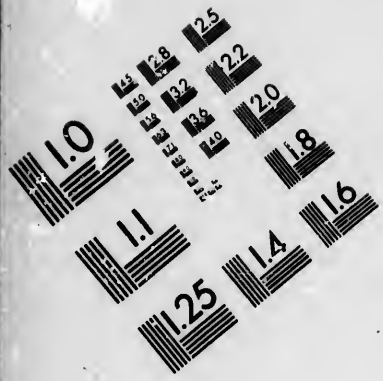

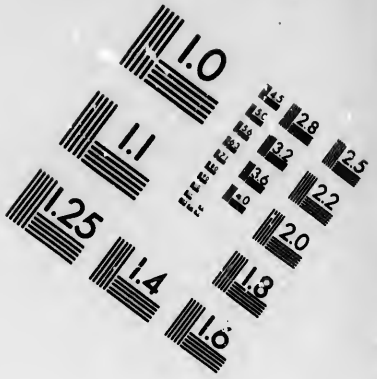

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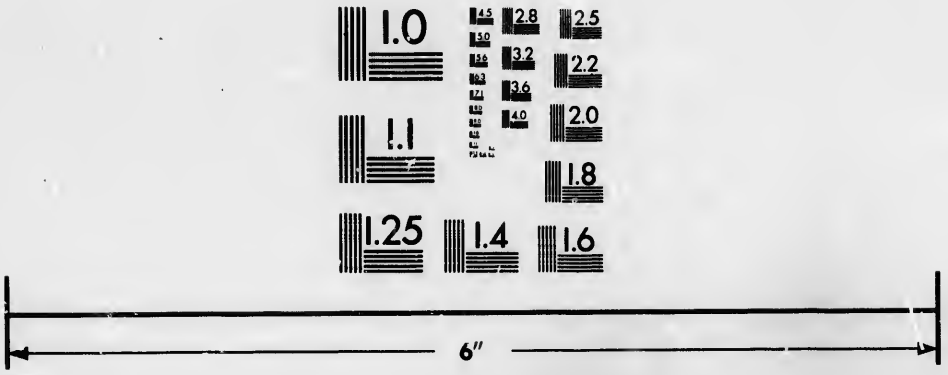

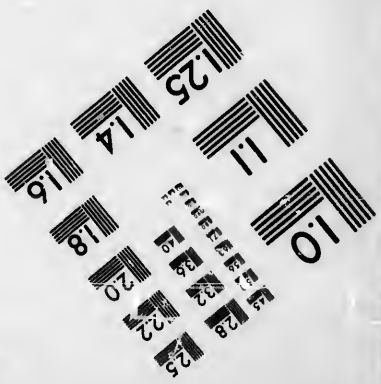

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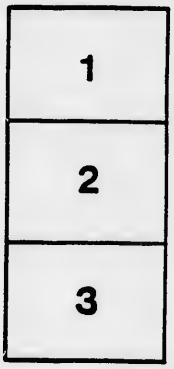

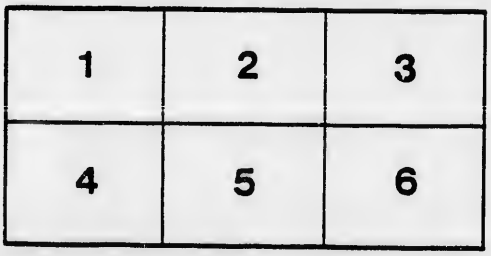

IN CHANCERY.

THE CASE OF

WEIR *v.* MATHIESON,

AS REPORTED IN THE ELEVENTH VOLUME OF

GRANT'S CHANCERY REPORTS,

PAGE 383.

TORONTO:
HENRY ROWSELL,
PUBLISHER OF CHANCERY AND COMMON LAW REPORTS.

1865.

University—Injunction—Removal of professor—Costs.

An injunction granted to restrain trustees of a university founded by Royal Charter removing a professor thereof.

By letters patent under the Great Seal, issued on the 16th of October, 1842, certain persons therein named were created a body corporate by the name of "Queen's College, at Kingston," with the style and privilege of a university, with power to appoint professors and other officers, and in case of complaint made to the trustees to institute inquiry, and in the event of any impropriety of conduct being duly proved, to admonish, reprove, suspend, or remove the person offending:

Held, that the professorships in the institution were offices of freehold, and that the trustees had not the power at their discretion without such inquiry of removing the professors, but that they held their appointments *ad vitam aut culpam;* that this court would by injunction prevent the trustees from improperly interfering with the professors in the discharge of their duties: and where a professor had been improperly removed, the court, on decreeing him relief, and in order to do him complete justice, ordered him to be paid out of the trust funds of the institution his arrears of salary; and ordered such of the trustees as had acted in such improper removal to pay the costs of the suit.

