Tuesday, December 11.

SECOND DIVISION.

[Lord Fraser, Ordinary.

PIGGOTT *v.* THE GOVERNORS OF THE FETTES TRUST.

Reparation—Public School—Dismissal of Foundationer by Headmaster—Damnum sine injuria—*Educational Endowments (Scotland) Act* 1882 (45 *and* 46 *Vict. c.* 59), *sec.* 14.

The rules of a public college, issued under the Educational Endowments (Scotland) Act 1882, provided, *inter alia*—"Any boy shall be liable, at the discretion of the Governors, to dismissal and to forfeiture of any benefit derived from the endowment for such continued idleness or breach of discipline as shall on report from the headmaster disqualify him, in the opinion of the Governors, for continuing a member of the College. Any boy may also be dismissed summarily for immorality, or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school. In all such cases the headmaster shall forthwith lay before the Governors a full report upon the subject."

A foundationer of the College suffered from a disease, and the Headmaster, believing, on medical advice, that it was leprosy, and was contagious, dismissed him from the College, and forthwith laid a report before the Governors, who approved of the proceedings taken. In an action by the foundationer against the Governors of the College, *held* that the master had acted under the rules, and that there being no averment of *mala fides* the action could not be maintained.

Under the Educational Endowments (Scotland) Act 1882 a scheme had been issued for the administration of Fettes College, and approved by Order of Her Majesty in Council, 3rd April 1886.

The 45th rule or section provides—"Any boy shall be liable, at the discretion of the Governors, to dismissal and to forfeiture of any benefit derived from the endowment for such continued idleness or breach of discipline as shall on report from the headmaster disqualify him, in the opinion of the Governors, for continuing a member of the College. Any boy may also be dismissed summarily for immorality, or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school. In all such cases the headmaster shall forthwith lay before the Governors a full report upon the subject."

In July 1884 Michael Christison Piggott was admitted as a scholar on the foundation of Fettes College, Edinburgh. He thereby became entitled to free board and education in said College for six years from the date of his admission, the estimated value of which was about £130 per annum. Upon 19th September he entered the College, and resided continuously there until 7th April 1887. Shortly after his entrance he became affected with a disorder, which was declared to be leprosy by the medical officers of the College, who, however, did not consider it necessary for the pursuer to leave the College at the time.

In the spring of 1887, however, eczema broke out in the school, and when this happened the medical officers considered it no longer safe to allow the boy to remain at school with the other boys, because it was thought possible that he might communicate the leprosy to them through the medium of the other skin disease. They therefore informed the Headmaster of the state of the facts, and the Headmaster summarily dismissed him from the College.

Piggott raised this action against the Governors of Fettes College. He averred that he had been examined by the medical officers of the College before his entrance. That twice before he entered the College he had been attacked by suppurations in his legs, which ran for some time and healed, leaving white cicatrices. He denied that his complaint was leprosy, and that there was danger to the other boys; and he stated that the Headmaster, by compelling him to leave the College, and by forfeiting his foundation, had inflicted on him a very serious injury. He had been deprived of board and education for the remainder of the period of six years for which he had been admitted—namely, about three and a-half years, and had had to commence business with an imperfect education.

He pleaded—"(1) The defenders being bound in terms of the contract libelled to provide the pursuer with board and education for a period of six years, and having failed to implement said contract, they are liable to compensate the pursuer for the loss thereby sustained."

The defenders pleaded—"(2) By the terms of section 45 of the scheme condescended on, the Headmaster was entitled to dismiss the pursuer."

Upon 24th November 1888 the Lord Ordinary (Fraser) assoilzied the defenders and found no expenses due to either party.

