

APPENDIX.

PART I.

PRIVILEGE.

1801. *November 17.*

ROYAL COLLEGE OF SURGEONS, *against* The MANAGERS of the Royal Infirmary of Edinburgh.

IN the year 1729, an hospital was opened at Edinburgh for the relief of the diseased poor of the city and neighbourhood. This hospital was erected by the College of Physicians, in co-operation with other charitable persons, who contributed to its support; and, in the year 1736, a royal charter was procured, erecting the contributors into an incorporate body, by the name of the Royal Infirmary of Edinburgh, and vesting the immediate direction of the affairs of the hospital in a court of ordinary managers, who were subjected to the controul of an annual court, consisting of the whole contributors.

Soon after this institution, certain members of the Incorporation of Surgeons erected an hospital of their own, which, under the authority and approbation of the Incorporation, was denominated the Surgeons Hospital. It began to be perceived, however, that it would be more conducive to public utility to unite these two charitable institutions; and accordingly, after mutual-proposals, and various conferences, in the year 1738 this measure was adopted; and it was agreed,

1st, That the erectors of the Surgeons Hospital, together with the six surgeons who had formerly attended the Infirmary, and such other members of the incorporation as shall oblige themselves to serve in the Infirmary, and all such intrants into the incorporation for the future, as within six

NO. 1.

The exclusive privilege of the College of Surgeons to officiate in the Royal Infirmary, does not belong to them as individuals, but as a Corporation, and is under controul of the Managers of the Infirmary.

NO. 1. months of their admission, shall subscribe an obligation to serve in the Infirmary, *shall be surgeons to the Royal Infirmary of Edinburgh.*

2d, That the erectors of the Surgeons Hospital shall convey the stock and effects of this hospital to the Royal Infirmary, for which they are to be enrolled upon the list of donors, and be entitled to the other privileges which donors enjoy.

3d, That the managers of the Infirmary shall regulate and settle the attendance of the six former surgeons, and the surgeons who had formerly attended the Surgeons Hospital, who are to be under such regulations as shall be appointed by the said managers of the Royal Infirmary.

This agreement, accordingly, was carried into effect, and the managers exercised their power of appointing and regulating the attendance of the surgeons. Their regulations were altered from time to time, as they conceived conducive to the purposes of the institution; and after trying various modes of classification, none of which seemed to answer the end proposed, they adopted the method of a regular rotation of all the surgeons, according to their seniority. In the year 1800, after the mode by rotation had been some time established, the managers conceived, that it would be expedient to alter it; and accordingly, they selected from the Incorporation six surgeons to attend the Infirmary, the two senior to do the duty for two years, to be then succeeded by the two next, and the two younger to be supplied every two years by election of the managers from the Royal College of Surgeons.

This resolution being conceived by the Incorporation of Surgeons to be an infringement of their rights, they applied to the Lord Ordinary, and obtained an interdict. Upon this, the managers requested to be heard by counsel against the interdict, which was recalled by the Lord Ordinary, who ordered the case to be stated in memorials, and reported the cause. The Incorporation of Surgeons,

Pleaded: By appointing particular surgeons, the managers convert to individual advantage what was intended for general benefit. The agreement entered into in the year 1738, between the Infirmary and the College of Surgeons, gives the managers a power of arranging and classing the surgical attendance, but not a power of selecting particular surgeons, to the total exclusion of the rest. It confers on the Incorporation the exclusive privilege of being surgeons to the Infirmary; which would be utterly defeated, if certain members only were suffered to attend the hospital in their professional capacity. Accordingly, the agreement has hitherto been uniformly understood in this sense by both parties; and ever since the year 1738, a succession of surgeons in rotation, so far as was judged consistent with the interest of the hospital, and subservient to the general rights of the incorporation, has been the basis of all the regulations from time to time adopted by

the managers. This must be conceived to be the true and fair meaning of the contract, the very purpose and object of which, on the part of the surgeons, was the increase of professional skill, and the improvement of surgical practice, by operating in the Infirmary; and while this privilege was reserved to the College in general, the managers have no right at their own will and pleasure to confine it to a few individuals; nor can it be reasonably pretended, that such partial restrictions are consistent with the real interest of the diseased poor in the hospital. This agreement, appointing the whole incorporation to be 'surgeons to the Royal Infirmary of Edinburgh,' and which has all along been conceived in a general sense, was an onerous contract; and the incorporation, when they conveyed the stock of their hospital to the Royal Infirmary, gave a valuable consideration for a privilege to be enjoyed by the whole College, and not merely by a few individual surgeons.

