

*Duplied* for Mr Rymér, The foundation is the true and fixed rule, except in so far as the same is altered by law: And it will not be found, That there is any legal constitution transferring the power to the *artium magistri*, or regents, who came not in place of the *licentiatus* and *baccalaureus*; for these were churchmen whose offices are extinct. *2dly*, The administration of the common stock of the college is not regulated by the foundation; and therefore custom might prevail to give them some power in that, though it could not invest them with any power contrary to the terms of the foundation. *3dly*, Suppose the provost had homologated the regents' power, by taking their votes, he could not dispense with the rules of the foundation: But the truth is, he only in courtesy asked their opinion by way of advice, which put no obligation upon him to follow it.

THE LORDS preferred Mr Halden, and declared Mr Rymer's admission void and null.

*Forbes, p. 186.*

1711. January 24.

BURNET, GORDON, &c. against SIMPSON, MIDDLETON, URQUHART, &c.

KING WILLIAM having mortified L. 300 Sterling out of the bishops' rents to the college of Aberdeen, he, by his patent, erects a new profession for teaching the oriental languages, and out of the foresaid stock mortifies 1200 merks for his salary; and Mr George Gordon being presented thereto, the masters and regents of the university scruple to receive him, in regard the L. 300 Sterling was expressly destinate for payment of their debts, and not for founding a new professor. He, to remove all scruples, enters into a communing with them, and, to facilitate his own admission, grants a bond, whereby he quits and renounces 200 merks of his salary in favours of the college, and obliges himself not to claim a vote in any of their affairs, except allenarly in the administration and management of that fund out of which his salary was payable; but, shortly after, he procured the masters to be more favourable, and prevailed with them to give him a discharge of the bond, and reponing him to his full salary of 1200 merks. But his bond being still kept from him, he raises a reduction of it, on these grounds; *imo*, That it was very unwarrantable, both in him and them, to make any such transaction, to restrict or diminish the rights and privileges of any of the members of the university, and cause them give down their salaries; these things not being alienable in their own nature, *pactis privatorum non derogatur juri publico*. *2do*, The view and occasion of his giving that bond and restriction was, that, finding some difficulty and opposition in admitting him, he granted that bond to take off all scruples, and consigned it in Doctor Urquhart's hands; and yet, it was so far from operating the effect he designed, that they still demurred to receive him, whereupon he was necessitate to apply to the commission for visitation of colleges, and got reiterated orders from them, com-

No 1.

No 2.

A college having been erected by the King, and confirmed by the Pope, named those who were to be regents. Two additional regents were afterwards appointed by the King. In a comparative trial for a regency, the principal refused to receive the votes of these two, as not being on the original foundation. Their votes were found good.

No 2.

manding his admission, and ordaining the Advocate to insist against them for disobedience ; so that the cause of his giving the bond not being fulfilled, but he put to procure his entry another way, the bond was null as *causa data et non secuta* ; and though he was admitted simply afterwards, yet it was to shun the commission, more than for his condescendence in the bond. *3tio*, The said bond is fully renounced and discharged by the same masters who exacted it, all of them subscribing save only Dr Middleton, the principal, and yet now with open face are contravening their warrandice. *Unumquodque eodem modo dissolvitur quo colligatur*. Answered to the *first*, That any man can renounce his own rights or privilege, though it will not affect his successor in office ; and it may be well doubted if King William, after he had mortified L. 300 Sterling for paying the college debts and fabric, could divert it by erecting a new profession. To the *second*, The bond is opposed, which is pure and simple, bearing no such quality or condition that they should admit him amicably, without putting him to such legal compulsitors as he pretends. And if it was deposited, it can only be proven by their oaths who now have the bond in their hands, which, if they once acknowledge, then it comes to Dr Urquhart to depone on the terms ; but the deposition is denied. To the *third*, The principal of the college is, by the institution, such an essential member in managing their affairs, that the discharge is not valid without him. *2do*, Though all of them had subscribed, yet they being only administrators of the revenue, they can alienate no part of it ; for that would be a plain malverse and dilapidation ; and though this is no part of the old mortified stock, yet it can no more be given away than the first patrimony, all being appropriated for public uses. And Mr Gordon's quarrelling this is inconsistent with his own oath *de fidei*, that he will in all things promote the public utility of the said college ; and his renouncing his privilege of sitting and voting is no prejudice to him, his office being none of the first founded offices, who were only trusted with the administration of the college affairs ; and he can neither be assumed nor imposed on them without their own consent. THE LORDS found, the professors, being only administrators, could not discharge any part of their rents, except for just and necessary causes ; and, before answer to that allegiance, that his bond was conditional, if they should presently receive him, allowed him to prove on what terms and conditions he granted the same, as he can be best served.

