[2d *March* 1840.]

(No. 2.)

ADAM GIBSON, Appellant.

[*Lord Advocate* (*Rutherfurd*) — *James Anderson.*]

HUGH ROSE ROSS and others, Managers and Directors of Tain Academy, Respondents.

[*Attorney General* (*Campbell*) — *Sir W. Follett.*[1]]

Schoolmaster.—Held (affirming the judgment of the Court of Session), that although a private body of subscribers to an academy may have obtained a charter of incorporation, a teacher appointed by them is not to be regarded as a public officer holding his situation ad vitam aut culpam.

2D DIVISION.
Lord Ordinary Jeffrey.
Statement.

IN the years 1808 and 1809 a number of gentlemen connected with the North of Scotland formed themselves into an association for the purpose of establishing and endowing an academy at Tain. They obtained a charter from the crown, constituting certain parties ex-officiis, and a certain number of subscribers (to be chosen in the manner therein prescribed), a body corporate, with the usual privileges, under the title of "Managers and Directors of the Tain Academy." Power was given to the directors (seven of whom are declared a quorum, and all questions to be determined by ballot,) to hold three meetings annually, in July, October, and December, and to the subscribers to hold an annual meeting on 30th of April. The charter also confers

[1] Rep. 16 D., B., & M., 301; Fac. Col. 23d Dec. 1837.

on the subscribers "full power to make such bye-laws "as they or the majority present at such meeting shall "judge proper and think necessary for the better "government of the academy."

The building and other arrangements of the academy were completed in 1812, and an advertisement for teachers, viz., a rector with a salary of 90*l.*, and other masters with salaries of 80*l.*, was inserted in the newspapers. At a meeting of directors on 13th October 1812 a draft of certain bye-laws was approved of; but before finally deciding thereon, one of the directors was instructed to correspond with persons versed in such regulations as to the adoption of additions or alterations; and the regulations so altered, on being laid before another meeting of directors, were then to be acted upon as interim laws, until the general meeting in April. One of these proposed bye-laws was as follows:—"That "if any of the teachers shall be found, after due inquiry "by the directors, to be unsuccessful, or in other re- "spects unworthy of the trust reposed in him, it shall "be always competent to the directors to deprive such "teacher of his office, and of all the emoluments con- "nected with it."

In December 1812, the appellant Gibson, then headmaster of the grammar school of Forfar, was chosen second or classical master of the Tain Academy. The secretary then, by order of the directors, intimated to the several teachers their appointments, and that if found qualified on examination by the professors of the Edinburgh University they should be entitled to the fees and emoluments of their situations, as the same are fixed by the directors, but subject always to the rules and regulations adopted by the directors for the govern-

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ment and management of the institution, as well as the bye-laws which the directors have laid down for the internal regulation of the institution.

On 15th February 1813 the academy was opened; on which occasion the directors publicly stated to the teachers the different bye-laws which it had been thought necessary to make in the meantime for their regulation.

On 30th April 1813, the day appointed by the charter for the election of directors, advertisement thereof having been made in the Inverness newspaper, the meeting of subscribers unanimously adopted certain bye-laws which the secretary intimated had undergone the revision of the teachers, and appointed them to be the standing regulations of the academy. Of these regulations the 6th was as follows:—"In case it shall "be found necessary to discontinue any of the teachers, "which can only be done by a special meeting of the "directors, regularly called for the purpose by their "preses for the time being, it is understood and de-"clared that such teacher shall receive three months "previous notice of such intention, before his services "are declared at an end." The regulations above-mentioned were subsequently acted upon and recognised by all parties concerned.

For many years after his appointment, the appellant taught Latin and Greek and also French, to the satisfaction of the subscribers and directors of the academy. Certain disputes afterwards arose betwixt the parties, which led to the appellant's dismissal. The proceedings of the directors, by which they attempted to accomplish that object, formed the subject of various summary applications by the appellant to the Court of Session, and the sentence of dismissal was suspended, on the

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ground of certain technical objections to the regularity of the proceedings.

