{App. No. XVI.}
1709, their charter was presented by their visitor to the circuit ^{p. 62.}
Court of Justiciary, and an Act of Adjournal passed, confirming the right of exemption from sitting on assizes, given them by the charter. By another Act of Adjournal of the High Court, of 24th March 1812, that Right Honourable Court, ‘ recommend to the ^{App. No. XXII.}
‘ Faculty of Physicians and Surgeons in Glasgow, to persevere ^{p. 80.}
‘ in the exercise of the powers *conferred by the said Royal char-*
‘ *ter and Parliamentary ratification*; and at the same time, the
‘ Court did, and hereby do, enjoin, and require all Sheriff and
‘ other Magistrates, with their respective Procurators-fiscal, with-
‘ in the limits mentioned in the foresaid charter and act of Par-
‘ liament, to be aiding and assisting to the memorialists, (Faculty)
‘ in the proper execution of the duty therein pointed out; and,
‘ on due information, to prosecute all persons illegally practising
‘ medicine or surgery within their respective jurisdictions, in all
‘ time coming.’

It now only remains, on this branch of the subject, that the defenders advert to the answers made on the other side, to the claim of right advanced by the Faculty. These answers appear substantially to resolve themselves into two.

In the *first* place, it seems argued, that the charter of King James does not create, nor was intended to create, any corporation at all, but was a mere measure of police, intended to give certain individuals the power of repressing ignorant and unqualified practitioners, and not applicable against such persons as might be properly qualified, though not entered by the Faculty. After the detail that has been given, the defenders would consider themselves as wasting time and pains, were they to enter into a formal refutation of this plea, by repeating the argument in favour of the

constitution of a legal and complete corporation ; because, if ever the existence of a corporation was established in any case, it has been so in the present ; and, in truth, it seldom has happened, that any corporation has had it in its power to adduce in its own favour such an ample body of existing evidence. The charter itself, as the defenders think they have shown, is alone sufficient to make good their rights. But the charter must also be taken in connection with the far more than prescriptive usage following on it ; which is quite conclusive. It may be equally said of any corporation whatever, that it is a mere measure of police, that is, a matter of internal municipal regulation ; and when it is said that the object of the charter was to protect the lieges from being imposed on by unskilled persons, there is nothing stated but just that which lies at the origin of almost all corporations connected with the arts. The argument now alluded to, that the rights granted were intended merely to affect unskilful persons, and not those sufficiently qualified, though not tried by the test of the corporation, if good at all, might be employed for the destruction of all corporations ; and the defenders think they may say with confidence, that no corporation is secure, if the corporate rights of the Faculty are not held fully established.

A *second* answer to the claims of the Faculty, consists of the allegation, that the charter of 1599 was merged in a Letter of Deaconry, or Seal of Cause, obtained from the Magistrates of Glasgow in the year 1656, *by the surgeons and barbers jointly* ;—that the effect of taking this new charter was to abrogate and extinguish the old, leaving no other title to the corporation except the letter of deaconry ;—that, in the beginning of the last century, all share in this letter of deaconry was resigned and given up by the surgeons ; and that thenceforward no corporation remained except that of the barbers, the surgeons being, from that date, unincorporated, or associated only by voluntary connection, without any of the privileges conferred by the deed of King James.

This argument is attempted to be founded on what the defenders may call a collateral event in the history of the Faculty, the slightest reference to which will be sufficient to show that the plea is most extravagantly untenable.

The charter by King James, although it conferred very extensive rights, did not, as is manifest, constitute the Faculty into a *Burgh* corporation, or give them any of the municipal privileges in the election of magistrates, and otherwise, held by proper city

corporations. The boundaries of the charter were, as will be remembered, much wider than those of the City of Glasgow, comprehending several of the adjacent counties. Its object was a totally different one from that of merely making it one of the crafts of that burgh; and accordingly, there is nothing in the charter which could give the Faculty a right to insist for a share in the administration of the town, along with the proper burgh corporations. It seems, however, to have occurred to the corporation, about the year 1656, that it would be expedient, *in addition* to the Charter of King James, to obtain a Seal of Cause from the magistrates constituting the surgeons,—and, so far as they had been united with them (which was as a *pendicle* of surgery, limited to their own petty department) the barbers,—into a proper burgh corporation. The minutes of Faculty, of date 4th August 1656, accordingly run thus:—‘ Conveint in the craftes hospitall the pre-
 ‘ sent visitoures, w^t, Mr James Hamiltoune, Daniel Browne, John
 ‘ Law, Mark Greig, William Clydesdail, Robert Harris, Adam
 ‘ Gray, and Andrew Bogle, who all in one voice did condescend
 ‘ and agrie, that ane seall of caus or letter of deaconrie be purchest
 ‘ from the town councell in favoures of the Facultie, BUT PREJUDICE
 ‘ OF THE OLD GIFT GRANTED TO THEM BE THE DECEAST K. JAMES;
 ‘ and this to be drawn allendarlie in favoures of the chyrurgeons
 ‘ and barbers.’

App. p. 36.

There was accordingly, on the 16th of August of the same year 1656, granted a Letter of Deaconry by the magistrates, in terms of a supplication to this effect, made to them by their ‘ servants and
 ‘ com-burgesses the chyrurgeons and barbers, *residenters within*
 ‘ *the said city.*’ The terms of this letter of deaconry, no less than the intrinsic character of the transaction, make it perfectly plain, that its nature and effect was in no wise to abrogate the original charter of King James, without prejudice to which it was expressly sought, but merely to confer certain *additional* privileges on the individuals favoured by that charter. These privileges themselves, it could not, as will be observed, confer on *all* the members of the corporate body erected by King James, because, from the nature of things it could only grant municipal privileges *to those of the surgeons who happened to be burgesses of the burgh.* Accordingly, the seal of cause is expressly granted ‘ to John Hall, present deacon
 ‘ of the said chyrurgeons and barbers, and whole present brethren
 ‘ of that art and craft, and to their successors chyrurgeons and
 ‘ barbers, *burgesses of this burgh.*’ This, of course, left out of the

App. No. V.
p. 41.

city corporation all those who, scattered over the extensive bounds of King James' charter, did not in any wise belong to the burgh of Glasgow, but were yet most properly members of the incorporated Medical Faculty. The whole consequences, in short, of obtaining the seal of cause, were merely to give *those* of the surgeons who were resident within burgh, together with the barbers, as a subordinate part of their trade, the privilege of forming a *Burgh* corporation, leaving the whole rights of the much more extensive *Medical* corporation, created by King James' charter, entirely untouched.

This city corporation existed, as thus erected, till the beginning of the last century, when the surgeons resolved upon separating from the barbers, giving up all claims to *municipal* privileges, and confining themselves to the rights granted by the charter of 1599. Their resolution to this effect originated, in a considerable measure, in disputes betwixt the surgeons and barbers in regard to their respective rights; in the course of which, the barbers were considered by the surgeons to have made certain unwarrantable encroachments; and, as appears from the records of the Town Council, to have been too much favoured in these encroachments by the ruling powers. Perhaps the chief reason was that which the defenders perceive pretty honestly stated in the pleadings given in by the Faculty in the case of Calder in 1761, viz. that 'the barbers' trade was become a mere handicraft, and practised ' by the most ignorant of the vulgar, quite unqualified for the ' society of men of education and learning, who now justly deemed ' the business of the corporation and the contamination of burgh ' politics incompatible with their liberal professions.' It is an historical fact, that very much about the same time, and probably for much the same reasons, a similar separation took place between the surgeons and barbers both in London and Edinburgh. Accordingly, on the 22d September 1722, a representation appears on the Town Council records, from the surgeons and pharmacians of Glasgow, in which they narrate that they were ' by gift and charter ' granted by King James the Sixth, authorised to examine all ' practysers in medicine, surgery, and pharmacy in the said city, ' and the five western shires of Scotland; and to fine and discharge ' all ignorant and unskilful practysers; and that a considerable ' time after this gift, the surgeons and barbers of Glasgow (no ' doubt with a view to the interest of both societies) were incor- ' porate together; and as such, had the common benefit and

App. p. 99 to
106 inclusive.

App. p. 73.

App.No.XXXI.
p. 106.

‘ representation of ane incorporation *in the place.*’ But they proceed to say, that in consequence of the conduct of the barbers, and their encroachments, ‘ we, as surgeons and pharmacians, have no advantage but disadvantage by the letter of deaconry ; and the design of the charter from King James is like to be frustrate.’ The parties therefore ‘ renounce, resign, surrender, and freely up- give and overgive, in the hands of the honorable Magistrates and Town Council of Glasgow, all right, privilege, and interest whatsoever, which we or our successors had, have, or could pretend to, by or from the foresaid letter of deaconry, granted by the Magistrates and Town Council of Glasgow, erecting the surgeons and barbers into ane incorporation, that the same may be extinguished and void as to us and our successors in office, requesting you our honorable superiors not only to receive this our resignation and renunciation, and cause record the same in the books of the Town Council of Glasgow, but also to divide and appoint unto our Faculty such shares and parts as belong to us in the common stock of the said incorporation, which we hereby submit unto your decision, we being most firmly resolved *to follow our own affairs, and duly and faithfully to execute the trust given us by the foresaid charter,* for the good of all his Majesty’s lieges, and to cultivate peace and a good understanding with all our neighbours, which the misunderstanding of our several interests by the foresaid letter of deaconry has so long and much hindered.’ This demission was accepted by the magistrates, and the stock divided. A new letter of deaconry was granted in favour of the barbers alone, as one of the corporations of the town ; and the surgeons were left to those privileges which they held under their own peculiar charter.

App. p. 107.

App. No. XXXII. p. 108.

It seems quite plain to the defenders, that the subsistence and validity of King James’ charter, and of the corporate rights conferred by it, cannot be considered as in the slightest degree affected by these transactions. This charter was, at the date of the letter of deaconry in 1656, an admittedly subsisting charter, forming the groundwork of a then existing corporation. There is testimony borne *in gremio* of the letter of deaconry itself, to the fact of an anterior corporation having existed, as is expressed, ‘ these 57 years past,’ on the foundation of that charter. And the application for the seal of cause is actually made by the head of the existing corporation ; the petition to the magistrates being presented by ‘ John Hall, present headsman or deacon of chyrur-

8th, 9th, 10th, and 11th Pleas in Suspension.

‘geons and barbers within the said burgh;’ and the seal of cause being only asked as a municipal right ‘for ane joint and harmonious correspondence of brotherhood, as brother *citizens*, willing ‘to sympathise *with the rest of the body of the city.*’ It is out of the question to maintain, that to accept this letter of deaconry necessarily derogated from the rights of the Faculty under their charter from King James, the latter being plainly the higher title, and the seal of cause an inferior right; and the charter further conveying much more extensive privileges, in so far as it extended its operation over several counties, whereas the seal of cause was limited in its grant to the mere territory of the burgh. Accordingly, the letter of deaconry was, as has been seen, expressly applied for; ‘but prejudice of the old gift grantit be the deceast ‘King James.’ The Faculty afterwards renounced their interest in the letter of deaconry. But what was the effect of this? plainly nothing more than that they lost the *municipal* privileges thereby conveyed, and had now no longer any right to rank amongst the city corporations, or to take part in the administration of the burgh, which right accordingly has since that time never been claimed by the Faculty. They ceased, in short, to be a *Burgh* corporation. But their whole rights, as a *Medical* corporation under the charter by King James, continued untouched and entire, the same as they had been before the acquisition, and as they remained after the loss, of their mere municipal privileges.

If it was necessary to add any thing in confirmation of this being the true state of matters, there is the most ample evidence in process further to corroborate the view now given.

App. p. 49, &c.

1st, The bonds of desistance formerly referred to, themselves, afford complete proof that the charter of 1599 still continued a subsisting title, *subsequently* to the date of the letter of deaconry. For these bonds, which extend from 1659 downwards, are, in the great majority of instances, granted by persons resident *beyond* the bounds of the burgh, whose title to practise could not, of course, be struck at by any seal of cause emanating from the Magistrates of the burgh, and who could only come under the description of unlicensed practitioners, in consequence of the subsistence of the original and more extensive charter.

— p. 44.

2dly, The act of Parliament, ratifying the privileges of the Faculty, was not passed till 1672,—fourteen years *after* the date of

the seal of cause; when, of course, if the original charter had merged in the seal of cause, it would have been this letter, and this letter alone, which would have been ratified. But so far is this from being the case, that the seal of cause is not once mentioned, and it is the charter of 1599 which is alone confirmed, as the incorporating charter of the Faculty.

3dly, In the whole course of the disputes betwixt the Faculty on the one hand, and the Magistrates of Glasgow and Barbers on the other, the subsistence and validity of the original charter was always assumed and admitted. In the act of Council, 9th May 1691, the Surgeons are expressly described as having been ‘united with the incorporation of trades, according to a gift granted to them by King James the Sixth, of date the penult day of November 1599 years.’ In a subsequent act of Council, of 16th September 1707, passed for the purpose of attempting to adjust the disputes betwixt the Surgeons and Barbers, one of the express enactments is,—‘That the Barbers have, and shall have no interest to the tryall of the qualifications of the Chyrurgeons, or in any faults committed by the saids Chyrurgeons, in the exercise of their employment as such; and that what privileges are in favours of the Barbers, are always but prejudice to the liberties and privileges of the Chyrurgeons, granted to them by their gift from King James the Sixth.’ In a deed of agreement executed in the following year, 1708, betwixt the Surgeons and Barbers, in regard to their respective stocks, it is declared, that ‘the said Chirurgeons have,—by virtue of a gift, long before the said letter of deaconry, granted in favours of them and their predecessors, for trying all practysers of chirurgie, within the shires of Lanark, &c., and admitting and licensing them according to their knowledge, and for fying of delinquents, and who practise within said bounds without being found qualified, and having license as said is,—received in several sums of money, as fynes imposed upon delinquents, admission of entrants, and quarter-accounts; both which stocks, as well that last above-mentioned, *accessing from the said gift*, belong properly and peculiarly to the said Chirurgeons, and in which the Barbers pretend no interest, &c.’ In the very act of Council of November 1719, which more immediately led to the separation, it is said,—‘That most of the differences that have hitherto happened betwixt the said parties, is from an undue extension of the rights

App. p. 45.

— p. 99.

— p. 101.

— p. 105.

