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The University Visitor

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Despite having provided, in Doctor Bentley's case,² one of the seminal cases concerning the right to be heard, it would be an exaggeration to say that the university as an institution has played a major role in the emergence of a developed system of administrative law. There are a number of reasons for this. Generally, it must be observed that only in comparatively recent times has there been such a system, and that, either as a part of such a development, or as a result of it, the courts have only recently extended the scope of judicial review from such traditional, and obvious, areas of administrative power as government departments, local authorities and licensing tribunals, into the less clearly 'public' field of trade unions, clubs and universities.

Secondly, there has been far less need for judicial intervention into the disciplinary affairs of universities in the United Kingdom and the Commonwealth than, for example, in the United States. There, emotive issues such as McCarthyism, and the conflict in southeast Asia, the existence of the declared constitutional rights of due process and equal protection, and the sheer size of the modern American university, with all the strains inherent therein, have combined to produce a torrent of litigation.

More particularly, the courts have historically been reluctant to intervene in the internal matters of a university, especially where provision has been made for the existence of a 'visitor', a peculiar and exclusive 'justiciary' established by the founder of an institution to give effect to its private laws. Even in the United States, where there is no equivalent to the visitor, the courts frequently express their reluctance to intervene, particularly in academic matters. The existence of a visitor is also connected with the question of the extent to which a university is a 'public' institution.

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1. See Bridge, "Keeping Peace in the Universities" (1970), 86 L.Q.R. 531 (hereinafter Bridge); Ouellette, "Le Controle Judiciaire sur l'Universite" (1970), 48 Can. B. Rev. 631; Halsbury's *Laws of England* (4th ed.) Vol. 5, paras. 872-879.

2. *R. v. Chancellor of Cambridge University* (1723), 1 Str. 537, 93 E.R. 698; 2 Lord Raym, 1334; 92 E.R. 370; and 8 Mod. Rep. 148; 88 E.R. 11 (K.B.)

The institution of the Visitor is an ancient one — one writer has dismissed it as being “redolent of monarchical paternalism for an isolated, unworldly community of scholars.”³ However there are good grounds for arguing that this view, which has also been expressed in the courts,⁴ is simply an example of the tendency to identify age with anachronism. It is probably an exaggeration to say that the Visitor is the answer to “the crisis in the universities”. Nonetheless the Visitor, being situated, theoretically, at the head of the university hierarchy, is at the same time not, strictly speaking, a member of the university: consequently he should be able to maintain a detached, but at the same time knowledgeable view of university affairs. By the full exercise of his functions he helps to preserve the autonomy of the university by shielding its internal disputes from the supervision of the courts. This aspect of the visitor’s role, his exclusive jurisdiction in internal matters, was strongly emphasised in the course of the most recent case on the matter, *Vanek v. Governors of University of Alberta*,⁵ where the application of an associate professor to have the proceedings of a committee established under university regulations in order to consider whether he should be granted tenure set aside on the grounds, *inter alia*, of a breach of natural justice, was dismissed. The decisions both at first instance and on appeal were based substantially on the premise that the granting of tenure, whatever the degree of susceptibility to an attack on the grounds of breach of natural justice, was in any case an internal matter within the exclusive jurisdiction of the visitor, and thus not a subject for the courts determination at all.

Any general review of the role of the visitor must perforce have reference to a number of old, English cases, which may, as far as the casual reader is concerned, bear little relation to the situation in modern Canadian or indeed British universities. Criticisms on this score can be answered in a number of ways. Firstly, there is the undeniable fact that there is a mass of ancient caselaw which it would obviously be fatuous to ignore altogether. This fact is closely related to two others. Firstly, the most that modern university,

3. Samuels, “The Student and the Law” (1973), 12 *Journal of the Society of Public Teachers of Law*, 252 at 260.

4. See, e.g. *R. v. Royal Institution for the Advancement of Learning, ex parte Fekete* (1969), 2 D.L.R. 3d 124 (Que. Q.B.) at 138, *per* Brossard J.

5. *Vanek v. Governor of University of Alberta*, [1975] 3 W.W.R. 167 (Alta. S.C.T.D.); affirmed [1975] 5 W.W.R. 429 (Alta. S.C., A.D.)

statutes seem to be able to say about the visitors whom they, doubtless unwittingly bring into existence, is that they shall have power 'to do all such things as pertain to visitors.'⁶ Clues as to what those powers might be, are not surprisingly, most likely to be found in old cases. Finally, although the modern university is in some respects barely comparable with the Oxbridge colleges that were the subject of so much litigation in the seventeenth and eighteenth century, the general administrative framework of universities has changed surprisingly little: in England, particularly, a compromise has been sought between a 'community of scholars' and an unashamedly bureaucratic organisation. The reluctance of these large bodies to react to changing circumstances has probably been one of the factors in the growing conflicts in universities generally. Be that as it may, it is at least arguable that many of the functions which were assigned to the visitor as long as three hundred years ago still have some relevance; and in that regard it is sad to have to note at this stage that the reaction of the Albertan legislature to the decision in *Vanek* has been to abolish the office of visitor altogether.⁷ Notwithstanding that, *Vanek* must be examined to see what light it sheds on the visitor generally: and there have indeed been a number of comparatively recent Canadian, English and other Commonwealth cases on the subject.

Bearing in mind what has been said in the last paragraph, it is proposed in this article to discuss the origin and nature of visitatorial jurisdiction, the scope of that jurisdiction and the extent to which it is itself reviewable by the courts, and to consider how relevant (sic) the visitor is to today's university.

A. *The Origins of the Power*

The original of all such [visitatorial] power is the property of the donor and the power everyone has to direct, dispose and regulate his own property.

Lord Hardwick in *Green v. Rutherford* was dealing with the jurisdiction of the visitor over grants of land to a corporation, but his words apply to visitatorial jurisdiction generally. The type of institution to which a visitor is attached is an "eleemosynary corporation",⁸ that is to say, that type of lay corporation set up for

6. *Universities Amendment Act*, S.A. 1976, c.88, s.2

7. See, e.g. *Act Respecting Memorial University of Newfoundland*, R.S.N. 1970, c.102, s.9

8. *Green v. Rutherford* (1750), 1 Ves. Sen. 462 at 472; 27 E.R. 1144 at 1149 (Ch.)

the purpose "ad studendum et ad orandum". Holt C. J. dissenting in the King's Bench in the leading case of *Phillips v. Bury*,⁹ after discussing the supervisory powers of the common law courts over corporations that are "for public government" continued:

But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them, and therefore if there be no visitor appointed by the founder, I am of opinion that in all such cases of eleemosynary corporations, the law doth appoint the founder and his heirs to be visitors; the founder and his heirs are patrons, and not to be known by common known laws and rules of the kingdom; but such corporations are as to their own affairs to be governed by the particular laws and constitutions assigned them by the founder.¹⁰

Thus the visitor is recognized as administering law distinct from the ordinary law of the land: the law as laid down by the statutes or charter of a university.

Clearly one is entitled to question the relevance of Lord Holt's dictum to the modern university, which few would honestly regard as "a private corporation for charity". The vast majority of the relevant cases decided in the seventeenth and eighteenth centuries dealt with Oxford and Cambridge Colleges, which tended to be established for purposes which were *de facto* as well as *de jure* "charitable", and were invariably privately endowed. Although it was, and indeed, is true that "every college is a corporation in itself, and altogether they form one corporation in the university in gross",¹¹ nonetheless the two ancient universities are themselves not eleemosynary but civil, the actual process of "studendum et . . . orandum" being in the care of the individual colleges. Consequently it would appear that they do not have visitors: hence Dr. Bentley was able to obtain a writ of *mandamus* for the restoration of his degrees.¹² Modern universities, however, are eleemosynary: the functions traditionally assigned to such corporations are in the hands of the universities themselves.¹³ For instance,

9. *Phillips v. Bury* (1962), 2 T.R. 346; 100 E.R. 186 (K.B.)

10. *Id.*, at 352, 189.

11. *R. v. Gregory* (1772), 4 T.R. 240a; 100 E.R. 995 (K.B.)

12. See *R. v. Chancellor of Cambridge University* (1723), 1 Str. 537, 93 E.R. 698 — and see *R. v. Gregory*, *supra*, where it is suggested that the University might have claimed in their writ that they had a visitor. The importance of the writ, and of procedure generally, is emphasized frequently; see, e.g. *R. v. Alsop* (1682), 2 Show. K.B. 170; 89 E.R. 868; *R v. Whaley* (1740) 2 Str. 1139; 93 E.R. 1087.

13. See *Vanek*, [1975] 5 W.W.R. 429 at 437, *per* Clement J.A.

the Act of 1821 incorporating the Governors of Dalhousie College, described the college as existing “for the Education of Youth and Students in the higher branches of Science and Literature”,¹⁴ and in *R. v. Dunsheath ex parte Meredith*,¹⁵ Lord Goddard C. J. held that, for the purposes of visitatorial jurisdiction, London University (which, consisting of a number of a semi-autonomous units, provided a very strong case) did not differ from an Oxford or Cambridge college.