Thereafter, proceedings for that purpose being adopted of new, a meeting took place on the 1st August 1837, at which the directors, being a quorum of seven, including the sheriff-substitute of Ross, an ex-officio director, unanimously "discontinued Gibson as a teacher in the "academy; dismissed him from the said office; and "declared his services at an end." Of this sentence Gibson brought a suspension. Answers having been lodged, the Lord Ordinary reported the cause to the Court, adding to his interlocutor the subjoined note[1]:—

[1] "*Note.* — As this case has been matured in various previous discus- "sions, and is fully argued in the Bill and Answers, the Lord Ordinary "thinks it for the interest of both parties that the merits should now be "disposed of, if possible, by a judgment of the Inner House, by which, "though issued only from the Bill Chamber, the whole matter in dispute "may probably be practically settled.

"If he had been to give his own judgment in this stage of the pro- "ceeding, it would have been for passing the Bill; not, however, because "he had made up his mind judicially that the letters ought to be sus- "pended simpliciter, but because he was not so satisfied of the reverse as "to justify him in precluding the complainer from taking the opinion of "the Court on the question, by refusing the Bill.

"If a single judge sitting in the Bill Chamber entertains any serious "doubt as to a question which must eventually go to the Inner House, "it is conceived to be his duty, generally, to pass the Bill; and even "where, from the fulness of the argument, or such other circumstances "as occur in the present case, there is reason to expect that an autho- "ritative opinion on the merits may be more speedily obtained by report- "ing the Bill and Answers, it is apprehended that he may be equally "justified in following such a course by the existence of such a doubt, "and equally excused from individually forming any positive opinion on "the merits.

"There are several points in the complainer's argument which he "conceives to be untenable, and some which appear to be pressed with "no great discretion. But others raise questions of difficulty. On the "whole, the Lord Ordinary is of opinion that the complainer was bound "by the bye law relied on by the respondents, if that bye law was duly "enacted in terms of the charter. But he has doubts whether it was so

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Judgment of Court, 23d Dec. 1837.

On the bill and answers being reported, the cause came before the Judges of the Second Division, when their Lordships pronounced the following judgment: "The "Lords, having advised this bill, with the answers and "productions, and heard counsel for the parties, on "report of Lord Jeffrey, Ordinary, refuse the bill, and "recall the interdict."

"enacted. The charter distinctly requires, not only that all bye laws "shall be adopted only at the annual meetings on 30th April, but that "previous notice of the intention then to propose them shall be given "'by public advertisement in the London and Edinburgh newspapers, "'one month at least previous to such annual meeting;' and it is under- "stood to be admitted that no such notice was given as to the bye laws "now in question: and whether the effect of this omission can be held "obviated, either by the alleged compact with the teachers, or the sub- "stantial iteration and homologation of the law, by its publication and "recital without objection at various advertised meetings for twenty-five "years ensuing, is a question deserving perhaps of more serious attention "than the respondents have been pleased to bestow on it.

"The main grounds, however, on which he would have been induced to "pass the bill, are, 1st, that the bye law itself only empowers the directors "to remove a teacher, 'in case it shall be found necessary' so to do, "which does seem to be something different from a power to remove "whenever they may think proper, or, in short, at their pleasure; while, "if a necessity (moral necessity of course) is required to justify the "measure, it is difficult to suppose that its existence should be held "proved by their mere allegation, and without allowing the party most "interested to disprove its reality; and, 2d, that the opinions given in "the case of Inverness in 1815 do give so much countenance to the "argument maintained by the complainer as to make it fitting that it "should not be rejected in a case so nearly analogous, without the "gravest consideration. The Lord Ordinary is also a good deal moved "in this question of the construction or legal application of the bye law, "by the variance of the terms in which it is expressed in the original "draft, enacted ad interim on 14th October 1812, and those in which it "is finally adopted on 30th April thereafter. In the former, it is pro- "vided that a teacher may be removed, not only if found 'on inquiry by "'the directors' to be unworthy of trust, but also if he be unsuccessful; "whereas in the latter he is only to be so dealt with 'in case it shall be "found necessary,' which really appears to be quite as strong an expres- "sion as that in the Inverness case, where the power was generally 'to "'dismiss any of the teachers on proper grounds.' It is difficult to "conceive that it can ever be necessary to dismiss a teacher, unless there "are proper grounds for his dismissal. (Signed) F. J."

