LORD TRAYNER and LORD MONCREIFF concurred.

The Court refused the suspension.

Counsel for the Complainer—J. C. Watt. Agent—James F. Macdonald, S.S.C.

Counsel for the Respondent — Baxter. Agents—Menzies, Bruce-Low, & Thomson, W.S.

COURT OF SESSION.

Wednesday, December 8.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

M'GREGOR AND OTHERS *v.* COX AND OTHERS (COUNCIL OF UNIVERSITY COLLEGE, DUNDEE).

(*Ante*, 32 S.L.R. 182 and 402; 33 S.L.R. 405; and 34 S.L.R. 6. See also 22 R. 210; 22 R. (H.L.) 13; 23 R. 559; and 23 R. (H.L.) 60).

University—Universities (Scotland) Act 1889 (52 *and* 53 *Vict. c.* 55), *secs.* 16, 19 (2) *and* (3), *and* 20—*Affiliation of University College, Dundee, to University of St Andrews.*

The Universities (Scotland) Act 1889, by section 16, empowered the Commissioners appointed under that Act "to affiliate University College" (Dundee) "to and make it form part of the" University of St Andrews, "with the consent of the University Court of St Andrews and also of the said College."

In 1890 the University Court of St Andrews, as constituted under the Universities (Scotland) Act 1858, and University College, Dundee, gave their consent to the College being affiliated to the University under section 16 upon certain conditions specified in an agreement. The Commissioners, acting under the Universities (Scotland) Act 1889, thereupon, also in 1890, issued an "order" affiliating the College to the University under section 16 upon the conditions specified in the agreement. They also shortly thereafter issued an "order" declaring the new University Court to be duly constituted under the Act of 1889. These orders were subsequently reduced upon the ground that the first-mentioned order was invalid, in respect that the Commissioners could only act in the matter in question by "ordinance," subject to the revision of the Queen in Council as prescribed by sections 19 and 20 of the Act, but before the action of reduction was brought, the Commissioners in 1894 issued an ordinance, whereby, *inter alia*, "without prejudice to, but in corroboration of, the order" subsequently reduced, they affiliated the College to the University subject to the conditions set forth in the agreement. This ordinance was, after the procedure prescribed by the Act approved by Her Majesty in Council in part—that is, with the omission of all reference in the ordinance to the order, which by that time had been reduced, and of one of the clauses of the agreement. This clause provided that the Council of University College, Dundee, should elect to the University Court such number of representatives as the Commissioners should fix and allow, and it was ultimately deleted in accordance with the wishes of the University Court and with the consent of University College, Dundee.

In an action for reduction of this ordinance brought by certain individual members of St Andrews University, in which, *inter alios*, certain persons were called as individuals, and as composing the Council of University College, Dundee, who alone appeared to defend the action, the pursuers maintained that the ordinance ought to be reduced, in respect (1) that the University Court had never consented to affiliation being effected by ordinance subject to the revision of the Queen in Council; (2) that the ordinance was never submitted to a properly constituted University Court as required by section 19 of the Act; (3) that the consent required by section 16 was the consent of the University Court in existence at the date when the ordinance was made, and that consequently the consent founded upon in this ordinance was ineffectual; and (4) that alterations had been made upon the ordinance and upon the agreement by the Queen in Council, which the pursuers maintained was illegal in the case of an ordinance affiliating the College to the University under section 16.

Held that the compearing defenders were entitled to decree of absolvitor, in respect (1) that the consent given must be taken to have been a consent to the affiliation being carried through as required by law—that is, by ordinance; (2) that the ordinance was submitted to a University Court, which was habit and repute duly constituted at the time, and that this was sufficient to satisfy the requirements of the Act; (3) that the consent did not cease to be effective as the basis of an ordinance because it was not used in that way until after the old court had ceased to exist; (4) that the Queen in Council was entitled to make the alterations in question on the ordinance and agreement, but that however this might be, the parties had, as regards the agreement, consented to the alteration, while as regards the ordinance the alterations were merely verbal.

This action was raised for the purpose of setting aside an ordinance of the Scottish Universities Commissioners, subsequently approved by Her Majesty in Council, whereby University College, Dundee, was

affiliated to and made to form part of the University of St Andrews, and certain other ordinances also made by the Commissioners and approved by Her Majesty in Council, which made arrangements with regard to the University of St Andrews on the supposition that University College, Dundee, formed part of that University.

On 15th February 1890 the University Court of the University of St Andrews, being the University Court constituted under the Universities (Scotland) Act 1858, resolved to consent, and by minute of meeting of that date consented and agreed, "to University College, Dundee, being affiliated to and made to form part of the University of St Andrews, on the terms and subject to the provisions and declarations" set forth in an agreement, which was signed on behalf of the University Court of St Andrews by four of the six persons then forming the Court, and by certain persons for and on behalf, and as duly authorised by the Council of University College, Dundee.

This agreement, *inter alia*, provided as follows:—"(4) Subject to the provisions of the statute the Council of Dundee College shall elect to the University Court from time to time such number of representatives as the Scottish Universities Commissioners may fix and allow, and such elected person or persons shall become and be members of the said court accordingly, but subject thereto none of the other conditions of section 15 of the said Universities (Scotland) Act 1889 shall apply to Dundee College or its principal or professors; provided always that none of the representatives of Dundee College elected under the provisions of this article shall be entitled to sit and vote in the University Court while any matter falling under article 8 hereof is under consideration."