This was a bill by the Rev. *George Weir* against the Rev. *Alexander Mathieson* and twenty-five others, trustees of Queen's College, at Kingston, and the College; setting forth that by royal letters patent, issued the 16th of October, 1842, certain persons therein named were created a body corporate by the name of "Queen's College, at Kingston," with perpetual succession as a College, with the style and privileges of a University for the education and instruction of youth and students in arts and faculties; that the letters patent further declared, that for the better execution of the purposes set forth in them, and for the more regular government of the corporation, there should be twenty-seven trustees; and amongst other powers conferred on the trustees, it was declared that they should for ever have full power and authority to elect and appoint for such college, a principal and such professor or professors, Statement.

1865. master or masters, tutor or tutors, and such other officer or officers as to the trustees should seem meet, and further, "that if any complaint respecting the conduct of the principal, professor, master, tutor, or other officer be at any time made to the board of trustees, they may institute an inquiry, and in the event of any impropriety of conduct being duly found, they shall admonish, reprove, suspend or remove the person offending, as to them may seem good. Provided always, that the grounds of such admonition, reproof, suspension or removal, be recorded at length in the books of the said board."

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That in the year 1853 the Rev. *John Cook*, D.D., (first principal of the college, and one of the defendants,) was directed by the board of trustees to proceed to Scotland, and procure professors for the college; and plaintiff, who was then filling the permanent office of Rector of the Grammar School of Banff, was desired by him to accept the professorship of Classical Literature in Queen's College, and in September of that year, plaintiff, being still in Scotland, accepted such office at a salary of £350 a year; and in October following entered upon the discharge of the duties of such professorship, and was then duly confirmed by the board of trustees, since which time plaintiff had continued faithfully to perform and discharge the duties thereof until the month of February, 1864, when he was hindered and prevented in the discharge of such duties by the wrongful, improper and illegal acts of the trustees; they having, on the 18th day of that month, passed the following resolution:

Statement.

"*Resolved*, that from the facts which have come to the knowledge of the trustees, and the present alarming state of the college, the trustees deem it necessary, and in the interest of the college, to remove Professor *Weir* from the office of Professor of Classics, and Secretary to the Senatus, and in the exercise of their power to

remove at discretion, they hereby do remove him from these offices accordingly forthwith; and that the treasurer do pay to him his salary in full to the end of the present session, and for six months thereafter, in lieu of notice; and that the secretary be instructed to communicate this resolution to Mr. *Weir*," which, on being communicated to plaintiff, he refused to recognise as valid, or to acquiesce therein in anywise: and notwithstanding such resolution plaintiff endeavored to perform, and would have performed, the duties of his professorship, but that the board of trustees had excluded him.

Statement.

The bill further alleged, that by means of gifts, donations and bequests from numerous members of the Church of Scotland, and others, and from other sources, the college was possessed of a large property, and from the annual income arising therefrom, and from any grant of money from the legislature, the board of trustees paid and discharged the salaries of the professors and other expenses of the college, in accordance with, and under, and subject to, the directions, provisions, powers and authorities in the said letters patent contained; that the Royal Charter was granted to the intent that the members of the Church of Scotland in Canada might have and enjoy a university and college, with similar powers and privileges, and upon the model of the University of Edinburgh, and the charter, in making provision for the appointment and removal of professors, had in view professors enjoying similar offices, and fulfilling similar duties to the professors in the University of Edinburgh; and that similar customs and usages should apply to and be associated with such professorships, and that the nature of such office and employment should be similar in the two universities. In the University of Edinburgh the tenure of the office of a professor is *ad vitam aut culpam*, that is, during the life of the incumbent, unless removed for impropriety of conduct; and the plaintiff submitted

1865. that, under the charter, such is the tenure of the professorship held by him in Queen's College, and such was the condition under which he accepted his appointment.

Weir v. Mathieson.

The bill further alleged, that the resolution of the 18th of February was passed by the board of trustees without the plaintiff being present—without his being notified or requested to appear before the board—without his being notified of any charge or complaint being preferred against him; and without the board having called upon him to make any defence; and without having asked from him any explanation whatever.

The bill further alleged, that such resolution had been passed by the board of trustees acting on an *ex parte* statement of the defendant *Leitch*, the principal of the college, which statement had been read to, but not entered on the minutes of the board: that at a meeting of the trustees, held on the 26th of February, 1863, they assumed to pass certain statutes or ordinances, which the plaintiff alleged to be illegal, amongst others, one declaring that all officers should be appointed by, and hold office only during the pleasure of, the trustees, except in cases where a special agreement had been or might be made: that the trustees might on their own motion, and without complaint being made, deal with the principal, professors, and other officers, when they saw cause, without recording the grounds of censure, suspension, or removal; and, on removal, such officer should be entitled to claim salary up to the date of his removal: that the passage of these statutes created great dissatisfaction and discontent amongst the professors, and that the alarming state of the college referred to in the resolution of the 18th of February, 1864, was solely caused by these obnoxious statutes, and the refusal of the trustees to pay any regard to the remonstrances made to them in respect to such statutes,

Statement.

and the plaintiff did not cause or originate such a state of things: that the meeting of the trustees of the 9th of February, 1864, was illegal and contrary to the charter, not being duly summoned or convened, it professing to be an adjourned meeting from the third of the same month, when only three of the trustees were present, who had no power to adjourn, and no notice was given, as prescribed by the charter, to the other trustees, of the meeting on the 9th.