November 9. 1711.—There being a vacancy of a regent of philosophy in the King's College of Aberdeen, there was, conform to the late visitation act, a program emitted, inviting all persons qualified to come and dispute in a comparative trial. Accordingly, Burnet and Simson being the two candidates, Burnet had five voting for him, and Simson had three. But Dr Middleton, the principal of that collage, inclining to favour Simson, he *objected* against Dr Bower, professor of the mathematics, and Mr Gordon, professor of the oriental languages, (two of the five who gave their suffrage for Burnet,) as having no

right to vote, as being none of the original founded members, but added since ; and by the excluding and rejecting them two, bringing it to be equal and split, three against three, and Dr Middleton the principal assuming the casting vote, he determined in Simson's favours, and put him in possession. But Mr Burnet, with Bower and Gordon, resolving not to be wormed or bullied out of their right, raise a reduction of Simson's election, and a declarator of his own, which the Lords took summarily in, that the college and students might not suffer by the delay.—*Alleged* for Simson and Middleton, That by the foundation of this college, laid by that worthy prelate William Elphingston, ratified by Pope Alex- and VI's indult, and confirmed by King James IV. in 1494, the several members of the Society are enumerate, viz: a doctor of divinity, a canonist, a civilian, a mediciner, a grammarian, a sub-principal, a cantor, a sacrist, six students of divinity, and thirteen of philosophy, &c. And so many of them as *regentes artium* or *magistri in artibus* (according to the custom of the university of Paris) are made electors: So that the professors of mathematics and oriental languages, being but lately supperadded members, whatever privileges they may enjoy, they can lay no claim to the voting at elections of others; for there being a *jus quæsitum* to the founded original officers, invested by the foundation with the sole privilege of electing, no additional members can be obtruded upon them, nor a share in electing be communicated to any other, without their consent; and therefore these new erected members had no right to vote; even as in the case of the barons sending commissioners from shires, to represent them in Parliament; and in the German empire, none of the Princes can claim a vote in chusing the Emperor, but the seven originally founded, except the two that have, with the consent of the Imperial Diet, been assumed since, which makes nine electors now, instead of the ancient seven. And though the foundations and rules of universities made in the time of Popery, have suffered great and material alterations since the Reformation, especially in abolishing superstitious rites, and turning them to more pious uses; yet that power of the electors has not been encroached on, nor new intrants obtruded upon them; and the 6th act of Parliament, 1633, condemns the altering or inverting of mortifications or pious donations.—*Answered* for Mr. Burnet, That his election was preferable to Simson's, as having clearly the majority of votes upon his side; and the suffrages of Bower and Gordon were just and legal; for though the Popes did meddle in all affairs without any right but usurpation, yet the Kings of Scotland, even under Popish darkness, opposed his pretensions, and always declared their people were not to be ruled by foreign laws, but their own, to exclude Popish encroachments; and it is certain, the erecting and founding universities is *inter regalia*, and one of the jewels and prerogatives of the Crown, and it bears to this day the name of King James IV's College, and his confirmation of it is yet extant; and the regents of philosophy now are not of the first foundation, but introduced since; the students of theology being converted to that use. Now if it be done *ex post facto*, who can they controvert but the King; for the increase of learning.