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Appellant's Argument.

The suspender appealed.

Appellant.—It is settled law that, in the case of a burgh or parochial schoolmaster, the masters are appointed ad vitam aut culpam, and cannot be arbitrarily dismissed, without sufficient cause duly proved. That rule is founded on public policy, and the necessity of giving permanency to an appointment, held for the advantage of the public. On the other hand, in a mere private school, clearly the proprietors or managers have a power of dismissing the teachers at pleasure. Under the first head are the cases of the Magistrates of Montrose v. Strachan, 18th June 1710[1], and Kempt v. Magistrates of Irvine, in 1697 and 1699[2]; and the case of Farish v. Magistrates of Annan[3] illustrates the official permanency of a public officer, such as a town clerk. Under the head of teachers of private schools is the case of Mason v. Scott's Trustees, 23d January 1836[4], which was, as the Lord Ordinary (Moncreiff) held, a private school, "dependent on a private trust, "by the terms of which it is altogether at the discretion "of the trustees in what manner they may choose to "manage it."

Incorporated schools, however, founded on charters from the Crown, such as the academies of Ayr, Inverness, and Tain, clearly come under the denomination of public schools; and the teachers in such are entitled to all the immunities of burgh and parochial schoolmasters; and such was the result of the decisions in the case of A. B. v. Directors of Ayr Academy, 3d June

[1] Mor. 13,118, and Fount.
[2] Mor. 13,136.
[3] 2 Sh. & M'L., 930.
[4] 14 D., B., & M., 343.

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1825[1], where, although the directors were found entitled to dismiss the rector on cause shown, it was one of the regulations that the rector should be bound to abide by the judgment of the directors, which should be final; and, in the case of Adam v. Directors of Inverness Academy, decided in 1815[2], where the directors of the Inverness academy, incorporated by Crown charter with the parochial school, with power to dismiss any of the teachers "on proper grounds," had been held not entitled to dismiss a teacher at pleasure, and without inquiry and proof. So in the present case, which was analagous to that of Inverness, unless it had been "found necessary" by the Court competent to decide in such a matter, there was no arbitrary power to dismiss. [Lord Chancellor.—It is admitted, that in the case of a private unincorporated school there is a power of dismissal. Now does the fact of being incorporated make a difference? Or, is there any case drawing a line between a mere private school and an incorporated academy?] It is admitted there is no case; but in principle the line is drawn by holding the teacher of a school, publicly sanctioned by act of incorporation, to be a public officer; and the Inverness case is an illustration. [Lord Chancellor.—That went on the terms of the charter.] Farther, if the bye-law was duly enacted, it is repugnant and contrary to law; but the appellant disputes the power of the directors so to enact, and the formality of their procedure in that respect.

The respondents counsel were not called on.

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[1] 4 S. & D. 63 (new ed.), 65. [2] Note in 14 D., B., & M., 714.

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Ld. Chancellor's Speech.

Lord Chancellor.—If your Lordships have no doubt, upon the appellant's own statement, that the Court below came to a correct conclusion, it would be but a matter of injustice to allow the parties to go on with any further proceedings. The case is that of a schoolmaster appointed by certain individuals to take charge of a school. Those individuals having met together, determined that a school should be instituted; and they thought it for the advantage of the undertaking that they should obtain a charter of incorporation, and that charter accordingly incorporated the individuals who had associated for the purpose of founding this school, and those who might come afterwards into their place. But the association still remained entirely of a private nature; it was founded and maintained by private means, and the members of the corporation were those who contributed to the support of the school.