"*Opinion.*—It is not necessary to define very strictly what is the nature of the relationship between the Governors and youths whom the former have elected to the foundations of Fettes College. It is contended by the pursuer that by his admission to the College as a foundationer a contract was entered into between him and the Governors which the latter could not terminate at their pleasure. Such a case is not presented for decision at present; and no opinion is therefore called for in regard to it. The pursuer of this action was admitted to the benefit of a foundation in September 1884. A scheme for the administration of the Fettes Endowment was approved, by Order of Her Majesty in Council, on the 3rd of April 1886. This scheme is applicable to all persons who had any right or privilege under the governing bodies in charge of Educational Endowments in Scotland, such as the Fettes College, at the time when the Act 45 and 46 Vict. cap. 59, was passed—See section 14. Therefore any rules laid down in that scheme are applicable to the present case. The 45th rule or section is as follows:—'Any boy shall be liable, at the discretion of the Governors, to dismissal and to forfeiture of any benefit derived from the endowment for such continued idleness or breach of discipline as shall on report from the headmaster disqualify him, in the opinion of the Governors, for continuing a member of the College. Any boy may also be dismissed sum-

marily for immorality, or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school. In all such cases the headmaster shall forthwith lay before the Governors a full report upon the subject.' This is not expressed with that clearness and precision that might have been expected in the circumstances of this endowment. The Lord Ordinary puts a different construction upon that rule from that put upon it by the Headmaster of Fettes College. It is stated by the defenders upon record that the Headmaster told the pursuer to leave the Institution for the reasons assigned in the record. This proceeding on the part of the Headmaster was *ultra vires*. The 45th rule of the scheme gave him no authority to order the pursuer away from the Institution. The only persons who could do so were the Governors, acting, no doubt, upon the report of the Headmaster. The first part of the rule states that 'any boy shall be liable, at the discretion of the Governors, to dismissal and to forfeiture of any benefit derived from the endowment for continued idleness or breach of discipline.' And then the rule proceeds to say that 'any boy may also be dismissed summarily for' two causes mentioned—viz., immorality, or whenever there are circumstances rendering it 'necessary in the interests of the school.' Dismissed by whom? Clearly by the same parties as were to dismiss according to the first part of the rule, viz., the Governors. No doubt the circumstances (other than immorality) must be according to the judgment of the headmaster; but the ultimate judges of the matter are the Governors, and the rule concludes with these words:—'In all such cases the headmaster shall forthwith lay before the Governors a full report upon the subject.' The rule is very inartistically expressed, but the Lord Ordinary cannot hold it to mean that the headmaster should have the absolute power of dismissal whenever he considered that the interests of the College required that a particular boy should be sent away. It would be a very extraordinary thing to confer such a power as this on any headmaster, when the first part of the rule limits the discretion of the Governors to dismissal for continual idleness and breach of discipline. The ambiguity arises from not embodying in one sentence the statement that they could dismiss for idleness, breach of discipline, and when it was required for the interest of the school.

"But practically the Governors have made the dismissal in the present case according to the statements in the record. All difficulty is obviated upon this head by the Governors coming forward and adopting and defending the action of the Headmaster. They do not plead that the Headmaster acted without their authority or subsequent approval, and therefore that they are not liable in damages. They adopt what he has done, and the Lord Ordinary is willing to hold that this subsequent adoption is equivalent to their approval of the conduct of the Headmaster as if it had been given before the dismissal of the pursuer.

"Now, the only other point in the case is, whether or not, assuming that there was no absolute right of dismissal at pleasure, was there sufficient ground in the circumstances of this case to bring it within rule 45? The boy was ill with leprosy when he entered the Institution, although at that time the disease remained dormant. It broke out at intervals afterwards, and the Headmaster said nothing about it, not being willing to do anything that might blight the prospects of the pursuer as a student in the College. This was acting with all kindness for the youth, and no one can blame the Headmaster for taking a course at once considerate and humane. But, then, at the same that the pursuer was dismissed, his leprosy again came to the front; and there being an epidemic of other disease among the boys, it was absolutely necessary to take action so as to prevent the whole of them becoming lepers by contagion. A learned argument was submitted to the Lord Ordinary by the pursuer's counsel to the effect that leprosy was not contagious. Upon this matter the Lord Ordinary is incapable of pronouncing any opinion; but the existence of such a disease in the midst of a community of boys like that at Fettes College was calculated to create such terror as to impair the usefulness of the Institution, and therefore the Headmaster (approved of afterwards by the Governors) was justified in sending the pursuer away. But here again the Lord Ordinary must add that he is not reviewing the action of the Governors or the Headmaster upon the merits. Their *bona fides* is not impugned. They had a right to dismiss a foundationer when they thought it was 'necessary in the interests of the school.' Having come to the conclusion that it was necessary, no court of law can, in the absence of an averment of want of *bona fides*, interfere with their judgment."