On 4th March 1890 the Secretary of the Scottish Universities Commission wrote to Principal Donaldson of St Andrews University suggesting certain alterations on the agreement, and intimating that the Commissioners had resolved that in the event of the affiliation being completed, two representatives of the Council of Dundee College should be added to the new University Court by ordinance under section 15 of the Universities (Scotland) Act 1889. The following docquet was appended to a copy of this letter:—"We agree to the alterations proposed by the Commissioners in the foregoing letter." This docquet was signed by five of the six members then composing the University Court of St Andrews University. A similar letter was sent to the Council of Dundee College, and the proposed alterations were considered at a meeting of the Council, and subsequently at a meeting of the Governors. Both these bodies agreed to accept the amount of representation on the University Court granted to them, and they also agreed to certain of the alterations suggested by the Commissioners. The agreement which was ultimately acted upon by the Commissioners was the original agreement altered in so far as the alterations suggested by the Commissioners had been accepted by both St Andrews University Court and the Council and Governors of Dundee College.

On 21st March 1890 the Commissioners issued an "order" purporting to affiliate University College, Dundee, to and make it form part of the University of St Andrews, subject to the conditions set forth in the agreement above referred to, and in terms of the Universities (Scotland) Act 1889, sec. 16 (1).

On 10th April 1890 the Commissioners issued a further order bearing to be under section 5 of the Universities (Scotland) Act 1889, declaring the new University Court of the University of St Andrews to be duly constituted in terms of that Act.

Upon 24th November 1890 the Commissioners issued the Ordinances Nos. 1 and 2, St Andrews Nos. 1 and 2. Ordinance No. 1 regulated the election of the two representatives to the University Court by University College, Dundee, agreed upon as before explained. Ordinance No. 2 regulated the order of precedence of the principal and professors in the University of St Andrews, including the professors and principal of University College, Dundee. Both these ordinances were based upon the supposition that Dundee College formed part of the University of St Andrews.

Questions were raised with regard to the legality of the "Order" affiliating Dundee College to and making it form part of the University of St Andrews, and negotiations were entered into with a view to obtaining an Act of Parliament to settle the matter, but these negotiations in the end produced no result.

Upon 3rd February 1894 the Commissioners issued the Ordinances Nos. 46, 47, and 48, St Andrews Nos. 5, 6, and 7.

Ordinance No. 46, St Andrews No. 5, was entitled "Regulations as to Application of Parliamentary Grants, as to Salaries, and for the Institution of a Fee Fund, and for other purposes." It proceeded upon the preamble that the Commissioners had certain powers conferred upon them by the Universities (Scotland) Act 1889, section 14, sub-section 5, with regard to fees and salaries, by sub-section 10 with regard to the property of the Scottish Universities, by section 26 with regard to the apportionment of the annual sum of £42,000 to be provided by Parliament among the universities, and by the Education and Local Taxation Account (Scotland) Act 1892 with regard to the distribution of the annual sum of £30,000 payable out of the Local Taxation (Scotland) Account; and also upon the further preamble that "whereas by an order issued by the said Commissioners on the 21st day of March 1880, by virtue of the powers conferred by section 16 of the first-mentioned Act (*i.e.*, the Universities (Scotland) Act 1889) the University College, Dundee, was affiliated to and made to form part of the said University of St Andrews with the consent of the University Court, and also of the Council of the said College, and upon the conditions set forth in an agreement between the said bodies scheduled to the said order."

Upon this preamble the ordinance proceeded as follows:—"Therefore the Commissioners under the first-mentioned Act (*i.e.*, the Universities (Scotland) Act 1889) statute and ordain, with reference to the University of St Andrews, as follows:—I. Without prejudice to, but in corroboration of, the Order made by the said Commissioners on the 21st day of March 1890, the University College of Dundee is hereby affiliated to and made to form part of the University of St Andrews, subject to the conditions set forth in the agreement scheduled to the said order, and which order and agreement are set forth in Schedule I. hereunto annexed."

The rest of the ordinance dealt with the various matters referred to in the first part of the preamble. It proceeded throughout upon the assumption that Dundee College had been duly made to form part of the University of St Andrews. Schedule I. annexed to the ordinance was the Order dated 21st March 1890, and appended to it was a schedule containing the agreement between the University Court of St Andrews and Dundee College, including clause 4 quoted above.

Ordinance No. 47, St Andrews No. 6, was entitled "Professorships in the Faculty of Medicine in the University of St Andrews," and Ordinance No. 48, St Andrews No. 7, was entitled "Composition of the Faculties and Institution of Faculties of Science." Both these ordinances proceeded upon the assumption that Dundee College had been made to form part of the University of St Andrews, and that the professors of the College were now also professors in that University.

Upon 15th June 1894 the Commissioners issued an Ordinance No. 53, St Andrews No. 8, entitled Pensions to Principals and Professors. This ordinance proceeded upon the assumption that the principal and professors of Dundee College had been duly made a principal and professors of the University of St Andrews.

Upon 2nd March 1894 certain individual members of the University Court of St Andrews University brought an action (reported *ante*, 32 S.L.R. 182 and 402; 33 S.L.R. 405; and 34 S.L.R. 6; and 22 R. 210, 22 R. (H.L.) 13, 23 R. 559, and 23 R. (H.L.) 60), in which, *inter alios*, they called as defenders the Council of University College, Dundee, and in which the conclusions were for reduction of (1) the minute of the University Court of St Andrews University dated 15th February 1890; (2) the agreement dated 15th February 1890; (3) the docquet appended to the letter from the Secretary to the Commissioners dated 4th March 1890; (4) the Commissioners' "Order" dated 21st March 1890, affiliating the University College of Dundee and making it form part of the University of St Andrews; and (5) the Commissioners' "Order," dated 10th April 1890, declaring the new University Court of St Andrews University duly constituted.

