

[28th August 1835.]

UNIVERSITY of GLASGOW, Appellants.—*Sir William Follett.*

The FACULTY of PHYSICIANS and SURGEONS, Respondents.—*Lord Advocate Murray.*

*Corporation—Exclusive Privilege—College.*—The Court of Session having held, 1. That the Faculty of Physicians and Surgeons in Glasgow are a legal corporation. 2. That the Faculty by virtue of the charter 1599, ratified by parliament in 1672, have power to debar from the practice of surgery persons who have not submitted to examination before them, or who have not attained their licence to practise. 3. That the degree of doctor of physic from a university where medicine is taught does not entitle the possessor to practise surgery within the bounds specified in the charter, unless he obtains a licence from the faculty. 4. That a testimonial of skill in surgery from a university where surgery is taught, or the degree of master in surgery recently introduced in the University of Glasgow, does not entitle the possessor to practise surgery within these bounds, unless he submits to examination by the Faculty and is licensed by them; and the University of Glasgow having appealed this judgment, the House of Lords remitted the cause to the Court of Session with directions to consider whether the Faculty of Physicians and Surgeons of Glasgow are a corporation capable in law of possessing and in fact clothed with the rights for which they contend in this action.

THE Faculty of Physicians and Surgeons of Glasgow was originally constituted by virtue of a grant from

2D DIVISION.

Lord Medwyn.

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King James VI., of date 29th November 1599, addressed to Mr. Peter Low, surgeon to the King, and Mr. Robert Hamilton, Professor of Medicine in the College of Glasgow, and was of the following terms:—

“ James, &c. Wit ye us, with advise of oure counsell, understanding the grit abuses quhilk hes bene comitted in time bygane and zit daylie continueis be ignorant, unskillit, and unlearnit personis, quha under the collour of chirurgians abuisis the people to thair plesuir, passing away but tryel or punishment, and thairby destroyis infinite number of our subjects, quhairwith na ordour hes bene tane in tyme bigane, specially within oure burgh and baronie of Glasgow, Renfrew, Dumbartane, and oure sherifdomes of Clidsdale, Renfrew, Lanerk, Kyll, Carrick, Air, and Cuninghame; for avoiding of sik inconvenientis, and for gude ordoure to be tane in tyme cuming, to have maid, constitut, and ordanit, and be the tenoure of thir oure letteris makis, constitutis, and ordainis, Maister Peter Low, our chirurgiane, and chief chirurgiane to oure dearest son the prince, with the assistance of Maister Robert Hamilton, professoure of medicine, and thair successouris, indwelleris of our citie of Glasgow, gevand and grantand to thame and thair successoures full power to call, summond, and convene before thame, within the said burgh of Glasgow or any otheris of our said burrows or publict places of the foirsaid boundis, all personis professing or using the said art of chirurgie, to examine thame upon thair literature, 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 exer-

“ cise thaireftir, resave thair aithis, and authorize thame  
 “ as accordis, and to discharge thame to use onie farder  
 “ nor they have knowledg passing thair capacity, laists  
 “ our subjectis be abusit; and that every ane citat  
 “ report testimonial of the minister and elders or ma-  
 “ gistratis of the parochin whair they dwell of thair  
 “ life and conversatione; and in case they be contumax,  
 “ being lauchfullie citat, everie ane to be unlawit in  
 “ the soume of fortie pundis, toties quoties, half to the  
 “ judges, other half to be disponit at the visitoures  
 “ plesure; and for payment thair of the said Mr. Peter  
 “ and Mr. Robert, or visitoures, to have oure other  
 “ letteris of horning on the partie or magistrates whair  
 “ the contemptuous person dwellis, chargeing thame to  
 “ poind thairfor within twentie-four houris under the  
 “ pain of horning; and the partie not haveand geir  
 “ poindable, the magistrates, under the same pain, to  
 “ incarcerate thame, quhill caution responsall be fund  
 “ that the contumax persone shall compeir at sick day  
 “ and place as the saidis visitouris sall appoint, gevand  
 “ trial of their qualifications: Nixt, That the saidis  
 “ visitouris sall visit every hurt, murtherit, poisonit, or  
 “ onie other persoun tane awa extraordinarily, and to  
 “ report to the magistratis of the fact as it is: Thirdlie,  
 “ That it sall be leisum to the saidis visitouris, with the  
 “ advice of thair bretheren, to make statutis for the  
 “ common well of oure subjectis anent the saidis airtis  
 “ and using thair of faithfullie, and the breakeris thair of  
 “ to be punishit and unlawit be the visitouris according  
 “ to thair falt: Fordlie, It sal not be leisum to onie  
 “ manner of personis within the forsaidis boundis to  
 “ exercise medicine without ane testimonial of ane  
 “ famous universitie quhair medicine is taught, or at

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“ the leave of oure and' oure dearest spouse chief medi-  
 “ cinaris ; and in case they failzie, it sall be leisum to  
 “ the saidis visitouris to challenge, perseu, and inhibit  
 “ thame throw useing and exercing of the said airt of  
 “ medicine, under the pain of fortie pundis, to be dis-  
 “ tributed, half to the judges, half to the pure, toties  
 “ quoties they be fund in useing and exercising of the  
 “ same, ay and quhill they bring sufficient testimonial  
 “ as said is : Fyftylie, That na manir of personis sell  
 “ onie droggis within the cite of Glasgow except the  
 “ sam be sichtit be the saidis visitouris and be William  
 “ Spang, apothecar, under the pane of confiscatioune  
 “ of the droggis : Sextlie, That nane sell rattoun poison,  
 “ asenick, or sublemate, under the pane of ane hundred  
 “ merkis, except onlie the apothecaries who sall be  
 “ bound to take caution of the byaris for coast, scaith,  
 “ and damage : Seventlie, That the saidis visitouris,  
 “ with thair bretheren and successouris, sall convene  
 “ every first Mononday of ilk moneth at some conve-  
 “ nient place to visite and give counsill to pure disasit  
 “ folks gratis : And, last of all, gevand and grantand to  
 “ the saidis visitouris, indwellers of Glasgow, profes-  
 “ souris of the saidis airtis, and thair bretheren, present  
 “ and to cume, immunite and exemption from all wappin  
 “ shawings, raidis, oistis, beiring of armour, watching,  
 “ wairding, stenting, taxationis, passing on assizes,  
 “ inquestis, justice courtis, scherriff or burrow courtis,  
 “ in actions criminal or civil, notwithstanding of oure  
 “ actis, lawis, and constitutionis thairof, except in giving  
 “ their counsill in materis appertaining to the saidis  
 “ airtis : ordaining you all the foresaidis provestis,  
 “ baillies of burrowis, sheriffis, stewartis, baillies of re-  
 “ galities, and otheris ministeris of justice within the