Other charges were introduced into the bill as to the defendant *Leitch* influencing the trustees against the plaintiff, but these it is considered are immaterial to the present report: and the bill asserted that even if the statements of the defendant *Leitch* were true, the trustees were not justified in passing the resolution complained of. The prayer was that the resolution might be declared illegal and void, as having been passed at a meeting not duly held; when no complaint was made against the plaintiff, and no impropriety of conduct on his part proved; that it might also be declared that such resolution was a breach of trust, and contrary to the charter, inasmuch as such resolution was passed without proper deliberation and consideration, and under the influence of prejudice; that the statutes referred to might be declared illegal and void; that it might be declared that plaintiff was entitled to hold and enjoy his said office in the college until duly removed or suspended therefrom for impropriety of conduct, duly proved, as contemplated by the charter; that the said resolution might be cancelled, and the trustees restrained from in any way interfering with, or impeding the plaintiff in the discharge of the duties of his office, and from withholding his salary in respect thereof; and that such of the defendants, the trustees, as voted for such resolution, and the defendant *Leitch*, (who was absent from the meeting at which it was passed,) might be ordered to pay plaintiff his costs.

Statement.

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Weir v. Mathieson.

Upon the filing of the bill an application was made during the vacation of 1864, before the late Vice-Chancellor *Esten*, for an injunction to restrain the trustees, as prayed by the bill, which, upon argument, he ordered to issue, his Honor observing,

"I have perused the charter and statutes. I think that the trustees have power to appoint for life, or for a term of years, or during pleasure; but that an appointment made generally must be deemed to be during good behaviour, and while the duties of the office are performed. I think that the 15th clause was obligatory, or was intended to insure an investigation in case of reasonable complaint. By the principles of the common law no man can be dismissed from his office without inquiry, and an opportunity of defending himself; I think, therefore, that the dismissal of Mr. *Weir* was illegal. He could doubtless recover the emoluments of his office, but I think he has a right to the protection of this court, which would not permit another to be maintained in his office while he recovers his salary at law. The legal remedy would be inadequate. I think that a person appointed under the trustees has a right to the protection of the court, and that trustees transcending their powers should be restrained by injunction. I disclaim, of course, all authority to interfere, if the trustees, proceeding in due course of law, pronounce a decision which is deemed to be erroneous. In this case the jurisdiction of the visitor would be invoked, whose decision cannot be reversed by this court; but this proceeding appears to me to be *ultra vires*."

Statement.

Eighteen of the Trustees, as also the College, subsequently answered the bill, the leading points raised by the answers of the trustees were that the trustees had power to appoint professors, masters, tutors and other officers, for such time as they thought proper; that many professorships in the colleges of the United Kingdom and of Europe, as also of Canada and elsewhere in

America, were and are not held for life; that the usages of the University of Edinburgh varied much from the provisions relating to Queen's College by the charter; that, in points not provided for by the charter, the usages of that University were not intended to be binding on Queen's College; and that plaintiff was not appointed for life; nor did he accept the appointment on condition that it should be for life.

That the authority of the Rev. Dr. *Cook*, referred to in the bill, was contained in a resolution passed by the trustees on 15th July, 1852, whereby the Rev. Dr. *Mathieson* and the Rev. Dr. *Cook*, or whichever of them might be in Scotland, were authorized to seek out and recommend for appointment by the board, professors to fill the vacancies existing at that time in the college.

Statement.

That after the plaintiff had been nominated under the authority of certain resolutions set out in the answer, a resolution was passed on the 8th of June, 1854, stating "that the appointment of Professor *Weir*, be approved of and confirmed from the period of his arrival at Kingston;" that the provisions of the charter respecting the trial of complaints made to the board do not take away any discretionary power which the trustees otherwise had, but are only obligatory where such discretionary power exists: and submitted that the board had such discretion to dispense with the services of the plaintiff as such, in the same manner as they could remove any officer of the college, subject to his receiving any payment on account of salary to which the law under the circumstances might entitle him; and that the trustees having, in the exercise of such discretion, dispensed with the services of the plaintiff, their act or motives could not be questioned in this court: denied any improper motive for such removal, asserted that such was done after full discussion by the board on the 9th and 10th days of February, 1864, and from a conviction that the conduct of plaintiff made his removal absolutely

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necessary for the best interests of the college; many of the facts and circumstances, shewing such necessity to exist, being within the personal knowledge of the trustees.

The answers further submitted that the plaintiff had no right to raise any question as to the regularity of the meeting of the board at which he was removed, his removal being, as the defendants contended, discretionary with the board; also, that Queen's College, being founded by Royal Charter, her Majesty was the visitor thereof, and the plaintiff's only remedy was by petition to the Crown.