‘ and privileges conveyed to the Surgeons by the gift of King
 ‘ James the Sixth, in the year 1599, which both parties en-
 ‘ deavour to confound with the letter of deaconrie; whereas
 ‘ the Barbers can justly pretend to no privilege by that gift, and
 ‘ the powers and privileges committed thereby, to the Surgeons
 ‘ and Physicians, gives them no furdur powers as to practition-
 ‘ ers within the city of Glasgow, than those who practise in the
 ‘ hail neighbourhood shires.’

App. p. 54.

4thly, In the action of declarator against the Magistrates in 1691, raised long *after* the date of the letter of deaconry, and in which a decree was obtained, expressly declaring the exclusive privileges of the corporation as then existing, the *only* title libelled on was the charter of 1599, and its ratification in Parliament, —no mention whatever being made of the letter of deaconry; and the decree ‘ finds and declares the said Chirurgeons of Glasgow, their priviledges, *in terms of the foresaid gift and ratification*, and possessione, of debarring unfreemen, libelled upon.’

— p. 62.

5thly, The act of adjournal of the Court of Justiciary of 12th October 1709, also long *after* the date of the seal of cause, bears, that the charter of King James was produced as a subsisting ground of claiming immunity to the surgeons from passing on assizes; and this immunity is confirmed to them, ‘ conform to the foresaid gift and ratification.’

— p. 64.

6thly, What is by itself conclusive, is, that after the *separation* betwixt the surgeons and barbers, and renunciation by the former, and all downwards to the present day, the Faculty *continued* to exercise their corporate rights, *on no other sanction than that of the charter of King James*; which was accordingly again and again recognised as the subsisting title of the medical corporation, long after their demission of the municipal privileges conveyed by the seal of cause. It was in virtue of this charter, that through the whole of the last century the Faculty proceeded to take judicial steps, and to obtain decrees, hornings, and captions, against unlicensed practitioners. In the proceedings against Calder in 1761, the charter was found an existing title to the corporation; in the face, as appears from the decree, of the very argument now used, ‘ that the surgeons and apothecaries are not at all incorporated, and the original corporation whereof they once were members,

‘ now exists in the barbers, and is alone exercised by them.’ In App. p. 77, 79. the declarator of 1791, and the proceedings against Dunlop in the same year, the same charter was libelled on as the existing title of the Faculty, and anew sustained. Finally, in the action against Steel and others in 1815, the charter of 1599 was anew set forth as the foundation of the corporation; and again, it was decided — p. 91.

‘ that the titles *produced* by the pursuers, as explained and confirmed by the acts of possession condescended on, afford a sufficient title to carry on such an action;’ and the very distinction between *medicine* and *surgery* which is *contained in the charter itself*, formed the basis of the judgment finding the parties entitled ‘ to practise medicine within the district specified in the *Royal grants founded on by the pursuers*, but that no persons can within the said district practise surgery, or carry on the business of an apothecary or druggist, without such an examination as is there prescribed.’ In that process, the hackneyed argument founded on the renunciation of the seal of cause was repeated, but appears to have been set aside, as entitled to not the slightest weight. ‘ The original character of the incorporation,’ said Lord Bannatyne, ‘ *was by no means hurt by their division from the barbers*; and I am therefore clear that the *original* power and right exists in the body.’ And the Lord Justice-Clerk, with whom Lord Glenlee and Lord Robertson entirely agreed on this point, observed, ‘ The separation — p. 89:

‘ was as to the choosing of deacons, and did not infringe in the least upon the privilege of the surgeons. In fact, the practice from the gift downwards, is a strong proof of the title; and we see in every step down to this present day, people put down by the Faculty, who unlawfully practised. This implies an undoubted consciousness by them of the justice of their powers. The recognition also, by the statute 55 Geo. III., and the title thus given by the legislature, confirms them. *There is not, therefore, in my mind, a doubt of the sufficiency of the title.*’ — p. 87.

The inference which, on the whole, the defenders consider themselves entitled, with the utmost confidence, to draw, is that they have completely established the statement with which they set out, that their Faculty is a lawful corporation, possessing, at this moment, under their subsisting titles, the exclusive privilege of examining and licensing all persons desirous of practising the art of surgery, within the bounds of the charter of 1599, and the corresponding right of debarring all persons from practising as surgeons,

1st Plea in
Defence.
12th Plea in
Suspension.

within these bounds, without being licensed by the Faculty. If this be so, then, unless some extrinsic ground of exemption can be made good on the part of the practitioners challenged, the Faculty has established their right to a decree, in terms of the conclusions of their suspension and interdict, which, besides claiming (what is not matter of dispute,) an interdict against their practising as physicians, without the degree of doctor of medicine, crave, ' that the said persons be suspended, and interdicted from exercising *surgery* and *pharmacie*, within the district specified in the said letter of gift, ay and until they have submitted to be examined by the Faculty, and have been *admitted, allowed*, and approved, and have obtained testimonials from the Faculty, according to their art and knowledge, that they should be found ' worthy to exercise.'

The defenders now proceed to the second branch of the subject, viz —to inquire how far the privileges of the Faculty, thus established, can be encroached on; or any exemption from the necessity of admission by the Faculty can be claimed, by individuals possessing degrees in surgery from the College of Glasgow.

II.—CLAIMS OF COLLEGE.

The claim set forward by the College of Glasgow, and by the individuals interested in supporting the same view, is, that the College is entitled, by granting a diploma, conferring the title of Master in Surgery, to give to the individual who obtains it, an unqualified right of practising as a surgeon, without the necessity of any examination, or admission by the Faculty, even though he is about to exercise the art exclusively within the bounds of their charter.

The claim thus advanced, will be seen, on a moment's consideration, to be one of a very sweeping description, and of very serious concern, not only to the defenders, but to all corporations, and especially all medical corporations whatever; because, as there are no limits within which the operation of these University degrees is confined, and if they are good in Glasgow, they are good everywhere, the consequence of sustaining this claim, would be, that persons thus authorised by the College, would be entitled to practise, not merely in Glasgow, but any where else, in defiance

of any medical corporation whatever. Indeed, the College takes no pains to conceal the full extent to which they carry their argument; and have openly avowed—as indeed they must do to be consistent,—that as they hold an University to be an institution *juris gentium*, and by the courtesy of nations respected all over the civilized world, so they hold that its degrees give to the parties possessing them, an unlimited title to practise every where. In this way, it is not merely the privileges of the defenders' Faculty, but the privileges equally of the Royal College of Surgeons in Edinburgh, and the Royal College of Surgeons in London, and generally of all medical corporations, which are now at stake. The claim of the College is, that by giving, at their own good pleasure, and in such terms as they may choose, a degree of Master in Surgery, they are entitled to enable any individual to practise surgery, in any part of the kingdom, in open defiance of all or any of these corporations.

In proceeding to consider the validity of this sweeping claim, the defenders cannot help remarking, at the outset, that it has been advanced by the College of Glasgow, in a way and manner which certainly do not entitle it to any prepossession in its favour. It is admitted that these degrees in surgery were never thought of by the College until the year 1816, which, by a coincidence, that is to say the least of it somewhat unfortunate, was the year immediately after that in which the judgment of the Lord Ordinary in the case of Steel, afterwards adhered to by the Inner-House, was pronounced, finding that the degrees in *Medicine* granted by the College, were not sufficient to warrant any individual to practise *Surgery* within the bounds of the Faculty's charter. It will naturally be thought, that this judgment might have been fairly held sufficient to determine the present question. For if the degree of Doctor of Medicine, which is the highest degree which can be given in the medical science, did not warrant any exemption from the operation of the Faculty's charter, it seemed to follow that no other, and above all, no inferior degree, emanating from the same body, could have that effect. But it appears to have occurred to some ingenious person, that although the degree of Doctor of *Medicine* would not do, that of Doctor or Master in *Surgery* might be tried; and, accordingly, the College commenced giving diplomas conferring this honour, with the express view, as was shewn by the result, of endeavouring to enable persons to practise as surgeons within the Faculty's bounds, with-

App. to Parlia-
mentary Report,
p. 260.

out any license from the Faculty. The inventors of this degree, (admittedly unknown, till then, within Great Britain), appear to have had their genius quickened by the old sharpener of the wits, because these diplomas were, of course, only given by the College on payment of certain fees, which went into the pockets of the medical Professors. The defenders perceive, from the report of the University Commission, that for every degree of Chyrurgiæ Magister, or C. M. granted by the College, each of five medical Professors receives a guinea. The whole object, indeed, of the scheme was manifestly to *undersell* the Faculty; a thing which the College could easily afford to do; as the *whole* of the revenue of the Faculty was derived from the dues of entry; whereas, in the case of the College, any thing that could be got was an addition to the salaries already enjoyed by the individuals. And the defenders do not make any very uncharitable inference, when they say, that the present process is not carried on upon the side of the College, with the view of supporting the dignity and privileges of the University, so much as with that of attempting to obtain a legal sanction for a traffic, which brings pecuniary gain to certain individual Professors.

The attempt to infringe the privileges of the Faculty, by these degrees, appeared so palpable an evasion of the judgment of the Court in the process of 1815, that it could not but at first appear to the defenders as utterly extravagant, and scarcely worthy of being made the subject of a serious argument. But the matter grew important, from the increasing number of persons who began to practise on no other footing than that of having obtained this degree; and, as the College has now appeared for the purpose of deliberately maintaining its validity, and this with much array of argument and authority, it becomes necessary for the defenders seriously to meet the claim, and to inquire into the grounds on which it is rested.

There appear to be substantially two arguments on which the claim is founded:—*1st*, That the right of granting degrees of the kind in question, *with all the privileges sought to be attached to them*, is possessed by the College of Glasgow, even without reference to any special grant, as something that is inherent in its character as an academic institution;—and, *2dly*, That, at any rate, the College is possessed of written titles, which expressly vest in it the power of giving degrees, attended with the privilege claimed.

In considering and refuting the *first* argument, the defenders think they shall arrive at principles which shall very much facilitate the disposal of the *second*; because, when they have shewn that there is no such inherent right in Universities as that now claimed, they shall be easily able to shew that the grants to Glasgow College do not confer on it any higher privileges than those that are common to Universities, and in fact vest in it much more limited powers than many of these possess.

On the *first* point, it is maintained by the College, that, simply as a University, it is entitled to add indefinitely to the number of sciences or arts taught within its walls,—that in every one of those branches, it is entitled to grant degrees or testimonials of excellence,—and that these degrees qualify the holder for *practising* all that in practice is connected with the things taught, without the necessity of license or admission by any Faculty or corporation whatever.

The defenders shall, for the present, assume in argument, (though they shall afterwards have occasion somewhat to demur to it in point of fact), that the present College of Glasgow is, in its constitution, a proper University, according to the academic sense of the term, and entitled to all the privileges of the most favoured of these bodies. Their answer to the argument, even on this assumption, is a broad denial of any such privilege existing in Universities. It is quite true, that Universities may grant degrees, and perhaps may vary those degrees as they please; although the defenders doubt whether, in the widest view, they can give any but those that are recognised and established by academic usage. But the defenders maintain, that under all variations, these degrees are nothing but mere *honorary* titles, or academic distinctions, conferring on those who bear them a certain character, and right of precedence, *but never giving them any license to practise an art or trade, and far less any art or trade which is the property of an incorporated craft.* It will always be remembered, that the question now at issue, is not whether the College of Glasgow can grant degrees, under any name whatever, merely as academical distinctions, which is a matter the defenders have no interest to contest. But the question is, whether they can give degrees *with a certain privilege attached to them*, that is, the privilege of practising, what is in law a manual calling, for whose remunerations, on the express footing of its being a craft or trade, an action may be brought in the Courts of law,

2d Plea in
Defence.
5th Plea in
Suspension.

and which is the recognized subject of corporate rights? To the doctrine that they are so entitled, the defenders entirely demur. They may, perhaps, grant degrees, unlimitedly, as academical honors; but, they never can convert these into licenses to practise a corporate trade.

It requires, as the defenders think, very little research into the history of University degrees, to arrive at the conclusion, that the character now given of them is a just one. The origin of degrees may be seen stated, with great accuracy and brevity, in the second of the *Discursus Academici* of *Matthias Stephanus*;—and the defenders may also refer to the 5th and 6th chapters of a work cited by the pursuers, *Facciolati's* Treatise on the University of Padua. They appear to have taken their rise from the custom in the ancient schools of the Roman law, of dividing the scholars into classes, with appropriate names, according to the proficiency of their studies. In like manner, in the modern Universities, when a student had arrived at that proficiency which made him, not only well instructed himself, but qualified to teach others, he became entitled to the distinction of '*Doctor*,' which, as the word itself shows, means nothing more nor less than just '*Teacher*.'—'Qui totum
' librum audisset, atque ita teneret, ut ejus doctrinam ipse quoque
' publice exponere posset, atque in concione propugnare, is demum
' satis ex eo genere didicisse putabatur, titulisque aliis post alios, et
' laurea ornatus, *Doctoris* nomen obtinebat.' In fact, in the first Universities, all the doctors *did* actually teach, or become masters or regents; the practice of prelecting being not confined to specific Professors, but being the privilege, and, in fact, the duty, of all the graduates. It, of course, occurred, that many of these graduates, in process of time, left the University, and went elsewhere. But the academic character of *Doctor* still naturally adhered to them. There were gradually added certain insignia and dress appropriate to the character. At last the name became, in many instances, a mere honorary title, without any duty of teaching being accessory to it. But still, the character of the person holding it was either that he was *actually* a teacher, or that he was, in the eye of the University, *qualified* to be a teacher; and this academic certificate was the sum and substance of what was given.—'Doctor (says Facciolati) ut vox ipsa
' sonat, is tantum dicebatur qui re ipsa doceret. Nomen honorarium
' cœpit esse, ut quam longissime repetamus, circa annum 1137, quo
' Irnerius, Legum Romanarum in Bononiense Gymnasio Interpres,
' ut Pandectis tum primum repertis famam conciliaret, hominesque
' alliceret, insignia quœdam excogitavit, quibus ornaretur qui in hoc

Facciolati,
cap. 5.

Ibid. cap. 7.

‘ studio præcelleret ; nec *doctus* modo appellaretur, sed etiam *Doctor*. ’
 Stephanus says,—‘ Dicuntur Doctores, uti et magistri, omnes illi qui-
 ‘ bus insignia Doctoralia conferuntur. *Proprie tamen, id nomen iis*
 ‘ *competit qui docent.* At Doctores promoti sunt, qui facultate et
 ‘ habitu docere *possunt*, licet jam docendo occupati non sint.’