Decree reducing the documents Nos. (4) and (5) was pronounced on 4th June 1895, but *quoad* the first three documents sought to be reduced the action was dismissed by interlocutor dated 4th March 1896, which was affirmed by the House of Lords on 27th July 1896.

Upon 2nd June 1894 the Universities Committee of the Privy Council met to consider the terms of the ordinances, and heard counsel for the General Council of St Andrews University and for the Council of Dundee College in support of petitions which had been lodged by these bodies. In respect of the action of reduction then depending, however, they adjourned *sine die*.

Upon 8th October 1895 the Commissioners issued an order of new declaring the University Court of the University of St Andrews to have been duly constituted.

Upon 23rd November 1896 the Universities Committee of the Privy Council again met to consider Ordinances Nos. 46 and 47, St Andrews Nos. 5 and 6, and heard counsel for the University Court and for the General Council of St Andrews University, both of which bodies had petitioned Her Majesty to withhold her approbation of these ordinances, and also connsel for the University College, Dundee, in support of them.

Upon 2nd December 1896 the Universities Committee of the Privy Council reported to Her Majesty that it might be advisable for Her Majesty to declare her approbation in part of Ordinance No. 46, St Andrews No. 5, that is to say, the whole of the ordinance with the omission of certain words.

The result of the omissions Nos. (1), (2), (3), and (4) recommended by the Committee was that the part of the preamble above quoted referring to the "Order" dated 21st March 1890 was omitted, and that clause I. of the ordinance was made to read as follows:—"The University College of Dundee is hereby affiliated to and made to form part of the University of St Andrews, subject to the conditions set forth in the agreement set forth in Schedule I. hereunto annexed." Schedule I. instead of containing the "Order" dated 21st March 1890, with the agreement between St Andrews University Court and the Council of Dundee College appended thereto in a schedule, contained only the agreement. The Committee also recommended (5) that the whole of article 4 of the agreement should be deleted.

By Privy Council minute dated 15th January 1897 the Queen in Council, upon the narrative that the Ordinances No. 46, St Andrews No. 5, and No. 47, St Andrews No. 6, had been made by the Commissioners in accordance with the powers conferred upon them by the Universities (Scotland) Act 1889, and had been published in the Edinburgh Gazette and had been laid before both Houses of Parliament as required by the Act, and that no address from either House of Parliament against the approbation of the same or of any part thereof had been presented to Her Majesty, and that petitions against the approbation in whole or in part of these ordinances had been presented by the General Council of the University of

St Andrews, the University Court of the University of St Andrews, the Council of University College of Dundee, and other bodies; that these had been referred to the Universities Committee, and that they had reported as above set forth, Her Majesty was pleased, by and with the advice of Her Privy Council, to declare Her approbation of part of Ordinance No. 46, St Andrews No. 5, that is to say, the whole of the ordinance with the omissions above specified as recommended by the Universities Committee, and of Ordinance No. 47, St Andrews No. 6.

By two Privy Council minutes, both also dated 15th January 1897, Her Majesty, by and with the advice of Her Privy Council, declared Her approbation of the Ordinances Nos. 48, St Andrews No. 7, and No. 53, St Andrews No. 8.

The Universities (Scotland) Act 1889 (52 and 53 Vict. c. 55) enacts as follows:—"Section 16—Without prejudice to any of the powers hereinbefore conferred, the Commissioners shall, with respect to the University of St Andrews and the University College of Dundee, have power (1) to affiliate the said University College to and make it form part of the said University, with the consent of the University Court of St Andrews, and also of the said College, with the object, *inter alia*, of establishing a fully equipped conjoint university school of medicine, having due regard to existing interests, and to the aims and constitution of the said College as set forth in its deed of endowment and trust. (2) In the event of the said University College being affiliated to and made to form part of the said University, to regulate the time, place, and manner of the first election of the assessors to be elected to the University Court by the General Council and by the Senatus Academicus of the said University after such affiliation, which election the Commissioners shall appoint to take place as soon as conveniently may be after such affiliation, and, in the event of such affiliation not taking place within such time after the passing of this Act as the Commissioners shall consider reasonable, they may regulate the time, place, and manner of such election as seems to them best. Section 19—(2) When the Commissioners have prepared the draft of any ordinance they shall cause it to be printed, and printed copies of it to be sent to the University Court, the Senatus Academicus, and the General Council of each university to which such ordinance relates, and shall also at the same time cause it to be published in such manner as they think sufficient for giving information to all persons interested. (3) During three months after the transmission to the University Court of any university of the draft of any ordinance relating to such university, the Commissioners shall receive any objections respecting such ordinance, and any amendments proposed thereon, submitted to them in writing by the University Court or the Senatus Academicus or the General Council, or by any member or members of any of them, or by any public body or persons directly affected thereby, and as soon as may be after the expiration of the said three months the Commissioners shall proceed to consider such objections and amendments. Provided that in computing the period of three months for the purposes of this section the months of August and September shall not be counted, nor any part thereof. Section 20—(1) All ordinances made by the Commissioners shall be published in the *Edinburgh Gazette* for four consecutive weeks, and shall be at the same time laid before both Houses of Parliament if Parliament be sitting, or if not, then within three weeks after the commencement of the next ensuing session of Parliament, and shall thereafter be submitted for the approval of Her Majesty in Council, and if neither House of Parliament within twelve weeks, exclusive of any period of prorogation, after an ordinance or part of an ordinance has been laid before it, presents an address praying the Queen to withhold her assent from such ordinance or any part thereof, it shall be lawful for the Queen in Council by order to approve the same or any part thereof to which such address does not relate. (2) It shall be lawful for the University Court, Senatus Academicus, or General Council of any university, or any governing body, and for the trustees or patron of any foundation, mortification, bursary, or endowment, or for any other person directly affected by any such ordinance, within one month after the last publication thereof in the *Gazette*, to petition Her Majesty in Council to withhold her approbation of the whole or any part thereof, and it shall be lawful for Her Majesty in Council to refer such petition to the Universities Committee, and to direct that they shall hear the petitioner or petitioners by themselves or by counsel, and report specially to Her Majesty in Council on the matter of the said petition; and it shall be lawful for Her Majesty, by Order in Council, either to declare her approbation of any such ordinance in whole or in part, or to signify her disapproval thereof in whole or in part, and in case of such disapproval the Commissioners may proceed to frame other ordinances in respect of the matters to which such disapproval relates, subject to the like provisions and conditions as are hereinbefore enacted; and no such ordinance shall be effectual until it shall have been so published, laid before Parliament, and approved by Her Majesty in Council. (3) The cost of any petition under this section may be regulated by the Universities Committee. Section 26—The Commissioners may by ordinance apportion the said annual sum (being an annual sum of £42,000 provided under section 25) among the said universities in such shares as they think just, and may prescribe how the share of each university is to be applied and expended," subject to two proviso clauses which are not of importance to the present question.