The cause having been put at issue, was brought on for the examination of witnesses and hearing before his Lordship the Chancellor, at the sittings of the court, at Kingston, in the autumn of 1864, when evidence was gone into at some length as to the conduct of the plaintiff and the feeling existing on the part of several of the trustees towards him, which it is not necessary to recapitulate.

Statement.

At the hearing a decree was made in favour of the plaintiff, the Chancellor stating, "My brother *Esten*, on the argument of the motion for injunction, has, I find, found the employment of the plaintiff by the defendants was during good behavior, in other words, *ad vitum aut culpam;* and that this court has jurisdiction and ought to interfere to protect him in the enjoyment of his office. These are the only two questions of law in the case, and I think I should hold that they having been disposed of by my learned brother, the plaintiff is entitled to a decree, as it is admitted that if his tenure be such as the Vice-Chancellor decides it to be, he has not been properly removed therefrom, although I doubt the jurisdiction of the court to interfere.

"The evidence before me in no way alters the character of the case as presented to my brother *Esten*.

"The decree will be to restrain the defendants from

1865.

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interfering with the exercise by the plaintiff of his duties or office as classical master; from appointing any one in his place, and from withholding from him his salary until he is legally removed.

"The defendants must pay the plaintiff his costs."

The defendants thereupon set the cause down to be re-heard before the full court.

Mr. *Blake*, Q. C., and Mr. *Cattanach*, for the plaintiff.

In discussing this case the court will have to consider and determine two questions which arise in it: first, the tenure by which the plaintiff held the office to which he has been appointed; and, secondly, whether the court can properly interfere for the protection of the plaintiff in the event of its being considered that such appointment created a freehold, or *quasi* freehold, in the office.

Argument.

It is shewn by the minutes of the board that the Rev. Dr. *Leitch*, Principal of Queen's College, at the time he was asked to accept that appointment, held a situation in Scotland, *ad vitam aut culpam*, and his appointment in the College not having been for any specified time, the trustees by resolution expressed the opinion that that appointment was for life: at the time plaintiff was appointed he also held a situation *ad vitam aut culpam*, and therefore the same reasons were applicable to his case as to that of Dr. *Leitch*. The general rule in Scottish Universities is, that professors hold their chairs for life. In Queen's College, the principal, and all professors, are and must be chosen in the same manner; and if the trustees are right in their contention as to their power to remove any of the professors, they must have that power as egards the principal also, their status under the charter being alike; a result which could never have been intended. The language of the charter

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here, shews that all the professorships were to be held for life, and provides a means for the removal of any of the incumbents only on complaint being made, and such removal to be by a majority of the trustees; thus clearly negativing the right of arbitrary dismissal, as is contended for by the trustees: in other words, the appointment to office exhausts the power of the trustees, except where complaint is properly made and sustained, when a removal may be made for cause. The express powers given by the charter are narrower than those which the trustees say are implied and are in effect embraced in the implied powers, a result which is absurd.

The general rule that such offices are freeholds, or *quasi* freeholds, is applicable to this case, and determines the tenure when there is no express contract.

Argument.

They also contended that the facts fully established the existence of a trust; the trustees holding the funds from which plaintiff's salary came, in trust for him, and others in like manner; that plaintiff, as a member of the corporation, was entitled to file a bill, on the ground that the trustees, in dismissing him improperly, had been guilty of a breach of trust; and also on the ground that the university was a public charity. They also contended, that the trustees appointed by the charter of incorporation were the visitors, and it was not necessary therefore to appeal to the Crown; that the trustees had agreed to act visitatorially in dismissing the plaintiff, and that having exceeded their authority by dismissing him at pleasure, such dismissal was a nullity, and that relief should be given in this court.

They referred, amongst other authorities, to *The King* v. *Richardson*, (*a*) *Attorney-General* v. *Pearson*,

(*a*) 1 Burr. 536.

(a) *In re Phillips' Charity*, (b) *In re* [illegible]*mington School*, (c) *Dummer* v. *Chippenham*, (d) *P*[illegible]*s* v. *Bury*, (e) *Willis* v. *Childe*, (f) *Comyn's D*[illegible] *Franchise*, (g) *Dougars* v. *Rivaz*. (h)

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Mr. *Strong*, Q. C., and Mr. *McLennan*, for defendants. The only ground on which plaintiff can at all rest his case, is that this is a charity; the leading case on this point is *Phillips* v. *Bury*, referred to by the other side. It is a prevailing principle in all such cases, that there must be a visitor. When no visitor is named, the founder is held to be such; but that rule is applicable only in the case of private charities, not where it is founded by Royal Charter.

It is out of the question to contend that the trustees are visitors in this case; they are the persons appointed to manage the institution—they are in fact the persons to be visited.—*Phillips* v. *Bury*, referred to in *Duke's* Charitable Uses, 256. The charter being silent as to visitors, the Crown must be held to be entitled to all the privileges of visitors.—*The King* v. *Catherine's Hall*. (i)

Argument.