Discurs. Acade-
mic. Secund.

The true meaning of these academic degrees may also clearly be seen by reference to the actual constitutions of the ancient Universities. The defenders may refer to that, which is perhaps one of the oldest extant, that of the University of Avignon, erected by Pope Boniface VIII. in 1303, by a Bull, extant in the *Bullarium Magnum*. The rules as to the acquisition of degrees are thus expressed :—‘ Si qui,
 ‘ processu temporis, in eodem studio fuerint, qui scientiæ brævium
 ‘ assequuti, *docendi*, sibi licentiam, *ut alios licenter erudire valeant*,
 ‘ petierint exhiberi, Sancimus ut in Jure Canonico et Civili, ac in
 ‘ medicina, et liberalibus artibus, examinati, possint ibidem, *et in*
 ‘ *facultatibus ipsis, duntaxat*, magisterii titulo decorari. Statuentes, ut
 ‘ quoties, ad id aliqui fuerint promovendi, præsententur Episcopo
 ‘ Avenionsi pro tempore existenti. Qui *magistris facultatis illius in*
 ‘ *qua examinatio fuerit facienda in eodem studio præsentibus convocatis*,
 ‘ eos gratis, et difficultate sublata qualiter, de scientia, facundia modo
 ‘ legendi, et aliis quæ in promovendis ad Doctoratus seu magisteria-
 ‘ tus officium requiruntur, examinare studeat diligenter, et illos quos
 ‘ idoneos repererit, petito secrete magistrorum eorundem concilio, ’ &c.
 ‘ approbet et admittat, eisque petitam licentiam largiatur. Illi autem,
 ‘ qui in civitate prædicta, examinare et approbati fuerint, ac *docendi*
 ‘ licentiam obtinuerint, ut est dictum, ex tunc, absque examinatione
 ‘ vel approbatione alia, legendi et docendi ubique, in facultate illa, in
 ‘ qua fuerint approbati, plenam et liberam habeant facultatem, nec
 ‘ a quoquam valeant prohiberi.’ The same thing appears in the
 constitution of the University of Ferrara, erected by Boniface IX. in 1391, where, in like manner, those who are desirous of degrees, are described as ‘ *Illi, qui processu temporis brævium meruerint, in illa*
 ‘ *facultate in qua studuerint, obtinere, sibi que docendi licentiam ut*
 ‘ *alios erudire valeant*, ac doctoratus seu magisterii honorem petierint
 ‘ *elargiri* :’—So, also, in the constitution of the University of Perugia, and indeed, indiscriminately, in the constitutions of all the Universities erected by the Pope, where precisely the same expressions are repeated in every instance. In fact, the very same thing stands out on the very Bull of Pope Nicholas, to which, in the present case, the College ascribes its own origin, in which those to whom the honour ‘ *Magisterii seu Doctoratus* ’ is to be given, are expressly described as those, ‘ *qui processu temporis brævium meruerint, in facultate*

Tom. I. p. 207.

Bullarium Mag-
num, tom. I. p.
294.

Ibid. 223.

App. p. 116.

‘ illa in qua studuerint, obtinere, ac docendi licentiam ut alios erudire
‘ valeant.’

The characteristic of the academic degree, thus impressed on it at its origin, continues to be its proper characteristic down to the present day. The academic doctor, or master, just holds at this moment, as formerly, a *testimonial* from a University, that he is a person so excelling in his department, as to be qualified to instruct in that department, all who may apply to him for instruction ;—or, in other words, a certificate that he is a learned and fully instructed man in his peculiar science. In this capacity he may, as a learned man, be consulted, and give advice ; and he may receive honoraries from such as apply for it. It is just in this way, that physicians, or doctors in medicine, are, as learned men in that department, consulted, and receive honoraries, but cannot sue for them. But the degree gives only this *character* ; and nothing more. It is utterly at variance with the essential character of such a degree, to suppose that it ever can give a license to practise a *trade*, for the work done in which the employer may be sued in a Court of law ; such as, in the construction of law, is the art of surgery. It affords an academical *certificate* of learning. It conveys academical rank. It confers precedence in the courtesies of society, or in the books of the Herald. But it does no more.

The consequences of giving to degrees any other character than what has now been described, viz. that of Academic Testimonials of Learning, and of sanctioning such a privilege as that contended for by the College of Glasgow for theirs, will appear, if thought on for a moment, to be of the most serious and dangerous description. It would, indeed, be putting it in the power of an University, to ruin any corporation whatever, by the mere invention of a degree. They have merely to issue a diploma, conferring the name of doctor or master in the art in which the corporation is conversant, to effect the destruction of all its exclusive privileges. The defenders have already said, (and the statement bears its own truth amongst with it), that the degrees of Glasgow College, if good against their Faculty, are good against any corporation of surgeons in the kingdom ; and may enable the graduates to set the whole of these at defiance. Further, the degree is not confined to surgery, but it also dubs the individual ‘ *chirurgiæ et pharmaceutices, magistrum.*’ Now, it is well known, that there are many corporations of apothecaries in the kingdom. But, on the principles of the College of Glasgow, their degree entitles the holder to set up a shop and sell drugs, within the bounds of the charter of any one of these corporations. But why stop at medicine or its branches ? The same principle will hold equally good in regard to any other profession

or trade. The College possesses a Botany Class. On exactly the same principle, they may give a degree of Doctor or Master in Botany, on which, it may be equally contended, that the holder might act as a practical gardener, in the face of a corporation of gardeners, with exclusive privileges. A class of chemistry, with corresponding degrees, may afford the easy means of infringing the rights of the ancient corporation of dyers. A class of architecture, and degrees, giving, as the degrees in question do, ‘*omnes tam theorice quam praxeos actus exercendi,*’ may at once invade the wrights and masons. There was a class of conveyancing, comprehending instruction in all manner of styles, recently instituted in Edinburgh University. What, upon the Glasgow principle, is to hinder that University from giving the degree of Master in Signet Letters; which, if given at a cheap rate, may save to the lieges all the necessity of serving an apprenticeship to a writer to the signet? The defenders perceive nothing, on the same principle, that can prevent the Doctors of Divinity manufactured in Glasgow, from mounting any pulpit in the country, without the ceremony of a license from the Presbytery. Or what is there, if their argument is good, to prevent the Doctors of Laws of Glasgow College from practising at the bar of your Lordship’s Court, in competition with, if not to the exclusion of, those who have been protected from this dangerous inroad, only by the possession of privileges hitherto supposed to be exclusive?

These consequences, however ludicrous, are the direct results of the argument of the College carried to its legitimate extent. Such a power as has been described, must be held vested in the College, if any other doctrine is maintained, than that which appears the only sound one, viz. that these degrees constitute mere academical honors, and nothing more. The illustrations are all directly in point; because, under the defenders’ charter, the art of surgery is to be regarded as being, within the territorial bounds of that charter, a corporate trade, as much as in the case of any other incorporated craft. The defenders may add, that the inexpediency of sanctioning any such encroachment by Universities on incorporated trades, would be as great as its incongruity; because, if corporations have any utility at all, it consists in their securing, that all entrants shall be competently skilled in their crafts, *according to the judgment of persons themselves practically cognisant with the trade*; which would no longer be the case, if a mere University degree conferred an equal privilege. The great use, for instance, of the defenders’ corporation, has been to prevent the public being endangered by individuals practising surgery, without a previous examination by persons themselves practical surgeons. There would

be evidently no sort of security substituted by the arbitrary,—and it is known often very careless,—examination, which takes place at obtaining University degrees, and which is conducted by persons not necessarily practical surgeons, and who, being removed from the sphere and the competition of those who are examined, and having the favor which all teachers have to their pupils, especially where, as in Glasgow, there is great competition among medical teachers, and much rivalry among the different schools of medicine, will be necessarily less rigid in their scrutiny of the fitness of the candidates. The College have been so sensible of the necessity of something practical in the education of surgeons, that it would appear from their own summons, that they require from those who receive their degrees, ‘an attendance of twelve months at a regular hospital or infirmary.’ But this very circumstance itself shews, as the defenders think, the utterly anomalous nature of these attempted degrees in surgery; because, if there is any one thing more characteristic of an University degree than another, it is this, that it is a testimonial of proficiency *in a course of study which is all completed within the University itself*; yet it cannot be pretended, that attendance in an hospital is any part of an academical curriculum. The inexpediency, and indeed absurdity of the proceeding, is still further shewn, with reference to the attempt made to include in the College license, the trade of apothecary. For, whilst the Faculty, before licensing any one as a pharmacist, require that he must actually give practical proof of his skill in compounding drugs; the rules of the College, so far at least as they have explained them, demand no such practical exhibition. And the consequence therefore is, that any compounder of drugs, however unskilful, may go forth to practise on, —or poison the public,—merely because he has been declared by the *fiat* of Glasgow College, after paying certain guineas to its Professors, ‘*artis pharmaceutices magister.*’

It is therefore humbly thought to be clear, with reference to the argument founded on a supposed *inherent* right in Universities to grant degrees, attended with privileges like those claimed, that no such right exists, or can be sanctioned. The defenders have, on this branch, argued the case in a way extremely favourable to the College; because they have assumed in argument, that they are entitled to grant degrees, *but only contended against the privilege of practising a corporate trade sought to be attached to them.* The defenders might concede to the College an unlimited right to grant a degree in surgery, or in any thing else, *so long as these remained merely University honors.* They might, with perfect safety, admit, that as academical honours, the College may grant the very degrees now in question; though the

defenders will continue to doubt, whether any other than the recognised and established honors can be given; and rather think that this is a point which your Lordship is not called on to determine. But assuming that, as *University honors*, the very degrees now in question could be given, the inquiry always remains behind,—an inquiry which the pursuers in their argument entirely evade,—Whether such degrees can have the effect attributed to them of entitling the holders to practise the trade secured to the defenders by the charter. This is the exclusive question brought to issue. For it will be observed, that the summons at the instance of the College does not conclude to have a mere right of granting academical honors declared, but a special right on the part of those holding their degrees, of practising the art or trade of the defenders, within the limits of their incorporating charter, equally with the defenders themselves. The summons expressly concludes, ‘that
 ‘ it should be found and declared, that all persons holding diplomas,
 ‘ degrees, licenses, or testimonials, from the University of Glasgow,
 ‘ empowering them to *practise the ART of surgery*, and its different
 ‘ branches, are entitled and authorised, in the most ample manner, to
 ‘ *practise the same, within the foresaid bounds, over which the said*
 ‘ *pretended Faculty claims the exclusive right to grant licenses as afore-*
 ‘ *said*; and that they are so entitled to *practise* without undergoing
 ‘ any examination from the said pretended Faculty, or from any other
 ‘ body whatever, and without making payment of any sums of money
 ‘ in name of freedom fines, or otherwise; and the said pretended
 ‘ Faculty, and all others, ought and should be decerned and ordained,
 ‘ by decree foresaid, to desist and cease from calling before them for
 ‘ examination, the licentiates of the University, from attempting to
 ‘ to exact fees from them, and generally, from molesting, annoying,
 ‘ or interfering with them, whilst exercising the *arts* which they are
 ‘ entitled to *practise* in virtue of the foresaid diplomas, degrees, licenses,
 ‘ or testimonials.’ Now, this is a privilege which it is humbly conceived, no University is entitled to have attached to its degrees.

Matters standing thus,—in regard to the general right of Universities,—the defenders proceed to inquire, in the *second* place, how far the College of Glasgow possesses any special and peculiar *grant*, giving it the right claimed. This involves a brief reference to the history of the College, in adverting to which the defenders think they will clearly shew, that the claim is as untenable on the footing of a special grant, as it is on general principles.

The College claims for its original foundation, a Bull of Pope

App. p. 115.

Nicholas V., dated in 1450. The defenders admit, that in that year, a Papal Bull issued, erecting an Academical Institution in Glasgow; although they think they shall afterwards very clearly shew that it by no means forms the constitution of the *present* University. By this Bull, there is no doubt that Pope Nicholas intended to erect a University proper, similar to those already existing in the Papal States, and elsewhere throughout Europe. After eulogising the town of Glasgow, as ‘locus insignis et valde accomodatus, in quo aeris
 ‘viget temperies, victualium ubertas, cæterarumque rerum ad usum
 ‘humanum pertinentium copia reperitur;’—and stating other inducements, and amongst others, the zeal which the then King of Scotland, James II., had towards the Roman Catholic faith,—‘*Eximiam fidei et devotionis sinceritatem, quam idem rex ad nos et Romanam Ecclesiam comprobatur,*’—the charter proceeds thus:—‘*In eadem civitate, Generale Studium, auctoritate apostolica erigimus; et statuimus, et etiam ordinamus, ut in ipsa civitate, de cætero, studium hujusmodi perpetuis futuris temporibus vigeat, tam in theologia et jure Canonico et civili, quam artibus et quavis alia licita Facultate.*’ The charter also adds,—‘*Quodque doctores, magistri, legentes, et studentes ibidem, omnibus et singulis, privilegiis, libertatibus, honoribus, exemptionibus, immunitatibus, per sedem Apostolicam vel alio quomodolibet, magistris, doctoribus, et studentibus, in studio nostro civitatis Bononiensis concessis, gaudeant et utantur.*’

Now, the precise description of academical institution thus intended to be erected, it is not difficult to discover. It was plainly an University intended to be *like* the other Universities then existing generally, and specially like that of Bologna. The Universities of that day were, it is well known, all formed after the same general model. They were, in many respects, very different institutions indeed from the present Scottish Colleges,—and they were, in particular, very different in that very matter of granting degrees now in question. The members forming the corporate body of the University were invariably divided into *Faculties*, which were altogether separate and distinct; and were generally four in number.—(1.) Of Arts, (improperly so called), comprehending, as is well known, the Humanities and Philosophy; (2.) of Theology; (3.) of Law; (4.) of Medicine. These *Faculties* each comprehended not merely one or more Professors, but the whole of the persons who had graduated into that Faculty, and who together formed the congregation or convocation of the Faculty. Degrees were given in each Faculty, not by one or more Professors, but on a solemn convocation of the whole graduates of the Faculty, in whose presence certain examinations, and frequently public disputations, were

held, and by whose joint assent the degree was conferred. Just as in ecclesiastical matters, ordination cannot be given save by those who are themselves ordained; so under the academical system of that day, graduation into any Faculty could only be conferred by those who were themselves graduates, assembled in solemn convocation. That this was the system, is not only a well known historical fact, but stands prominently out in the constitutions of all these ancient Universities. Thus, in the Bull erecting the University of Avignon, already referred to, it has been seen, that degrees in any of the Faculties were only to be given, ‘magistris facultatis illius in qua examinatio fuerit facienda in eodem studio presentibus convocatis;’—and, ‘petito, secrete, magistrorum eorundem consilio.’ In like manner, in the constitution of the University of Ferrara, degrees are to be given,—‘Doctoribus et magistris in eadem facultate actu inibi legentibus convocatis;’ and it is added, ‘juxta modum et consuetudinem qui super talibus in Bononiensi et Parisiensi ac aliis generalibus studiis observantur.’ In the same way, in the University of Perugia, degrees were to be given,—‘Magistris facultatis in qua examinatio fuerit facienda, tam regentibus quam non regentibus, quinque vel quatuor ad minus in eodem studio presentibus convocatis.’ In another Bull, erecting in 1360 a theological faculty in this very University of Bologna, theological degrees are only to be awarded,—‘omnibus magistris dictæ facultatis theologicæ in qua hujusmodi examinatio fuerit facienda, in studio ipso actu regentibus præsentibus convocatis;’ and, ‘petito, secrete, pure, ac bona fide, eorundem magistrorum consilio.’ So also in all the other Universities.