No 2. may add new professors, with all the privileges competent to the former? And there is warrant enough for it in the principal foundation, which has an express clause bearing these privileges to be given, *tam incorporatis quam incorporandis*, which cannot be restricted to such as might be assumed in Bishop Elphingston's life, but must extend *pro omni tempore affuturo*; and that this is the plain meaning is evident by the writer of the Appendix to Spottiswood's Church History, who gives us the rise of this university, and says expressly, that the election of the members when vacant, is by the major part of the masters, which includes the whole professors. And Dr Chamberlane, in his *Magna Britanniae Notitia*, or Present State of Great Britain, describing this university of Aberdeen, says the same. See likewise Bishop Elphingston's life, in Dr M'Kenzie's new collection. And besides all this, these two voted in the electing other professors, such as the teacher of Greek, and the physician; and being necessarily absent at another time, their excuses were admitted and recorded.—It was further *objected* by Simson against Burnet, That he had rendered himself incapable of being chosen, by using solicitation for votes, and attempting to corrupt and bribe some of the members; but there being no evidence adduced, this was let fall. It was also surmised against Gordon, That at his entry he had renounced his right of voting; but he produced an act of the Committee for Visitation of Colleges, finding that was unwarrantably extorted from him. *Vide supra*, 24th January 1711.—THE LORDS having advised this debate, they found Dr Middleton, the principal, in the wrong to refuse and reject Bower and Gordon's suffrages; and found they had good right to vote; and therefore reduced Simson's election, and preferred Burnet as having the clear plurality; and assoilzied him from Simson's counter-reduction and declarator.

December 21. 1711.—IN the case between Simson and Burnet, regents of the College of Aberdeen, the LORDS, *supra*, 9th November 1711, found that Gordon and Bower had right to vote in the election of a regent, and so preferred Burnet. After which interlocutor, Dr Middleton principal, Mr Black sub-principal, Dr Urquhart professor of medicine, and other masters compared, and craved to be heard on the interest of the college, arguing strongly from Bishop Elphingston's foundation, that though our Princes might add new members, yet they could not, in prejudice of the old founded masters, give them a right of suffrage and voting. But the LORDS having advised this point, of new, they, by a plurality, found Bower and Gordon, by their patents, were entitled to vote as well as the old masters. Then the adherents to Mr Simson's election recurred to some personal objections of incapacity against Gordon, Bower, and Burnet himself. And, *imo*, As to Gordon, that he had given a bond at his admission, renouncing his right to vote at any college meetings.—*Answered*, As it was impetrate by threats and concussion before his admission, so it was taken off by an order of the Commission for Visitation of Schools and Colleges.—THE LORDS found, whatever this bond might operate *pro futuro* when discussed, yet