By section 5 (3) it was enacted that the University Court as constituted under the Act should be a body corporate with perpetual succession and a common seal. The

Universities (Scotland) Act 1858 contained no such enactment with regard to the University Court as constituted under that Act.

Upon 18th March 1897 certain members of the University of St Andrews brought the present action, in which they called as defenders (*first*) the University Court of the University of St Andrews, acting under the Universities (Scotland) Act 1889; (*second*) the Scottish University Commissioners; (*third*) the University of St Andrews; and (*fourth*) certain persons as members of the Council of University College, Dundee, as individuals and as such members and composing the said Council. The pursuers concluded for declarator that the Ordinances No. 1 St Andrews No. 1, No. 2 St Andrews No. 2, No. 46 St Andrews No. 5, No. 47 St Andrews No. 6, No. 48 St Andrews No. 7, and No. 53 St Andrews No. 8, as altered and approved by Her Majesty, were null and void, and of no force or effect in so far as they purported to affiliate University College, Dundee, to and to make it form part of the University of St Andrews, or otherwise and in particular that these ordinances were null and void and of no force or effect, to the extent in the summons thereinafter specified. Then followed a specification of those portions of the ordinances which the pursuers desired in the alternative to have declared null and void and of no effect, being those portions of the ordinances which either purported to affiliate University College, Dundee, to and to make it form part of the University of St Andrews, or which made arrangements with regard to University College, Dundee, or its principal and professors, on the assumption that it was a College, and that they were a principal and professors of St Andrews University, or made arrangements with regard to St Andrews University on the assumption that University College, Dundee, was part of that University. Then followed the following reservation — "But reserving always the full force and effect of said ordinances in all other respects; reserving the effect of said Ordinance No. 46, St Andrews No. 5, as an apportionment of the Parliamentary Grant divisible among the universities of Scotland under the Universities (Scotland) Act 1889, and under the Local Taxation (Scotland) Act 1892." The summons also concluded for reduction of the ordinances above enumerated "to the effect and under the reservations foresaid."

The defenders fourth sued alone lodged defences.

The pursuers set forth the facts narrated above, and also averred, *inter alia*, as follows—"(Cond. 17) . . . At said hearing before the Privy Council the said University Court maintained that they had not given and would not give any consent to the ordinances nor to any affiliation or union on the terms contained in said agreement. In answer to said petitions the said Commissioners prepared and forwarded to the Universities Committee a memorandum with reference to the said ordinances, which contained, *inter alia*, the following statement—'The Commissioners have no power to incorporate the College with the University without the consent of the University Court. That consent has been given, but only upon the conditions expressed in the agreement; and if these conditions were altered without the assent of both parties, there would be no consent on which the ordinance could be supported.' (Cond. 21) . . . The said University Court has never consented to the Ordinance No. 46, St Andrews No. 5, and said ordinance has never been submitted to a properly constituted University Court. No consent was given by the said University Court to any alteration. No consent has ever been given by either of the parties in terms of section 16 of the Universities (Scotland) Act 1889, to the union effected by Ordinance No. 46, St Andrews No. 5. A great many alterations were suggested to the Universities Committee of the Privy Council by the General Council of the University and by the University Court, on the lines proposed by the Commissioners and otherwise, but were all objected to by the defenders on the ground that they were outside the terms of consent which had been agreed to."

The defenders averred, *inter alia* — "(Answer to articles 17 and 18)—Explained that the portions of the Ordinance No. 46, disapproved of in paragraphs (1), (2), (3), and (4) are in no sense material. Nothing is thereby deleted except the formal references to the Commissioners' order of 21st March 1890, which was reduced, and which the Ordinance No. 46 replaces and supersedes. The portion disapproved of in paragraph 5 is the clause whereby the question of special representatives of Dundee on the St Andrews Court was reserved for the decision of the Commissioners. The clause was in the first instance consented to by the St Andrews Court on 15th February 1890. It had also been, along with the whole other terms of union, approved of by the St Andrews Senate on 8th March 1890. But when the original objections to special representation were reverted to on behalf of St Andrews before the Privy Council the present defenders intimated at the bar that their consent to the union would be in no way withdrawn or affected although the clause in question should be struck out in accordance with the contentions of St Andrews. The defenders never have withdrawn, and do not now withdraw, their consent to being affiliated to and made to form a part of the University of St Andrews on the terms and conditions embodied in Ordinance No. 46 as finally approved of. (Answer 21) . . . The terms of the consent have been altered only in one respect, and that at the request of the University of St Andrews. The said alteration is in no sense material, and is wholly in the interests and for the benefit of the University on whose behalf the pursuers profess to sue. The Ordinance No. 46 was made in full compliance with the provisions of the Act relative to procedure, and was approved of by the University Court of the University of St Andrews in office at the time, with

regard to the title of which Court to discharge its duties no doubt then existed. The said Court and all those concerned in the passing of the ordinance in question proceeded in the *bona fide* discharge of their respective duties."