Bullarium Magnum, Tom. I., p. 206.

Ibid, p. 294.

Ibid, p. 223.

Ibid, p. 281.

It was manifestly a University, or *Studium Generale*, of this description, which Pope Nicholas intended to establish in Glasgow. For not only is there a direct allusion to the common division into Faculties, by its being erected a ‘*studium generale in qualibet licita facultate*,’ but the express provisions of the constitutions now alluded to, in regard to degrees, are engrossed *totidem verbis* in Pope Nicholas’s Bull. Its words are,—‘*Quodque illi qui processu temporis brevium meruerint in facultate illa in qua studuerint obtinere, ac docendi licentiam ut alios erudire valeant, nec non magisterij seu doctoratus honorem petierint eis elargiri, per doctorem seu doctores, magistrum seu magistros, facultatis ejusdem in qua examinatio fienda fuerit, Episcopo Glasguen. nunc et pro tempore existenti, et Ecclesia Glasguensi pastoris solatio destituta, vicario, seu officiali in spiritalibus, dilecto filiorum capitali, dictæ Ecclesiæ, presententur. Qui quidem Episcopus, vel vicarius, seu officialis, aliis doctoribus et magistris ibidem tunc legentibus convocatis, promovendos*

‘ easdem in his quæ ad Magisterii seu Doctoratus honorem quomolibet requiruntur, per se vel alium juxta morem seu consuetudinem in aliis studiis observari solitos examinare studeant diligenter. Eisque si ad hoc sufficientes et ydonei reperti fuerint, hujusmodi licentiam tribuat seu Magisterii impendat honorem. Illi vero, qui in eodem studio civitatis Glasguensis examinati et approbati fuerint, ac docendi licentiam et honorem hujusmodi obtinuerint, ut prefertur, ex tunc, absque alia examinatione et approbatione, deinceps regendi et docendi tam in eadem civitate quam in singulis aliis studiis generalibus in quibus regere et docere voluerunt, plenam et liberam habeant facultatem.’

Report University Commissioners.

Under this system a University was established, or, to speak more correctly, was attempted to be established, in Glasgow. There are some traces, in its records, of actings like those of a proper University, and in particular, of those congregations of graduates, which formed one of the distinguishing characteristics of an University. But it is undoubted, that no very complete establishment was ever formed,—that the institution ultimately dwindled into great insignificance,—and that, at the time of the Reformation, it had, with many other similar bodies on a Papal foundation, become almost altogether, if not entirely, extinct. This will be seen proved by the new charter of erection to be immediately noticed.

App. p. 118.

Report, University Commissioners, p. 217.

Subsequently to the Reformation, it appears to have been resolved to re-establish an Academical Institution in Glasgow, although, as shall be presently seen, on a totally different foundation from the old one. In the year 1577, King James VI. accordingly granted a charter, commonly called the *Nova Erectio*, for the purpose of accomplishing this object. By this charter, there is created an institution of a radically different description from the former *Studium Generale*, or University proper, with its divisions into Faculties, and other privileges: The creation of King James being a mere academy, or school for youth, with a head master and three other inferior masters, having peculiar branches of study allotted to them. This will appear very clearly from a reference to the terms of the charter. Throughout the whole deed it does not even contain the name of *studium generale*: But the phrase used is *academia*—or *collegium*,—which latter in the language of the day, is known to import something different from, and inferior to an University. The whole scheme indeed appears historically to be a mere repetition of an attempt made a few years before, on the part of the Magistrates of Glasgow, to found an inferior institution of this description, called by them *Collegium Nostrum*, and which appears to have failed from want of funds. The charter by King James is indeed exceedingly humble in its phraseo-

logy; for it bears to be merely intended ‘ad faciendum et erigendum App. p. 118.
 ‘*quandam faciem collegii.*’ It proceeds on a narrative very much at
 variance with the idea of its being any confirmation of the old Papal
 grant; being declared to be erected for the express purpose of assist-
 ing to dispel the darkness of Popery. Its inductive cause is, ‘cum Di-
 ‘vina Providentia nos, iis temporibus, ad regni gubernacula perduxerit, App. p. 119.
 ‘in quibus Evangelii lucem, *expulsis Papismi tenebris*, Scotiæ nostræ
 ‘præluere voluit, nosque imprimis sollicitos esse oporteat ut tantum
 ‘Dei beneficium ad posteros nostros propagetur.’ And one of its pro-
 visions is expressed in the following terms: ‘Insuper cum *Sathanæ* as-
 ‘tum percipiamus, nullibi non dantis operam ut juventutem ab — p. 124.
 ‘Evangelii professione *ad plusquam cimerias Papismi tenebras abdu-*
 ‘*cat*, districte mandamus ut singuli qui in hanc nostram academiam
 ‘fuerint cooptati, fidei professionem edant, eandem nimirum, quæ e
 ‘Dei verbo petita et transcripta, a nobis in regni nostri conventibus
 ‘edita atque publicata est, idque faciant semel ad minimum quotannis,
 ‘ut, *profligato humani generis hoste*, collegium nostrum virtute, eru-
 ‘ditione, et piis moribus efflorescat, in Dei sempiternam gloriam.’
 The whole of this new institution, far from comprehending various
 Faculties, with graduates lecturing in each, was merely to contain a
 Principal and three Masters, together with certain appendages, thus
 described,—‘Gymnasiarcham, tres regentes, æconomum, quatuor
 ‘pauperes studentes, servum gymnasiarchæ, coquum, et janitorem.’
 The duties of each of these were abundantly multifarious. The Gym-
 nasiarcha or Principal was, besides taking a general superintendance of
 the whole institution, to lecture on Theology, to be Professor of He-
 brew and Syriac, and to preach regularly in the church of Govan. Of
 the masters, ‘*Primus*, precepta eloquentiæ ex probatissimis auctoribus — p. 122.
 ‘et Græcæ linguæ institutionem profitebitur; adolescentesque, tum
 ‘scribendo tum declamando, exercebit, &c.—*Proximus*, dialecticæ et
 ‘logicæ explicandæ operam dabit, earumque præcepta in usum et ex-
 ‘ercitationem proferet, idque ex probatissimis auctoribus ut Cicerone,
 ‘Platone, Aristotele,’ &c.—‘Adjunget insuper elementa arithmeticæ
 ‘et geometricæ, in quarum principiis non parum momenti ad eruditi-
 ‘onem parandum situm est, et ingenii acumen excitandum: Porro,
 ‘*Tertius* regens physiologiam omnem, eamque quæ de natura est aus-
 ‘cultationem, utpote imprimis necessariam, quam diligentissime ennar-
 ‘rabit; geographiam etiam et astrologiam profitebitur; nec non ge-
 ‘neralem etiam chronographiam, et temporum a condito mundo suppu-
 ‘tationem, quæ res ad alias disciplinas et historiarum cognitionem non
 ‘parum lucis adferet.’ Nothing can be more completely incompatible
 with the ancient division into faculties, than the appointment of these
 masters, with the almost ludicrous combination of branches on which each

was to prælect. There is accordingly not a word said in the charter as to the constitution of Faculties, or the collection of graduates in these Faculties. Neither is there any reference made, as in the old Papal Bull, to the constitution of any of the ancient foreign Universities. There are indeed given all the privileges ever granted, 'ulli aliarum' 'in regno nostro academiæ.' But whilst this general clause makes, as your Lordships will particularly observe, no special reference to the former University,—and no reference, such as was made in the Papal Bull, to any academical bodies out of the kingdom,—it must also be plainly held in what it does refer to, only to point to such academies as were of the same description with that which was just erected. The whole scope and tenor of the *Nova Erectio* shew the intended institution to be altogether different from the old University established by Pope Nicholas, and not to be *Studium Generale* divided into faculties, but a *Pedagogium*, or school for youth, with merely (as has already been observed) a Principal or Head Master, and three inferior masters, having certain branches of science allotted to each.

Now it will be observed, that it is under this *Nova Erectio* of King James, that the College of Glasgow has continued down to the present day. In this charter lies its present constitution. The number of Professors has indeed increased, from four, by additions either made by the Crown or the College itself. But these additions are in correct language merely an increase of masters in the *pedagogium*. The substance and essential character of the institution remain unchanged.

In process of time, the College, thus constituted, assumed the privilege of granting degrees or academical honours;—that is, it conferred the title of Doctor, in Theology, Law, and Medicine, and those of Master and Bachelor in Arts. But these degrees were, and in strictness of speech are, actually at the present day, *irregularly* conferred, according to the principle of the ancient Universities. The defenders desire that, when they say this, they may not be misunderstood. They have no wish, as they have no interest, to challenge these degrees as to all intents inept or void. On the contrary, they are willing to concede to the College that in as far as *hitherto* granted, they are sanctioned by a usage, which gives them validity; and the defenders indeed think, that it is only from usage that they derive any validity at all. The defenders may concede, that the College may be called, not improperly, a University, in the common parlance of society. They might safely go farther, and admit that the College of Glasgow, as an academical institution, is intrinsically entitled, even though not formed after the model of the old Universities, to grant all manner of University degrees, *considered as mere academical honours*. But with reference to the great argument of the College, founded on the alleged rights

specially conferred by the Bull of Pope Nicholas in 1450, it is very material to observe the undoubted fact, that all the degrees now given by the College are given in a way which is unwarranted by that Bull, and at direct variance with all its principles. The Papal Bull authorised degrees to be given alone by that Faculty in which they were taken, and by a solemn congregation of all the graduates in that Faculty. But it is not pretended that any of the College degrees are so given; for they are neither given by the separate Faculties, nor by congregation of the graduates in those Faculties. They are conferred by the general body of Professors, the greatest part of whom have, in many cases, never themselves graduated into that degree which they pretend to give;—and no congregation of graduates possessing the same degree is ever dreamt of. In regard especially to the degrees in surgery now more immediately in question, it is an undoubted fact, that no such thing exists in Glasgow College, as a *Faculty* of Surgery. These pretended degrees are granted by the Professors at large, without discrimination. There is no congregation of the alleged Masters in Surgery. The very Professors who grant the degree are themselves not Masters in Surgery; and according to the fundamental principles of the old Universities, not having themselves the degree, cannot legitimately grant it. It will be seen from the terms of the summons of declarator itself, that one only of the whole Professors in the College, the Professor of Midwifery, assumes this title of Master in Surgery; and his degree was only received from his brother Professors, by whom themselves no such degree was held.

The defenders would close this sketch of the History of the College, by further referring to the following admitted facts, bearing directly on its present competition with the Faculty. In the *first* place, it is admitted, that under the old University of 1450, there was no school of surgery,—the defenders believe in fact no school of medicine at all,—and most certainly no school of surgery; nor were any degrees, such as those now in question, ever given by that University. Even if the old University had, under the Papal Bull, the privilege of founding a Faculty of Surgery, and of giving degrees in that Faculty, this was a privilege which was never exercised. It is further not pretended that at the date of the Faculty's charter in 1599, there had been any more than before, founded any Faculty, nor even that there had been instituted any class of Surgery in the College. It was *whilst matters stood thus*, that the existing Monarch, finding otherwise no means of securing proper education in Surgery, nor of protection of his subjects from empirics, erected the *separate* Faculty of Physicians and Surgeons in Glasgow, and committed to them by his charter the right and duty of examining and licensing 'all persons' practising as Surgeons within certain bounds. In other

words, there being no Faculty of Surgery *in* the College, the Sovereign instituted a Faculty *out* of the College, with the exclusive privilege of examining and admitting all Surgeons within the specified district. *Secondly*, It is admitted that, whilst this Faculty *continued* to exercise the exclusive privilege conferred on them, there was no attempt made by the College of Glasgow, under their *Nova Erectio*, to exercise a similar privilege for 217 years *after* the institution of the Faculty. It admittedly was not till 1816 that the College began to give degrees or licenses in Surgery, in competition with the licenses of the Faculty. During all the intervening period of 217 years, the Faculty, uninterrupted and undisturbed, exercised the *exclusive* privilege of licensing Surgeons within the bounds of their charter. Nor can any instance of such a license from the College be given during all this period. The privilege claimed by them, if it truly existed, was on their own admission never used. And indeed the argument which they openly maintain is, that they were not only entitled in 1816, but would be entitled at any period however remote, to revert to the privileges conferred on them by the Bull of 1450, notwithstanding the admitted absence of all use of the alleged privilege on their part, and the admitted exercise of the same privilege all the while by the competing corporation.

From the facts now stated, the defenders consider themselves entitled to deduce the following arguments, against the claim of the College, so far as they attempt to found it on special grant.

3d Plea in
Defence.