“ saidis boundis, and zoure deputis, to assist, fortifie,  
 “ concur, and defend the said visitouris and thair pos-  
 “ teritie, professouris of the saidis artis, and put the  
 “ saidis acts maid and to be maid to execution; and  
 “ that oure other letteris of our session be granted there-  
 “ upon to charge thame to that effect within twentie-  
 “ four houris nixt after they be chargit thairto. Gevin  
 “ under oure previe seall at Haliruid house, the penult  
 “ day of November, the year of God javc. and four-  
 “ score nynetein zeiris, and of oure reign the thirty-  
 “ three year.”

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In 1600 this letter was recorded in the burgh books,  
 the authority of the magistrates being interponed thereto;  
 and, of date 3d June 1602, the following took place,  
 thus recorded in the minutes of the Faculty:—

“ The quilk day, w<sup>in</sup> the Blackfrier Kirk of Glasgow,  
 “ in presence of Sir George Elphistoune of Blaiths-  
 “ wood, Knight, provest, James Forrest, John Ander-  
 “ sounne, Will. Andersounne, baillies thereof, compeirt  
 “ Mr. Peter Low and Mr. Robert Hamiltoune, whilk  
 “ producit ane gift of our Soverayne Lord anent their  
 “ liberties, w<sup>t</sup> the provest and baillies authoritie inter-  
 “ ponit thereto, as the samyn at length beires, and  
 “ made convention with y<sup>r</sup> breithren, videlicet, Adam  
 “ Fleming, Mr. Rob<sup>t</sup> Allasone, William Spang, Thomas  
 “ Thomsonsone, John Lowe; and the samyn being red, the  
 “ said Mr. Peter and Mr. Rob<sup>t</sup> was content, of their  
 “ ane consents, notwithstanding of their nomination of  
 “ gift, that ilk yeir aince at Michelmes the samyn shall  
 “ be lytit amongst the brethrine, and wha be manniest  
 “ vottis beis elected to remaine visitor for ane year  
 “ y<sup>r</sup> efter, and so forth yearly in all tyme coming; and  
 “ also is content y<sup>t</sup> the fores<sup>ds</sup> persons, brethren of

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“ craft presentlie admitted by them, shall have power  
 “ and libertie to use the craft and calling as free as  
 “ themselves efter their knowledge, and that they shall  
 “ not visit any of the foirs brethren patients being on  
 “ cuir w<sup>t</sup>out their aune consents and the patients first  
 “ had and obtained thereto ; quik brethren being present  
 “ consents to concure, assist, and had hand to ; and,  
 “ thereafter the said Mr. Robert, present visitor, whill  
 “ Michalmese, be consent of the brethren hes elected  
 “ Robert Herberstone, notar, clark to them, who hes  
 “ given his oath of fidelitie, and also creat George  
 “ Bonnell officer quill Michelmes, and hes given his  
 “ oath, and the said brethren, to conveine all such  
 “ tymes as shall be appoynted, being warned be the  
 “ officer, under the paines conteinit in the ordinance to  
 “ be set doune thereanent ; the brethren hes p<sup>n</sup>tly given  
 “ their oathes, and ordained the rest, and John Hall,  
 “ to be conveined, and y<sup>t</sup> they shall concur and assist  
 “ y<sup>r</sup> w<sup>t</sup> uthers as becomes.”

On the 22d of the same month the members met and fixed the fees of entry, and inter alia ordained “ that  
 “ barbers, being a pendicle of chyrurgerie, shall pay at  
 “ their admission fortie pundis Scots, and ilk zeir  
 “ twentie shilling to the pair, and limitit not to meddle  
 “ with any thing farder belonging to chyrurgerie, under  
 “ the paine of five pundes toties quoties.” In 1656 the Faculty agreed to purchase from the town council a seal of cause or letter of deaconry, “ but prejudice of the old  
 “ gift grantit them by the deceast King James ;” and accordingly on the 16th August of that year they obtained from the magistrates and council a letter of deaconry in favour of the surgeons and barbers, constituting them a burghal corporation. In 1722, however,

the “surgeons and pharmacians” surrendered, so far as they were concerned, their privileges under the letter of deaconry, and this surrender being accepted by the magistrates, the burgh corporation thereafter consisted exclusively of barbers. In the meanwhile the original grant of King James had been confirmed by act of Parliament in 1672, which in substance repeats and ratifies the privileges thereby conferred. Under authority of this grant the Faculty had been in use, from the date of their constitution in 1602, to exercise the privileges of a corporation, making bye laws, admitting members, and debarring persons not admitted from practising surgery within the city, their title never being questioned, and their applications for this purpose in their corporate capacity being enforced by the courts of law in a long series of cases. In 1815, in an action before this Court for having one Steel and others prohibited from practising surgery without being licensed by them, a defence was maintained by the parties complained of that they had obtained degrees of doctor of medicine in the Scottish universities, and that these entitled them to practise surgery in Glasgow as in any part of the kingdom without further licence. The Court repelled this defence, and prohibited the parties in question from practising surgery in Glasgow without examination and licence by the faculty<sup>1</sup>; but immediately thereafter a chair of surgery having been instituted in the college of Glasgow, the university commenced granting degrees in surgery, which the parties obtaining them considered to authorize their practising surgery without a licence from the Faculty, notwithstanding the decision in the case

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<sup>1</sup> Faculty of Physicians and Surgeons v. Steele, &c. Feb. 26, 1819.