The pursuers pleaded, *inter alia*—"1. The pursuers are entitled to decree of declarator and reduction as concluded for, as regards Ordinances No. 1 St Andrews No. 1, and No. 2 St Andrews No. 2, in respect said ordinances depend upon the order of 21st March 1890, which has been reduced. 2. The pursuers are entitled to decree of declarator and reduction, as concluded for, as regards Ordinance No. 46, St Andrews No. 5, in respect (1) that the consent required by section 16 of the Act of 1889 has not been obtained; (2) that it was incompetent for the Commissioners to issue an ordinance under section 16 after the constitution of the new University Court; or otherwise, that affiliation under section 16 could only be carried through while the old University Court remained in office; (4) that Ordinance No. 46, St Andrews No. 5, as issued, was merely corroborative of and based upon the order of 21st March 1890, which has since been reduced, with all that has followed thereon, and that the deletions have materially altered its meaning and intent. 3. The pursuers are entitled to decree of declarator and reduction, as concluded for, as regards Ordinances No. 47 St Andrews No. 6, No. 48 St Andrews No. 7, and No. 53 St Andrews No. 8, in respect said ordinances depend upon the illegal union effected by Ordinance No. 46, St Andrews No. 5."

During the discussion in the Inner House the pursuers were allowed to add the following plea-in-law—"The alleged consent was given upon terms which have not been given effect to, and have been materially altered, and in any event was not a consent which the Commissioners were entitled to act upon, at the time and in the manner in which they did, by issuing an ordinance professing to proceed upon said alleged consent."

The defenders pleaded, *inter alia*—"(1) In respect of the provisions of the Act of 1889, and of the powers thereby conferred on and exercised by the Commissioners, and the approval by Her Majesty in Council, the Court has no jurisdiction; or otherwise, the action is incompetent as laid. (4) The pursuers' averments being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (5) The union of University College, Dundee, with the University of St Andrews having been regularly and orderly carried out under and in terms of the statute, the defenders should be assoilzied from the conclusions of the summons."

On 10th July 1897 the Lord Ordinary (STORMONTH DARLING), after hearing counsel in the Procedure Roll, assoilzied the compearing defenders from the conclusions of the summons, and decerned with expenses.

Opinion.—[*After stating the facts*]—"In these circumstances the defenders state a preliminary plea that the approbation of the Queen in Council is conclusive, and that this Court has no jurisdiction to examine the procedure which led up to it, even with the view of ascertaining whether the statutory conditions have been complied with. I cannot assent to that argument. This case does not involve any question as to the exercise of the royal prerogative. The powers committed to the Queen in Council are purely statutory. All questions of policy and discretion as to the approval or disapproval of an ordinance are absolutely committed to the Queen in Council subject to an address from either House of Parliament, and this Court has no jurisdiction to entertain for a moment any question of that kind. But that does not in the least derogate from the jurisdiction of the Supreme Court to decide whether a statute has or has not been complied with. That is a kind of jurisdiction which it alone can exercise, and it cannot escape from deciding whether a statutory duty has been lawfully performed, however august may be the authority to which the duty has been entrusted.

"I proceed, therefore, to examine the grounds on which the pursuers allege that the statute has been violated.

"The first of these, as I understand the argument, is that when the Commissioners issued the ordinance in February 1894, they were not entitled to proceed on the consent of the Old University Court which had been obtained in 1890. I ask, why not? It is quite true that under section 16 (1) the Commissioners had not power to incorporate these two institutions except with the consent of the governing body of each. The power to consent had been expressly conferred on the Old University Court by section 5 (4). The consent had been given, and it had never been withdrawn. I can find nothing in the Act to warrant either of the propositions contained in the second branch of the pursuers' second plea-in-law.

"The pursuers' second ground of objection is that the deletions made by the Queen in Council materially altered the meaning and intent of the ordinance, and accordingly that the ordinance in its final shape effected a union to which the University Court had never consented. But that seems to me to involve the fallacy that the consent of the Court had to be given to the ordinance itself. Now, the consent required by section 16 (1) is an initial consent. The Commissioners cannot move a step without it; but having got it, they proceed to frame their ordinance, and it follows as a necessary consequence from that being held to be the proper form of procedure, that the ordinance must run its appointed course. It cannot, under the statute, have any new term added to it, but it is subject to partial disapproval either at the instance of Parliament or the Privy Council; and partial disapproval may of course have the effect of materially altering the conditions of union. But the two bodies having consented to union, must be understood to have taken their risk of all that; and no

very great risk it is, because they have the amplest opportunity of satisfying the Queen in Council that partial disapproval would be unfair to one or both of them. In the present case it is quite plain that no injustice was done to the interests which the pursuers represent by the deletions made in the ordinance. Most of these were purely verbal, and consequential on the reduction of the Commissioners' order of 1890. The only alteration which had any substance in it was the deletion of article 4 of the scheduled agreement, and it is stated by the defenders, without contradiction, that this was done because they intimated that their consent to the union would not be affected by giving effect in this way to one of the contentions urged by the St Andrews Court. In plain English, the pursuers as representing the University are now seeking to take advantage of a concession obtained by the University in order to upset the ordinance altogether. To that kind of argument no court of law can give effect.