I. The defenders maintain, in the *first* place, that the College are not entitled to found their assumed privilege on the Papal Bull of 1450, inasmuch as whatever may be contained in it, that Bull forms no part of the constitution of the *existing* college; nor can in any wise be set forward as part of its subsisting titles. The present College of Glasgow owes its formation entirely to the *Nova Erectio* of King James, and cannot go farther back for its origin. It is impossible to maintain that this *Nova Erectio* was a mere confirmation of the Papal Bull. It bears complete intrinsic evidence of being directly the reverse of this;—and, indeed, contains expressions of the most unqualified abhorrence of all attributes and gifts of Papacy. It is quite manifest, that the *Nova Erectio* constitutes a fundamentally *different* institution from that founded by the Papal Bull. They are two wholly separate and distinct creations,—just as distinct as is the College of Glasgow from the University of Oxford, or any other University whatever. The defenders, indeed, see no reason why the present College should take to themselves, as their own title, the Papal Bull constituting the old University, any more than they can claim as their

own titles, the charter of the University of Oxford, or of any other University. Whether the College can by virtue of any *inherent* privilege in it as an academical institution, adopt the rights of other Universities, and make these rights their own at pleasure, and whether the privilege now claimed is a general University privilege, capable of being thus adopted, is another question, which the defenders have already discussed in a previous part of this argument. But, in so far as the question of special *grant* is concerned, the defenders say, that the College of Glasgow is not more entitled to found upon the Papal Bull of 1450, as being granted to the *present* College, than to found upon the charters of any other University whatever, however remote or disconnected that University may be.

If the defenders are correct in the position they have now laid down, it is one which strikes at the root of the whole argument maintained by the College, because that argument is entirely founded on the assumption, that the present College, being in right of all the privileges conveyed by the Bull of 1450, is entitled, under its terms, to grant degrees in surgery as one of the 'licitæ facultates,' in which degrees could be given in the University so constituted. The defenders' conclusive answer is, that whatever is given by that Bull, was not given to the present College. Now, if the present College of Glasgow is *not* entitled, (as the defenders think they have shown), to found on the Papal Bull as a grant in their own favour, what foundation have they for the claim, in so far as special grant is concerned? None whatever. The *Nova Erectio* of King James confers by its terms no such right. The College are therefore driven away altogether from the argument on special grant, and must support their claim on other grounds. Now, these grounds must either be some prescriptive usage in their own body, or some inherent privilege common to them with all similar institutions. Of prescriptive usage they can pretend to none, because it is admitted that, prior to the year 1816, this degree was unknown to them. It may not be out of place to add, that, to this very day, it is unknown to any other University in the United Kingdom besides Glasgow. And it may be subjoined, that its validity, even as an academic honour, is looked upon, to say the least, with great distrust, even by those who have had to consider it in no other light than as a mere academic honour; for the defenders perceive, that, whilst the late University Commission enacted a great variety of regulations in regard to the ordinary degrees, and, amongst the rest, the degree of Doctor of Medicine, for all the Scottish Universities, including that of Glasgow, there is no regulation whatever laid down in regard to this new degree of *Chirurgiæ Magister*, or C. M.; and all

Report of Commission, p. 277.

that the Commissioners remark on it is, merely 'that, in 1817, the ' *practice* of giving the degree of Master in Surgery was introduced, ' in the *belief*, that the power of *originating* such a practice is involved ' in the terms of the foundation.' To the slightest support from usage the College cannot pretend. Again, in so far as the claim is made to rest on an inherent privilege in the University, of giving a degree with such rights attached to it, the claim has been already considered, and as the defenders think, abundantly answered.

II. But the defenders will now assume, in argument, that the Papal Bull of 1450 *does* form a part of the constitution of the present College of Glasgow, and may be founded on as such. Even this assumption will advance the College but a very little way towards the acquisition of the right claimed by them; because the question then arises, whether this Papal Bull really *contains* any grant of the privilege claimed, viz. the privilege of granting licenses to practise the trade or calling of surgeon. The College must not only prove themselves possessed of the charter, but they must also prove that the charter conveys the right they seek. It is not pretended that this is directly done; for the Papal Bull has not a word on the present subject. The College must therefore prove that, indirectly, the right is conveyed to them; and of course, the whole *onus probandi* in the matter lies with them.

Now, how is this proved by the College? In the *first* place, they say that the Bull entitles them to grant degrees 'in *quavis licita Facultate*,' and that surgery was then a '*licita Facultas*' in a University. The defenders meet this latter position with the most unqualified contradiction. They challenge the College of Glasgow to produce a single instance among the ancient Universities, in which a Faculty of *Surgery* was instituted. There were in many,—indeed in most of them,—a Faculty of *Medicine*. And the degree of Doctor of Medicine was given in such Universities by this Faculty. But it is surely unnecessary to revert to any explanation of the distinction, already so amply shewn, between medicine and surgery,—the one the general science of diseases, and their cure,—the other a mere practical art, essentially consisting in manual or mechanical operation. In the days of those ancient Universities, it would, in fact, have been thought a degradation, even to admit amongst their graduates a person who practised what was thought a very inferior craft. There was even a strong barrier of superstition against the admission of such persons; because it is an historical fact, that so far was the ecclesi-

astical maxim, 'Ecclesia abhorret a sanguine' carried, that even when ecclesiastics practised medicine, (and to them, this as other branches of learning was at first chiefly confined,) they never would perform any surgical operation, but left this entirely to their servants, or *tonsores*, who are undoubtedly the somewhat humble parents of the whole race of modern surgeons. As the original Universities were all ecclesiastical establishments, the same feeling, in regard to surgery, of course pervaded them. Those who practised that art, were never regarded in any other light than that of mere craftsmen, who might form themselves into corporations like any other trade, but who were quite unworthy of a place in a literary body. No such thing ever existed as a Faculty of *Surgery*, among the '*licitæ Facultates*' of any University.

If any illustration were required, in regard to a fact which can scarcely be seriously disputed by any one acquainted with the antiquities of Universities, it might be afforded by a reference to the history of that University, which is both one of the oldest of all, and that which was commonly taken as the model for all the rest,—viz. the University of Paris. The date of the origin of that University is placed as far back as the reign of Charlemagne. A Faculty of Medicine appears to have existed in it from a very early part of its history. But so far was it from possessing any Faculty of *Surgery*, that it has been already seen, that in the year 1311, Philip the Fair constituted a separate corporation, or College, of Surgeons, for the express purpose of securing skilful men in that art, of which the University did not afford the means. This College was quite distinct from the University; and so exceedingly averse was that learned body to afford any sort of recognition of surgery as an academic science, that the greater part of the history of the University, as given both by Du Boullay (Bulæus) and Crevier, is engrossed, with an account of the attempts made by the surgeons to get themselves engrafted upon the University, and the strenuous resistance made to these attempts by that learned body. One great cause of offence seems to have been, that this corporation had assumed the right of taking to themselves titles, something like University degrees, such as those of licentiates, bachelors, and masters. But, observes the learned historian of the University, these titles of master and bachelor could only be recognised as used in the sense of master and apprentice, in any common craft;—and as for that of licentiate, 'la license qu'obtiennent les chirugiens, est celle d'opérer; *licentiam operandi*, est il dit dans l'ordonnance de Phillippe le Bel en 1311,

Supra pp. 4-5.

Crevier, Hist.
de L' Univ. de
Paris. Tom. V.
p. 400.

‘ au lieu que la licence qui est accordé aux suppôts des Universités est celle d’enseigner.’ Accordingly, the dignity of the University was so hurt by this assumption, that it appears that they would not even hold communication with the corporation of surgeons under these titles, and would recognise them as entitled to nothing within the walls of their University, but the mere common rank of scholars,—

Crevier, Tom. V. p. 53. ‘ L’université, apres avoir examiné leurs titres et leurs moyens, con-
 ‘ sentit de se joindre à eux, dans la cause qu’ils poursuivoient, mais
 ‘ sous la condition qu’ils seroient reputes vrais ecoliers, et non autre-
 ‘ ment; *ut veri scholares et non alias.*’—‘ Le faste, (adds Crevier),
 ‘ se glissoit déjà dans cette société; et ils prenoient les qualités de
 ‘ bacheliers, licenciés, et maitres. L’Universitié ne veut reconnoitre
 ‘ en eux que cette d’écoliers.’ So utterly repugnant were all the prin-
 ciples and feelings of the University, to any intermixture of surgeons
 amongst the graduates, that it was actually part of the statutes of
 the Faculty of Medicine, that no one could be admitted to a degree
 in that Faculty, who had practised as a surgeon, without an express
 renunciation of all future practice in the art.—‘ Il est dit’ (says
 Crevier, in referring to these statutes), ‘ que les candidats qui auront
 ‘ précédemment exercé la Chirurgie, *ne seront point admis qu’ils ne*
 ‘ *se soient engagés par un acte passé pardevant notaires a n’en plus*
 ‘ *faire les opérations.* Car, ajoute le statut, il convient de conserver
 ‘ pure et entiere la dignité de l’ordre des medecins.’ The defenders
 are given to understand, that this very renunciation of surgery is still
 made actually indispensable, before obtaining degrees in medicine from
 the English Universities.

Crevier,
 Tom. VII.
 p. 85.

These observations may serve to illustrate how utterly inconsistent it is with all the then recognised principles, to suppose that, under the phrase of ‘*licita facultas*’ was, or could be intended, a Faculty of *Surgery*, or by degrees, ‘*in quavis licita facultate,*’ such degrees as those now in question. But whilst the defenders make these observations, it is quite enough for their case merely to say, that the *onus* of proving that the ‘*licitæ facultates*’ included a Faculty of *Surgery*, with degrees such as are now attempted to be supported, lies on the College;—and no such thing is or can be proved.

It cannot, at the same time, be too often repeated, that, even supposing degrees in surgery could be proved to be allowed by the Papal Bull, it would be necessary for the College to establish that these were not merely academical honours or testimonials of skill in the mere *science* of surgery, *but also had attached to them the privilege of unlimitedly practising the art or trade.* Even the right of granting degrees in surgery,

as a 'licita facultas,' would be utterly insufficient for the present purpose of the College, without having these established to comprehend an unlimited privilege of practising, not less than a testimonial of learning.

The College, however, it is to be remarked in the *second* place, attempt to bring out from the Papal Bull the assumed privilege, in another way. They say that, by that Bull, the University of Glasgow had given to it, in special terms, all the privileges of the University of Bologna, being invested 'omnibus et singulis privilegiis, libertatibus, honoribus, exemptionibus, immunitatibus per sedem apostolicam, vel alias quomodolibet, magistris, doctoribus et studentibus in studio nostræ civitatis Bononiensis concessis.' Now, the averment is, that whether there existed a Faculty of Surgery or not, degrees in surgery were given at Bologna, having attached to them the unlimited privilege of practising now contended for.

But the averment is perfectly gratuitous, and destitute of all evidence. The College, on whom the whole *onus probandi* falls, have entirely failed to substantiate it. In fact, they have hitherto adduced no evidence whatever showing what was, at the date in question, the state of matters at Bologna one way or other. They have put into process, indeed, certain regulations for that University, recently laid down by a Bull of Pope Leo XII., dated 1824. But this is utterly insufficient to make good the allegation. For, in the *first* place, the question is not, what are now, or since 1824, the regulations of the University of Bologna? But what were its rules in 1450, when the Papal Bull was granted in favour of Glasgow University, transferring to it the *then* existing privileges of Bologna? Every one knows that one of the consequences of the French Revolution was to produce a complete overturn, both in the University of Paris, and generally in the Universities over the Continent; which have almost all of them been placed on totally new foundations. Any regulations, therefore, flowing from the Pope in relation to the University of Bologna in 1824, would be quite irrelevant to prove what privileges were held by it, and from it transferred to Glasgow in 1450. But, *secondly*, these very regulations themselves tell in a most unfortunately strong manner against the case of the College itself; because, although it does appear that, like the College here, they have recently adopted this new degree of Doctor or Master in Surgery, the rules most expressly provide, *that this degree shall not by itself give any title to practise surgery*. Before even a doctor can practise, he must have spent at least two years in a clinical school, and must obtain what is there called a *matriculation* amongst the surgeons. The rule is explicit,—'Cum quis doctoratum

No. 93 of Pro. ' *medicinæ aut Chirurgiæ adeptus sit, ab ejus exercitio abstineat*
 ' *DONEC ejusmodi facultatis MATRICULAM mereatur, aliter pœnas incur-*
 ' *rat a lege sancitas ;—Nemo autem ejusmodi matriculam mereatur,*
 ' *nisi qui duos annos scholæ clinicæ operam dederit, sive Medicus fue-*
 ' *rit, sive Chirurgus.*' It then proceeds to further details. In the
 same way, as to pharmacy, the rule is equally express:—'*Peracto*
 '*cursu scholastico, atque utroque gradu adepto, ANTEQUAM Pharma-*
 '*ciam facere queant, MATRICULAM LIBERI EXERCITII, obtineant op-*
 '*portet.*'

The College has tried, however, to make out, that if not at Bologna, at least at some *others* of the Italian Universities, such degrees as those in question were given, at and prior to the time of the Papal Bull of 1450. Waiving for the present the entire irrelevancy of any statements as to other Universities, where the Bull refers exclusively to one, the defenders would remark, that it appears to them, that the College are equally unsuccessful in making out this position on any thing in the least degree resembling definite evidence. The evidence, which the College would require to adduce, would be some evidence from authentic records, and not the mere *dicta* of modern authors, drawing their own theoretical inferences; which is the character of the pursuer's proof. But even with the aid of all this, they are singularly unsuccessful. It will always be borne in mind, that the point which the College must prove is, that these Universities, *in their capacity of Universities*, gave degrees in surgery, which degrees were, in their own nature, followed by an unlimited privilege to practise the art. Now, this the College has, as seems to the defenders, in no way made out. It rather appears, (though the subject is involved in a good deal of obscurity), that in *some* of these learned bodies, the medical Faculty had not only its ordinary University rights as such, but had, over and above, conferred on it, *by an express ordinance of the State*, a certain measure of superintendance over the surgeons within the bounds of the place, and a power of licensing or prohibiting these, according as it found them qualified or unqualified. But this power, it did not possess by virtue of any University privilege, *but through an express enactment*. In other words, where there was no *separate* corporation of surgeons, as in Glasgow, the State, thinking it necessary that persons practising that art should be laid under some restrictions, might find it convenient to vest the restrictive power in the medical Faculty of the University of the place. But all this is very different from a power being possessed by the University, *as such*, to grant degrees in surgery, which would form an unlimited title to practise. Accordingly, so far from its appearing that

degrees in surgery were ever granted for this end, it seems very plain, both that *no* degrees of surgery were ever, in point of fact, granted at all; and that, even the possession of the highest University degrees was held not sufficient to qualify for surgery in such places, without an exhibition of actual skill in that practical art. Thus, there is to be found a Bull of Pope Gregory XIII., addressed to the Medical College in Rome, by which, on the narrative that there were many grievous impositions practised even by persons, ‘publice doctoratis, et privilegium doctoratus, etiam a publicis et generalibus Studiorum Universitatibus, habentibus;’ the Pope gives power to the College, — ‘Omnes et singulos, ac quoscunque, artem medicinæ exercentes, etiam medicos publice et in publicis Gymnasiis vel Universitatibus quibuscunque doctoratos et promotos, exceptis tamen illis medicis qui longo usu, tam in stationibus medicorum, sive Collegiis habitis, quam alias in exercitio medicinæ, probi et periti communiter existimantur, ad se examini subjiciendum, et per interdictionem exercitii medicinæ, compellere, et per ipsum Protomedicum et duos alios de eodem Collegio examinare; et illos quos ad medicinam exercendam non idoneos, nec sufficientes repererint, exercitio medicinæ hujusmodi in ipsa urbe prorsus interdicare, seu ab ipso exercitio ad tempus et donec, et quousque studio mediante, ad melius profecerint, suspendere.’ And the Bull concludes by declaring this enactment valid, ‘non obstantibus privilegiis doctoratus in medicina, dictis medicis, qui ut præfertur non idonei nec sufficientes, pro tempore referti fuerint, quomodolibet, et etiam per quæcumque Gymnasia, Collegia, et Universitates, etiam generales, ac etiam prævio rigoroso examine, etiam publice facto, concessis, et concedendis.’ In the same way, there appears an enactment in the *Constitutiones Siculares* of the Emperor Frederic II., that no one should practise Surgery within certain bounds without a testimony from the Medical College of Salerno; ‘Salubri constitutione sancimus, ut nullus chirurgicus ad practicam admittatur nisi testimoniales literas offerat magistrorum in medicinali facultate legentium, quod per annum saltem in ea medicinæ parte studuerit, quæ chirurgiæ instruit facultatem, et præsertim anatomiam humanorum corporum, in scholis didicerit et sit in ea parte medicinæ perfectus, sine qua, nec incisiones salubriter fieri poterunt nec fracturæ curari.’ Under such authorities, licenses to practise Surgery appear to have occasionally issued from some of these bodies. But it does not appear, that without an express *enactment* empowering it so to interfere, any University ever granted such licenses; and far less ever took upon it, in virtue of its mere right as an University, to grant a *degree*, which was by its own power, as an academical title, to have an equivalent effect.