Certain questions can be asked about the nature of the modern university in relation to the origin of visitatorial jurisdiction. The basis of the jurisdiction is the right of the founder to establish his own system of law, to be administered by himself and his heirs, or a nominee. It has been argued that the nature of modern universities, instituted and financed by the state, precludes the adoption of this view of the fount of visitatorial power.¹⁶ In the absence of any express nomination (and of any founders’ heirs)¹⁷ it has been held that the Crown is visitor, and that the visitatorial powers are to be exercised in the Court of Chancery.¹⁸ This is indeed now recognised by statute. Section 19(5) of the Judicature (Consolidation) Act 1925¹⁹ provided that “there shall not be vested in the High Court . . . [a]ny jurisdiction formerly exercised by the Lord Chancellor on behalf of her late Majesty as visitor of any college or of any charitable or other foundation.” This jurisdiction applied equally to institutions which have themselves been established by the Crown, and to which no appointment as visitor has been made. Thus, technically at the time of the *Aston University* case,²⁰ the Crown was visitor, a point which was not, apparently, raised. Donaldson J. was content to observe that no appointment had been made, and clearly did not regard the matter as being outside the jurisdiction of the High Court.²¹

14. 1 & 2 Geo. 4, c.39

15. *R. v. Dunsheath, ex parte Meredith*, [1951] 1 K.B. 127; [1950] 2 All E.R. 741

16. *Ouellette, supra*, note 1 at 634

17. See *R. v. Dr. Shippen*, 8 Mod. 367; 88 E.R. 262, where the court did not know who the founder, or visitor was.

18. See *R. v. Bishop of Ely* (1788), 2 T.R. 290, 100 E.R. 157 (K.B.)

19. 15 & 16 Geo. 5, c. 49

20. *R. v. Senate of the University of Aston, ex parte Roffey*, [1969] 2 Q.B. 538, [1969] 2 All E.R. 964, (D.C.)

21. For discussion of the basis of the Crown’s jurisdiction to visit in these circumstances see, in particular, *R. v. St. Catherine’s Hall, Cambridge* (1741), 4 T.R. 233; 100 E.R. 991; *R. v. Gregory, supra*, note 119; and the judgment of Lord Holt in *Anonymus*, 12 Mod. 232; 38 E.R. 1284 (K.B.).

One must now consider the relevance of the role to Canadian Universities without a specially appointed visitor.²² Ouellette discussed the varied functions of the Lord Chancellor, and pointed out that there was no equivalent figure in the Canadian system. The closest comparison he could find was the Minister of Education, who was already visitor of several public schools.²³ However, the peculiar nature of the office of Lord Chancellor is not really the point. The Crown remains the significant figure: The Chancellor acts in his capacity as Keeper of the Great Seal. The provincial Lieutenant-Governor is a more obvious choice, being in a sense a delegate-cum-representative of the Crown as the Lord Chancellor is in this respect. The Lieutenant-Governor is indeed often appointed visitor in his own right. Such is the case in Alberta:²⁴ in *Vanek*²⁵ it was argued that the Lieutenant-Governor stood in the position of the Crown in England, and the High Court in the position of the Lord Chancellor. Clement J.A. however ruled that in the absence of express delegation, the Lieutenant-Governor and no-one else was Visitor.²⁶ The position is different in Saskatchewan where, although the Lieutenant-Governor is visitor, his powers are statutorily exercisable, on his direction, by the Saskatchewan Court of Queen's Bench.²⁷

Clearly the court in those circumstances is not acting in its normal capacity: that would destroy the point of the rule laid down by the 1925 Act. At the same time the initial decision to vest visitatorial authority in the Lord Chancellor rather than in the Court of King's Bench may well have been swayed by considerations of the inherently "charitable" nature of such eleemosynary foundations as colleges.²⁸ In an early Canadian case, *Re Wilson*,²⁹ concerning a plea for reinstatement by a dismissed professor, the Nova Scotia Supreme Court doubted whether the nature of the "public"

22. Where the statute setting up a university is amended, to the exclusion of the section concerning the visitor, it seems likely that a positive measure has been taken to dispense with him: see *Re Polten*, (1975) 80.R. (2d) 271 (D.C.)

23. Ouellette, *supra* note 1 at 639

24. Universities Act, R.S.A. 1970, c. 378, s.5

25. *Supra*, note 5

26. [1975] 5 W.W.R. 429 at 443

27. *Queen's Bench Act*, 1970 R.S.S. 1970, c.73, s.12(3)

28. At the same time one should not go too far, and regard them as spiritual rather than lay corporations. See the judgment of Lord Holt noted *supra*, note 21; and also *R. v New College in Oxford* (1672), 2 Lev 14; 83 E.R. 430; and *R v. Brian and Patrick* (1678), 2 Keb. 66; 84 E.R. 41

29. *Re Wilson* (1885), 18 N.S.R. 180 (S.C.)

institution with which they were dealing, King's College, Windsor, made it possible for it to be subject to such absolute jurisdiction as had been possessed by the visitors of Oxford Colleges. Thompson J. pointed out that the College had not been "founded" in the sense that the "private corporations of eleemosynary character" had been, and went on to say:

This corporation, then, of governors, not being situated at all like the fellows of an English University, not being the objects of the Founder's bounty, but the administrators of that bounty, being in fact put in the Founder's place, to administer the bounty, and to make statutes on all matters respecting the College.³⁰

The majority in the Supreme Court gave a somewhat restricted version of the visitor's powers, an attitude imposed on them by the fact that the Bishop of Nova Scotia was not only Visitor but also a member of the Board of Governors who made the decision in question. Basically, the issue of whether the Crown's jurisdiction as visitor is exercised by the Lord Chancellor or in the Queen's Bench Division is one of policy. The Divisional Court is the home of the prerogative writs, and the issue here is the administration of a peculiar form of private law.

Connected with the question of the origin of visitatorial jurisdiction is that of the appointment of particular visitors. It has been seen that in the absence of an express appointment to the contrary, the founder and his heirs, or alternatively, the Crown, have the power of visitation. Particular words are not required for the establishment of a visitor. As Lord Hardwicke said in *Att. Gen. v. Talbot*³¹ "it is sufficient if the intention of the founder appears who should be visitor, and technical words are not necessary".³² The intention of the founder was gauged, in this particular instance, by the fact that the Chancellor of the University was entrusted with the power of interpreting the statutes of the College (Clare Hall, Cambridge) to the *express* exclusion of the founder's heir's.³³

The position in Canada seems to be as follows. An institution will have been established by charter or by private or public Act³⁴ (and a

30. *Id.*, at 196

31. *Att. -Gen. v. Talbot* (1747), 3 Atk. 662; 26 E.R. 1181 (K.B.)

32. *Id.*, at 673, 1187

33. An interesting case to compare with *Re Wilson* in connection with the relationship between the visitor and the board is *Eden v. Foster* (1725), 2 P.Wms. 325; 24 E.R. 750 (Ch.).

34. *E.g.* McGill (charter); Memorial, *supra*, note 7, and see *University of Toronto*

statute may have made general provision for universities as a whole, in addition to the universities' individual charters).³⁵ It is more than likely that the visitor will be the Lieutenant-Governor and that his powers will be very vaguely expressed,³⁶ but particularly in the case of institutions with some denominational affiliation, it is not unusual to find that bishops have been appointed, as is the case with so many Oxbridge colleges.³⁷ An interesting point in connection with provisions appointing Lieutenant-Governors as visitors is that one not infrequently finds that the Lieutenant-Governor is expressly given certain powers, presumably quite independent of visitatorial authority, in relation to such matters as appointments of a proportion (sometimes a considerable proportion) of the membership of the Board of Governors.³⁸

B. *Visitatorial Jurisdiction*

Whatever relates to the internal arrangements and dealings with regard to the government and management of the house, of the domus of the institution, is properly within the jurisdiction of the visitor.

Sir Richard Kindersley's statement in *Thomson v. University of London*³⁹ is the obvious starting-point for a discussion of visitatorial power. Expressed in general terms, the principal question raised is as to the nature of "internal arrangements and dealings" (with an implied corollary: who constitutes the "domus"). Traditional and well-established areas of jurisdiction included the resolution of disputed elections to fellowships, and hearing complaints of the corporators. These functions were part of his general duty to interpret the statutes of the foundation. The settlement of disputes concerning academic affairs has recently been re-asserted as being within the visitor's province, though not without reservations.⁴⁰ More questionable areas include his jurisdiction over members of an institution, whose relationship with it is deemed to be contractual rather than that of corporators, and over disputes alleging a breach of natural justice.

Act, S.O. 1871, c.56, originally S.O. 1833, c.89. In fact, as is often the case the university was established *initially* by royal charter in 1827.