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above mentioned, on the assumption that it had proceeded upon the view taken of the nature of the degree of doctor of medicine, as not including under it a degree in surgery.

The University of Glasgow, by which these new degrees were granted, had originated in the following bull from Pope Nicholas V., in the year 1450: “ Nicolaus  
“ Episcopus, servus servorum Dei ad perpetuam rei  
“ memoriam. Inter cæteras felicitates quas mortalis  
“ homo in hac labili vita ex dono Dei nancisci potest,  
“ ea non in ultimis computari meretur quod per  
“ assiduum studium adipisci valet scientiæ margaritam,  
“ quæ bene beateque vivendi viam præbet, ac peritum  
“ ab imperito sui pretiositate longe facit excellere, et ad  
“ mundi arcana cognoscenda dilucide introducit. Suf-  
“ fragatur indoctis, et in infimo loco natos vehit in sub-  
“ limi, et propterea sedes apostolica rerum spiritualium  
“ et etiam temporalium provida ministratrix, et cujusvis  
“ commendabilis exercitii perpetua consultans adjutrix,  
“ ut eo facilius homines ad tam excelsam humanæ con-  
“ ditionis fastigium acquirendum, et acquisitum in alios  
“ refundendum semper cum augmento ducantur, illos  
“ hortatur, eis loca preparat, illos juvat et fovet, ac  
“ favoribus prosequitur gratiosis. Cum itaque sicut pro  
“ parte carissimi in Christo filii nostri Jacobi Scotorum  
“ regis illustris nuper fuisset expositum nobis quod  
“ ipse rex non solum ad utilitatem reipublicæ, ac  
“ incolarum et habitatorum terrarum sibi subjectarum,  
“ sed et aliarum partium vicinarum laudabiliter inten-  
“ dens, in ejus civitate Glasguensi, tanquam in loco  
“ insigni et valde accommodo, in quo aeris viget tem-  
“ peries, victualium ubertas, cæterarumque rerum ad  
“ usum humanum pertinentium copia reperitur, desi-



“ deret plurimum fieri et ordinari per sedem apostoli-  
 “ cum studium generale in qualibet licita facultate, ut  
 “ ibidem fides Catholica dilatetur, erudiantur simplices,  
 “ equitas servetur, iudicii vigeat ratio, illuminentur men-  
 “ tes, et intellectus hominum illustrentur, nos præmissa,  
 “ et etiam eximiam fidei et devotionis sinceritatem  
 “ quam idem Rex ad nos et Romanam ecclesiam gerere  
 “ comprobatur, attente considerantes, ferventi desiderio  
 “ ducimur quod civitas ipsa scientiarum ornetur mune-  
 “ ribus ita ut viros producat consilii maturitate con-  
 “ spicuos, virtutum redimitos ornatibus, et diversarum  
 “ facultatum dignitatibus eruditos, sitque ibi scienti-  
 “ arum fons irrigans, de cuius plenitudine haurient  
 “ universi literarum cupientes imbui. Documentis hiis  
 “ igitur omnibus, et præsertim ydoneitatem ejusdem  
 “ civitatis, quæ, ut accepimus, ad multiplicanda doc-  
 “ trinæ semina et germina salutaria producenda valde  
 “ congrua et accomoda fore dicitur, diligenti examina-  
 “ tione pensatis, non solum ad ipsius civitatis, sed etiam  
 “ incolarum et habitatorum totius regni Scotiæ et  
 “ regnorum circumjacentium, commodum atque pro-  
 “ ficuum paternis affectibus excitati, necnon ipsius  
 “ regis in hac parte supplicationibus inclinati ad laudem  
 “ divini nominis et orthodoxæ fidei propagationem, in  
 “ eadem civitate generale studium auctoritate apostolica  
 “ erigimus et statuimus, et etiam ordinamus ut in ipsa  
 “ civitate de cætero studium hujusmodi perpetuis fu-  
 “ turis temporibus vigeat, tam in theologia ac jure  
 “ Canonico et civili quam artibus et quavis alia licita  
 “ facultate, quodque doctores, magistri, legentes, et stu-  
 “ dentes ibidem omnibus et singulis privilegiis, liberta-  
 “ tibus, honoribus, exemptionibus, immunitatibus per  
 “ sedem apostolicam vel alias quomodolibet magistris,