Bullarium Magnum, Tom. II. p. 407.

Conringius de Antiquitat. Academicæ, pp. 54, 55, 56 & 103.

Facciolati Gym-
nasium Patavi-
num.

The defenders may further refer, in illustration of this statement, to a book already cited, *Facciolati's Treatise on the University of Padua*, in which will be found a great variety of forms of University degrees, and of other academical documents. There are forms of degrees in all the usual Faculties, including medicine. There is also one document containing a *license* to a certain individual to practise surgery. Now, it is remarkable, and in perfect consistency with what has just been said, that whilst, in all the usual Faculties, there is an express graduation,—there is no academical title of any kind whatever conferred on the surgeon, but a mere permission given to practise. The words in the former case are,—‘*Fecimus et creavimus Doctorem et Magistrum in prefata scientia, concedentes eidem, in dicta scientia, nomen, honorem, et titulum Doctoratus et Magisterii dignitatem.*’ But in the case of the surgeon, there is nothing but a mere ‘*licentia*,’ without either the name of Doctor or of Master, or any other academical name whatever, being granted him. In whatever way therefore the right to grant this *licentia* originated, (if there was such a right,) it is quite plain, that the license was not procured through the intervention of an academical degree, giving an unlimited power to practise, as *ipso facto* a privilege inherent in the degree.

This explanation may dispose of the whole references by the College to the other Italian Universities, besides Bologna; because it shews that these references do not bear on the point at issue. There is no question here with regard to any power in Glasgow College, to superintend the surgeons within that burgh, and to grant or refuse them licenses *under an express enactment to that end*; because no such express enactment is pretended. The College does not pretend to have ever had from the State any *express*, and, far less, any *exclusive* privilege of licensing surgeons within certain bounds, such as that granted to the defenders’ Faculty. The whole question is, whether, *on its mere right as an University*, the College can grant degrees in surgery, having, by their intrinsic power, the effect of an unlimited license to practise? Now, the defenders maintain, that no such thing is ever proved to have been done *on their mere rights as Universities*, by any of the Universities alluded to.

But finally, the defenders have to say, that all inquiry into the practice of *other* Universities than Bologna, is, on the shewing of the College itself, irrelevant. In arguing from their alleged grant of 1450, they must stand by the words of that grant; and there are no privileges given, except those of the University of Bologna alone. It might happen that every different University had its own separate constitution and privileges. But in reasoning from their alleged grant,

the College must exclusively confine themselves to the University of Bologna; and it is not proved that ever such a privilege, as is claimed, was there exercised.

III. The defenders have now, however, to proceed to an argument, which may be used against the College, even on all their own assumptions,—that is, supposing the Papal Bull is not only a subsisting right, but that degrees in surgery, having the effect of a license to practise, were actually at its date granted at Bologna; and the privilege of granting such degrees accordingly transferred under the Bull to Glasgow University. Even in that view, there are certain very simple considerations which appear to the defenders conclusive against the claim.

The grant contained in the Bull, taken in its utmost extent, merely confers certain *powers* on the proposed new institution. It does not lay it under any obligation to exercise those powers. There was the *privilege* given to it, of forming itself after the model of Bologna. But, of course, there was no necessity laid on it to incorporate in its system all and every thing which existed in Bologna. It might take what it chose. It might leave what it chose. Thus, assuming that there was a Faculty of Surgery at Bologna, and degrees granted in that Faculty, it was put within the power of Glasgow University also to erect such a Faculty, and grant such degrees. But the University might do this or not as it pleased. Now, the University did *not* choose to institute any Faculty of Surgery, either in 1450, or at any other time prior to the date of the defenders' charter in 1599. What, in these circumstances, happened?—The Sovereign, conceiving it absolutely necessary for the safety of his subjects, that such a body should exist, in order to separate the skilful from the ignorant, and finding no Faculty of Surgery in the University, established a Faculty of Surgery by his own express charter, to which the duty which the College had declined to undertake was committed,—and committed *exclusively*,—for the obvious purpose of having the whole matter vested in one responsible body. Now, the defenders maintain, with the most perfect confidence, that, in doing so, the Monarch was only exercising an act of undoubted prerogative. In the original establishment of the University, there was, in the widest sense of the argument, merely an institution erected, having the *option* of instituting within itself a school, or College of Surgery. But it did not follow that, if that option was not exercised, the Sovereign was, therefore, tied up from instituting a separate College, or Faculty of Surgery. On the contrary, in all sound construction, it is to be held, that the option

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fell to be exercised within a reasonable time, otherwise there was a virtual abandonment of the privilege. The University did not, for 150 years, attempt to exercise the privilege. It is, with submission, at variance both with plain reason and the sound construction of law, and is, indeed, a gross encroachment on the Royal prerogative, to maintain that, in these circumstances, the Sovereign was not entitled, for the benefit of his subjects, to institute a separate College or Faculty, by which the office, refused to be performed by the College, might be discharged, and to which, *exclusively*, the duty should be thenceforward committed.

The fallacy of the argument used by the College, on this branch of the case, consists in completely throwing out of view the proper nature of the right, in regard to this matter, arising out of the Papal Bull. They put this right on the footing of a special patrimonial grant, constituted by words of express conveyance, in favour of an individual, or of a corporation; and then they argue, with great plausibility, that this express grant the Sovereign could not recal by any subsequent grant in favour of another party. But this is a mere attempt to mislead by a most fallacious analogy. In so far as *patrimonial* rights were conferred upon the University,—suppose, for instance, a grant made to them of certain lands or teinds,—it may be perfectly true, that it was beyond the power of the Sovereign arbitrarily to recal that grant. But in so far as its *literary* constitution was concerned, it is quite untenable, and at variance with the whole constitutional law on the subject of Universities, to say that the Sovereign could not interfere to make any alteration on its original charter of erection. A University, *quoad* its literary constitution, is a public institution by the Crown, for the good of the country,—and is subject, in that literary constitution, to all manner of alterations on the part of the Sovereign, in whom the power of making these alterations is specially vested, as part of his prerogative. It is quite true, that a University may also hold property as a patrimonial corporation; and that this property is as sacred from the touch of the Sovereign, as that of any private individual. But so far as it is a school of learning, its whole constitution is, as the defenders have always understood, subject to an unlimited revision and alteration by the Crown. Accordingly, it is well known how repeatedly this power has been exercised under visitations by Royal Commissioners, who just exercise this prerogative of the Crown by delegation.

Now these considerations go to the very root of the present argument; because the whole question, properly analyzed, is just this,—Whether, *supposing* the University to have had given it in 1450 the

privilege of constituting within itself a Faculty of Surgery, it was not within the prerogative of the Sovereign, (that privilege not being used) to say in 1599, that the intended Faculty should *not* now be within the University, but should exist in a separate body. This is no question of patrimonial right, but of public utility. And the defenders cannot perceive any valid ground, on which this prerogative can be denied the Crown. Suppose that in place of there having been no school of Surgery, there had actually been in 1599 a school of Surgery for sometime established in the University; the defenders maintain it as undoubted, that it was quite within the prerogative of the Crown, on views of public utility, to have *suppressed* that school, either absolutely, or with a view of opening it in some other University within the same geographical limits. But if this be so, *a fortiori*, it was in the power of the Crown, when no school of Surgery had been *de facto* instituted in the University, to exercise his prerogative to the effect of declaring, that the privilege of examining and admitting Surgeons once intended to belong to the University, (supposing that the case), was no longer to remain with it, but was to be transferred to the separate Faculty which he then erected.

The defenders may indeed take even higher ground in regard to the Royal prerogative, than they are now assuming. Suppose that there had been in 1599 a regular *Faculty* of Surgery in the University, with the unquestionable power of granting degrees in Surgery; and that this Faculty, in place of being abrogated, was expressly intended to subsist and continue; it was notwithstanding, as the defenders maintain, entirely in the power of the Crown to declare, that the *effect* of these degrees should *not* be to entitle the holders to practise, without undergoing, in addition, an examination by a board of practical men. The regulation of academical degrees forms just part of the Royal prerogative in regard to the internal constitution of Universities. The Sovereign has again and again interfered, (as for instance by the late University Commission), to lay down express rules as to the course of study &c. necessary for obtaining those degrees, and thus materially to limit and controul the rights of the University in granting them. It is just an exercise of the same prerogative, for the Sovereign to declare, what shall be the privileges attached in future to these academical honours, after they have been granted, according as his views of public expediency may dictate. The Crown had therefore a full right, for the sake of public utility, to declare in 1599, that the possession of academical honours should *not* be sufficient to qualify for practising Surgery, without an examina-

tion and admission by a Surgical board. This was just what was done by Pope Gregory XIII. in the Papal Bull formerly alluded to. And although the defenders do not mean to argue that the one case rules the other, they maintain that the prerogative is quite the same. Now this is just what the Crown did when, in 1599, it subjected 'ALL PERSONS *professing or using the art of CHIRURGIE,*' within certain bounds, to the examination of the defenders' Faculty. The unlimited phrase of 'ALL PERSONS' must be held to comprehend all without exception, *even though possessed of academic honours*; and accordingly, such an unlimited meaning was expressly given to it by this Court in the case of Steel in 1817, when it was decided, that even possession of the highest academical honours in medicine, did not exempt from the operation of the clause, when the holders became desirous of practising the art of *Surgery*. It is almost ludicrous to contend, that whilst this effect was denied to the highest medical degree, it should be granted to a mere subordinate title.

But the defenders do not require, in order to make out their case, to take the high ground last alluded to. And all they have to maintain is, that however the University might be privileged originally, to erect a Faculty of Surgery, as part of its literary constitution, yet *not* having done so for 150 years, it was within the power of the Crown, for public good, to erect a separate Faculty, to which, from that date, the privilege of examining surgeons should *exclusively* belong; and the defenders think that this right can scarcely, with seriousness, and certainly not with success, be denied to form part of the Royal prerogative.

The defenders have only to call to your Lordships remembrance, on this branch of the case, the additional conclusive fact, that the charter granted by the Crown *was ratified by a subsequent act of Parliament, confirming all its provisions*. The provisions of the charter actually form, at this moment, *part of the subsisting law of the land*. There exists, at this moment, a statutory enactment, that 'ALL PERSONS *professing the art of surgery,*' within certain bounds, shall be previously licensed by the defenders' Faculty. And how is it possible, that any person whatever, *whether possessed of an academic degree or not*, can escape the operation of this comprehensive, and indeed, unlimited enactment?

IV. The defenders have to add another argument, equally conclusive, and which they would be entitled to maintain, even were they to go still further in their concessions to the College, and to admit,

that the Bull in 1450 vested in the College a privilege of erecting a Faculty, and of licensing surgeons to practise, which it was quite impossible for the Crown, or even the Legislature, to annul. The de-^{5th Plea in} fenders allude to the argument arising on the LAW OF PRESCRIPTION. Defence.

Take the assumption just now stated; and observe how, in that^{4th Plea in} view, the case stands. On the one hand, the College claims on a title Suspension. giving them the privilege of licensing surgeons to practise, dated in 1450; *but on which, it is admitted, that no possession of any kind ever followed, down to 1816.* On the other hand, the Faculty claim upon a title, dated in 1599, giving them the *exclusive* right of licensing surgeons within certain bounds, because it subjects to their examination, 'ALL PERSONS *professing and using the art of* CHIRURGIE,' within these bounds;—and it is admitted, that from 1599 down to 1816, the Faculty *exclusively* exercised this right. Now assuming both titles equally to give the privilege, (which is assuming as much as the College can desire), the case resolves itself into one of the commonest points of the law of prescription. The College claims on a title on which, admittedly, no possession followed. On the other hand, the Faculty claim on an exclusive title, on which an exclusive possession of more than 217 years has taken place. The defenders submit it to be clear beyond challenge, that the Faculty have acquired, by prescription, an exclusive right, under their charter, on which they are entitled to stand against all the world, and, in particular, against the College, whose right, if ever possessed on the title set forth by them, has been, in competition with the Faculty, lost *non utendo*.