The next point is as to the internal management of the college; in all matters relating to that, the visitor's jurisdiction is conclusive; *Phillips* v. *Bury* is a clear decision on this point. The jurisdiction of the court is clearly stated by Mr. *Haddon* in his work on the administrative jurisdiction of the Court of Chancery, (pp. 166-7,) and rests it upon the ground of trust. Here there is no trust, and the case of *Willis* v. *Childe*, relied on by the other side, was a case of express trust.

(a) 3 Mer. 353, at pp. 295 & 402
(b) 9 Jur. 959.
(c) 10 Jur. 512.
(d) 14 Ves. 245.
(e) 2 T. R. 346.
(f) 13 Beav. 117.
(g) F. 32, 34.
(h) 28 Beav. 233.
(i) 4 T. R. 233.

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Any contract of hiring, especially for personal service, is not such a contract as this court will specifically perform; in the present case there is no mutuality between the parties.

[Mr. *Blake*, Q. C.—We do not rest the case on the ground of specific performance.]

The bill is clearly rested on the right to specific performance; and although that relief is not in terms asked for, still such is the effect of the prayer.

This court will not enforce a contract to build a house; but where money has been left to build, the court will enforce execution of the trust. This it is true may be said to be a very thin distinction, but the reason why the court interferes in the latter case is plain, it is that there is no legal remedy for the party entitled.

Argument.

In this case no such objection exists, as the plaintiff can proceed either by *mandamus* or by action to enforce payment of the stipulated salary; the frequency of action is not a sufficient reason for overcoming the objection to the court pronouncing a decree such as is here sought.

As to the tenure of office; the 15th section of the charter points out the course to be taken in the case of complaint being made against professors and others; and the 19th section authorizes the trustees in their discretion to abolish any of the chairs in the college.

[*Spragge*, V. C., that may be so. If, as is contended for by the other side, the professor has a freehold in his office; that of course can only be while the office continues to exist.]

Nothing can be more untenable than the argument attempting to place this on the same footing as the University of Edinburgh; there it is questionable if a

professor can be removed for any cause. Professor *Leitch*, it is shewn, before he would consent to accept the appointment, insisted upon it being made during good behavour; that fact, however, instead of being in favor of the view contended for by the plaintiff, supports the construction put upon the contract by the trustees.

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The Attorney General v. *Magdalene College*, (*a*) *In Re Berkhampton Free School*, (*b*) *The Attorney-General* v. *Deadham*, (*c*) *The Attorney-General* v. *Clarendon*, (*d*) *In Re Queen's College, Cambridge*, (*e*) *In Re Oxford College*, (*f*) *Pickering* v. *Ely*, (*g*) *Stocken* v. *Brocklebank*, (*h*) *Johnson* v. *Shrewsbury & Birmingham Railway Co.*, (*i*) *Horne* v. *The London & North Western Railway Co.*, (*j*) *Ogden* v. *Fossick*, (*k*) *Brett* v. *East India & London Shipping Co.* (*l*) *Peto* v. *The Brighton &c. Railway Co.* (*m*). were, with other authorities, referred to and commented on by counsel.

The other points taken by counsel appear sufficiently in the judgment.

The judgment of the court was delivered by

Judgment.

SPRAGGE, V. C.*—This case has been exceedingly well argued on both sides.

The first point that I propose to consider is the tenure by which Professor *Weir* held his office. I take that first, because, in my view of the case, it depends on

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(*a*) 10 Beav. 502.
(*b*) 2 V. & B. 134.
(*c*) 23 Beav. 350.
(*d*) 17 Ves. 491.
(*e*) Jacob 1.
(*f*) 2 Phil. 521.
(*g*) 2 Y. & C. C. C. 249.
(*h*) 3 McN. & G. 250.
(*i*) 3 D. M. & G. 914.
(*j*) 10 W. R. 170.
(*k*) 11 W. R. 128.
(*l*) 3 N. R. 680.
(*m*) 1 Hem. & M. 468.

* MOWAT, V. C., gave no judgment, having been concerned in the case while at the bar.

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that, whether this court has jurisdiction in the matter before us. Upon this point the nature of the institution, whether public or private, is material; as to that I think there is no room for doubt. It is a college and university, and the reason of its institution is thus set forth in the Royal Charter: "Whereas the establishment of a college, within the province of Upper Canada, in North America, in connection with the Church of Scotland, for the education of youth in the principles of the Christian religion, and for their instruction in the various branches of science and literature, would greatly conduce to the welfare of our said province." It is, in my opinion, a corporate body, constituted by Royal Charter for the advancement of religion and learning generally, in Upper Canada, and so of a public nature.

Judgment.