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“ doctoribus, et studentibus in studio nostræ civitatis  
 “ Bononiensis concessis gaudeant et utantur; ac vene-  
 “ rabilis frater noster Willielmus Episcopus Glasg. ac  
 “ successores sui qui pro tempore fuerint Glasgn. epis-  
 “ copi præfati studii Glasg<sup>is</sup> sint rectores cancellarii  
 “ nuncupati, qui habeant supra doctores, magistros, et  
 “ scolares ac alios de universitate studii hujusmodi  
 “ similem facultatem et potestatem quam habent rec-  
 “ tores scholarum dicti studii Bononiensis, quodq. illi qui  
 “ processu temporis bravium meruerint in facultate illa  
 “ in qua studuerint obtinere ac docendi licentiam ut  
 “ alios erudire valeant, nec non magisterii seu doctora-  
 “ tus honorem petierint eis elargiri per doctorem seu  
 “ doctores, magistrum seu magistros facultatis ejusdem  
 “ in qua examinatio fienda fuerit, Epo. Glasgsi. nunc  
 “ et pro tempore existenti et Glasg. ecclesia pastoris  
 “ solatio destituta vicario seu officiali in spiritualibus  
 “ delictorem filiorum capituli dictæ ecclesiæ presen-  
 “ tentur; qui quidem episcopus vel vicarius seu offi-  
 “ cialis, aliis doctoribus et magistris. ibidem tunc legen-  
 “ tibus convocatis, promovendos eosdem in hiis quæ ad  
 “ magisterii seu doctoratus honorem quomodolibet  
 “ requiruntur per se vel alium juxta morem seu consue-  
 “ tudinem in aliis studiis observari solitos; examinare  
 “ studeant diligenter, eisque, si ad hoc sufficientes et  
 “ idonei reperti fuerint, hujusmodi licentiam tribuant seu  
 “ magisterii impendant honorem; illi vero qui in eodem  
 “ studio civitatis Glasguen. examinati et approbati fue-  
 “ rint, ac docendi licentiam et honorem hujusmodi ob-  
 “ tinuerint ut præfertur, ex tunc absque alia examina-  
 “ tione et approbatione deinceps regendi et docendi,  
 “ tam in eadem civitate quam in singulis studiis gene-  
 “ ralibus in quibus regere et docere voluerint, plenam

“ et liberam habeant facultatem, statutis et consuetudi-  
 “ nibus, etiam juramento, confirmatione apostolica vel  
 “ quacunq̄ue alia firmitate, vallatis cæterisque contrariis  
 “ non obstantibus quibuscunq̄ue. Nulli ergo omnino  
 “ hominum liceat hanc paginam nostræ erectionis, con-  
 “ stitutionis, et ordinationis infringere vel ei ausu teme-  
 “ rario contrahere. Si quis autem hoc attemptare pre-  
 “ sumpserit, indignationem Omnipotentis Dei, et Bea-  
 “ torum Petri ac Pauli Apostolorum ejus, se noverit  
 “ incursum. Datum Romæ apud S'tum Petrum,  
 “ anno incarnationis Dominicæ millesimo quadringen-  
 “ tessimo quinquagesimo, septimo idus Januarii, ponti-  
 “ ficatus nostri anno quarto.”

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James II., by charter in 1453, granted various civil privileges to the university thus constituted, and after the Reformation James VI., in 1577, granted a charter, generally termed *Nova Erectio*, containing inter alia as follows:—

“ Cum Divina Providentia nos iis temporibus ad  
 “ regni gubernacula perduxerit in quibus Evangelii  
 “ lucem, expulsis papismi tenebris, Scotiæ nostræ præ-  
 “ lucere voluit, nosque imprimis sollicitos esse oporteat  
 “ ut tantum Dei beneficium ad posteros nostros propa-  
 “ getur; neque id alia ratione commodius fieri possit  
 “ quam proba educatione et juventutis recta informa-  
 “ tione in bonis literis, quæ, nisi honoribus et præmiis  
 “ alantur, prorsus sunt interitura: hinc est quod nos,  
 “ dum rem literariam passim per regnum nostrum in  
 “ Dei gloriam promovere studeremus, animum etiam  
 “ nostrum adjecerimus ad colligendum reliquias acade-  
 “ miæ Glasguensis quam præ inopia languescentem  
 “ ac jam pene confectam reperimus; et, cum concilio  
 “ et consensu dilecti nostri consanguinei Jacobi Comitæ

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“ de Mortoun, Domini Dalkeith, tutoris nostri et proi-  
 “ regis charissimi, ei malo prospicere volentes, ad tela  
 “ paupertatis delenda quæ bonarum artium studiosis  
 “ maximopere infesta esse solent, dederimus et con-  
 “ cesserimus, prout per præsentis damus et concedimus,  
 “ et pro nobis ac successoribus nostris pro perpetuo  
 “ confirmamus, et ad mortuam manum perpetuo unimus  
 “ et confirmamus, collegio nostro Glasguensi totam et  
 “ integram rectoriam de Govane, cum vicaria ejusdem,  
 “ jacen. in diœcesi Glasguen. et vicecomitatu nostro de  
 “ Renfrew, vacan. per decessum magistri Stephani  
 “ Betoun rectoris ejusdem, non ita pridem vita functi,  
 “ cum omnibus decimis, emolumentis, et fructibus, gleba  
 “ et mansionibus, omnibusque aliis commodis quæ de  
 “ jure aut consuetudine regni quomodolibet pertinere  
 “ queant.

“ Volumus autem in dicto nostro collegio duodecim  
 “ personas ordinarias residere ad gymnasii commoda  
 “ procuranda et juventutem bonis literis informandum,  
 “ quæ ex impensis et fructibus ejusdem alantur et sus-  
 “ tententur, pro modo ac facultate reddituum dicto col-  
 “ legio assignatorum, secundum discretionem gymnasi-  
 “ archæ et regentium subscriptorum; nimirum, gym-  
 “ nasiarcham, tres regentes, œconomum, quatuor pau-  
 “ peres studentes, servum gymnasiarchæ, coquum, et  
 “ janitorem; quorum singulos in suis muneribus obeun-  
 “ dis sedulos esse volumus, et pro laboribus honoraria  
 “ ac stipendia percipere, quo majore alacritate suis  
 “ officiis invigilent.”