Suppose that this were the case of two ordinary trading corporations. This is putting the case very favourably for the College;—because, unquestionably, the constitution of a trading corporation, with its superstructure of patrimonial interests, is a thing much less susceptible of interference on the part of the Crown, than the Constitution of any University, or seminary of learning, instituted merely for the public good. Besides, the College itself admits—or cannot dispute—that its charter of 1450 in no way conveyed the *exclusive* privileges of a corporation; for, whatever it says on behalf of its degrees, it does not say, that those *not* possessing them could have been prevented from practising, if the public chose to employ them;—a consideration which clearly establishes the character of these degrees to be that of mere testimonials. But even put the case of the College on the extensive basis of their charter of 1450 actually conferring on them the exclusive privileges of a corporation in this respect; and apply a simple legal analogy. Suppose, that in 1450, the Sovereign grants a charter to certain

individuals, and their successors, giving them the rights of a corporate trade,—say of a corporation of tailors—that is, the exclusive privilege of making clothes within certain bounds; and suppose, that, upon this charter, no possession follows by any exercise of privilege till 1816. Then suppose, that, in 1599, the Sovereign grants another charter of the same description to another body of men, and their successors, also conveying to them the same exclusive privilege of making clothes, or acting as tailors within the same bounds; and upon this second charter, possession follows, by this second body of men exercising, for the whole period of 217 years, the *exclusive* privilege of tailoring within the specified district. Can there be the shadow of a doubt, that the exclusive privilege of the second corporation would be completely established, and that it would be impossible for the persons holding the charter of 1450, in the face of the opposite possession, to revert to that charter, and to insist on exercising any right under it. It would be in vain to say, that the King could not derogate from the first charter by a deed granted subsequently; because this might be equally said in every case where two successive rights to the same property had been granted by the proprietor. But, in such a case, it is undoubted, that if the latter deed has been fortified by prescriptive possession, while no possession has followed on the first, the right under the second deed is secure from all challenge. The first deed has, in consequence of no possession having followed on it, become, in any competition with the second, *entirely inoperative and extinct*. The second deed is established, in all its provisions, by the positive prescription, whilst the first is entirely cut down by the negative. But the case supposed is, in legal principle, precisely the present, stated in the way most favourable for the College.

The only serious answer which the College has made to the argument from prescription, is, that the privilege created by the Bull of 1450, was *res meræ facultatis*, which could never be lost merely *non utendo*, but could be exercised at any time. This might have been an exceedingly good answer, *had there been no competing right acquired by the Faculty*; but, as the case stands, it is quite inapplicable. The plea of *res meræ facultatis* may be exceedingly sufficient when addressed to those who, without alleging any right in their own persons, contend that a person must not exercise certain rights of property, *merely* because he has not hitherto exercised them. But it is trite law, that the plea is quite inapplicable where, in consequence of the non-exercise of these rights, there has been a positive right acquired by the other party. To the extent now stated, but no farther, the doctrine

is good ; or, to use the words of Mr Erskine, ‘ no right can be lost *non utendo*, or by disuse, *unless the loss of it to him who neglects to exercise it shall establish some positive right in another.*’ Thus, no man can be prevented from walking across his property in any direction he pleases,—or from enclosing it—or from building on it,—merely because he has not done these in time past, for however long ;—because these are all *res meræ facultatis*. But if his neighbour has, in consequence of his not preventing the encroachment, acquired a servitude of road, or pasturage, or lights, the doctrine would be quite ineffective, in opposition to such right of servitude. In fact, the whole doctrine of the law, on the subject of servitudes by prescription, is founded upon this very principle, that the natural right which every man has to use his own property as he pleases, and to regard his employment of it, in any way he may prefer, as *res meræ facultatis*, cannot be set up against a positive counter-right, acquired, through his non-usage, by another party. The same precisely may be said to be the foundation of the law of corporations by prescription, and the very ground on which exclusive privileges are acquired by mere lapse of time. For nothing can be more clear, in so far as original rights are concerned, than that it is *res meræ facultatis*, for a man to employ whom he pleases to labour for him,—to cut his coat, or make his shoes. Yet, if through the non-exercise of this original privilege, a certain body of men have been enabled to exercise an *exclusive* possession of tailoring or shoemaking, this will be sufficient to bar all within the bounds from reverting to their original right. This doctrine runs through the whole theory of the law. For example, in the case of jurisdiction, lost *non utendo*, in competition with a rival judiciary continuing all the while the exclusive court of the district,—in the case of a right to tolls and customs, lost by non-exaction, where the privilege granted by the charter was prescriptively exercised, free from the accompanying tribute,—in the case of an elective franchise lost by non-exercise, where an interference not warranted by the original set, has been prescriptively submitted to,—and in fact, in all the subject-matters of the law where these two things combine,—on the one hand, the non-exercise of a privilege originally competent,—and on the other hand, the acquisition, in consequence of that non-exercise, of a right incompatible with that privilege, by a competing party.

Erskine, B, iii.
t. 7, § 12.

Rolland v. Craigievar, 13. Nov. 1671, Mor. 10,724, and Supplement, Vol. II. p. 589.—Justices of Ayrshire v. Town of Irvine, 12. Jan. 1712, Mor. 9393. Dunn v. Town of Montrose, 7. Dec. 1731, Mor. 10,731. Miller v. Storrrie, 15. June 1757, Mor. 10,738.—Magistrates of Hamilton v. Duke of Hamilton, 4. Feb. 1756, Mor. 10,777.

The application to the present case is obvious. Supposing the privilege of conferring degrees in surgery, *having the effect of a license*, granted to the College by the Bull of 1450, it may be true, that

if no competing right had ever been exercised by the Faculty, they might, even in 1816, revert to it, notwithstanding its non-exercise, on the plea of its being *res meræ facultatis*. But, in the meanwhile, in consequence of this non-exercise, a right is acquired by the Faculty, inconsistent with this privilege, because, on a charter giving to them the power of examining and licensing 'ALL PERSONS' within certain bounds,—unquestionably a sufficient charter for prescribing an exclusive right,—the Faculty keep possession of an *exclusive* privilege for more than two centuries. It appears to the defenders quite indisputable, that there is no legal method of explaining away the non-exercise of their alleged privilege by the College, which can invalidate the exclusive right which the Faculty thus acquired.

Let it be supposed in illustration, that the question was regarding any other privilege which was, or may be conceived to have been conveyed to the College by the Bull of 1450. Suppose that this Bull had conveyed, and been a valid title to convey to the College, the right of salmon fishing in a certain part of the Clyde; in imitation, it might be, of some right of fishing in the Remo, or the Po, held by the University of Bologna. Unquestionably, the mere non-exercise of this right would not, by itself, bar the College from taking it up at any time. But if, in the meanwhile, some individual or corporation got, in 1599, a charter from the Crown, conveying this very fishing, and upon that charter, held an *exclusive* possession of it for two centuries, it would be manifestly quite in vain for the College afterwards to interfere with the right so acquired, or to claim any share in the fishing, on the ground that they got a Bull in 1450, and that fishing was *meræ facultatis*. But the same principle exactly applies in the case of the privilege now in question.

If the defenders have satisfactorily answered the argument of the College, founded on the allegation of their privilege being *res meræ facultatis*, there is no other plea maintained by them, in regard to the argument from prescription, which can create a moment's difficulty. Their whole case on this point consists of an obviously futile attempt to *separate* the charter of the Faculty from the possession held on it. They say, that in the question of prescription, it is only the *possession* which is to be looked to; and that, as there could be no possession, of a right of debarring graduates in surgery, where none existed, no such right has been acquired. This is a plain fallacy. The possession, even considered by itself, was that of a right of debarring *all* persons. But, further, the charter and the possession manifestly cannot be separated in the legal inquiry. The *effect* of the possession is just

to fortify the charter, so as to prevent all competition from the rival right, on which *no* possession followed, and to render that rival right, in a question with the charter, altogether inoperative and void. And what is the charter, so fortified against all competition by the rival right? It is a charter which makes it necessary that 'ALL PERSONS 'professing surgery,' within certain bounds,—that is, all persons, *whether professing academic degrees or not*, should be 'ADMITTED and 'ALLOWED' by the Faculty.

The defenders humbly presume to submit their plea from prescription as altogether unanswerable; because it assumes all that the College can demand, viz.—that the Bull of 1450 is part of their subsisting titles; and that it actually conveys, as fully as could be done in express words, that very privilege of examining and licensing surgeons which they claim. And the same argument would equally apply to any claim founded on the *Nova Erectio* of 1577. The argument is, that the most ample title standing by itself, *without possession*, is insufficient against the competing charter of the Faculty, followed by an *exclusive* possession of more than 200 years.

V. The defenders have stated another plea on record, which they shall now merely notice, but which would remain to them, even were it established that the College had been, in 1816, entitled, and were actually, at this moment, entitled to put in force their alleged privilege, under the Bull of 1450. If the College were entitled now to adopt the privileges conferred by the Bull, it is, as the defenders think, plain, that they would be bound to exercise these privileges *in the way and manner pointed out by the Bull*. They cannot both approve and reprobate the deed on which they found;—approve it, to the effect of drawing their title from it, and reprobate it, to the effect of exercising the right in a totally different manner from what the deed expressly enjoins. If they can revert to the deed at all, they must take it, with all its accompanying provisions. Now, it has been seen, that the degrees allowed by the deed were to be conferred after a very peculiar manner, viz.—1st, They were to be conferred by a special *Faculty*, after an examination before that Faculty; and, 2dly, They were to be conferred, *by the whole graduates in the Faculty assembled in congregation*. This has been already shewn to have been the constitution of all the then existing Universities; and it is the special constitution laid down by the Bull of Pope Nicholas, which expressly provides, that degrees 'elargiri per doctorem seu doctores, ac magistrum 'seu magistros, facultatis ejusdem in qua examinatio fienda fuerit.'

6th Plea in
Defence.

App. p. 116.

And also, '*aliis doctoribus et magistris ibidem tunc legentibus convocatis.*' But it is not pretended, that the degrees now sought to be protected, were given according to these provisions. For, 1st, It is admitted that there was not, and never is, any congregation of graduates, at granting these degrees, which is itself enough; and, 2dly, It is not with the least degree of seriousness even averred, that there is any thing which can be called a *Faculty of Surgery* in the College. It is said, that there is a *Faculty of Medicine*; and if this be true, that *Faculty* may be entitled to grant degrees in *Medicine*, but no others; unless, indeed, the extravagant proposition of the College can be maintained, that they are entitled to invent and grant degrees in any thing,—in surgery,—in pharmacy,—in chemistry,—in botany.—all entitling the holders unlimitedly to practise the arts connected with these subjects, in the face of all corporate rights whatever. But, it has already been ruled, in the case of Steel, that degrees in *Medicine* give no title to practise surgery within the *Faculty's* bounds. Now, if it be established, that the degrees sought to be protected, are not given according to the provisions of the Bull of 1450, the inference which the defenders think themselves clearly entitled to draw is, that these degrees are not warranted by, but are in fact at variance with, the very deed alleged to give the right of conferring them, and therefore cannot be recognized or defended.

The defenders would subjoin to these remarks on the claims of the College, two very strong authorities, directly corroborative of the argument which has now been maintained. They are drawn from the law of England; but as the question regarding the effect of University degrees is more a question of public than municipal law, the decisions of the English Courts, in which, from the different situation of the two countries, such questions have occurred more frequently than here, are entitled to very great respect. It appears, that by a charter of incorporation, confirmed by Parliament in the reign of Henry VIII., the College of Physicians in London, had given them the privilege of examining and licensing all persons intending to practise in that city, or for seven miles round it. About the beginning of last century, several questions arose between this corporation and the graduates of the English Universities, who contended for precisely the same privilege for their degrees, as is now claimed in regard to those from Glasgow College. But in two successive instances, the Courts of law held, that these degrees gave no title whatever to practise within the bounds of the corporation, without receiving the license of that body. The first

case reported, is that of *College of Physicians v. Levett*, reported by *Raymond, Vol. I., p. 472*, in these terms:—‘ The plaintiffs brought debt against the defendant for £25, for having practised Physic within London, five months, without license. Upon a *nil debet* pleaded, it was tried before Holt, Chief-Justice of the King’s Bench, at Guildhall, on Tuesday, the 18th November 1701, in Michaelmas term, 13 Will. III.; and the defendant’s defence was, that he was a graduate Doctor of Oxford. But it was ruled by Holt, upon consideration of the whole statutes concerning this matter, that he could not practise within London, or seven miles round, without license of the College of Physicians; and by his direction, a verdict was given for the plaintiff.’ The other case is that of *College of Physicians v. West*, concerning which the following statement appears in the *Modern Reports, Vol. X., p. 353*:—‘ The question was, whether a man, that had taken his degree of Doctor of Physic in either of the Universities, might not practise in London, and within seven miles of the same, without a license from the College of Physicians. The Court clear of opinion, that a license from the College was necessary; and that, by reason of the charter of incorporation confirmed by 14 and 15 Henry VIII., cap. 5, penned in very strong and negative words. As to the testimonial granted by the Universities, upon a person taking the doctor’s degree, the Court was of opinion, that these testimonials might have the nature of a recommendation,—they might give a man a fair reputation,—BUT CONFERRED NO RIGHT; and consequently, all those statutes which have confirmed the privileges of the Universities, could revive or confirm nothing but the reputation that this testimonial might give such graduates.’ It was added by the Court,—‘ The College of Physicians, without doubt, more competent judges of the qualifications of a Physician, than the Universities. And there might be many good reasons for taking a particular care of those that practised physic in London.’ Now, these decisions are precisely in point to the present case. The Faculty here have just as complete a right of licensing within their bounds, as the College of Physicians had within theirs. If ‘very strong words’ in their charter are to have any effect, what can be stronger than the clause, which subjects ‘ALL PERSONS professing surgery’ to the Faculty’s examination, thereby including every body without exception, whether vested with a University degree or not? All that can now be said in defence of University degrees, might have been urged in favour of the degrees of the English Universities; because, as every one knows that the con-

stitution of the University of Oxford, is of a much earlier date than that of the title founded on by the College of Physicians, it might have been equally urged then as now, that their grant could not derogate from the previously acquired privileges of the University. It will not be pretended, that the degrees of Glasgow College are entitled to any higher regard, than those of the University of Oxford. Yet, in those cases, it was expressly found, that whatever might be the benefit of possessing those degrees as academic testimonials, they were entitled to no effect whatever in competition with the privileges of a regular medical corporation, or in the emphatic words of the Report, *though giving a reputation, conferred no right.*

But, in truth, the defenders may say, that this Court itself has pronounced the same judgment, and that the whole question now at issue was truly decided in the case of Steel in 1817, when the University degrees in medicine were found insufficient to warrant any practice of surgery within the bounds of the present Faculty's charter. For, if a University degree could confer any privilege of practising at all, it does appear, that these general degrees, implying, as must be assumed, a universal knowledge of the whole branches of the science, must necessarily have had this effect given to them. The only way, indeed, in which the College attempts to evade the objection, arising from their possessing no proper Faculty of *Surgery*, is, by arguing, that they have a Faculty of *Medicine*, which must be held to embrace *all* the subordinate branches of the science. But if a *Faculty* of medicine possesses this ample scope, then, by parity of reasoning, a *degree* in medicine must equally comprehend a degree in all the subordinate branches; yet the Court expressly found, that such a degree gives no right of practising surgery within the Faculty's limits. The truth manifestly is, that the present proceedings are merely an attempt,—not, with submission, very highly creditable,—to evade the decision in 1817. But if, substantially, the validity of academic degrees to encroach upon the Faculty's chartered privileges was then made the subject of decision, it needs scarcely to be said, that no evasion of that decision can be permitted, through the mere invention of a new and colourable name.