"The pursuers' third ground of objection is, that when the Commissioners issued the draft of their ordinance, there was no University Court legally in existence to which it could be referred. There was, of course, a *de facto* Court, because the Commissioners by their order of 10th April 1890 had declared the new Court to be duly constituted. But this declaration was one of the documents cut down by the House of Lords in 1895, and the Commissioners' new declaration was not issued till 8th October of that year. I do not understand it to be disputed that the Commissioners had power to issue this latter declaration, because section 16 (2) expressly empowered them to appoint a new Court to be elected, even although incorporation had not taken place. But the argument, as I understand it, is that in the interval between 10th April 1890 and 8th October 1895 the *de facto* Court was not legally constituted, because it contained the new members allowed by the Act of 1889, instead of being limited to the six persons who formed the Court under the Act of 1858. The conclusion sought to be drawn is, that all its proceedings during these five years, including its consideration of the draft ordinance, were illegal. It would be a great misfortune if the law were so hidebound by logic as to make such a conclusion inevitable. But happily it is not so. The judgment of the House of Lords in *Livingstone* v. *Proudfoot*, 6 Bell's App. 469, *aff.* 8 D. 898, is directly in point. The judgment was that the judicial proceedings of a presbytery were not rendered void by the circumstance that for nine years it had contained a number of members who were not properly qualified; and the ground of judgment was that stated by Lord Stair (4, 42, 12), where he says that to any reduction upon such a ground 'holden and reputed will be a sufficient defence.' There can be no stronger kind of general and *bona fide* repute than that which is founded upon formal recognition by a statutory body of Commissioners.

"These are the pursuers' main pleas. They state some others, such as that the Commissioners had no powers over the Dundee College, and that an ordinance effecting incorporation ought to have dealt with nothing else. But these, I think, cannot be seriously maintained.

"I have dealt with the action as if it related solely to the ordinance of incorporation, because unless the pursuers succeed in reducing that, their case is gone. I would only add that the proposal in the summons to reserve the effect of the ordinance as an apportionment of the Parliamentary Grant seems to me quite inadmissible in any view, because plainly the amount was fixed with reference to the enlarged University, and if the incorporation were to go, the apportionment would have to go with it. The result is that, in my opinion, the defenders' fourth plea-in-law is well founded, and that they are entitled to absolvitor."

The pursuers reclaimed.

The arguments of parties appear from their pleas and from the opinions of the Lord Ordinary and Lord Moncreiff. It ought, however, to be noted that the defenders maintained that, although they did not dispute the jurisdiction of the Court to inquire whether statutory powers committed to Her Majesty in Council had been duly exercised, in this case the Court had no jurisdiction, because (1) all the questions raised by the pursuers had been committed to the final arbitrament of the Queen in Council, and (2) this was really an attempt to get the Court to revise the distribution of the grant under sec. 25, which the Court had no right to do, in respect that this power had been exclusively conferred upon the Commissioners by sec. 26.

At advising—

LORD JUSTICE-CLERK—It is unnecessary to go over the history of this case, which is fully stated by the Lord Ordinary. The pursuers desire to have the latest ordinance by which the University of St Andrews and the University College of Dundee have been united, set aside, on grounds connected both with the action of the Commissioners who issued the ordinance and the action of the Queen in Council in approving of it, under the authority of the Universities Act of 1889.

First, it is said that in issuing the ordinance the Commissioners proceeded upon the consent given by agreement by the University Court of St Andrews in 1890, and that they had no power to do so. I am unable to understand wherein the force of this objection lies. The consent was given. The Commissioners upon that consent took a course which was afterwards held to be not within their powers, and their proceedings were reduced. But I cannot hold that their having done something which it has been held technically that they could not do, makes it illegal for them, with the consent still before them, to do that which they had a legal right, and if they so held, a legal duty to do. It cannot be disputed that they had

in 1890 power to do what they have done by the later ordinance. Any mistake they may have made, which is removed and out of the way, cannot affect their competency to do that which the statute under which they were acting authorised.

The pursuers further maintain, that if the ordinance were to be held competent they are entitled to have it set aside, because when under the statute it was passed on for consideration of the Queen in Council, certain alterations were made in it, and that it has therefore become an ordinance not according to the form of the consent given by the University Court under section 16 of the statute, and upon which it proceeded. Now, it is plain that when consent was given under the statute, it was to an ordinance in terms of it being issued, and nothing else. For it has been held by the final Court of Appeal that whatever the Commissioners did upon the consent, and in whatever form they did it, their proceedings fell within the powers given to the Queen in Council, according to the rules laid down for the revisal of ordinances. In other words, anything done in the way of affiliation or incorporation under section 16 had to be dealt with as if section 16 had contained an express proviso that it should be subject to the provisions of section 20, appointing all ordinances to be laid before Parliament and submitted to the Queen in Council. Such an ordinance, therefore, under section 16, was subject to such revision as is provided by section 20, and was therefore subject to disapproval in whole or in part. Can it be said that if any part of it were so disapproved on revisal, that would entitle any person interested to have the ordinance, as approved by the Queen in Council, reduced and set aside, on the ground that what was ultimately done by the Queen in Council was in some small particular an alteration by deletion of something in the ordinance which was inserted because it was contained as a condition in the consent given under section 16? I cannot so hold. Those who were consenting parties must now be held to have known that the ordinance following could be dealt with like any other ordinance under section 20. In giving their consent to what was to be done by the ordinance, they consented that, being by ordinance, it should go through the procedure, and be subject to be affected by exercise of the powers conferred by statute upon the Queen in Council in dealing with such ordinances after all interested had been duly heard. But even had it been otherwise, I should have no hesitation in disregarding the objection stated. All the deletions except one were verbal, in no way affecting the result, and only making the wording of the ordinance conformable to the existing state of facts resulting from the reduction in the former action. The only practical alteration was the deletion of a clause favourable to the defenders, which they consented should be struck out because the University of St Andrews objected to it, and they did not care to insist upon it. The pursuers, who profess to have the interests of St Andrews University at heart, thus try to make use against the defenders of what was in reality a concession offered to and accepted by that University before the Privy Council. The plea is one to which, as the Lord Ordinary says, no court of law can give effect.