After a series of regulations, the charter concludes thus:—“ Insuper cum Sathanæ astum percipiamus nul-  
 “ libi non dantis operam ut juventutem ab evangelii  
 “ professione ad plusquam cimerias papismi tenebras

“ abducet, districte mandamus, ut singuli qui in hanc  
 ‘ nostram academiam fuerint cooptati, fidei professio-  
 “ nem edant; eadem 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, eruditione, et piis moribus efflorescat  
 “ in Dei sempiternam gloriam, quam nostra hac funda-  
 “ tione solummodo ob oculos nostros proposuimus  
 “ utpote unicam nostrarum omnium actionum metam.  
 “ Volumus autem nostrum hoc collegium et academiam  
 “ Glasguensem iis omnibus immunitatibus et privilegiis  
 “ gaudere quæ a majoribus nostris, aut nobis, aut alias  
 “ quovismodo concessa sunt ulli aliarum in regno  
 “ nostro academiæ, tam libere, pacifice, et quiete ac  
 “ si eadem ab antiquis retro temporibus ultra hominum  
 “ memoriam ulli obvenissent.”

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The university had always been accustomed to grant degrees in divinity, law, and medicine, but previous to 1816 there was no chair of surgery, and it was only then that they commenced to give degrees in surgery. The degree of master in surgery having been obtained from the university by the respondents M<sup>c</sup>Millan and others, and they having in virtue thereof assumed the privilege of practising surgery within the city of Glasgow, the Faculty raised a suspension and interdict to have them prohibited from so doing without examination and admission by them; whereupon, on the other hand, the university instituted a process of declarator against the Faculty, concluding to have it found and declared “ that  
 “ all persons holding diplomas, degrees, licences, or  
 “ testimonials from the University of Glasgow, empow-  
 “ ering them to practise the art of surgery and its

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“ different branches, are entitled and authorized 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 licences as aforesaid ;  
 “ 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 also to have the  
 Faculty ordained “ to desist and cease from calling before  
 “ them for examination the licentiates of the university,  
 “ from attempting to exact fees from them, and generally  
 “ from molesting, annoying, or interfering with them  
 “ while exercising the arts which they are entitled to  
 “ practise in virtue of the foresaid diplomas, degrees,  
 “ licences, or testimonials.”

On the cases being reported to the Inner House, their Lordships appointed them to be laid before the other judges, requesting their opinion on the following question ; viz. — “ Whether persons holding diplomas,  
 “ degrees, licences, or testimonials from the said university, empowering them to practise the art of surgery  
 “ and its different branches, are entitled and authorized  
 “ so to do within the bounds over which the defenders  
 “ claim the privilege to grant licences, as pleaded by  
 “ them ; and are so entitled to practise without under-  
 “ going any examination by the Faculty of physicians  
 “ and surgeons in Glasgow, and without payment of  
 “ any sums of money in name of freedom fines or other-  
 “ wise ?”

Lords President, Balgray, Gillies, Mackenzie, Medwyn, Corehouse, and Fullerton returned the following opinions :—

“ 1. That the Faculty of physicians and surgeons in  
 “ Glasgow are a legal corporation.

“ 2. That the Faculty, by virtue of the charter 1599,  
 “ ratified by parliament in 1672, have power to debar  
 “ from the practice of surgery persons who have not  
 “ submitted to examination before them, or who have  
 “ not obtained their licence to practise.

“ 3. That the degree of doctor of physic from a uni-  
 “ versity where medicine is taught does not entitle the  
 “ graduate to practise surgery within the bounds spe-  
 “ cified in the charter, unless he obtains a licence from  
 “ the Faculty.

“ 4. In like manner that a testimonial of skill in  
 “ surgery from a university where surgery is taught, or  
 “ the degree of master in surgery, recently introduced  
 “ in the university of Glasgow, does not entitle the  
 “ possessor to practise surgery within these bounds,  
 “ unless he submits to examination by the Faculty, and  
 “ is licensed by them.

“ To these observations it may be proper to add,  
 “ that we entertain no doubt that there is a university  
 “ at Glasgow, with as ample power to confer degrees  
 “ as any other university in the kingdom. It has been  
 “ recognized in grants from the Crown, by royal visi-  
 “ tations, in public statutes, and in decisions of this  
 “ Court, in a great number of instances. The mistake of  
 “ the defenders on this point seems to have arisen from  
 “ their confounding the University of Glasgow with the  
 “ College of Glasgow; but those bodies are distinct, as was  
 “ found by the decision of this Court in the case of Muir-  
 “ head against the College of Glasgow, 16th May 1809.

“ We think it unnecessary to inquire whether the  
 “ University of Glasgow has power to grant degrees or

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“ testimonials of skill in surgery. Admitting that the  
 “ university possesses that power, and supposing it had  
 “ been exercised from the date of the erection in 1450,  
 “ we are of opinion, on the grounds above stated, that  
 “ such degrees or testimonials would be of no avail in  
 “ a question with the Faculty. If they had been in use  
 “ at the date of the charter, it is possible that James VI.  
 “ might have admitted an exception in their favour  
 “ with regard to the practice of surgery, as he has done  
 “ in favour of medical degrees with regard to the prac-  
 “ tice of medicine; and as they are now granted, they  
 “ may perhaps induce the legislature to restrict the  
 “ privileges of the defenders. But as the law stands at  
 “ present, we are of opinion they cannot control the  
 “ express and ambiguous terms of the charter 1599,  
 “ ratified in parliament, and uniformly acted upon.

“ We have not taken into view the plea of prescrip-  
 “ tion urged by the defenders; their case would cer-  
 “ tainly have been much more doubtful if they had  
 “ been compelled to resort exclusively to that plea.  
 “ Although they had from time immemorial exercised  
 “ the power of debarring from the practice of sur-  
 “ gery those who had not submitted to examination,  
 “ even including graduates in medicine, yet, agree-  
 “ ably to the maxim *tantum præscriptum quantum*  
 “ *possessum*, that usage would not have conferred a  
 “ right to exclude those who had the university’s  
 “ diploma of skill in surgery, recently introduced, as-  
 “ suming that the university has power to grant it,  
 “ which the pursuers maintain on very plausible grounds.  
 “ But the defenders, standing on their charter, are  
 “ entitled to plead that their privilege strikes at every  
 “ person not expressly excepted, and the charter con-



“ tains no exception applicable to the practice of sur-  
 “ gery.”<sup>1</sup>

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LORD MONCREIFF.—I am inclined to think that the university of Glasgow are entitled to obtain decree of declarator in the terms or according to the substance of the conclusions of their action.