35. *E.g. Universities Act* 1963, S.B.C. 1963, c.52

36. *Supra*, note 7

37. *E.g.* King's College, Nova Scotia; Bishop's University, Quebec

38. See *e.g. supra*, note 7, s.108; and *supra*, note 35

39. *Thomson v. University of London* (1864), 33 L.J. Ch. 625 at 634

40. See *Ex parte Macfadyen* (1945), 45 S.R. (N.S.W.) 200 (S.C.)

The point should initially be made that Visitors are of two types: special and general. If a person is appointed visitor of a college or university, and no particular powers or limitations are imposed upon him, it can be assumed that he is a general visitor with all the customary incidents of visitatorial office: inspection of the charter or statutes is the method of ascertainment here.⁴¹ In the charter of the University of Liverpool the visitor (the Queen in Parliament, through the Lord President of the Council, a quite common form of appointment) has the right “from time to time and in such manner . . . as they shall think fit to direct an inspection of the University, its buildings, laboratories and general equipment and also of the examinations, teaching and other work done by the University.” Bridge is surely right in asserting that this type of formula denotes a general visitor.⁴² Even in the case of a general visitor there may be limits on the exercise of his power. Lord Holt in *Philips v. Bury*⁴³ (which concerned the power of the Bishop of Exeter, and visitor of Exeter College, Oxford, to remove its master) gave an example of this when discussing the two-pronged aspect of visitatorial power:

He cannot visit *ex officio* more than once in five years, but as visitor he has a standing constant authority at all times to hear the complaints and redress the grievances of the particular members.⁴⁴

“Hearing complaints and redressing grievances”, and generally solving disputes, are the subjects of this discussion. It would be very unexpected nowadays for a visitor to exercise his jurisdiction, undoubted after *Philips v. Bury*, to expel fellows. His intervention would come, as Lord Holt said, out of his power “to hear appeals of course”.⁴⁵ Therefore it is difficult to agree with Thompson J.’s assertion in *Re Wilson* that the removal is “the principal power of the English visitor”.⁴⁶ It should be noted that the visitatorial role is largely an appellate one, dealing with the merits of questions that arise within a particular institution. However, a visitor may also act in the capacity of a court of review supervising the decisions of

41. See *St. John’s College, Cambridge v. Todington* (1757), 1 Burr. 158, 97 E.R. 245 (K.B.); See also *Re Wilson* (1885) 18 N.S.R. 180 at 195; and *R. v. Blythe* (1698), 5 Mod. 404; 87 E.R. 732 (K.B.)

42. Bridge, *supra*, note 1 at 535

43. (1692), 2 T.R. 346; 100 E.R. 186

44. *Id.* at 348, 188

45. *Id.*

46. 18 N.S.R. 180, at 200

inferior tribunals. For instance, examination of the procedures of a purported election to a college fellowship (historically one of the visitor's most common tasks) would be better categorised as review rather than appeal. Like the reviewing courts in administrative law, the visitor is concerned principally with statutory interpretation.

Dealing first with students, it has been established by a number of cases that the visitor is the ultimate arbiter in matters concerning examinations. The first case of this sort, *Thomson v. University of London*⁴⁷ concerned a claim for breach of contract by an examination candidate who had been awarded first prize and a gold medal, only to be informed, some years later, that the method of marking which he had been led to believe by the Registrar of the University was the correct one (an assurance he received before entering for the examination) was in fact erroneous, and that on a correct interpretation of the relevant rules, he should have come second: accordingly, another medal was struck for the prize-winner, and Thomson claimed a breach of the contract he had made with the University based on his negotiations with the Registrar. Sir Richard Kindersley, V.C. held that there was not in any legal sense, a contract between the two parties: but his reason for declining to act on behalf of the applicant (who was seeking an injunction to restrain the awarding of the second medal) was that the issue was one for visitatorial jurisdiction:

It is hardly possible to suggest any case which is more clearly within the cognizance, and the exclusive cognizance, of the visitor,

for the "holding of examinations and the conferring of degrees" were "one, if not the main and only object of the University".⁴⁸

Similar views were expressed in *Thorne v. University of London*,⁴⁹ which concerned a claim by a disappointed candidate for the LL.B. degree who alleged that his papers had been negligently marked and sought a *mandamus* to compel the award of his merited degree. Diplock, L.J. relying, *inter alia*, on *Thomson* held that the court had no jurisdiction to deal with such an issue, being an action "relating to domestic disputes between members of the University".⁵⁰ Diplock L.J. hinted at one possible justification for

47. (1864) 33 L.J. Ch. 625

48. *Id.* at 634

49. *Thorne v. University of London*, [1966] 2 Q.B. 237; [1966] 2 All E.R. 338 (C.A.)

50. *Id.* at 242, 339

the decision when he said “the High Court does not sit as a court of appeal from university examiners.”⁵¹ Indeed, short of sitting down and marking the papers themselves, it is hard to conceive how the court could exercise such a jurisdiction, once it has been decided, as it was in *Thorne* that the concept of a duty of care is inapplicable to such a situation. It might be argued that the visitor is in no better position as far as hearing an appeal of this nature is concerned, but that is not the point. The point is that nobody bar the examiner himself is in a position to make a judgment on a question of this kind, subject to independent assessment in a doubtful case. The visitor’s responsibility in such a situation could be to appoint such an independent assessor.⁵² Quite apart from the issue of what a visitor’s powers should or should not be, it is surely questionable as a matter of policy that every student who is dissatisfied with his marks should be entitled to have the matter considered in the courts.

Reference may be made here to *King v. University of Saskatchewan*.⁵³ There a law student sought a *mandamus* to compel the University to grant him a degree. Johnson J. of the Court of Queen’s Bench held that the matter came within the exclusive jurisdiction of the Visitor. Neither the Saskatchewan Court of Appeal, nor the Supreme Court of Canada, who both held that the court did in fact have jurisdiction, felt it necessary to contradict Johnson J. on this matter. Rather they held that what King sought at this stage was not the actual conferring of the degree, but the performance of the public duty imposed by the University Act on the University Council to determine properly his appeal against the examiners’ decision.

In *King* then, the traditional area of visitorial jurisdiction remained substantially unimpaired. Such was not the case with an earlier Commonwealth decision, *Ex parte MacFadyen*.⁵⁴ Here a student who failed some examinations was refused a deferred examination. Having unsuccessfully appealed to the Dean of his Faculty (Dentistry) and to the Senate, on the grounds that his failure and the refusal to let him take the deferred examination were

51. *Id.* at 243, 339

52. It should be remembered that “in matters in which the corporators have a discretion, the visitor should not interfere if the discretion has been exercised fairly.”: Bridge, *supra* note 1 at 541

53. *King v. University of Saskatchewan*, [1969] S.C.R. 678, 6 D.L.R. (3d) 120, 68 W.W.R. 745; affirming (1969) 1 D.L.R. 321, 67 W.W.R. 126 (Sask. C.A.), affirming (1969) 66 W.W.R. 505 (Sask. Q.B.)

54. *Supra*, note 40

motivated by personal vindictiveness, he finally petitioned the Governor of New South Wales, who by virtue of section 17 of the University and University Colleges Act 1900-1951, was visitor of the University of Sydney, “with authority to do all things that pertain to visitors as often as he deems meet.”⁵⁵ The Governor refused to intervene, and the student applied for a rule nisi for the issue of a *mandamus* to compel him to act. Neither of the judgments delivered was prepared to take the claim that this was an area in which the visitor might have exclusive jurisdiction seriously. Halse Rogers J. said of the Governor’s appointment that:

it was never contemplated by the Legislature or by anybody from the time the Act was passed until quite recently, that it did anything more than give the Governor an official connection with the University.⁵⁶

The decisive factor for the court seemed to be section 14(2) of the Act which provided that “[t]he management of the affairs, concerns and property of the University is vested entirely in the Senate.” This is certainly unusually sweeping. The Senate seems to have the combined roles of Senate and Board of Governors, a view which is confirmed by looking at its composition. Out of a membership of 26, only 5 Fellows were to be “representative of the teaching staff of the University.” There are, in the manner of Australian electoral rules, procedural requirements concerning the election of Fellows designed to test the analytical skills of the most determined psephologist and Davidson J. admitted that the court might well compel the visitor not to decide an electoral dispute.⁵⁷ However the court’s decision not to interfere in the instant case seems to have been based more on policy than law.