The managers,

Answered: The relief of the diseased poor is the primary object of an infirmary; the advancement of professional knowledge, is merely a secondary consideration, to be adopted only so far as is compatible with the great end and purpose of the institution. The managers are invested with their powers for this express object, and it is *ultra vires* of any set of managers to oblige their successors to follow any other plan with respect to surgical attendance, than what they shall judge most conducive to the interest of the hospital. A rotation of surgeons can never be an advisable method; as in that case, the management of the hospital may often be entirely in the hands of the unskilful; and experience has shewn to the conviction of the managers, that this is a bad method of distributing the surgical attendance. The agreement in 1738, cannot therefore be understood in any such sense: It is an agreement, by which the managers are restricted to the Royal College of Surgeons of Edinburgh, in the appointment of surgeons to the hospital: They are to be appointed solely from that body, but every surgeon is not necessarily to be appointed. This is evidently the meaning of the contract; for there is no provision made in it to enforce the attendance of a surgeon; and the managers cannot be bound to elect each member of the incorporation in his turn, while he is left at liberty to refuse his attendance. And with respect to the contract being onerous, it was answered, that the Incorporation of Surgeons had received an equivalent, by being admitted to the usual privileges of donors, in proportion to the sum which they had contributed.

The Court, by a considerable majority, found, that the managers were entitled to enforce their late regulation, and accordingly remitted to the Lord Ordinary to refuse the bill.

NO. 1.

It was observed from the Bench : Possession in this case is on the side of the managers, who have all along been in possession of the management, of which the regulation of surgical attendance is an important part, and which accordingly, from time to time, has been variously modified. Indeed, the power of management can reside no where else by the terms of the charter. The great point to be considered, is the good of the hospital, which seems inconsistent with allowing an indiscriminate rotation of surgeons ; for in every body of men, however respectable, there must be individuals whom no practise can make perfect, and whom no experience can improve. The contract between the managers and the College of Surgeons, can only be sustained, so far as it is consistent with these principles.—But the majority of the Court seemed also to think, that even by the terms of this contract, though a monopoly was given to the College in general, a power of selection remained with the the managers.

Lord Ordinary, *Dunsinnan.*

For Surgeons, *Erskine, Turnbull, Bell.*

Agent, *William Balderston, W. S.*

For Managers, *Lord Advocate Hope, Solicitor-General Blair, Monypenny, Cockburn.*

Agent, *Robert Boswell, W. S.*

Clerk, *Hems.*

J.

Fac. Coll. No. 1. p. 1.

1803. *March 11.*

STIRLINGS, *against* BLACK.

NO. 2.

A patentee is not entitled to an interdict upon a patent, the validity of which has not been judicially ascertained.

IN the month of November 1800, John Turnbull *junior* of Cordale Printfield, and John Crooks, chemist in Edinburgh, obtained a patent for the exclusive privilege of using a peculiar mode of bleaching by means of steam. This patent they assigned, by a writ of indenture, to William Stirling and Sons, merchants in Glasgow, who accordingly issued licences to different bleachers, allowing them to practise the patent method upon payment of a certain duty.

Charles Black, bleacher at Springfield, adopted a method of bleaching, which was alleged to be comprehended under the patent, but refused to take out a licence. Upon this, Stirlings presented a bill of suspension, praying for an interdict, which was granted by the Lord Ordinary, upon presenting the patent and writ of indenture. Black did not object to the bill being passed to the effect of trying the question, but contended, that the interdict should be recalled ; upon which point the Lord Ordinary reported the cause. The suspenders

Pleaded : A patent from the Crown must be presumed to be valid, until it be shewn to be otherwise ; and as there is nothing which makes the possession of an exclusive privilege, an exception from the general rules of law with respect to every other sort of possession, the suspenders are entitled to