Now it has been decided in several cases, that where individuals establish a school from private funds, the regulations which apply to schools that are considered public do not apply. A public schoolmaster is a public officer, and he cannot be dismissed any more than any other officer without cause. That is the ground of the decisions of Courts in the cases of public schoolmasters. It is clear, however, that in a private trust this rule cannot apply. In the course of the argument I asked the counsel whether there was any line drawn in the law of Scotland between a private establishment, the members of which had been incorporated, and those private establishments the members of which were not incorporated, and they very properly answered that there had been no case recognizing any line of distinction

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existing between the two. We must take it then that the distinction has never been adopted. If so, I am sure that your Lordships will not now introduce it for the first time. Nothing could be more destructive to the interests of private establishments than that persons holding subordinate situations in them should be considered like public officers, and treated as having freeholds in their offices. They who assert that such is the case have the burden thrown on them of showing it to be so in law.

There are many cases in which it may not be expedient for the interest of the public that a man should continue to hold a situation, and yet no one may be able to show a sufficient cause for his dismissal. He may take great pains with his scholars, but he may not be successful in teaching them. This want of success might be a good reason for removing him, and yet, without showing something wrong in his conduct, it would not afford a reason, in a court of justice, for his dismissal. In the case of a public school, the master being an officer, the inconvenience must be submitted to, but that inconvenience should not be extended to an establishment of a private nature.

On referring to the provisions of the charter of this incorporation, it appears that the powers given to the parties are very large. They are to appoint a treasurer and other necessary officers, and to have a common seal; and "full powers" are given "to the fellows of "the said society, and to their successors, at their gene-"ral meetings, to make such other and so many private "laws, constitutions, orders, and ordinances as shall by "them, or the major part of them, who shall be present "at such meetings, be judged proper, and shall be

"thought necessary for the better government and "direction of the said academy." So far, therefore, they have the most unlimited discretion. There is then a clause as to the teachers, "that the teachers shall con-"sist of a rector and an assistant, and that the patron-"age of the academy shall for ever remain in the sub-"scribers and their heirs, who are to meet every year, "and examine the state of the funds, and to fill up "vacancies in the teachers (if there are any), and in "general to give their orders respecting what may "appear necessary to be done for the good of the insti-"tution." The powers therefore given are as large and ample as language can be made to express.

My Lords, it appears that upon its being proposed that this gentleman, the present appellant, should become a candidate for the office of master, there were communicated to him (that is not in dispute) certain excerpts from minutes of the directors of the 16th of December 1812, and that amongst others was this minute:—"And the meeting request of their secretary to inform the different gentlemen above mentioned," of whom he Adam Gibson was one that was found qualified, "of their election," &c. (His Lordship quoted this order and the sixth bye-law.) That was communicated to the master, Mr. Gibson, the present appellant, previously to his accepting the office, and the bye-law passed on the 30th of April was in the very terms of that communication. Now it seems to me to be very immaterial—those facts being established between the parties—whether that bye-law was advertised in the newspapers or not, because the party accepted the office under the terms stipulated in that proposed law, which was regularly enacted into a bye-law on the 30th of

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April following, in the very same terms; those were clearly the conditions on which he accepted the office.

My Lords, when we find that the charter itself leaves the managers of this institution at liberty to make such laws and regulations as they may think fit for the better management of the academy; when we find that they, by a bye-law of their own, limit the power which that charter gives them, because the bye-law introduces a regulation in some degree restricting the authority which the charter conferred upon them, is it possible, in putting a construction upon this bye-law, to hold that any other persons were to be judges of the necessity of removing this master but those who made the bye-law? Instead of considering this as a bye-law which is liable to objection, as exceeding the powers of those who made it, it must be regarded simply as part of the contract between the directors and the masters, creating a restriction upon the power which, by the charter, they unquestionably had a right to exercise.