*medio tempore* did not debar him from voting. *2do*, *Objected* against Bower, That he had neglected to qualify himself to the government, conform to the act of Parliament 1707.—*Answered*, The allegiance is caluminous; but *esto* it were true, it is not relevant till it be declared in a process against him; for he is in possession, and holden and repute is sufficient to sustain his vote; even as all the deeds of Barbarius Philippus stood good though a slave, *L. 3. D. de officio prætor.* *3tio*, *Objected*, That Mr Burnet obtained the plurality of votes by corruption and undue solicitation; for, *1mo*, By a letter of Mr Fraser, one of the electors, it appears he acknowledges his pre-engagement to Burnet.—*Answered*, Simson should be excluded from proponing this *exceptione doli*; for you elicited this letter by one you wrote to Mr Fraser, begging his vote; besides, 'pre-engaged' signifies no more than I think Burnet in my judgment fitter.—THE LORDS repelled both objections made against Bower and Fraser. Then they condescended on sundry deeds offering bribes to procure votes for Burnet; and particularly, that one Captain Stewart offered forty guineas to repair the structure of the college, if they would prefer Burnet; and qualified Burnet's knowledge, that he was present in the room when the offer was made, and did neither contradict nor reclaim; and is expressly prohibited by the foundation statutes, *quod si pro quocunque munera vel preces interponantur decernimus talem inhabilem*, under no less terrible commination than *sub pena damnationis æternæ*; such practices being contrary to the very light of nature, the principles of the divine law, and common moral honesty; and God forbid any judicature should give the least encouragement or countenance thereto. The canon law is as peremptory as the foundation is, for *Quest. 4. § 5. causa 1. in 2da parte decreti Gratiani*, he who enters by bribery is declared incapable, though done without his knowledge, *capendum, et summoperi studendum, ut nemo per Simoniacam hæresim regiminis locum obtineat, quocunque factione, calliditate, promissione seu datione per se vel aliam submissam personam*. And Lancelotus, in his Institutions, confirms the same; and this would hold even with us in the election of members of Parliament.—*Answered* for Burnet, These are but amusements and strained inferences to busy up a sinking cause: For suppose an hundred offers, (though nothing more ordinary in competition for places) yet if done without my warrant or knowledge, the most innocent man in the world may be prejudged; yea, the enemies of a candidate for an office have no more to do but to offer money in his name, if that were enough to put him by the cushion\*; neither can it be proven; for, *1mo*, You are parties, and *nemo idoneus testis in sua causa*; *2do*, You are but *testis singularis, et unus testis est nullus testis*. Yet it was thought in such occult crimes, (as is done in adultery) a cumulative adminiculating proof would suffice, though they did not depone as to the same individual acts, but upon deeds at several times. Some said his presence in the room would neither import his knowledge nor consent; for in a crowd of many people it

\* *Scopum non attingere.*

No 2. might escape his hearing ; and therefore thought it could only be proven by his own oath, though it was urged this was to cause him swear *in propriam turpitudinem*. But this point not being fully clear, it was referred to the Ordinary to be further heard.—It was further *objected* against Mr Burnet, That he was incapable, being wholly ignorant of the Greek tongue, which a philosophy professor should perfectly know, for Aristotle and others ; but this being faintly proponed, it was not much noticed by the Lords. See PERSONAL OBJECTION.

*Fol. Dic. v. 1. p. 150. Fountainball, v. 2. p. 669. & 691.*

Dr Middleton and Mr William Simson protested against the above interlocutor.

*Fountainball, v. 2. p. 734.*

\*.\* Forbes reports the same case :

THE King's College of Aberdeen being erected by Pope Alexander, on application from K. Ja. 4. in *anno* 1494, and endowed with mortifications from Bishop Elphinston, (who built the fabric), and from others ; in August 1498, that King granted a charter to the college, ratifying the erection and former dotations, mortifying some new rents, and giving to the masters, *incorporatis seu incorporandis*, all rights, privileges, and immunities, competent to other universities, and given by the French King to the university of Paris, or by K. Ja. 1. to the university of St Andrews, or by K. Ja. 2. to the university of Glasgow. The principal, sub-principal, two regents, and one professor of medicine, another of civil law, and a third of grammar, having been the only persons in use, beyond the years of prescription, to elect regents or professors of philosophy ; Dr Thomas Bower was added to the founded masters, by a late gift from the Sovereign, constituting him King's professor of mathematics in that university, with the same privileges and immunities competent to any other profession of mathematics in any other university or college in Scotland, or which any professor *in dicta regia universitate clamare et frui potest, aut potuit*. Upon a comparative trial of Mr Alexander Burnet and Mr William Simpson, candidates for a vacant profession of philosophy in the said King's college, three of the founded masters voting for Mr Burnet, and three for Mr Simpson, Dr Middleton, the principal, by his casting voice, determined in favours of Mr Simpson, and admitted him ; albeit Dr Bower, pretending to a vote, gave it in favours of Mr Burnet. Whereupon there arose a competition before the LORDS betwixt Simpson and Burnet, about the title to the office. At the discussing whereof, all the LORDS were clear, That the Sovereign might add new professors to those in the foundation ; but that the funds mortified by Bishop Elphinston could not be impropriated to any such new superadded professor ; and that Dr Bower, by virtue of his patent, is entitled to vote in the election of regents, jointly with other masters who were in use to vote.