The last ground of reduction is that the Commissioners' ordinance could not be referred to the University Court of St Andrews, there being then no such court in existence, the Commissioners' appointment of a court under the statute having been cut down in the former reductions. This contention is also, I think, quite unsound. A University Court was ostensibly appointed by the statutory authority, did sit, did act in the *bona fide* fulfilment of the duties of the Court, not only on this matter, but on all the multifarious matters which statute and custom require shall be dealt with in regular course by the court of a university. That its actings, in so far as it proceeded as a properly constituted court might have done, were good and valid, cannot, I think, be doubted. Even judicial acts done by a judiciary held and reputed to be acting under proper powers, have been held valid and effectual where it has been discovered later that technically the office was not duly held by those acting as holders, there being no corrupt or masterful assumption of it, but a *bona fide* action on belief of duty. Such a view is according to the principles of sound legal policy, for most disastrous results might follow to innocent persons, and to public institutions and interests, if in such circumstances acts done in the fulfilment of what was believed and held to be the exercise of office were to be held null.

I agree with the Lord Ordinary that the defenders are entitled to absolvitor.

LORD YOUNG—I agree in the result of the Lord Ordinary's judgment. I think there are no grounds for sustaining any of the conclusions, either declaratory or reductive, of the summons. I do not think it necessary—indeed I do not think it would be in any respect profitable—to enter into details. I think the pursuers set forth no ground, have established no grounds, for giving them any of their conclusions. I notice—my attention has been called to it—that the Lord Ordinary has stated in the end of his note, as the result at which he has arrived, that the defenders' fourth plea-in-law is well founded. I should not myself have been disposed to put the judgment upon the fourth plea. I should rather, if I had been to select a plea, have taken the fifth, which is that the union of University College, Dundee, with the University of St Andrews having been regularly and orderly carried out under and in terms of the statute, the defenders should be assoilzied from the conclusions of the summons. I have said that it is in my opinion unnecessary and would be unprofitable to enter into details—my conclusion being simply that the defenders should be assoilzied from all the conclusions of the action.

LORD TRAYNER—I think the Lord Ordinary's judgment is right, and I agree with Lord Young in thinking that the fifth plea-in-law for the defenders ought to be sustained.

LORD MONCREIFF—I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

It may be questioned whether the objections stated by the pursuers to Ordinance No. 46, St Andrews No. 5, as altered and approved by Her Majesty in Council, are not such as are by the statute reserved for the final decision of the Queen in Council; but assuming that they are competently before us, I am of opinion with the Lord Ordinary that they are one and all unfounded.

I think that in the end it was conceded that the consent originally given on 15th February 1890 was unobjectionable.

1. The pursuers maintain that the consent of the University Court of St Andrews was never obtained to the affiliation and incorporation of the Dundee College with the University by means of an ordinance which should be subjected to the procedure enjoined by sections 19 and 20 of the Universities (Scotland) Act 1889. They say that what the University Court did consent to was an ordinance or order which should come immediately into operation without being exposed to criticism and objection under the procedure prescribed by those sections.

It requires some hardihood even to formulate this objection. The present pursuers' predecessors, the pursuers of the first action of reduction, succeeded in obtaining from the House of Lords a judgment to the effect that the Commissioners' Order of 21st March 1890 was invalid, and should be reduced in respect that the procedure enjoined by sections 19 and 20 for all ordinances made by the Commissioners had not been observed. That order having been reduced on the ground mentioned, and an ordinance to the same effect as the reduced order having been made by the Commissioners and approved of by Her Majesty in Council after due procedure, the pursuers, who like their predecessors object to the affiliation and incorporation of Dundee College with the University of St Andrews, maintain that no consent was given to affiliation and incorporation by an ordinance to be so approved. In other words, that the University Court of St Andrews only consented to affiliation and incorporation in a manner not authorised by the statute.

Apart from the answer that the scheduled agreement contains no such reservation, it must, I think, be held that the University Court when they gave their consent, consented to the affiliation and incorporation being carried out according to law.

2. The pursuers maintain that the consent required by the statute is a consent to be given by the University Court in existence at the time when the ordinance is made; and that as Ordinance No. 46 was not made until 3rd February 1894, the consent given by the former University Court on 15th February 1890 is ineffectual. I do not find in the statute any provision or indication of intention that a consent well given and never withdrawn shall become inoperative simply because of an alteration in the composition or constitution of the University Court, or because some time may have elapsed between its date and the date when the ordinance is made.

3. The pursuers object that material alterations were made upon the ordinance by the Queen in Council, and that this was illegal. It being, as we must now hold the law, that affiliation and incorporation under section 16 can only legally be effected by following the procedure enjoined by sections 19 and 20, it necessarily follows that an ordinance which proceeds upon a consent given by the College and the University is subject to alteration by Her Majesty in Council. Under section 20 the Queen in Council is empowered to disapprove of such ordinance in whole or in part. This implies that part of an ordinance which proceeds on consent may be struck out. By giving its consent the University Court subjected itself to this risk.