I entertain no doubt that the defenders are a corporation entitled to exercise exclusive privileges, according to the terms and true meaning of the original charter in their favour in 1599. But I am of opinion that, except in so far as they acquired such rights by that charter, and by the subsequent ratification of it in parliament, they cannot maintain any prescriptive title in the particular matter in question to the prejudice of whatever rights and privileges may be vested in the university of Glasgow.

I can entertain no doubt that the pursuers constitute a university in the amplest sense of that term; with the fullest powers of conferring degrees in all the departments of arts and science in which it is competent for any other university to grant degrees.

Considering this to be clear, I am farther of opinion that the university of Glasgow have power to grant de-

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<sup>1</sup> Note by Lord Medwyn.—“ I entirely agree in this opinion. When this  
 “ cause was pleaded before me in the Outer House I early formed this  
 “ opinion, and would have so decided; but I thought as the case had  
 “ been very anxiously and elaborately pleaded, and as a great variety of  
 “ documents had been founded on, that it would be presented for review  
 “ in a more convenient form by having written pleadings on both sides.  
 “ Afterwards, when the university appeared to support the effect claimed  
 “ for their degrees in surgery, I thought it more becoming the respect  
 “ due to that learned body to obtain at once the decision of the Court,  
 “ although my own views of the case were not in any wise altered by  
 “ their appearance or pleading. I therefore made avizandum with the  
 “ cause, and, according to my usual practice in such cases, without pre-  
 “ suming to offer any opinion of my own.”

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grees in every department of the science of medicine, and that the degrees which they have power to grant do, according to the law of Scotland, constitute a valid licence generally to practise the art according to the terms of the diploma granted. I do not doubt that there may be special exclusive privileges constituted in favour of other bodies, which will be sufficient to prevent the exercise of such rights in particular places or circumstances; I speak at present of the effect of the degrees generally.

It farther appears to me to admit of no reasonable question that the art of surgery is a branch of the general science of medicine, which it is perfectly competent for any royal university to teach, and in which upon due examination they may grant degrees; which will be equally effectual as licences for practice generally as any other medical degree which it is in their power to grant. Nor do I think that it at all militates against either the competency or the effect of such degrees in surgery, that until lately, and since the establishment of a regular teacher of that art within the university of Glasgow, they had not been in the use of granting similar degrees; seeing that the power appears to me to be inherent in their general character as a university, and such as could not be lost by the lapse of any length of time during which it might not be exercised.

Having this opinion on the general points agitated in these papers, I think that the question between the parties depends on the construction of the charter 1599, on which the title of the defenders rests. If that had been a simple and absolute grant of exclusive privileges in a branch of science not then regularly taught in the university, it must have been effectual, at least when

ratified in parliament, to subject all persons whatever to the force of its provisions. But it is qualified, and in all its structure extremely peculiar. Although, therefore, I feel the force of the arguments employed by the defenders, and the weight of the views entertained by other judges, I still have considerable doubt whether it ought to be so construed as either in intention or in effect to operate to the prejudice of the university.

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It has already been determined in the case of Steele, in 1819, 1st, That the privileges of the defenders as a faculty or corporation do not affect the holders of degrees of *medicinæ doctores* in the practice of medicine or physic, in the limited sense of the term, as ordinarily understood; and, 2d, That the holders of such degrees are not by virtue thereof entitled to practise surgery within the bounds of the charter without submitting to examination by the defenders. The question which remains is, whether, on a sound construction of the charter, when the university of Glasgow, having a regular school of surgery established, do grant degrees in that special branch of the healing art, the persons holding them must still be subject to examination by the defenders before they can practise within the limited bounds.

The commission constituted by the charter consisted of the king's surgeon and Mr. Robert Hamilton, professor of medicine, and their successors; and it does appear a little singular, that, if surgery was regarded as so perfectly distinct from medicine as not to be comprehended within the latter term in any sense, a professor of medicine should be one of the two commissioners appointed to examine persons in their knowledge of the art of surgery, and grant licences to practise it. He at

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least must have been held competent to the examination, and by implication himself competent to the practice of the art. The object of the charter was to prevent “unskilled and unlearned” persons, who “under the colour of chirurgeons abuse the people,” &c. &c., from carrying on their practices. To attain this object ample power is given to call before the commissioners “all persons professing or using the said art of chirurgeon,” to examine them on their knowledge, &c., to grant licences according to their fitness, and in case of contumacy to impose fines. There seems to be no doubt that in this part of the charter it relates specially to surgery, as contradistinguished from the other branches of the science of medicine. But I am not satisfied that this affords a complete solution of the question.

The fourth article of the charter prohibits all persons within the bounds “to exercise medicine without ane testimonial of ane famous university where medicine is taught, or at the leave of our and our dearest spouse chief medicinaris,” and authorizes the commissioners to challenge, pursue, and inhibit such persons from the practice of medicine under the pain of 40*l.*, &c. It is clear enough that here no power is given to the visitors to examine persons in medicine as different from surgery, the right of practising it being made to depend solely on a testimonial by a famous university or the leave of the king’s physicians; and so far there is a marked distinction between that case and the case of the practice of surgery. But still this express acknowledgment in the body of the charter of the rights and privileges of the universities appears to me to be of very great importance in the question, whether it was intended in this

charter to create any collision between the rights and powers conferred on the commissioners, either in regard to surgery or in regard to medicine, and the vested rights and privileges of the royal universities?