Albeit, it was *alleged* for the principal, and other three founded masters, That Dr Bower could no more, by virtue of the clause in his gift, *cum omnibus privilegiis et immunitatibus quæ quovis alius professor, &c.* pretend to the power of electing regents, than to the power of regenting and teaching philosophy or theology. For if the clause be carried beyond the common privileges, it cannot stop, but carry all the special privileges of professing theology, conferring degrees, and other distinguishing powers appropriated to the principal, sub-principal, and other particular professors, which is ridiculous. ‘Nam ultra numerum assumptus ad collegium, non aliter censetur assumptus, quam salvo et illibato jure ordinariorum, quamvis ille nitatur nova principis concessione, Perez. in L. 1. §. Si quis a principe, D. lib. 43. tit. 8.’ The common law determines, that ‘Rescripta principum ea humanitate sunt accipienda, ne cuiquam injuriam inferant, adeo ut rescriptorum verba potius improprie sunt interpretanda, quam ut eorum contextus in alterius prejudicium accipiatur.’ And albeit the profession of divinity be founded 100 years ago with the like clause of all privileges competent to other professors; yet the professor of theology never voted in the election of regents. So that the above seven founded professors, who by long possession have prescribed a right to the election of regents exclusive of others, cannot be encroached upon by this novel pretension of Dr Bower.

In respect it was *answered* for Mr Burnet, That prescription cannot be obtruded against a new created profession, that was not in being before; whatever might have been pretended for the exclusion of one who had forborn for the space of prescription to exerce his privilege; Dr Bower’s right is preserved, in the very privilege of all members incorporated, or to be incorporated, and cannot prescribe, save from the time of his being incorporated; which differenceth his from the professor of divinity’s case, who may have lost the privilege of voting by the negative prescription. It is owned that Dr Bower’s patent doth not entitle him to encroach upon the particular professions of the other masters; but the power of electing regents is competent to all the masters and professors of that university, under the quality of masters or professors.

Thereafter it was *objected* by Mr Simpson against Dr Bower, That he was not qualified to vote, because he had not, at the election, subscribed the Confession of Faith, and taken the oath of allegiance conform to act 17. Parl. 1690.; nor had sworn the oath of allegiance, and subscribed the same, with the assurance, conform to the act 6. Parl. 1693.; both which statutes are ratified by the act 6. Parl. 1707, whereby such non-jurants and non-subscribers are disabled from being admitted and continuing in their offices; and consequently his voting so *jure prohibente*, was *ipso jure* null.

*Answered* for Mr Burnet, Dr Bower being admitted in the exercise of his office, and not objected against at the time of the election, as not qualified to the government, his vote must stand good to Mr Burnet, according to good order, and the law *Barbarius Philippus*; though a sentence of deprivation should follow; and follow it must, to apply the certification and penalty in the laws

No 2.

above-mentioned to Mr Bower, who cannot be judged till he be called, and in the field.

THE LORDS repelled the objection against Dr Bower, that he is not qualified to the government in the terms of law, he being in possession of the office at the time of the election, and that objection not then made against him; without prejudice to any party to insist against him as accords.

Thereafter, *alleged* for Mr Simpson, The foundation charter provides, that *si pro quocunque supplicationes seu munera quorumcunque interveniant, talis sit inhabilis*; and *ita est* that Mr Burnet, at least his friends for his behoof, offered to bribe one of the electors, which rendered him utterly incapable of being elected; as it is sufficient to overturn the election of a member of Parliament, that good deeds were done, or bribes given by any person on his behalf.

*Answered* for Mr Burnet, *Non relevat*, that one of his friends offered to bribe an elector, unless it had been done by Mr Burnet's order, consent, or knowledge; seeing otherwise the deed of a third party should prejudice the ignorant and innocent; and perhaps one might *malo animo* cause his friend offer bribes against himself for his competitor to cast his election. Nor is it the offer to corrupt, unless money or good deed were received, that can incapacitate a voter. Besides, the offer is alleged to have been made to one who voted against Mr Burnet; so that the votes for him stand clear.