Under those circumstances the present appellant becomes a master at this academy, and at a meeting regularly convened by a notice for that purpose the directors discontinue him. Whether they were right or wrong—whether they were acting from pure or impure motives—it is not for your Lordships to inquire into. If they exercised a legal right in doing the act now in question, there is no reason in these proceedings to interfere with the exercise of that legal right.

My Lords, cases have been referred to which seem to me to leave no doubt upon the point. I find it clearly established in the cases quoted at the bar that a private society has the right which was exercised here; and there is no difference between this and a private society,

though they have been incorporated. If the charter had interposed any restriction, the grantees might be considered as having entered into a contract with the Crown to exercise certain rights within certain limits. That was the Inverness case. The charter did not give the directors the power of dismissing the schoolmaster, except for good reasons; and if any party is restricted from doing an act, except for cause shown or reasons assigned, there must be some jurisdiction competent to exercise its judgment as to whether the reasons assigned be valid reasons or not. Here the charter contains no such restriction; it gives the most unqualified power to the directors to make such rules and regulations as they may think fit; and the bye-laws they make give them discretionary power, at a certain meeting, of dismissing the schoolmaster.

The cases of parochial schools seem to be admitted to have no application to the present case. The rule established for parochial schools is one which ought to be established in all schools that partake of the nature of public schools. In the Inverness case the judgment proceeded upon the ground that the charter limited the powers of the directors, and confined them to dismissing a schoolmaster for reason assigned. The Court of Session said, if that be so, we must be the judges of the reasons. Although there is no case directly in point, I think your Lordships will find in the case of Ayr there was a corporation, and they laid down certain rules under which the directors were at liberty to dismiss the master appointed. They had laid down rules for the appointment of a master; that master had been discontinued, and another master was appointed in his place; and one question in the cause was, whether

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the master who had been so secondly appointed came into his office under the same terms which had been laid down regulating the appointment of his predecessor. It was considered that he accepted his office under those terms, and that those conditions were binding upon him. It seems to be established in the language of the Ayr case, that if the office of a schoolmaster is of the nature of a public office he holds his office during life or during good behaviour; and that it is not competent to those who manage such schools to alter the tenure of the office, and make him enter into a contract to hold it during pleasure. But the case of Mason v. Scott's trustees[1] established that in private charities that rule is not applied.

There being nothing here in the nature of a public office, and the schoolmaster having accepted his trust upon the conditions of that bye-law, which, instead of being an enlargement, was a restriction upon the power of the corporation, it does not appear to me that there is any thing stated to induce your Lordships to doubt that the directors had by the constitution of the establishment which was under their management, and by the law under which they were acting, the power to dismiss the individual now appealing to your Lordships.

Of three judges present at the time the argument in this cause took place below, it appears that one of them, the Lord Justice Clerk, thought that the bill ought to have been permitted to pass, but without expressing any decided opinion as to the ultimate issue of the case; his Lordship seems to me to have proceeded

[1] Ante, p. 21.

upon what had previously taken place. Now it does not appear to me that it is a legitimate ground for judgment that there has been litigation and considerable error in the previous proceedings. The question is, whether this proceeding is correct which is complained of; whether the former proceedings have been in error, or have occasioned expense, does not appear to me to be a ground upon which the judgment ought to proceed in this case. Therefore, under these circumstances, it is unnecessary that the time of your Lordships should be occupied upon any further discussion in affirming the interlocutor appealed from, unless the learned counsel for the respondents should wish to say something upon the subject of costs. At present I should be inclined to advise your Lordships to affirm it without costs.

Sir *W. Follett.* —We have no wish, my Lords, to press for costs against the appellant in this case. We made no such application in the Court below, and we have no wish here to make the application.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed.

G. and T. WEBSTER — SPOTTISWOODE and ROBERTSON, Solicitors.