It will scarcely be necessary, after all that has been said, to advert to a plea founded by the pursuers on the allegation that their degrees have been recognized by the Legislature, by being *alluded to* in certain acts of Parliament. The pursuers are unfortunate in their *proof* of this; for their only reference is to a statute which has been repealed. But, were the fact so, there would be truly nothing touching the

present discussion, in the Licentiates of Glasgow College being incidentally mentioned in an Act of Parliament; to which it is not even alleged that the defenders were parties. The *fact* of such licences being granted, is undoubted, and the Legislature may, if it think fit, take them as *testimonials* when it pleases. But the question now is, not whether they are good academic *testimonials*, but whether they entitle the holders to set at nought the exclusive privileges of the defenders' Faculty;—an assumed right which it will not be pretended that the Legislature ever sanctioned, either directly or indirectly.

The defenders also consider it unnecessary, before concluding, to enter into any detailed examination of the series of propositions, with which the Case of the pursuers is closed. The preceding argument must have sufficiently shewn the general fallacy by which the whole of these are pervaded. Taken together, they seem to resolve themselves into the following question, which the pursuers put, as if it were unanswerable;—If the degree of Doctor of Medicine gives a licence to practise medicine, why should the degree of Master in Surgery not give a licence to practise surgery? There are two short answers,—1st, Even the degree of Doctor of Medicine gives, properly speaking, no *licence* to practise; that is, the College are not entitled to interdict from practising, those who have *not* this degree; but it is a mere academic certificate, conferring reputation and character;—2dly, With reference to the only point properly in discussion, viz. the right to practise *within the bounds of the Faculty's charter*;—the short answer is, that *Physicians*, having an academic testimonial, are, by the terms of that charter, expressly *admitted* to practise *as such*; whereas, by the same charter, *Surgeons* are, as expressly, *excluded*, unless entered by the Faculty, by whom 'ALL PERSONS professing SURGERY within the ' bounds, must be ADMITTED AND ALLOWED.'

It is, upon the whole, confidently trusted, that whilst the Faculty have, on their side, made good the privileges claimed by them under their charter, and subsequent possession, it has been also clearly established, that the College has no right to grant the degrees founded on, —either at all,—or, at all events, (which is the only thing in which the defenders are interested), *with the privilege attached to them of enabling the holders to escape the operation of the defenders' charter, —and to practise Surgery without being examined and admitted by the Faculty.*

The defenders have, before closing this perhaps already too pro-

tracted statement, to advert, in a very few sentences, to a question which, as they think, somewhat irregularly, is attempted to be engrafted on the main discussion. They mean the question as to the fees, or dues of entry, leviable by the Faculty. It is argued, on the other side, that even supposing a power of examination and admission vested in the Faculty, they have still no right to exact fees of entry. It is also alleged, that the fees charged by them are exorbitant. Now, this part of the case the defenders would shortly dispose of by the following remarks :—

7th Plea in
Suspension.

App. p. 35.

25. Mar. 1679.

App. p. 46.

— p. 47.

— p. 105.

— p. 102.

1st, In relation to the general right to exact dues of entry, it is scarcely necessary to remind your Lordship, that this is a right which, under due controul, from the superintending power of this Court, is universally recognised as belonging to every corporate body. It is, in fact, absolutely necessary, in order to keep up the corporate establishment, of which, very often, this forms the only revenue. The invariable practice of all corporations, in this respect, is well known. It will, accordingly, be seen, that from the earliest period of the history of the Faculty, all downwards, the exaction of moderate fees of entry, formed part of the usage following on its charter. The defenders have already quoted at length, bye-laws, enacted by the corporation in the year 1602, *fixing the various sums to be paid at that time, as freedom fines, or dues of entry.* It appears, that in 1679 a fresh act of the corporation was passed, declaratory of 'intrants being always subject to the tryall of the Facultie for their qualifications, and paying their freedom *fynes.*' In all the disputes betwixt the Faculty on the one hand, and the Magistrates of Glasgow, and individual third parties on the other hand, this right of exacting fees of entry was always conceded. The obnoxious Mr Henry Marshall, whom the Magistrates in 1679 improperly attempted to thrust into the Faculty, only demanded that he should be admitted, 'he being found qualified, and paying the ordinary dues and *fees.*' The barbers never claimed any privilege for themselves, except 'for payment of the like freedom fines, and other dues, as the surgeons, their sons, sons-in-law, and prentices do pay.' And in the agreement to divide the stock temporarily held by the surgeons and barbers together, under the letter of deaconry, it was admitted, that amongst the sums 'belonging properly and peculiarly to the said chyrurgeons,' were 'summes of money as fynes imposed upon delinquents, admission of *Intrents*, and quarter-accounts.' The practice of exacting fees of entry has continued down to the present day, and was broadly brought before the Court in the case of Steel in 1817, in which case part

of the statement in the summons was, ' that the *fees* exacted by the pursuers for licenses are most reasonable and moderate in themselves, and below what would be considered a fair compensation for such trouble, or the dues proper to support the establishment, under which the examiners and visitors of the Faculty are appointed, and discharge this part of their public duty,—the fees of a diploma to practise within Glasgow being at present only twenty guineas, and for practising in the country five guineas.' And the conclusions against the defenders, to which effect was given by the after interlocutor, were, ' either to submit themselves to the necessary examination before the pursuers, so as if found qualified, they may obtain the requisite license or diploma, *on paying the prescribed fees*, or to desist from the practices before specified, within the city of Glasgow, and the territory described under the letter or gift by King James the Sixth.' The general right of exacting fees of entry appears, therefore, unquestionable; and indeed, necessarily follows, as a matter of course, on sustaining the right of the Faculty at all, under their charter of incorporation.

App. p. 94.

— p. 94.

2dly, In regard to the amount of fees exacted, the defenders meet the charge of exorbitancy with the most unqualified contradiction. The fees demanded are, on the contrary, extremely reasonable and moderate; far lower than are charged in many other bodies of the same kind, both in this country and on the Continent, and scarcely sufficient to support the corporate establishment in a state adequate for the discharge of its functions; which functions, including the prosecution of unlicensed pretenders, the defenders must be permitted to say, in reply to a most groundless assertion on the other side, they have, all along, continued most faithfully to discharge. On this point, (the moderateness of their fees,) the defenders are most willing, were it competent, to go to immediate issue with their opponents; and are so far from desiring to withdraw themselves from the superintending controul, which they are aware is vested in this Court over all corporate bodies, that they both acknowledge and court it. The pursuers complain, that the fees vary, according as the person is to become a fully entered member, participating in the benefits of the widows' fund and library,—a licentiate for the town,—or a licentiate for the country. But this variation, besides being most reasonable in itself, is in perfect consistency with the rule so repeatedly recognized in the law of corporations, ' that the fine or

Read v. Corporations of Mary's Chapel, 27th May 1790, Mor. 1977.
 Duncan v. Magistrates of Aberdeen, 21st July 1786, Mor. 2003.

' composition paid for entrants might be *proportioned* to the benefits to be derived from a participation of the trade.' In point of fact, the fees for licenses *remained, at the commencement of these proceedings, exactly as they stood at the time of the process against Steel, when they were expressly brought before the notice of the Court; and have since actually suffered some reduction.* The statement of the defenders upon record, in regard to the matter of fees, may be thought sufficiently satisfactory, which is this:—' The fees exacted for licenses, so far from having been higher than were absolutely necessary, have been on the whole found inadequate to enable the Faculty to prosecute unqualified persons, and perform the other duties enjoined by the charter, and recommended by the Court of Justiciary. The suspenders have produced their printed regulations; and *are willing, if it be thought competent, to submit them to the consideration of the Court, and modify them as they shall direct.* They have no wish to levy them with a view to the interest of their own society, either generally or individually; but are willing that the whole should be exclusively appropriated to the expenses necessary to carry the grant into effect, which are very considerable.'

But, *3dly*, the defenders have humbly to doubt, how far the question of fees is in any proper sense *hujus loci*. The fees of entry are, like the other rules of the Faculty, *established by regular and formal bye-laws of the corporation*; framed not with reference to the special case of the individuals now in question, but framed for general regulation many years ago, and acted on during all the intervening time, as laws of the corporate body. Now it may be quite competent for any one having interest to set aside these bye-laws, if *ultra vires*, or improper, by a regular action of reduction or declarator for that special purpose. But the defenders have always understood, that, *until* regularly set aside in such an action, such bye-laws must be held subsisting and operative against all claiming an entrance into the corporate body, or a share in its privileges. So, in fact, has it been again and again found by this Court; *Fleshers of Glasgow against Watson, 20th November 1824, Shaw and Dunlop, Vol. III. p. 305,—Porteous against Cordiners of Glasgow, 11th June 1830, S. & D., Vol. VIII. p. 908.* It is therefore thought to be altogether incompetent, in a process like the present, for compelling unlicensed persons to enter with the Faculty, for these persons to defend themselves, on the ground of

an objection to certain of the existing bye-laws of the corporation ; and still more to claim *to be allowed to go on to practise*, in defiance of the privileges of the corporate body, until the corporation make good the intrinsic propriety of one and all of their regulations. This would be to invert, very extraordinarily, the position of parties on the record. The formal bye-laws must be held good till legally set aside ; and they give the corporation the whole benefit of a possessory right, entitling them to exclude the unlicensed practitioners from the possession of the corporation privileges, until the intruders either enter on the terms of the corporation, or shew, in a regular action, that they and all other persons are entitled to enter upon different terms ; or in other words, get the existing bye-laws set aside, and others established in their room by the competent authority. In the meanwhile, the intruders cannot be allowed to practise, in violation of the existing bye-laws. This is a question purely between the Faculty and the individuals challenged ; for it is plain, that if the degrees of the College are found to give no right whatever in competition with the Faculty, the College has not, *qua* such, any title or interest to insist in any process for the regulation of the fees of the Faculty. Now, the whole question raised as between the Faculty and the individuals challenged, in the suspension and interdict now before the Court, to which alone these individuals are parties, is simply, whether they are entitled to practise without subjecting themselves to examination and admission, agreeably to the existing laws of the Faculty, standing at this moment unrevoked. They cannot defend themselves by stating objections to these bye-laws by way of exception ; but they must either stop from practising until they submit to the laws of the Faculty, or at least they must stop from practising until they, on whom the whole *onus* lies, set aside these laws, and get others substituted by the Court. On this branch, the question is purely one of possession. In fact, the terms themselves of the suspension and interdict reduce the point to a very narrow one. For the letters of suspension do not, in the remotest manner, raise the question of fees, but merely claim, in strict terms of the charter, and in its very words, a general interdict, by which ‘ the said
 ‘ persons should be suspended and interdicted from exercising
 ‘ surgery and pharmacy within the district specified in the said
 ‘ letter of gift, *ay and until they have submitted to be examined by*
 ‘ *the Faculty, and have been admitted, allowed, and approved, and*
 ‘ *have obtained testimonials from the Faculty, according to their art*

‘ *and knowledge, that they shall be found worthy to exercise.*’ It is humbly thought impossible to refuse to give, *de plano*, this general interdict, under the rights established by the Faculty.

In the close of all, the defenders would only take the liberty of reminding your Lordship of what it is perhaps necessary to repeat as an apology for any tediousness in the foregoing argument,—viz., the very great importance of the present question, to the Faculty. To the College it is comparatively an insignificant question, involving little else than a matter of academic antiquities; or the continuance of some paltry fees to certain individual Professors. To the individuals challenged, the question is also comparatively immaterial;—because all the privileges which they desire, they may procure by entering with the Faculty, on the Faculty’s very easy terms. To the Faculty, however, the question is serious; because, if the claim of the College were sanctioned, it would at once put in the power of that body,—by reducing the price of its diplomas (which is all so much gain to their already sufficient revenue) below those dues of entry which the Faculty, depending entirely on these, must keep up, in order to maintain its establishment,—to annihilate the Faculty at their pleasure. The existence of the Faculty may, therefore, in some sense, be said to be at stake. The defenders may presume to add, that the public itself is in some measure interested in the permanency of their institution; because, if there be, indeed, any advantage, as was contemplated by the Charter of King James, in subjecting those desirous of practising in this important art to the rigid scrutiny of persons, who are both themselves practical men, and the future competitors of the candidates,—and if, in a public view, this must ever be preferable to leaving these candidates to the arbitrary examination of men of mere speculative science, all this benefit would be lost by recognising the alleged privilege of the College, in competition with that of the Faculty. Nay more, as the College, whatever privilege they may claim for their degrees, *can show no title on which they can prevent those who have not their degrees, from practising, if the public choose to employ them*, the effect of the destruction of the Faculty, would be to open that very door to an inundation of empirics, which was shut by the wisdom of our ancestors. The College, in fact, would, in the destruction of the Faculty, actually destroy in their own persons, the very privilege, and the very profit, which they now seek so anxiously to

defend ; because, as the reason why these degrees in surgery are now sought, is just that the holders may be enabled to evade the privileges of the Faculty, the extinction of that body, by abolishing the necessity of any title in order to practise, would create an instant cessation of all demand for these academical honours. The defenders cannot, of course, look forward to the result of the question without interest. But, in the whole circumstances, they do so without dread. And they have no doubt, that, by their obtaining absolutor from the declarator at the instance of the College, and an interdict against the individuals challenged, a check will be given to proceedings, which, they cannot help thinking, form, on the part of the College, no less than of those whom it supports, a very unwarrantable encroachment on established rights and privileges.

In respect whereof, &c.

W. PENNEY.