The pursuer reclaimed, and argued—The Lord Ordinary was right in his reading of the rule, but it was not a good defence to say that the Governors had adopted the action of the Headmaster. The rule provided certain procedure before a boy was dismissed, and if that was omitted the boy was deprived of a safeguard which had been given him. The pursuer was a foundationer, and the 45th rule expressly stated that a foundationer was not to be deprived of the benefits of the College except by the action of the Governors in dismissing him. Even allowing that the Headmaster acted in *bona fide*, and no allegation of malice or personal ill-feeling was made against either him or the Governors, this was not a case for his discretion, and he should have awaited the result of a report to the Governors. All that was asked was damages. There was no plea for reinstatement of the pursuer in the College. The grounds on which the pursuer asked for a proof were that there was no sufficient reason for his dismissal in 1887. It was known to the Headmaster and the medical men of the College so long back as 1884 that the pursuer suffered from this skin disease; nothing was said about it, and no harm had resulted from it. Even if it was leprosy, that disease was not contagious—*Fitzgerald* v. *Northcote and Another*, Michaelmas Term, 1865, 4 Foster and Fin. 656; *Hutt and Another* v. *The Governors of Haileybury College*, June 19, 1888, 4 Time's Rep. 623.

Counsel for the respondents were not called upon.

At advising—

Lord Justice-Clerk—There is no doubt that

this case is an unfortunate one. The pursuer seems to have been able by his exertions to entitle himself to a place upon the foundation of Fettes College, but he has not been able to obtain the full benefits of the institution. It appears upon the record, upon the pursuer's own admission, that he was afflicted from time to time with running suppurations in his legs which might or might not be dangerous to the other boys at the school, but the fact that he had these suppurations is unquestionable. These suppurations once more became active. In these circumstances the Headmaster finds that eczema had broken out in the school, and he came to the conclusion that he could not allow the pursuer to remain, and accordingly removed him from the school. It is not alleged that he acted in this manner otherwise than upon a report from the medical men of the College that that was the proper course to take. The facts being that we have here the pursuer's admission that these suppurations existed, and further, that the Headmaster acted upon the advice of those whose advice he was bound to follow, what is the legal conclusion? If the Headmaster was so advised, and if he had the power, then it was his duty to remove him from the school.

In respect to the Headmaster having the power, the Lord Ordinary says that in his opinion he had not the power, but that his only duty was to make a report upon the matter to the Governors, and that the Governors, after taking the report into consideration, might have dismissed the pursuer. I think that that view of the Headmaster's duty under the 45th rule is erroneous. What is the meaning of the words—"Any boy may also be dismissed summarily for immorality, or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school. In all such cases the Headmaster shall forthwith lay before the Governors a full report upon the subject." This plainly means that the right and duty of exercising authority under this part of the 45th rule rests upon the Headmaster as being the only person who can deal summarily with the matter, and that it is not meant that he should first of all lay a report before the Governors of the College in order that they might take action. After he has exercised his authority, and ordered the boy to be removed from the school, he must then lay a report before the Governors in order that they may take his action under review for approval or condemnation. But the dismissal is his own act, and is done summarily, and here the authority was exercised because the master considered it for the benefit of the whole school. If that is so, I do not think it necessary that I should consider the suggestion in the Lord Ordinary's note that the Governors had homologated the action of the Headmaster. The pursuer has not put foward any case on the ground that the Headmaster was actuated by *mala fides*, and on the whole matter I do not think that it would be right for us to send this case to a jury for their consideration whether the Headmaster had good grounds for exercising his discretion or not.