The head of such an institution, in the absence of anything defining the tenure of his office, and taking it out of the general rule, holds his office *ad vitam aut culpam*. This is as clear from the case in the House of Lords of *Gibson* v. *Ross*, (*a*) cited by the defendants, as from any of the older cases. In that case the master of an academy, established by Royal Charter, at Tain, in Rosshire, had been dismissed by the directors and managers of the institution; and the question was as to the tenure of his office, and the court in Scotland, and the House of Lords, upon appeal, both held that the institution was private and local; the circumstance of its being incorporated by Royal Charter making no difference. Lord *Cottenham*, by whom judgment was delivered, observed, "It is clearly established that a private society would have the right to dismiss a master: and there is no difference here between these parties and any other private society, except that these parties are incorporated." In another passage he states the different rules applying to public

(*a*) 7 Cl. & Fin. 241.

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and private schools. "A public schoolmaster," he says, "is a public officer, and as such he cannot be dismissed without an assigned and sufficient cause." But it is clear that in the case of a private trust, this rule does not apply. That is a clear and well settled principle of law.

Attorney-General v. *Pearson*, heard in 1817, was the case of a minister of a dissenting congregation; and Sir *Samuel Romilly*, contending against the removal of the minister, at discretion, instanced the case of public schools, and said, that whenever the trustees had endeavoured to keep the master dependant upon them by a limited appointment, the court had uniformly resisted the introduction of any such limitation. This shews that it must have been well understood in his day, that the tenure of office of the master was during good behaviour.

Judgment.

In the matter of the Free Grammar School of Chipping, Sodbury, (*a*) before Lord *Lyndhurst*, the appointment of the master was general. It was by the bailiff and burgesses, confirmed by the bishop. The master was afterwards removed upon some disagreement, as to what was to be taught in the school. The Lord Chancellor held the removal by the bailiff and burgesses improper; they had, he said, exercised the power of appointment; and he added, "but I do not find anywhere that they have a right to remove the schoolmaster, as long as he shall continue to conduct himself with propriety in his office," and more to the same effect.

In the case of *Phillips'* Charity, the master was appointed to office "so long as he shall continue to discharge the duties of the said school to the satisfaction of the trustees and feoffees of Mr. *Phillips'* Charity." A petition was presented by Mr. *Newman*, the schoolmaster, to the Court of Chancery, in 1839, and it was

(*a*) 8 L. J. Chy. 18.

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thereupon declared by the then Vice-Chancellor that Mr. *Newman* "was entitled to hold the office of schoolmaster, and to the emoluments thereof, so long as he should well conduct himself, and be competent to the performance of the duties thereof." Sir *J. L. Knight Bruce* held such to be his tenure of office, as settled by the order, upon the matter coming before him, without, however, expressing his own opinion upon the point.

There are other cases which bear more or less upon the same point, but the authorities I have quoted appear to me to establish that, as a general rule, the master of an educational establishment, which is a "public charity," as this institution is admitted to be, holds his office during good behaviour.

Judgment.

I think no sound distinction exists between professors in this university, and the masters of public schools. The head of this institution clearly, I think, stands upon the same footing, and I think the charter shews that he and all the professors hold their office by the same tenure; that they are all, in the language of Lord *Cottenham*, "public officers."

There are considerations in favor of such being the tenure of office, urged by Mr. *Blake*; some drawn from the provisions of the charter, especially the 15th and 16th clauses, and some resting on other grounds, which are of considerable weight, but into which I do not find it necessary to enter.

But, it is contended that the appointment in this case was in effect, though not in terms, *dum bene placito;* and that there is nothing in the charter restrictive of such appointment. I do not know that the charter would not prevent an appointment to office of that tenure, even if it had by contract been so expressly

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limited. What was said by Sir *Samuel Romilly* leaves room for doubt upon that point; but here the appointment is general, and must be taken to be of such tenure as would flow from the nature of the office. It is to be remembered, too, that this engagement was not made in Canada, where it is said appointments of this nature are understood to be *dum bene placito*, but in Scotland, where the contrary seems to be understood. I gather this in part from the evidence, and in part from the case of *Gibson* v. *Ross*, which was a Scottish case; and from the cases in the Scotch courts referred to in that case.

I do not attach much weight to the argument deduced from the power possessed by the trustees to reduce the number of chairs in the University. That power seems to me quite consistent with the tenure of office, being during good behaviour, as long as the chairs exist; in other words, an office *ad vitam aut culpam*, subject to the abrogation of the office itself. Nor can I say that the implied engagement, involved in the tenure of office claimed by the plaintiff, is unreasonable and improbable; as the defendants contend, in the face of what I find to have been the practice for many years both in England and Scotland, in regard to offices of a cognate character.

Judgment.

The question of jurisdiction was strongly contested at the bar, and, in connection with it, the question as to where the visitatorial power of this university resides. My own opinion is, that whoever be visitor, this court has jurisdiction. The functions of the visitor are in relation to matters of interior economy and management; and as to those matters, it may be granted that they are exclusive; but that is not inconsistent with the jurisdiction of this court in relation to public charities. Several of the cases cited arose in regard to the application of the revenue. The *Attorney-General* v. The *Foundling Hospital*, (*a*) is an instance of this. In

(*a*) 2 Ves. Jur. 41.