The pursuers further maintain that even if part of the ordinance proper may be legally disapproved by Her Majesty in Council, the terms and conditions of the original consent cannot be touched. I do not think that in this question it is possible to separate the consent from the ordinance, of which it forms an integral part. But, further, the consent has not in this case, in any reasonable sense, been altered. Apart from a few necessary verbal alterations, the only part of it which has been deleted, viz., the fourth article, was deleted at the request of St Andrews Court.

4. As to the pursuers' objection that when the Commissioners issued their Ordinance No. 46 there was no University Court legally in existence to which it could be referred, I agree with the observations and reasoning of the Lord Ordinary.

Perhaps the most plausible way of stating the pursuers' case is to say that the consent given by the old University Court in 1890 is spent; that it is too late to resuscitate it, when after the lapse of several years an attempt to carry it into effect has failed, and a new University Court has been constituted, and that it is for the new Court to decide whether consent should now be given or not. This argument is not without force, but if tested it will be found to be without any foundation in law.

On the whole matter I think the defenders have been rightly assoilzied.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel for the parties on the reclaiming-note against the interlocutor of Lord Stormonth Darling, dated 10th July 1897, refuse the reclaiming-note, adhere to the interlocutor reclaimed against, and decern: Find the defenders entitled to additional expenses," &c.

Counsel for the Pursuers and Reclaimers —Sol.-Gen. Dickson, Q.C.—Dundas, Q.C.—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for the Defenders and Respondents—Johnston, Q.C. — Clyde. Agent—J. Smith Clark, S.S.C.

Friday, December 17.

FIRST DIVISION.

[Railway Commissioners.

NORTH EASTERN RAILWAY COMPANY *v.* NORTH BRITISH RAILWAY COMPANY.

Railway—Railway Commissioners—Appeal —Competency—Regulation of Railways Act 1873 (36 *and* 37 *Vict. cap.* 48), *sec.* 8—*Railway and Canal Traffic Act* 1888 (51 *and* 52 *Vict. cap.* 25), *sec.* 17.

Where the Railway Commissioners sit in lieu of arbitrators under the provisions of section 8 of the Regulation of Railways Act 1873, they exercise a proper jurisdiction not depending on the consent of the parties, and an appeal is competent under section 17 of the Railway and Canal Traffic Act 1888 to a superior court on a question of law.

Railway—Railway Commissioners—Appeal — Competency — Railway and Canal Traffic Act 1888 (51 *and* 52 *Vict. cap.* 25), *sec.* 17.

The Railway and Canal Traffic Act 1888 provides by section 17 that an appeal on a question of law, save as otherwise provided by that Act, shall lie from the Railway Commissioners to a superior court of appeal.

Held that an appeal was competent although the order appealed against disclosed no question of law, but where it appeared on the face of the judgments of the Commissioners that the order had been made because of a determination of a question of law.

Railway—Running Powers.

By an agreement entered into between the North Eastern and North British Railway Companies, scheduled to and incorporated with an Act of Parliament, it was provided that "for the purpose of maintaining and working in full efficiency in every respect the East Coast route by way of Berwick for all traffic between London and other places in England, and Edinburgh, Leith, Glasgow, and other places in Scotland, the North British Company shall at all times hereafter permit the company (*i.e.*, the North Eastern), with their engines, carriages, waggons, and trucks, to run over and use the North British Company's railway . . . between Berwick and Edinburgh . . . subject to the payment by the company to the North British Company for such user of such tolls, rates . . . as have or has been or shall from time to time be agreed upon by and between the said companies, or in default of such agreement, as shall be fixed by arbitration in manner hereinafter provided."

Under their statutory powers the Railway Commissioners became the judges both of the extent to which the running powers so conferred were to be exercised and of the payments to be made for the use of the North British Company's line.

In an application to the Commissioners, the North Eastern asked for an order authorising them to run the whole existing service of passenger trains upon the East Coast route.

Held that the fact that the North British Company were owners of the line gave them no legal right to run any of the East Coast passenger trains, and formed no legal obstacle to the Commissioners (in the exercise of their discretion) granting the North Eastern Company's application.

This is a sequel of the case reported *ante* under date 17th December 1896, vol. xxxiv. p. 179, and 24 R. (H.L.), p. 19.

By article 8 of an agreement between the North Eastern and North British Railway Companies, scheduled to and incorporated with the North Eastern and Carlisle Amalgamation Act 1862, it is provided—"8thly. For the purpose of maintaining and working in full efficiency in every respect the East Coast route by way of Berwick, for all traffic between London and other places in England and Edinburgh, Leith, Glasgow, and other places in Scotland, the North British Company shall at all times hereafter permit the company, with their engines, carriages, waggons, and trucks, to run over and use the North British Company's railway, sidings, stations, wharves, and stopping, loading, and unloading places, water, watering-places, and other conveniences at and between Berwick and Edinburgh and Leith, all inclusive , . . subject to the payment by the company to the North British Company for such user of such tolls, rates, or dues, or such share or proportion of tolls, rates, or dues, as have or has been or shall from time to time be agreed upon by and between the said companies, or in default of such agreement as shall be fixed by arbitration in manner hereinafter provided."

By article 17 it is provided — "If and whenever any dispute or difference shall arise between the company and the North British Company as to facilities or accommodation to be given, or as to any rent or charge or allowance (terminal or otherwise) to be paid or allowed by either company to the other under this agreement, every such difference shall be determined by arbitration under the Railway Companies Arbitration Act 1859."

Section 8 of the Regulation of Railways Act 1873 (36 and 37 Vict. c. 48) provides—"Where any difference between railway companies . . . is under the provisions of any general or special Act . . . required or authorised to be referred to arbitration, such difference shall, at the instance of