LORD YOUNG—I am of the same opinion, and I agree that the construction of the 45th rule which your Lordship has expressed is the right one, and therefore I think that the Lord Ordinary's construction of that paragraph is erroneous. His Lordship does not think that this rule is expressed with that clearness and precision that might have been expected in the circumstances, and he puts a different construction upon it from that put by the Headmaster. I confess I do not think that it is wanting in clearness and precision, and I agree with the construction which the Headmaster puts upon it. The rule is divided into two parts—"Any boy shall be liable, at the discretion of the Governors, to dismissal and to forfeiture of any benefit derived from the endowment for such continued idleness or breach of discipline as shall on report from the headmaster disqualify him, in the opinion of the Governors, for continuing a member of the College." That is the first part of the rule, and by it the headmaster may report to the Governors that a boy has been guilty of continued idleness or breach of discipline, and that he is of opinion he ought to be dismissed, and if the Governors concur in this opinion they may dismiss him. The other part of the clause is in these words—"Any boy may also be dismissed summarily for immorality, or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school." There is no reference to the Governors there. The dismissal is to be summary, and whenever it shall seem right to the headmaster in the exercise of his judgment, and in that case the report he is to make is provided for in these words—"In all such cases the headmaster shall forthwith lay before the Governors a full report upon the subject." That is, he shall make another and a different report from that provided for by the first part of the clause.

This is an action against the Governors of Fettes College for a breach of their contract with the pursuer. It is not a personal action at all, and that is quite plainly stated by the pursuer in his first plea-in-law—"The defenders being bound, in terms of the contract libelled, to provide the pursuer with board and education for a period of six years, and having failed to implement said contract, they are liable to compensate the pursuer for the loss thereby sustained." Any contract between him and the defenders must have been made according to the statutory scheme for the government of the College, and his complaint is that he has been summarily dismissed by the Headmaster before the time had expired for which the contract was to subsist, and that this action was approved of by the Governors of the College, because they erroneously believed that the pursuer was suffering from a disease which made his presence at the College dangerous to the other boys. I do not think that that is a relevant ground for an action of damages at all. It might be a different thing if there was any personal charge against the Headmaster of malice in acting as he did, but I do not see any relevant charge here at all. The case was taken on the footing that the Headmaster was acting conscientiously and exercising his judgment to the best of his ability. We must take it as the fact that the medical officers of the school had considered the case, and had reported to him that it was no longer safe as regarded the health of the other boys that the pursuer should be allowed to remain. It was upon this report that the master acted.

It was said that a legal wrong had been done

to the pursuer if upon a trial he could satisfy a jury that the doctors had given a wrong opinion upon his case. But such a contention would lead to this, that every headmaster would be subjected to claims for damages by boys who had been dismissed in an action in which the question at issue was whether a medical opinion was correct or not. I cannot take that as a relevant ground of action at all, even although there may have been a serious mistake on the part of the medical men. I think it would be a mere farce to send this case to a jury upon the issue for the pursuer whether the doctors of Fettes College had given a wrong medical opinion or not. I think the Headmaster acted according to the contract made with the pursuer. He kept him for a short time, and when he was found to be suffering from a highly infectious disorder he dismissed the boy in the interests of the school, and laid a report of what he had done before the Governors, who approved of his proceedings. There is no ground of action here.

LORD RUTHERFURD CLARK and LORD LEE concurred.

The Court adhered.

Counsel for the Appellant—Jameson—Orr. Agent—J. D. Macaulay, S.S.C.