The policy, however, is basically sound. The courts can be reluctant to state the perfectly reasonable view that nobody is really capable of acting as a court of appeal against a decision involving simply a failure in an examination. Admittedly the court in *MacFadyen* were a good deal firmer on this point than the Court of Appeal in *Thorne*,⁵⁸ but even so they were dealing with a case which *prima facie* was justiciable by the visitor. A major problem was the size of the corporate body itself, which consisted solely of the Senate of 26 Fellows, and if one accepts that visitatorial

55. Act No. 22, 1900

56. (1945), 45 S.R. (N.S.W.) 200

57. *Id.* at s. 202

58. *Supra*, note 49

jurisdiction is to concern itself solely with the acts and omissions of corporators, clearly that jurisdiction is in this case limited almost to the point of extinction. However if one regards it as the most significant part of visitatorial jurisdiction that he should be an interpreter of the University's statutes and guard against their abuse; especially with regard to what is so obviously an "internal matter", it is difficult to see how he cannot have jurisdiction here when he is invoked by a member of the university.⁵⁹ In such circumstances one can only agree with the recent comment that the better view is that "locus standi is determined solely by reference to the subject-matter of the issue, and that the status of the petitioner is irrelevant."⁶⁰ A danger there would be that the visitor might be bombarded with complaints by rejected applicants for admission.

This is one of the problem areas of visitatorial jurisdiction over students: that of locus standi. There are two others relating particularly to examinations. The first implicitly raised in *Thorne* is whether malice rather than negligence, is the charge against the examiner. For instance, it is stated in *R. v. Askew*,⁶¹ a case concerning the admission of a male midwife to the College of physicians, that the conduct of the college or any similar corporation "ought to be fair, candid and unprejudiced, not arbitrary, capricious or biassed, much less warped by resentment or personal dislike."⁶² The question is essentially one of discretion: where an examiner, or an admissions committee, or an appointments or tenure committee has acted in good faith, has taken into account all relevant considerations and disregarded all irrelevant ones, and has acted in all other ways with full regard to the established conventions relating to the exercise of discretionary power, the mere existence of locus standi before the visitor will not *compel* him to intervene. The implication of the argument in *Thorne* is that where a candidate is "dishonestly or capriciously" excluded from a professional body his remedy is with the courts. This might well be the situation regarding *admission* to a university, for it is questionable whether somebody who is not a member has locus standi before the visitor.

59. The court's view of the University's statutes was that they should not be regarded as encouraging students to appeal to the visitor: *supra*. note 40 at 205. Halse Rogers and Davidson JJ. also took an unfavourable view of visitor in *Ex Parte King: Re Univ. Sydney* (1944), 44 S.R. (N.S.W.) 19

60. Christie, "Jurisdiction and Natural Justice" (1974), 37 Mod. L.R. 324 at 325

61. *R. v. Askew et al.* (1768), 4 Burr. 2186, 98 E.R. 139 (K.B.)

62. *Id.* at 2180, 141

The other area of doubt concerns the situation where a system of appeals from a decision regarding examinations has been established and the procedure followed involves some breach of the rules of natural justice. The question of availability of redress in the courts, despite the existence of a visitor, in the event of a breach of natural justice by some inferior tribunal will be discussed later.

The question of standing will also be discussed later. It concerns students who are not corporators, and applicants for admission. When the question is one of admission, or re-admission into a faculty, of a student who is still, or already, a member of the university, the question of standing does not arise. This was determined in a recent Quebec case in which greater regard was had for the office of visitor than had previously been observed in "la belle province". In *Langlois v. Rector and Members of Laval University*.⁶³ Rinfret J.A. of the Quebec Court of Appeal has no doubt that the question whether a law student who had failed to secure the necessary credits in his first year but had nonetheless been permitted, erroneously, to enter his second year, should be allowed to continue there, or obliged to take his first year again, was an "internal matter" within the exclusive jurisdiction of the visitor.

In that view he contrasted with another Quebec judge, Brossard J. who in *Fekete* (1969), expressed amazement that "more than one hundred years" after Confederation it could seriously be argued that the jurisdiction of the courts was ousted by that of the Royal Visitor.⁶⁴ In that case a McGill undergraduate, who had participated in the publication of an offensive edition of a student newspaper, sought a writ of evocation (replacing in Quebec the order of *certiorari* and prohibition) to prohibit further proceedings of the Committee on Student Discipline on the grounds, *inter alia* that "the proceedings before it are affected by gross irregularities and there is reason to believe that justice will not be done" (the wording of the relevant statutory provision, article 846 of the Quebec Civil Code⁶⁵). Notwithstanding his views on the visitor, Brossard J. (with whom the other members of the Court agreed) was adamant that the Court had no jurisdiction to interfere with the proceedings of the Court of Discipline. Apart from the matter of visitatorial jurisdiction, the question before the court in *Fekete* was whether the

63. *Langlois v. Rector and Members of Laval University* (1974), 47 D.L.R. (3d) 674 (Que. C.A.)

64. (1969) 2 D.L.R. 3d 127

65. 4 S.Q. 1965, c.80

nature of the disciplinary body was such as to leave itself open to review by the Court under two particular provisions of the Civil Code i.e. namely Articles 846 and 33. The former which dealt with the remedy of evocation to prohibit further proceedings in certain circumstances, such as want or excess of jurisdiction, or a breach of natural justice, dealt solely with *courts* subject to the superintending and reforming power of the Superior Court: in effect to statutory bodies. Article 33 vested in the Superior Court a superintending and reforming power over, inter alia, "bodies politic and corporate" which admittedly included the "Committee of Student Discipline" at McGill. However the power did not extend, in the case of bodies politic and corporate, to the remedy of evocation before judgment, specifically provided in the case of "courts" by article 846, and the court in the instant case decided that it had no power to interfere.

Rinfret J.A. in *Langlois* specifically held that the power of supervision bestowed on the court by that article did not exclude the jurisdiction of the visitor, and that in any case "insincerity, fraud or a substantial error on the part of the respondents amounting to fraud or a denial of justice" would have to be established before article 33 could be invoked.⁶⁶ This was done in neither case.

Here is observed the difficulty of stating general rules of "university law" because of the diversity of institutions and jurisdictions. Generally one speaks of the court's jurisdiction being ousted by the visitor; in Quebec, in the light of these two cases, it is justified to talk of the visitor's jurisdiction being excluded by the court, and the implication of Rinfret J.A.'s remarks is that in the event of "insincerity, fraud or a substantial error . . ." even in the academic sphere, the courts and not the visitor have jurisdiction. The policy considerations of all this have been discussed already. Incidentally, the provisions of article 33 itself seem to accord with the general view of the scope of visitatorial jurisdiction. The superintending and reforming power does not apply to "matters declared by law to be of the exclusive competency of such courts or of any one of the latter" (this is negligent drafting but it presumably includes bodies politic and corporate) "and save in cases where jurisdiction resulting from this article is excluded by some provision of a general or *special* law" (emphasis added).

Fekete raises, almost by accident in the light of the court's attitude towards the visitor, the question of his role in relation to

66. *Supra*, note 63 at 682

student discipline, as opposed to academic matters. There seems to be no reason why, in the field of general discipline, as well as that of academic matters, a “practical” visitor could not perform the tasks of “reforming and superintending” as well as any court. However, it must be admitted that, although Ouellette maintains that visitatorial jurisdiction, *ratione materiae*, “extends, according to the case-law, not only to academic questions, but more generally to questions of . . . discipline”,⁶⁷ the authority supporting the latter part of the proposition can hardly be described as modern.⁶⁸ A visitor might have a useful function as an ultimate and, one would hope, demonstrably impartial appellate tribunal. In major incidents, of course, the law of the land might be involved: in such cases the visitor’s jurisdiction could not be regarded as exclusive.

It has been recognised, at least, since *Philips v. Bury*⁶⁹ that the visitor has the power to dismiss academic staff, though it would be unusual to find him exercising it nowadays. The visitor certainly had general supervisory powers over questions of dismissal. Hence in *Ex parte Thomas Lamprey*⁷⁰ the Lord Chancellor of the day (1737) acted as visitor of Christ Church, Oxford and decided that it was reasonable on the part of the Dean to have deprived a chaplain of his office for having married. In the early Canadian cases on tenure it was generally held (a notable exception being *Re Wilson*⁷¹) that appeal against dismissal lay to the visitor: though in only one such case, *In re the University Act*⁷² (where three judges of the Saskatchewan Court of King’s Bench sat as visitor to the University of Saskatchewan), was this means of redress in fact employed. Hagerty J. in *Weir v. Mathieson*⁷³ (in which a professor sought an injunction from the Court of Chancery for his reinstatement) accepted the definition of visitatorial power given in Lewin’s *Trusts*:

With the visitatorial powers the Court of Chancery has nothing to do, (the office of visitor being to hear and determine all

67. Ouellette, *supra*, note 1 at 639 (author’s translation)

68. The most recent authority seems to be *Green v. The Master and Fellows of St. Peter’s College, Cambridge et al.* (1896), 31 L.J. 119 (H.C.)

69. (1692) 2 T.R. 346; 100 E.R. 186

70. *Ex parte Thomas Lamprey* (1737), West t. Hard. 209; 25 E.R. 899 (Ch.)