*Replied* for Mr Simpson, By the canon law, a person for whom a bribe is offered, even without his knowledge, is incapable of enjoying the benefice, Quæst. 5. Caus. 1. c. 1. Yea, an offer of bribery by a near relation of the party, is presumed to be done by his warrant. It is not to be supposed, that Mr Burnet, or any person, would act so rashly, as not first to sound the ford by his friends; whom, no doubt, he had followed in the way they led him, had he found it passable. It is easy to discover from circumstances, *quo animo* a bribe is offered by a third party, viz. by considering whose friend or acquaintance he is, and which of the parties he has a warm side to.

THE LORDS repelled the objection made against Mr Burnet, that there were solicitations and offers of money made for him to the electors; the same not being alleged to have been received or done by his order.

Thereafter, January 23. 1712, it was *objected* by Dr Middleton, the principal, against Mr Burnet, That suppose Dr Bower's vote be sustained, Mr Simpson hath the plurality; in so far as, he, the principal, votes for him, which makes the votes equal, four on both sides, and gives his casting vote also in favours of Simpson. Now that the principal hath two votes, viz. an elective and a casting vote, is clear from these words in the foundation charter, *volumus ut in omnibus istis electionibus principalis dicti collegii habeat vocem electivam seu nominativam et conclusivam*; and from constant practice. The like is observed in elections in the royal burghs, where the provost votes first, and in case of equality has also the casting vote.

*Answered* for Mr Burnet, Whatever right the principal may claim to two votes in other cases, he cannot be heard to do it in this; where he assumed only a conclusive or casting vote as Præses, after all the rest had voted, upon an imaginary equality presupposed by him; and being *functus*, cannot recur now to claim an elective vote, which he ought to have done before any of the other professors had voted, as is usual where any Præses hath two votes.

THE LORDS found, That, in this case, the principal can have only the casting vote; reserving his claim to a double vote in other cases as accords.

*Forbes, p. 560.*

1712. February 19.

GORDON against BLACK.

MR GEORGE GORDON having been presented by K. William to be professor of the oriental languages in the college of Aberdeen; before the other masters would admit him, they procured a bond from him, renouncing 200 merks of his salary in favours of the college; and he having raised a reduction of it as extorted, and only depositate, he was put to attend that process at Edinburgh a month or two. When he returned to Aberdeen, the first thing he meets with is a program fixed on the college gates, that his place was vacant; and inviting any to come and dispute in a comparative trial for it. Then he requiring the janitor to ring the bell at the hour he used to have his lessons, and to open the common hall door, both were denied; and he was told Mr Black, the sub-principal, had discharged him; and Gordon having gone to him, he told him, you have forfeited your place by your absence above a month; he answering it was necessary, and procured by themselves, he was still debarred access to the schools for executing his function and employment. Whereupon he gave in a bill to the Lords complaining of this insolent summary way of oppressing him, and craving to be reponed. The strait occurred to the Lords was, how Mr Black could be obliged to answer on a bill? However, being appointed to be seen, he did decline to enter summarily into the trial of the affair; yet alleged, in his own defence, what he did was most warrantable, and agreeable to the statutes and Bishop Elphinston's foundation; where it is expressly provided, that the *magistri personalem facient in dicto collegio residentiam*, so that if any of them *per totum mensem se absentaverit, ipso facto ex tunc, prout ex nunc, præbenda sua privatum eum esse declaramus*; and that they cannot dispense with these rules. Mr Black cited another paragraph of their statutes, where all the masters are obliged to take an oath at admission on these terms, *recipiendus tactis sacris Dei evangeliiis juramentum præstabit corporale hæc nostra statuta et constitutiones inviolabiliter observare, singula dicti collegii privilegia defendere, ejusque commodum et utilitatem in omnibus juxta posse suum procurare*: Which oath both Mr Gordon and he having taken, he could not be so far wanting to his duty, as not to put

No 2.

No 3.

Found a professor could not be punished for a delinquency, summarily by the principal; but must be proceeded against in a collegiate manner according to law.