Counsel for Respondents—Gloag—Maconochie. Agents—J. & F. Anderson, W.S.

Wednesday, December 12.

FIRST DIVISION.

STEEL'S TRUSTEES *v.* STEEL AND OTHERS.

Succession—Vesting—Fee and Liferent—Clause of Survivorship.

A testator in his trust-disposition and settlement, after providing an annuity to his wife, directed his trustees to hold the fee of the subjects liferented by his wife, and the whole residue of his estate, for behoof of his children in certain proportions. The provisions in favour of his sons he directed should be payable to them as follows—£2000 to each twelve months after his death, and the remainder twelve months after the death of his wife. The provisions to his daughters were to be held for them in liferent, and for their children in fee, and failing any of his daughters without issue, the share of such deceaser was to form part of the residue of his estate. He further provided that "in case of the decease of any of my sons before receiving payment of their provisions, without lawful issue, then the provisions of such deceasers, so far as unpaid, shall fall back into and make part of the residue of my estate divisible as aforesaid." The testator died in 1841, and his wife in 1852. A son died without issue in 1861, and three daughters died thereafter without issue. *Held* that the testamentary trustees of the said son had no claim to any part of the fee of the shares liferented by the three daughters whom he predeceased, in respect that the fee of the shares liferented by the daughters did not vest in the sons till the death of the liferentrices.

Observations per Lord President on *Haldane's Trustees* v. *Murphy*, 9 R. 269.

By his trust-disposition and settlement, dated 25th December 1833, Robert Steel, merchant in Port-Glasgow, conveyed his whole estate, heritable and moveable, to trustees for certain purposes. After providing for payment of his debts. and bequeathing a liferent of his house and furniture, and an annuity of £400 to his wife and some small legacies, the testator in the sixth place appointed his trustees to hold the fee of the subjects liferented by his wife, and the whole residue of his estates, heritable and moveable, for behoof of the lawful children procreated of his body, in the following proportions, and subject, *inter alia,* to the following declarations and provisions:—"For and on account of each of my sons four shares or portions, and for and on account of each of my daughters three shares or portions of said residue—that is to say, for every sum of four pounds sterling set apart for a son, a sum of three pounds sterling shall be set apart for a daughter, . . . and I provide and appoint that the provisions hereby made in favour of my sons shall be payable to them as follows, viz., the sum of two thousand pounds sterling, subject to the eventual deduction after mentioned, to each of my said sons upon the expiry of twelve months after my death, and the remainder upon the expiry of twelve months after their mother's decease . . . and I provide and appoint that the provisions hereby made on account of my daughters shall be held by my said trustees for behoof of my said daughters respectively in liferent for their liferent alimentary use allenarly of the annual proceeds of the capital of the said provisions, . . . and for behoof of the heirs of the bodies of each of my said daughters respectively, but still subject to the said powers and faculties conferred on my trustees afterwritten, in such proportions and under such conditions and restrictions as they, my said daughters respectively, shall appoint by a writing under their hands, which failing, equally among them in fee, and failing any of my said daughters without heirs of her body, then the share of such deceaser or the residue thereof, so far as not disposed of under or by virtue of these presents, shall form part of the residue of my estate . . . and I provide and appoint that in case of the decease of any of my sons before receiving payment of their provisions, leaving heirs of their bodies, the provisions of such deceasers, so far as unpaid to them, shall fall and devolve to the heirs of their bodies respectively in place of their parents, and in case of the decease of any of my sons before receiving payment of their provisions without lawful issue, then the provisions of such deceasers, so far as unpaid, shall fall back into and make part of the residue of my estate divisible as aforesaid."

By a codicil dated 28th July 1840 the testator recalled the provisions made by him to his son Robert in his trust-disposition and settlement, and directed his trustees to hold and pay the same to his other children proportionally according to the other shares or portions of the residue of his estate before destined to them, and under the same conditions. The codicil also contained the following provisions—"Further, I declare that