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Birkhampstead Free School, (*a*) an order was made by the court, declaring that the warden of All Souls' was visitor of the school, but that the revenues were subject to the jurisdiction of the court, which order Lord *Eldon*, upon the matter coming before him, pronounced to be "perfectly agreeable to law," and in another passage he says, "the court has, in fact and practice, acted upon the ground of such jurisdiction, of which there is no doubt."

In the *Attorney-General* v. *Locke* (*b*) the governors of the charity, who were also visitors, were made accountable to the court, *quoad* the estates of the charity.

Judgment.

In most of the cases it is put upon the ground of trust; the governing body of a public charity hold their powers in trust, and a court of equity, as to matters not falling within the proper functions of the visitor, sees that the trusts are properly carried out; in some cases, on behalf of individuals, who are aggrieved by the improper exercise of the trust; in other cases, on behalf of the Crown, as *parens patriæ*. *Green* v. *Rutherforth*, (*c*) is an instance of the former. The trust was to present to a rectory. The bill was demurred to on the ground that the jurisdiction was in the visitor, not in the court, but was overruled. The observations of Lord *Hardwicke* are valuable; he says, "It is sufficient to shew that the visitor, though general, could not give an adequate remedy in many cases on this trust," and he refers to the case of *Eton College*, where, as he says, the court held that "the bare averment of a visitor would not preclude the jurisdiction of this court; but the extent of his authority must appear, that the court may be satisfied he can do complete justice; and therefore," he says "a mandamus was awarded." Lord *Hardwicke's* opinion evidently was that in cases of this nature a court of

(*a*) 2 V. & B. 134. (*b*) 1 Ves. 462.
(*c*) 3 Atk. 164.

equity should exercise its jurisdiction, unless satisfied that there was an adequate remedy elsewhere, upon the same principle as a court of common law would grant a mandamus. 1845. Weir v. Mathieson.

Rex. v. *Barker* (*a*) was an application for mandamus, directed to the trustees of an endowed dissenting chapel, to admit a minister duly elected. Lord *Mansfield* observed, "Here is a function with emoluments, and no specific legal remedy," and the mandamus was granted. These cases are apposite to the contention by the defendants, that this court has no jurisdiction, because, as they contend, the Queen is visitor.

Dawson v. *Corporation of Chippenham*, (*b*) was a bill by the master of a public school for improper dismissal; a demurrer to the jurisdiction was overruled. *Willis* v. *Childe* (*c*) was a similar case, and the bill was sustained. In the *Attorney-General* v. *Sherborn School*, the point was again discussed with the same result. In the *Attorney-General* v. *Dedham School*, (*d*) the question was again discussed in connection with the authority of the visitor, Sir *John Romilly* observing that "this court does not interfere with the visitatorial power, unless it finds a breach of trust." *Dougars* v. *Rivaz*, (*e*) before the same learned judge, is a strong case in favor of this bill. The plaintiff was the pastor of a French Protestant Church in London, which had been incorporated by Royal Charter by Edward VI., and which was possessed of certain revenues, out of which the salary of the pastor was paid. The elders and deacons, who formed the governing body, deposed the plaintiff from his office, and withheld from him his salary. For the plaintiff, it was insisted that the matter complained of was cognizable by Judgment.

(*a*) 3 Beav. 1265.
(*b*) 14 Ves. 245.
(*c*) 13 Beav. 117.
(*d*) 23 Beav. 350.
(*e*) 28 Beav. 233.

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this court, as it involved the due performance of a trust in respect of the trust funds under the control of the defendants, and that this was a matter distinct from the visitatorial power of the Crown. The defendants objected to the injunction, contending that the court could only interfere in cases of trust, and that in that institution no trust could be shewn to exist for the plaintiff. Sir *John Romilly* held that the court had jurisdiction, and granted relief. His remarks are apposite to this case. "It appears that the funds of the institution are under the control of the governing body, and the defendants have practically the power of withholding from the plaintiff the emoluments assigned to and accepted by him. This constitutes a trust which they have to perform, and which they are bound to perform, in favor of the person who fills the office of pastor; and assuming the plaintiff to be wrongfully deposed, I am of opinion the relation of trustee and

Judgment.

cestui que trust does exist between the elders and deacons and the pastor. * * * The visitor visits the corporation with respect to corporate matters; but that circumstance does not remove from this court the jurisdiction or obligation to exercise its functions of inquiring whether the duties attaching to the defendants, so far as they have a trust to perform towards the minister, have been properly exercised by them."

The case of *Pickering* v. *Bishop of Ely* is distinguishable from this case; in that it was not a case of a public charity, nor was there an endowment of any kind, or revenues upon which to fasten a trust. Sir *J. L. Knight Bruce*, who decided that case, could not have intended to deny the jurisdiction of the court in the case of a public charity, for in the case of the *Phillips' Charity* and the *Fremington School*, decided not long afterwards, he upheld the jurisdiction.