71. (1885), 18 N.S.R. 180

72. *In re the University Act, In re the University of Saskatchewan and MacLaurin*, [1920] 2 W.W.R. 823

73. *Weir v. Mathieson* (1865), 11 G.C.R. 383 (Ch.); reversed (1866), 3 G.E. & A.R. 123

differences of the members of the society among themselves, and generally to superintend the internal government of the body, and to see that all rules and orders of the corporation are observed), it is only as respects the administration of the corporate property that equity assumes to itself any right of interference.⁷⁴

Hence the court of appeal held that the fact that Professor Weir was paid out of the general revenue of the college rather than out of a special fund set aside for his office (which was not an integral part of the college) precluded the exercise of the court's jurisdiction.

Similarly, in *Ex parte Jacob*,⁷⁵ the New Brunswick Supreme Court refused to quash the dismissal of a Professor of Divinity by the Senate (in whom, subject to the approval of the Governor in Council were vested all necessary powers for the management of the University [of New Brunswick]'s affairs,) firstly on the grounds that the Senate's action was not a judicial act, and secondly, on the ground that the matter came within the exclusive cognizance of the Lieutenant-Governor as Visitor. The three judges of the Saskatchewan Court of King's Bench who reviewed the dismissal of Professors MacLaurin, Hogg and MacKay, and Mr. Greenway, were clearly of the opinion that the matter was one of visitatorial jurisdiction, although at the same time they felt bound by the Law as laid down in *Re Wilson*. They came to the conclusion that they had no power to intervene "unless the president or governors exercised their discretion of removal in an oppressive manner or from a corrupt or indirect motive",⁷⁶ another reference to the fact that the visitor cannot act when the corporators have acted with their discretion.

Another area which seems to fall within the scope of his visitatorial jurisdiction is the terms of a particular appointment. Thus, in *Att.-Gen. v. Stephens*,⁷⁷ the main question was whether a fellow who had been elected to a travelling fellowship, and after having been paid for the first five years was prevented by ill-health from fulfilling the travelling requirements attached to the donation, should refund the amount received. Lord Hardwicke L.C. held that to require that would be inequitable and went on to say:

There are two other matters (1) whether the travelling fellows must be members of the college; (2) whether they have the power

74. 3 G.E. & A.R. 123 at 147

75. *Ex parte Jacob* (1861), 10 N.B.R. 153 (S.C.)

76. [1920] 2 W.W.R. 823, at 827

77. *Att.-Gen. v. Stephens* (1787), 1 Atk. 358; 26 E.R. 228

to let the chambers which they hold in the right of the fellowship. As to these matters, they are not properly the object of this court's jurisdiction, but ought rather to be determined by the visitor.⁷⁸

This illustrates the distinction brought out in a number of cases between the court's jurisdiction over, for instance, an independent trust fund, and the visitor's jurisdiction over internal matters such as the conditions of fellowships. The internal matters such as the conditions of fellowships. The North American institution of tenure could be described as such a condition, and Cavanagh J. in *Vanek* specifically said that "the tenure procedure at the University of Alberta is clearly a domestic issue of the university and thus falls within the province of the visitor to the exclusion of the courts."⁷⁹ There are circumstances, when a question involving the granting of tenure fits more nearly into the jurisdiction covering dismissals rather than that concerning conditions of employment, in the sense that a refusal to grant tenure may be tantamount to termination of employment.

In jurisdictions where tenure, as such, is not known, disputes tend to be centred on questions of re-appointment and promotion. The most resounding vindication of visitatorial jurisdiction in England since the eighteenth century was made by Lord Goddard C.J. in *R. v. Dunsheath, ex parte Meredith*,⁸⁰ which was concerned, generally, with the failure to renew the contract of a lecturer at the London School of Economics. Discussing the scope of visitatorial jurisdiction, Lord Goddard, in refusing to grant a *mandamus* compelling the clerk of the Convocation of the University to summon an extraordinary meeting thereof, said:

The question [regarding that jurisdiction] has generally arisen with regard to the election to fellowships, but I see no difference in principle between the question whether a particular person is a fit and proper person to be appointed or retained as a teacher at a university or school.⁸¹

Similarly in *Bell v. University of Auckland*⁸² the question arose whether the conditions laid down for the settlement of applications for promotion, which in the instant case did not appear to have been

78. *Id.* at 360, 229

79. [1974] 3 W.W.R. 167 at 176

80. [1951] 1 K.B. 127

81. *Id.* at 132

82. *Bell v. University of Auckland*, [1969] N.Z.L.R. 1029 (S.C.)

complied with, were an internal matter to be dealt with by the visitor. This was one of the contract cases and can be more conveniently discussed under *locus standi*, but Turner J. made some general comments about visitatorial powers. The university had asserted that the plaintiff's statement of claim seeking a declaration for breach of contract should be struck out because the court's jurisdiction was taken away by section 5 of the University of Auckland Act 1961, which provided that: "The Governor-General shall be visitor of the University, and shall have all the powers and functions usually possessed by Visitors." Turner J. denied that the visitatorial role was "ceremonial rather than functional"⁸³ but felt unable to decide at that stage in the proceedings (evidence being incomplete) whether the case in question was within the visitor's province as delineated by the English case-law. The contractual element in the case inclined Turner J. to feel that the matter in question was less obviously internal than those that arose in *Thorne*, *Dunsheath* and *King*.

Bridge argues⁸⁴ that the case should fall within the same class as *Dunsheath*, relating to promotion as opposed to reappointment, and certainly this would seem to follow logically from Lord Goddard's own extension of the case-law quoted above. However that was strictly only *obiter dictum*, for although Turner J. said that *Dunsheath* was concerned with "the propriety of a decision of a governing body of a university not to renew a teaching appointment",⁸⁵ the case itself was in fact brought to compel an officer of the University to call a meeting of Convocation. The question of the visitor's jurisdiction over the lecturer's appointment was not directly in issue, and in fact the action was not brought by the lecturer himself but by a member of Convocation, and the problem of the overlap between the visitor's jurisdiction and the Courts' was not present: though presumably it might have been, if it had been decided on terms assigned to it by Turner J..

Dunsheath also resembles *King* in that the clerk of Convocation was under a statutory duty to convene it in certain circumstances.⁸⁶ Nonetheless the dispute in question was held to be a purely domestic matter within the visitor's jurisdiction, and it was specifically stated by Lord Goddard that the principles of the law regarding that

83. *Id.* at 1031-1032

84. *Supra*, note 1 at 593

85. [1969]N.Z.L.R. 1029 at 1033

86. See [1951] 1 K.B. 127 at 128

jurisdiction applied equally to chartered and statutory corporations. This is a preferable solution to that in *King*, where the court became entangled with the juridical dichotomy inherent in the university, and noted by Fridman,⁸⁷ between its private and public aspects. This dichotomy, and the problems that it poses for the courts was demonstrated by reasoning both in the Saskatchewan Court of Appeal and the Supreme Court to the effect that although the conferring of a degree was an essentially “private” and “domestic” act, and conferring, or at least the consideration or procedure of conferring, might be enforced by the prerogative remedy of *mandamus*, so it was in effect held that there were circumstances in which judicial intervention into the area of examinations would be justified: however, the real issue in *King* was the applicability of the rules of natural justice.

C. Areas of Doubt

It is becoming apparent that there are a number of “grey areas” of visitatorial jurisdiction, where it is hard to say with certainty whether the court or the visitor is the correct arbiter.

There are some areas which clearly do not involve matters “with regard to the . . . management of the domus, of the institution” as that phrase has come to be interpreted by the courts. One such area, implied already, is the law of trusts. For instance, in *Green v. Rutherford* it was held that property devised to a college years after its foundation and under a special trust was not subject to visitatorial jurisdiction as

the visitor has authority to judge only according to the statutes of the foundress and is restrained from acting otherwise; consequently he has no power to exercise the trust⁸⁸

(by deciding on the presentation of a divinity fellow from the college as rector of a parish). In *Att.-Gen. v. Magdalen College Oxford*,⁸⁹ on the other hand, Lord Langdale M.R. held that the appointment of the officials to a school run by the college was a matter of internal management to be regulated by the visitor rather than a trust to be administered in Chancery.

87. See “Judicial Intervention into Universities Affairs”, (1973) 21 Chitty’s L.J. 181

88. *Supra*, note 8 at 472, 1150, *per* Lord Hardwicke, L.C.