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It is clear that the rights and privileges of the universities were not overlooked; and if it be granted, as I think it must be, that if at that time surgery had been specially taught in the university, the university might then have granted degrees in surgery. The question appears to me to be, whether the right to grant such degrees, with their ordinary legal effects, shall be held to have been taken away, or in this case excluded by implication; or, in other words, whether it required an express clause reserving them, to save them from the operation of the first article of the charter?

The view of the general scope of the charter which I should be inclined to take is this: That the art of surgery, though of great importance to the public, was considered as an inferior branch of the science of medicine. That to prevent the abuses referred to in regard to surgery, and also to prevent unauthorized persons from practising medicine generally, it was expedient to institute the commission, with this effect, that no one could practise medicine generally without a testimonial from a university where medicine was taught, or the leave of the king's physician; and no one could practise the inferior art of surgery without a licence from these commissioners, as things then stood; but that as the superior powers of the universities were here expressly recognized in regard to medicine, it was implied that as soon as they chose to exercise their privileges by teaching, examining, and granting degrees in surgery, such degrees would form a title to practise at least co-ordinate

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with the licence of the commissioners, if not essentially superior to it.

The difficulty therefore which I have, is to see how, while the privileges of the university generally with regard to medicine as then taught are expressly recognized in the charter, and their power to grant degrees in surgery cannot in my opinion be doubted, it can be held on a sound construction of this charter, that it was intended to have the effect, or can legally produce such effect, of excluding or impairing the efficacy of such degrees in surgery when legally granted.

I must however distrust my own judgment, seeing that the same difficulties have not been felt by the other consulted judges.

On the 15th November 1834, the Court pronounced the following interlocutor:—“ In the suspension and  
“ interdict, sustain the reasons of suspension; sus-  
“ pend the letters impliciter; interdict, prohibit, and  
“ discharge in terms thereof; find and declare the inter-  
“ dict perpetual; and in the declarator, sustain the  
“ defences, assoilzie the defenders from the conclusions  
“ of that action, and decern; reserving the question  
“ respecting the amount of the fees which the suspenders  
“ are entitled to charge, and all competent actions  
“ thereanent: Find the chargers liable in expenses:  
“ Find also the university liable in expenses since their  
“ appearance in the action; allow an account,” &c.

Against this interlocutor the university of Glasgow appealed.

*Appellants* —1. The university of Glasgow is a proper university, originally created, as other similar bodies in

Europe before the Reformation, by bull of the pope, and possessing all the privileges of a university, and in particular the power of granting degrees in the several sciences; and although surgery was not taught separately from medicine till 1816, it is included under the general science of medicine, which the university has always taught, and in which it has always granted degrees.

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2. The degrees in medicine and surgery granted by a university afford a sufficient warrant to practise the arts of medicine and surgery in every part of the realm.

3. The King had no power to erect a corporation with privileges inconsistent with those of the existing universities.

4. The letter of King James in favour of Messrs. Low and Hamilton is not so framed as to create a proper permanent corporation with exclusive privileges, and in particular it contains no power to prohibit from practising persons not examined and admitted by them.

5. The exceptions in the King's letter in favour of persons holding a university diploma to practise medicine, must extend to the practice of surgery, which is a branch of medicine.

*For the Faculty.*—1. The present college of Glasgow is not a proper university, but a mere pedagogium under the nova erectio by James VI., to which alone it can refer for its present constitution; and, farther, even if it were entitled to go back to the bull of the pope, which was entirely derelinquished when the college was re-erected after the Reformation on a new footing, they could not give degrees as a university, as understood by that bull, seeing they have no faculties of the different sciences by the members of which degrees may be given; but

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these are granted by the professors, the greater number of whom may not be even graduates of the science in which the degree is given; a practice inconsistent with the constitution of a proper university.

2. University degrees are merely in themselves testimonials of skill, but can receive no civil effect, except in so far as conceded by the municipal authority of the state in which they may have been established.

3. The civil privilege of an exclusive right to practise an art, as arising from examination and admission, by any particular body, can only be conferred by grant from the King. A university degree cannot convey this privilege, unless in virtue of such grant; so that the university which did not possess this had no privileges wherewith the charter to the Faculty could interfere; and the King may undoubtedly confer an exclusive privilege of this nature on any body, though not a university.

4. The terms of the royal letter are clearly such as to constitute a permanent corporation, with powers of examination and admission, and an express power to discharge all persons not admitted by them from practising surgery within the bounds specified. This grant was farther confirmed in parliament, and has been followed by uninterrupted possession under it, so that it is impossible to dispute the title of the Faculty as a corporation, which has indeed been repeatedly sustained by the courts of law.

5. The exception in the letter is expressly limited to medicine, which is pointedly contradistinguished from surgery, the latter indeed being then considered rather as a craft or trade than as a science; and, besides, in the case of Steele it was determined that a degree of



doctor of medicine did not authorize the party holding it to practise surgery without admission by the Faculty, necessarily implying that surgery was quite distinct from medicine, and not included under it.

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LORD BROUGHAM.—In the Court below it does not appear that the attention of either the counsel or of the learned judges was directed to the point which is really the most essential to the decision of the cause, and which must in one way or another be disposed of before the question can arise which alone was discussed at any length in Scotland, namely, the conflicting claims of the University and the Faculty. The point to which I refer is the existence of that faculty as a corporation capable in law of possessing, and in fact clothed with the rights for which it contends.

The letter of 1599 under the Privy Seal, and which is called a charter, is the first ground of the Faculty's claim. It is a singular instrument; it assumes to bestow upon two individuals, Low the King's surgeon, and Hamilton a physician, and their successors, power to examine all surgical practitioners, and license them to practise if they found them qualified, to fine all who practise without their licence, to take their goods and incarcerate their persons in cases of contumacy; and it exempts them and their brethren from watch and ward and stented taxes. There are other powers of a lesser kind, and the jurisdiction thus conferred extends over Glasgow, Renfrew, Dumbarton, Lanarkshire, and Ayrshire, over which I do not understand the present claim to extend or ever to have been extended.