Mr. *Strong* distinguishes *Willis* v. *Childe*, and *Dou-*

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gars v. *Rivaz*, from the case before us, on the ground that those were cases of trust. I do not see that this is less so. Mr. *Strong* says, and I agree with him, that Queen's College is what in law is called a charity; I think unquestionably a public charity; and he says, what is probably correct, that the Queen is visitor. Now if there are revenues of such an institution, as there must be, or it could not be carried on, those revenues must be administered by the governing body; and that body must administer them for the purposes declared in the charter, and therefore necessarily in trust, and I apprehend it can make no difference whether those revenues are derived from endowment or from benefactions year by year. However derived, the trust is the same. This case I think is not distinguishable from those referred to. The trust gives this court jurisdiction, and is outside of the visitatorial power, which, as Mr. *Strong* contends, affords the only remedy.

Judgment.

I may here notice the objection that this is in effect a bill for specific performance. It is not more so than those of the masters of public schools, which have been referred to; and does not rest upon that head of jurisdiction, but upon trust. There being a trust, it cannot be an objection to relief upon it, that it originated in a contract. The agreement seems to amount to this. There is a contract, but of a nature which this court will not specifically perform, and therefore, although there be a trust proper for this court to execute, the court will decline its ordinary jurisdiction in regard to trusts, and refuse to execute them. I cannot accede to this.

The next point is as to whether this suit is rightly constituted, supposing the court to have jurisdiction, or whether it should not have been by information, or by information and bill. I think it is rightly constituted as it is. *Dummer* v. *Corporation of Chippenham*, *Willis* v. *Childe*, and *Dougars* v. *Rivaz*, already referred to, were all suits by the individual aggrieved, and in the latter

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case, while it was objected by the learned counsel for the defendants, among them Sir *Hugh Cairns*, that the corporation ought to have been made a party defendant, it was not objected that a bill by the plaintiff was not proper. The same suit, with the suit of the *Attorney-General* v. *Dougars*, (*a*) illustrates in what class of cases the proceeding is proper by bill, and in what by information. In the former suit the court gave costs against the defendants, and they paid them out of the funds of the charity; and the information was filed in part on the ground of that misapplication of the funds. Thus, to correct the individual wrong, consisting of deprivation of office and its emoluments, a bill was sustained; while, to correct the public wrong of a misapplication of the funds, an information was sustained.

Judgment.

I may here observe, that it does not appear to be necessary to shew that the payment of the funds to another improperly appointed to the office, will not leave sufficient for the payment of his salary, to the person deprived of office. This does not seem to have been an element in any of the cases. It is sufficient to shew a breach of trust affecting the fund, out of which the party instituting the suit is entitled to be paid.

It has been doubted in this case, whether the court can properly go so far as not only to reinstate the plaintiff, but also to direct that his arrears of salary be paid to him. I have not felt pressed with any difficulty on that score. The court finds the act of removal, done as it was done, *ultra vires*, and therefore a nullity. The plaintiff, it follows, has all along been, and still is professor; he has been improperly debarred from executing his duties, and his salary has been improperly withheld from him. The court declares that he still is professor; and that he has been dismissed and ought to be restored, but that he has been and is professor; and so in effect

(*a*) 10 Jur. N. S. 966.

declares that he is entitled to what appertains to his office, *inter alia*, salary. The proper officer would surely be justified, and it would be his duty, to pay him his salary, without express direction in the decree to that effect, and, if so, it cannot be wrong to give such express direction; moreover, it would not be in accordance with the practice of this court to give such incomplete remedy, as would be given if the court left him to seek payment of his salary by proceedings elsewhere. The presence of the Attorney-General cannot, I apprehend, be necessary for this purpose, as it is only a consequential direction upon that, for the determining of which he is not a necessary party. I had come to this conclusion before observing that in the case of *Phillips'* charity, the arrears of salary were expressly directed to be paid. It is not to be doubted that it was decreed in other cases also, though the reports do not happen to mention it.

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I think the decree should direct the payment of the plaintiff's costs by the defendants, by whose votes his dismissal was effected, and that they ought not to come out of the funds of the institution. I have already referred to the direction in *Dougars* v. *Rivaz*, and *Attorney-General* v. *Dougars*, upon that point; the reason for this, and it is obvious enough, is given in the latter case: the like direction was made in the case of *Phillips'* charity.

Judgment.

It is perhaps hardly necessary to say that it has not been a question for the consideration of this court whether just grounds do or do not exist for the removal of the plaintiff from his professorship. He has been removed upon the assumption by the trustees that they had the right to remove him in their discretion. If his tenure of office be such as in our opinion it is, he could not be so removed; *that*, and his remedy in this court are the questions that it has been our province to decide.

1865. Weir v. Mathieson. It was conceded in argument, that if the plaintiff's tenure of office was *ad vitam aut culpam*, the deprivation of office which had taken place in his case was not regular, and could not be sustained.