89. *Att.-Gen. v. Magdalen College, Oxford* (1847) 10 Beav. 402, 50 E.R. 637 (Ch)

As noted above, dismissed professors have occasionally based a right to be reinstated on the argument that their status derived from a trust that by-passed visitatorial jurisdiction. In *Weir v. Mathieson*⁹⁰ this claim was dismissed on the ground that the post in question had no specific funds annexed to it. There are, however, reasons of principle and convenience, as well as the technicalities of the law of trusts behind such a decision. Lord Hardwicke L.C., in *Green v. Rutherford* discussed this point. It had been argued before him that, on the authority of his own decision in *Att.-Gen. v. Talbot*⁹¹ (which settled the right of the visitor to determine disputed elections to fellowships) the donation in question, and the rights attached to it, should be subject to visitatorial authority. In the earlier case, however,

[t]here was a plain implication to subject to the general visitatorial power to avoid confusion, which would arise, if every one coming in as a Fellow should not be subject to College discipline; and in 2 Jo. 175, it was determined, that power of expulsion includes power of admission. I . . . indeed laid weight on the inconveniences which might arise from a different decision, which were obvious but different from the present, for it is not so necessary here, that every special trust, consisting of various parts, should be subject to the jurisdiction of that visitor, nor will the like confusion ensue.⁹²

Another area where visitatorial jurisdiction is circumscribed concerns the law of the land. The visitor was “created” to administer a system of private law based on the statutes of a particular institution. When that institution is involved in a dispute which, while seemingly internal, is in fact concerned with the general law, it is only natural that the proper forum for adjudication should be the courts. Hence, when in 1693, a number of fellows of St. John’s College, Cambridge refused to take oaths of allegiance to William and Mary, a *mandamus* was granted compelling the master to receive them, the court holding that:

The visitor is made by founder and is a proper judge of the private laws of the college, he is to determine offences against those laws. But where the law of the land is disobeyed, this Court will take notice thereof, notwithstanding the visitor.⁹³

90. (1886) 3 G.C.E. & A.R. 123

91. (1747) 3 Atk. 662; 26 E.R. 1181

92. (1750) 1 Ves. Sen. 462 at 475; 27 E.R., 1144 at 1151 (K.B.)

93. *R. v. St. John’s College, Cambridge* (1693), 4 Mod. 233; 87 E.R. 366, at 241, 371

The overlap between the domestic matters of the university and the general law of the land (an aspect of the public-private dichotomy discussed earlier), seen in its most thorny aspect in *King* is also present in the third area where visitatorial jurisdiction becomes blurred, that of contracts. Here there are clearly many cases outside visitatorial jurisdiction: for instance transactions made with external parties. An early instance was *R. v. Windham*⁹⁴ where a *mandamus* was issued compelling the master of Wadham College Oxford to affix the college seal to an agreement for a lease made between the fellows and a third party. Lord Mansfield C.J. said:

the visitor acquiesces in the application for a mandamus. For who could ever entertain a thought or idea of this being a dispute proper for the visitor to decide. It is not a private dispute, but a suit by a third person against the whole body, for the specific performance of an agreement. An application to the visitor in such a case is nugatory: for he cannot compel a specific performance.⁹⁵

However most of the cases that have arisen have not been so easily disposed of. This is because, when the contract in question is made by the university and one of its academic members, it is a nice point whether the agreement is one "relating to the internal arrangements and dealings with regard to the government and management of the domus."⁹⁶ When the action in question is simply one by an unretained member of staff for damages for breach of contract and it is accepted by both sides that the period of employment has terminated the courts (in the absence of some arrangement between parties) would be the proper forum for adjudication.

Equally might this be true of a case such as *Simon Fraser University v. Juliani*,⁹⁷ Where at the conclusion of a dispute between the university and its "Resident in Theatre Arts" as to whether or not he had resigned, he was allowed to continue, theoretically, in his position, with full pay, until December 31st 1969 on condition that he did not set foot on the campus, other than as a member of the public, after May 15th. The university was granted an injunction to prevent the defendant from breaking the latter provision of the contract, which was as Bridge says, "in a

94. *R. v. Dr. Windham* (1776), 1 Cowp. 377; 98 E.R. 1139 (Ch.)

95. *Id.* at 378, 1140

96. *Supra*, note 39

97. *Simon Fraser University v. Juliani* (1969), 5 D.L.R. (3d) 670 (B.C.S.C.)

sense external to his relationship with the university and was indeed expressly designed to keep him away from it.”⁹⁸ In general, however, a number of cases suggest that in matters relating to contracts between the university and its academic members, the visitor remains the ultimate authority.

The earliest case in which the issue was raised was *Thomson v. University of London*,⁹⁹ discussed above. The plaintiff there claimed for a breach of contract made between him and the university. Sir Richard Kindersley V.C. held that to call the relationship a legal contract was a misnomer. Even if the relationship in question was contractual (he said) the contract was one relating to the internal affairs of the university and hence subject to visitatorial jurisdiction. *Thomson* is peculiar in that the agreement involved was much more limited than one would normally find, being concerned simply with the taking a particular examination. The vice-chancellor himself noted this, contrasting Thomson’s situation with that of an Oxbridge undergraduate, who would pay much more money for his membership of the university. Moreover, he denied that such an undergraduate would be in a contractual relationship as such: “for his *status* he pays very considerably.”¹⁰⁰

The problem of the relationship between the student and the university is more relevant to the question of a student’s *locus standi* before the courts than to his position vis-a-vis the visitor. As far as the latter is concerned, Christie’s attitude mentioned above,¹⁰¹ that the subject matter of the dispute rather than the “status” of the complainant should be the deciding factor, is sensible. This has usually been the case, historically, given the fact that the visitor’s principal task is the interpretation of university statutes. It is only the unexpected resuscitation of the visitor at the hands of Professor Bridge, coinciding with the academic interest in the student’s standing with the courts, and the prompt arrival of a case, *Herring v. Templeman*,¹⁰² in which both issues were fleetingly raised, that has enabled them to become enmeshed.

Herring involved allegations of breaches of natural justice by various bodies, brought by a student at a teacher training college

98. Bridge, *supra*, note 1 at 544

99. (1864), 33 L.J. Ch. 625. See also *Att.-Gen. v. Talbot* (1747), 3 Atk. 662; 26 E.R. 1181, at 675, 1187

100. *Id.* at 638

101. *Supra*, note 60

102. *Herring v. Templeman*, [1973] 2 All E.R. 581 (Ch.), *aff’d* on different grounds [1973] 3 All E.R. 569 (C.A.)

who was expelled for failure in the practical side of his course. Brightman J. of the Chancery Division (to whom the plaintiff applied for a declaration, an injunction to re-admit him, and damages) treated the case as being in the line of cases from *Att-Gen. v. Talbot to Thorne*, and held that the matter fell within the cognizance of the visitor.

On appeal, however, it was realised that the college was not a corporation in the sense that most colleges and universities are: it was a trust, and did not have any "members" as such. Therefore the plaintiff changed his plea to one of breach of contract: the college maintained that even so exclusive jurisdiction lay with the visitor. The Court of Appeal, however, were uncertain

what, (if any) is the authority that appertains to the office of visitor in the case of an endowed college which is subject to the visitation of the ordinary in connection with a dispute such as the present, involving an alleged breach of contract between the governing body and a person who, though a student under tuition and training at the college is in no position of membership.¹⁰³

Therefore the issue was left unresolved, which was a pity, as, in Brightman J.'s words "in none of the reported cases . . . did the issue of natural justice arise".¹⁰⁴ Russell L.J. agreed that the student-institution relationship was contractual, but that has not been the issue in most of the cases involving the visitor. In *King*, for example, Spence J. left the question of breach of contract open.¹⁰⁵ If one argues that the university's power to discipline students is contractually based, it is reasonable to assume that such an agreement, being based on the university's charter and statutes, is 'internal': The same argument could be applied to professorial contracts. The only questionable area of *locus standi* for students should be in relation to admissions, and "membership" should be reasonably construed.

The relationship between the university and its academic staff is clearly contractual. Yet even here, matters concerning the relationship but relating to the internal management of the institution have, as noted above, been held to come within the exclusive cognizance of the visitor; and as in the student cases, the contractual question itself is often said not to be strictly relevant. Clement J.A. upholding Cavanagh J.'s judgment in *Vanek*, said:

103. [1973] 3 All E.R. 569 at 572, *per* Russell L.J.

104. [1973] 2 All E.R. 581 at 589

105. [1969] S.C.R. 678 at 686, 68 W.W.R. 645 at 653

These proceedings do not raise the contractual aspect of the relationship between Vanek and the board, and indeed *certiorari* does not provide a remedy for breach of contract. They are taken on the footing that the provisions in the [faculty] handbook . . . are regulations of the university which are to be given their proper effect quite apart from any consensual operation.¹⁰⁶

Where breach of contract has been alleged, equivocal response has been made by the courts as to the authority of the visitor. This happened in *Bell*, mentioned above, where a lecturer whose application for promotion was rejected by means different from those that the university had undertaken to follow, claimed that his contract had been breached. Turner J. was unable, at that stage to say for certain that

on no conceivable presentation of the plaintiff's case could the evidence turn out to support a claim of breach of contract in respect of which the Court's jurisdiction would not be ousted by that of the visitor.¹⁰⁷

Bridge asserts¹⁰⁸ that in the light of *Dunsheath* and *Juliani* the contract would be regarded as falling within Kindersley V-C's class of contracts relating to the internal management of the domus. Fridman, on the other hand, doubts whether the contractual relationship is a wholly domestic issue, from which the courts are excluded.¹⁰⁹ However, it is probable that the motive behind this (and certainly behind Wade's belief that the student-institution relationship is contractual¹¹⁰) is the conviction that the prerogative orders are inapplicable — as efficacious a route to justice as the declaration, the injunction or damages, would be by way of appeal to the visitor.