Now the first thing that strikes us here is the entire want of any mode of electing or continuing the corporate

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body. How its existence is to be kept up is not in any way to be discovered from the grant, and perpetual existence is the very essence of the corporate character. The two individuals are to license persons, that is, give them leave to practise, but the persons so licensed do not become corporators either by the grant or by the practice at any time had under it. On the contrary a certain number, at the will of the parties, is said to be chosen by them for that purpose, and the others are only authorized to practise, but without any interference in the Faculty concerns. Mention is, indeed, made of Low and Hamilton's successors in one place, and brethren in another; but Low alone had any office at the time. Hamilton was only a professor of medicine, that is, a practitioner. Who shall be intended his successor? If he said that he was King's physician, their successors may mean the King's surgeon and physician for the time being, but this is wholly contrary to the practice and to the intention of the party now and at all times.

Again, a power of making bye-laws is said to be given. I cannot discern any such thing. The two persons, with advice of their brethren (and who these were is no where pointed out), are to make statutes for the public good concerning surgery and the practice of it; and the breach of these rules is to be punished by them; but this is a power given, and most unlawfully given them, to make general laws for governing surgical practice, and not laws for regulating their own corporate proceedings, which is the meaning of a bye-law. It is therefore nothing like a power to make bye-laws.

Another very extraordinary power is given, or rather given to some persons, who may or may not be those persons. There is a prohibition against all persons

practising medicine without a testimonial from a university, or a licence from the king's and queen's chief medicinars; and if they do the two visitors are to promote them. This seems to make a distinction between the two persons grantees of the privileges in the instrument and the royal physicians, and to show that Hamilton was not one; it makes it all the more difficult to understand who the successors of the grantees are.

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But an act was passed after the restoration in 1672. Does that remove the difficulty? It may render lawful the powers illegally given by the grant of 1559. But does it supply the great defect of corporate character? First, it continues the power of licensing to practise medicine, giving that to the successors of the grantees, and not to the king's and queen's physicians. It is said by the learned judges that this is a mistake; but it is new to me to find a parliamentary enactment which is quite plain altered by suggestion. The act, if it is good for any thing, gives the power to the persons whoever it names, and not to those whom the grant of 1599 names. But next, it does not show who are to be the corporators, or how those are to be chosen; and, lastly, it gives ratification to the grant only so far as it can be extended to surgeons, apothecaries, and barbers, and their successors alternately, and no further. Now these surgeons, apothecaries, and barbers are no longer in the Faculty; they have nothing to do with it, and consequently I cannot see how, allowing the act 1672 to have supplied the defects in the grant 1599, and to have created a corporation, that corporation can now be said to exist.

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The cases and precedents referred to are not sufficient to enable us to get over these difficulties without much more discussion of them than they have received below. All the precedents are those of recognition where the point was not made; and some of them, as the orders made by the Court of Justiciary, are without any competent jurisdiction, for it certainly cannot be contended that the supreme Criminal Court has any jurisdiction to decide whether or not this Faculty is a corporation. But even the case of Steel, in 1827 and 1829, is any thing rather than decision. The question never was distinctly brought before the Court; and though one or two of the learned judges express themselves satisfied of the title to pursue, yet they clearly assume rather than decide that the Faculty was a corporation. The Lord Justice Clerk relies on the recognition, as his Lordship terms it, in the 55 Geo. 3, c. 69, which can hardly be said to have any such force, as it merely directs the certificate of the Faculty to be taken, without giving any force.

A claim of this kind had been recognized on behalf of the writers to the signet by the Court below, and it came before your Lordships while Lord Gifford sat here upon appeals, in a case decided in 1825.

Some of the learned judges in the Court below in that case had assumed it as clear that the universities were no corporation, and had referred to the case of Gardiner in 1814, stating that the Court there had taken this fact for granted as well as their right to make bye-laws; whereas it is plain from the report of the case that those points were neither decided nor taken for granted, but in express terms saved, and that the

decision passed against the society on the plain ground that they had no right to refuse passing Gardiner's signet letters even if they were a corporation and had the right of making bye-laws. In 1803 a case had come on in which the Court held the society to be entitled to the privileges of a corporation; but though the House of Lords did not formally decide the point, it is plain from Lord Gifford's remark that he regarded the society as no corporation.

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I cannot easily bring my mind to understand how there can be a corporation created without providing in some way for its perpetuity,—without indicating of whom it is to consist. But this cannot be gathered in any way from the grant, and the act leaves the difficulty where it found it; beside the other objection, that its provisions only extend to a corporation composed of surgeons, apothecaries, and barbers.

Although for these reasons I am unable to recommend an affirmance of this decree, yet, considering the importance of the case both to the parties and to the law,—considering the influence which its decision may have on the rights or claims of other corporations, — and considering that this view of the question was never distinctly taken below and received no judicial discussion,—it appears to me that your Lordships should remit, with these remarks, to call their Lordships attention to it.

The House of Lords ordered and adjudged, That the said cause be remitted back to the Second Division of the Court of Session in Scotland, with directions to the judges of that division to consider and to take the opinions of the whole other judges of the Court of Session, including the Lords Ordinary, whether the respondents, as the Faculty

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of Physicians and Surgeons of Glasgow, are a corporation capable in law of possessing and in fact clothed with the rights for which they contend in this action ; as also to consider whether the right of interdict is taken away by the provision of a penalty made in the grant or letter of gift in the pleadings mentioned. And it is further ordered, That the said Court do determine the question of the respondents costs relating to this appeal, and that they have power to recal or alter the said interlocutors appealed from.