The question then arises: Who can appeal? The visitor's powers *ratione materiae* have already been discussed. *Ratione Personae* jurisdiction has traditionally been limited to the corporators, which as a rule means academic staff, and students where they are

106. [1975] 5 W.W.R. 429 at 434. The same could be said of regulations concerning student discipline. Although discipline is said to be contractually based, in the sense that students are required to agree to observe ordinances, etc. before coming into residence, such agreement may be fairly illusory, bearing in mind the relative bargaining positions of the parties. Here, the regulations had at least been agreed to by the faculty association.

107. [1969] N.Z.L.R. 1029, at 1033

108. *Supra*, note 1 at 543

109. Fridman, "The Nature of a Professorial Contract", *supra*, Chapter 1, note 22 at 20

110. See Wade, "Judicial Control of Universities" (1969), 85 L.Q.R. 468

members of the institution. An example of a case where students were for this reason prevented from appealing to the visitor is *Ex parte Davison* (1772), cited in *R v. Grundon*.¹¹¹ The latter case concerned the right of a “boarder”, the prosecutor in a claim for assault, to remain in college after being given notice to quit. Lord Mansfield relied on *Davison* where it was held that visitatorial jurisdiction was limited to the foundation, and that “independent members” had no recourse to the visitor. Davison, a commoner, had been sent down from University College, Oxford, one term before completing his degree. He appealed to the Lord Chancellor as visitor (“University College being of Royal Foundation”).¹¹² The College having protested against certain statements in Davison’s petition, the question became one of whether the matter was for visitatorial jurisdiction at all. The college argued that it was an eleemosynary foundation limited to a master and twelve fellows, and that strangers to the foundation had to rely for redress of their grievances on the ordinary laws of the land. Davison alleged that “the visitor’s jurisdiction is confined to the foundation, but comprises the whole government of the college.”¹¹³ The position of “independent members” was sufficiently described by the statutes of the university (for instance a degree could only be awarded to someone who was a member of a college) for such members to come within the jurisdiction. The Lord Chancellor dismissed the petition.

Christie takes issue with Bridge’s view, based on *Davison*, that visitatorial jurisdiction is limited to corporators. He maintains that the use of the word “member” in such cases as *Thomson*, and *St. John’s College, Cambridge v. Todington*,¹¹⁴ in relation to *locus standi* before the visitor, can be explained by the fact that most petitioners will be, technically “members” of the institutions in question.¹¹⁵ From the standpoint of common sense there is much to be said for Christie’s view, if the visitor is to be a workable adjudicator: and students are often now specified as “members” of the university in the charter. A complicating factor is the method, employed by both Bridge and Ouellette of looking at visitatorial

111. *R. v. Grundon* (1775), 1 Cowp. 315; 98 E.R. 1105 (K.B.). *Ex parte Davison* is cited at 319

112. 1 Cowp. 315 at 319; 98 E.R. 1105 at 1108

113. *Id.* at 320, 1108

114. (1757) 1 Burr. 158; 97 E.R. 245

115. 37 Mod. L. Rev. 324 at 326

jurisdiction from two angles, “*ratione materiae*” and “*ratione personae*” — to put it another way the scope of that authority is to be looked at from the viewpoint both of the personnel, and the subject-matter, to which it extends. The question of admissions, while seemingly to fall within Kindersley V.-C.’s “internal” category, can presumably not be brought before the visitor by a rejected candidate, who is not a “member” in even the loosest sense. It is probably mistaken to treat the above cases as cases on *locus standi* at all. The question is essentially one of jurisdiction rather than standing. If the student is a member of the university, in the widest sense, the visitor has jurisdiction.

The problem of admissions is essentially one of discretion. Much more justiciable was the issue of elections to fellowships which also, as Christie points out, raises questions of entitlement to membership. For instance, in *R. v. Hertford College, Oxford*,¹¹⁶ a candidate for a fellowship restricted to members of specified churches, who was not a member of one of them, was told that even if he came first in the examination he would not be elected. He did not enter, but after results had been declared he sought a *mandamus* compelling the college (established by statute in 1874) to examine him. In this he was, not surprisingly or unreasonably, unsuccessful. Lord Coleridge C.J. held, firstly, that there was no refusal to examine him — the college were quite prepared to examine him but on the terms mentioned above; secondly, even if they had refused, the office was now adequately filled and the court was not going to interfere with the college’s reasonable, and discretionary decision; and thirdly, the plaintiff’s proper remedy, “if any” was an appeal to the visitor:

There are cases directly on point, and of great weight, which show that the authority of the visitor is as complete over admissions to fellowships as over a motion from or deprivation of them.¹¹⁷

He cited as examples *St. John’s College v. Todington*, and other cases where elections were disputed and mentioned an instance where

the college of which I was a fellow was ordered . . . by the visitor to admit, and did admit to a fellowship, a gentleman whom the college had rejected upon grounds which the visitor,

116. [1878]3 Q.B.D. 693 at 701

117. *Id.* at 701-702

the Bishop of Exeter, deemed insufficient and against which the rejected candidate successfully appealed.¹¹⁸

As Christie points out not only these cases but also *Thomson* supports the proposition that petitioners before the visitor need not be incorporators. Thomson was simply taking the LL.D. examination: he was not a member of the University in the fullest sense. According to *Kindersley V.-C.* visitatorial jurisdiction extended to cover those:

who are either actually members of the University or who come in and subject themselves to be at least *pro hac vice*, members of the University.¹¹⁹

Again “*ratione materiae*” and “*ratione personage*” seem to conflict. *Ex parte Davison*, the only case definitely supporting Bridge can be doubted as a general authority not only for the antiquated distinction between commoners and scholars, but also on the grounds of the separation, in Oxbridge, of the eleemosynary and civil corporations, which enabled him to come under visitatorial supervision. Generally, no such separation occurs, or rather, the two functions are carried out by the same corporate entity.¹²⁰

The final grey area concerns natural justice. The cases most pertinent to the subject, *Vanek*, *Herring* and *King* have already been discussed. It has already been observed that there is no English authority on the point of the courts’ jurisdiction in areas of visitatorial cognizance where a breach of natural justice has been alleged. *Vanek* suggests that in such a case the visitor still has exclusive jurisdiction. On the other hand it has by no means been settled that tenure proceedings are legally subject to the rules in any case. However a number of the student cases have indicated that the adjudicative bodies involved were judicial in nature.¹²¹ One major problem is that it is by now apparently settled that a decision made in breach of natural justice is in reality no decision at all, and therefore that nothing the visitor does can make it one. Connected with this is the notion that jurisdictional error should always be reviewable in the courts.

*King*¹²² perhaps encapsulates the problem, which clearly involves the more general question of excluding the courts from

118. *Id.* at 703

119. (1864) 33 L.J. Ch. 625 at 634

120. See, e.g. *Vanek*, [1975] 5 W.W.R. 429 at 437, per Clement J.A.

121. See e.g. *Glynn v. Keele University*, [1971] 2 All E.R. 89 (Ch.).

122. *Supra*, note 53

internal university matters as well as the particular issue of natural justice, more neatly than the other two cases. That case involved an application by a student for *mandamus* to compel the university to hear properly the appeal of the applicant against the decision of the College of Law not to grant him the degree of Bachelor of Laws. Johnson J., at first instance, held that the question of the granting of degrees was a purely domestic one falling within the exclusive jurisdiction of the Visitor. The Court of Appeal also denied King his remedy, but on the grounds that although the University Council was a statutory body (established, or rather, continued by s.73 of the University Act 1965)¹²³ which had public duties, namely, “to deal with and subject to an appeal to the Senate, to decide upon all applications and memorials by students or others in connection with any faculty in the University”, which, *prima facie*, were enforceable by *mandamus*, those public duties had, in the instant case, been satisfactorily performed. With this conclusion the Supreme Court of Canada agreed, adding that the procedures of the various bodies to whom King had applied did not amount to a breach of natural justice; a finding, which effectively excused the Court from ruling definitely that *mandamus* was in fact an appropriate remedy in the circumstances.

The public-private dichotomy that this illustrates has been commented upon above. Spence J. revealed the Supreme Court’s doubts, pointing out that the issue was essentially a domestic one:

The considerations which are given to such an issue are not those which can be assisted by an adversary formula, and it is difficult to conceive of a situation which would have the representatives of a law school faculty confronting the representatives of a student in the trial of an issue as to whether a degree should be granted.¹²⁴

The procedural problem, that is to say, the question whether natural justice should apply, and if so in what form, to a statutory body which decides inherently domestic issues (but which takes extraneous matters into account) is different from the question whether the prerogative orders should lie for breach of natural justice in those circumstances. The Supreme Court held that the second question did not need to be answered. As to the first the statutory duty involved an application of the rules of natural justice.

123. *University Act*, R.S.S. 1965, c. 181.

124. [1969] S.C.R. 678 at 686; 6 D.L.R. (3d) 120 at 128; 68 W.W.R. 745 at 753

The result of this would appear to be, as Megarry J. noted,

that every student in Canada who is disappointed at his degree may, by the simple process of complaining of his disappointment, obtain one or more hearings according to the full process of natural justice.¹²⁵

Megarry J.'s remarks are not perhaps quite fair. It may be that the procedures involved in the consideration of whether or not to grant a degree at Saskatchewan left something to be desired and that the revelation of such shortcomings in the courts, or the threat of such revelation might be considerably beneficial. However one cannot help feeling that these matters are best dealt with internally and that the adversarial factor, invariably implicit in the rules of natural justice, has no place here.

So, policy, as well as law, is again involved here. If the visitor is to be regarded as a useful, indeed vital, aspect of the university hierarchy, that attitude will be based, to a considerable extent, on the assumption that it is his function to administer a system of essentially private justice.¹²⁶ To suggest that arbitrary and despotic power is a necessary concomitant of this is ridiculous. If it is asserted that "university law" is something apart from the common law, and that the university's independence in this sphere is a "good thing" the argument against allowing natural justice cases is a strong one. On the other hand these factors have to be weighed against the subject's interest in having his procedural rights protected in the courts.

D. *The Scope of Judicial Review*

Given that the visitor has jurisdiction over domestic matters (with the provisos noted above) the question arises as to the degree of supervision over the visitor himself. The reports resound with references to the "exclusive" and "arbitrary" nature of his powers.¹²⁷ The possibility of interference by the court is described as "meddlesome". In *Dr. Patrick's case* it was said:

125. *Leary v. National Union of Vehicle Builders* [1971] Ch. 34, at 52

126. See *R. v. Grundon*, *supra* note 111 at 322, 1109 where it is said that the law administered by the visitor is comparable to admiralty law. *Certiorari*, for instance does not lie to a visitor (*Bridge, op.cit.* at 544). Prohibition does lie: see *R. v. Dr. Shippen*, *supra* note 17.

127. For cases where the existence of a visitor has been held to exclude the courts, see, as well as those mentioned already, *R. v. Warden of all Souls College, in Oxford* (1682), Jo. T. 174; 84 E.R. 1203 (K.B.); *R. v. Alsop* (1682) 2 Show K.B. 170; 80 E.R. 868 (K.B.)

here being a visitor appointed, the court had nothing to do in the matter, for the founder intended that the college should be free of all foreign suits, and that all controversies should be determined within the university, to the intent that they might better follow their studies, but by this means, if they should come hither upon every controversy, the order and rule of the universities should be overthrown, and the visitors are the proper judges of the laws and statutes and not this court.¹²⁸

The fact that there is no appeal on the merits from a visitor's decision does not mean that the courts have no power to supervise his acts. A body of case-law has been built up placing the visitor in basically the same position as much more modern tribunals. Reference has already been made to "jurisdictional fact" in connection with the visitor: The courts have had occasion to determine whether a matter, such as trust, falls within or without visitatorial cognizance.¹²⁹ There is a number of other areas where the court exerts control, and these help to clarify the exact procedures to be followed by the visitor, in themselves an area of doubt, given the antiquity of the office and the rarity of its exercise. (It might be mentioned at this point that one of the most significant aspects of the inherently private nature of visitatorial jurisdiction is that a court has no notice of it unless it is brought to the court's attention: "It is but a forum domesticum, and not taken notice of by the common law."¹³⁰ The common law has nonetheless imposed some of its procedural standards.)

The visitor can be compelled to act by a writ of *mandamus*. Lord Hardwicke, speaking in 1735, said that he did not know of any such case,¹³¹ but the point appeared to be well settled by 1794. In *R. v. Bishop of Ely*¹³² a fellow deprived of his office due to the publication of a seditious pamphlet, appealed to the visitor who dismissed the case. The plea for *mandamus* was rejected, but the court made it clear that in an appropriate case they would compel

128. *Dr. Patrick's Case* (1662) 1 Lev. 65, 83 E.R. 299 (K.B.) at 66, 300

129. An action may lie against a visitor who exceeds his jurisdiction: "where a founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in any sentence exceeds those rules, an action lies against him, but it is otherwise where he mistakes in a thing within his power, though in this case there be not any appeal over": Lord Holt in *Phillips v. Bury*, *supra*, note 9.

130. *Dr. Walker's Case* (1735), Cas. t. Hard. 212; 95 E.R. 137 (K.B.), memorable as marking "positively the last appearance" of Dr. Bentley

131. *Id.* at s. 218, 140

132. *R. v. Bishop of Ely* (1794), 5 T.R. 474; 101 E.R. 367 (K.B.)

the visitor to act, although they were in no way concerned with the merits of the case, Lord Kenyon saying:

It was settled in *Phillips v. Bury* that the court has no other power than that of putting the visitatorial power in motion . . . but that if the judgment of the visitor be ever so erroneous, we cannot interfere to correct it.¹³³

Again, in *R v. Bishop of Lincoln*,¹³⁴ the visitor of Lincoln College, Oxford was compelled, in accordance with the statutes, to hear an appeal arising from the election of the rector: there it was said that not only will the court not go into the merits of the case, but also that they will not invariably compel the visitor to do so “for it is sufficient, if he decides that the appeal comes too late.”¹³⁵

The court can exercise no review of the visitor’s actual findings but it can supervise the manner in which he reaches them. If visitatorial power is to be seriously regarded as a useful adjudicatory tool it is important that the procedure to be followed should be reasonably well defined. Fridman has asked a number of questions about the way in which visitors might be expected to act.¹³⁶

One question that Fridman asks is: “Must the visitor personally investigate and come to a decision? What assistance can he demand to perform his task?” In the eighteenth century cases it seems quite clear that visitors such as Bishops did conduct their own hearings and come to their own conclusion, as the Bishops of Ely and Lincoln did in the above cases. Lord Chancellors too seem to have been conscientious; such notables as Lords Eldon¹³⁷ and Brougham¹³⁸ appearing in the law reports in visitatorial guise. In a case in 1682 involving All Souls Oxford it seems taken for granted that the visitor, the Archbishop of Canterbury, would hear and determine the question himself.¹³⁹ By 1864, however, archiepiscopal duties had presumably become more time-consuming. Then the visitor was assisted by two assessors (one of them the future Lord Coleridge) who prepared a report and recommendations which the Archbishop simply confirmed.¹⁴⁰ So a degree of delegation

133. *Id.* at 477, 268.

134. *R. v. Bishop of Lincoln* (1785) 2 T.R. 338n., 100 E.R. 157 (K.B.); See also *Usher’s Case* (1960), 5 Mod. 452; 87 E.R. 759 (K.B.); and *Ex parte Madfadyen*, *supra* note 40, especially at 204

135. *Id.* This seems, to say the least, a trifle unjust.

136. *Supra*, note 109 at 21

137. *In Queen’s College, Cambridge* (1821), Jacob 1; 37 E.R. 750

138. *In ex parte Inge, re Catherine Hall* (1831), 2 Russ. & M.; 39 E.R. 519

139. *Supra*, note 127

140. *Watson and Fremantle v. Warden and Fellows of All Soul’s Oxford* (1864),

seems permissible. Some latitude is clearly allowed when the Queen in Council is appointed visitor, as at London. In a case mentioned in the *Science Journal*¹⁴¹ the committee appointed to act as visitor to hear the appeal of a graduate student whose thesis had not been accepted consisted of a Lord of Appeal in Ordinary, the then Minister of Education, and the head of a Cambridge College.

Fridman proceeds to ask: "What criteria must [the visitor] observe?" The answer to this has already been given. The visitor in his role as the judiciary of a private jurisdiction, is to administer and act according to, the statutes of his college or university, and where they are silent on the point in question according to "the general usage of the universities of England". College and university law being similar to, though distinct from, the common law, and visitatorial opinions apparently being given in writing, it would seem that there is room for some system of precedent: at the same time flexibility is desirable in an area in which there is, in any case, little modern authority. Bridge points out that a "a visitor is not required to proceed according to the rules of the common law":¹⁴² however the procedural guidelines settled by administrative law have been imposed on him.

Therefore Fridman's next question, "Does he have to obey the call of natural justice?" can be answered affirmatively. Both branches of the rule apply. On the basis of *R. v. Bishop of Lincoln* it was argued in *R. v. Bishop of Ely*¹⁴³ (1788) (in which the fellows of Peterhouse, Cambridge, sought a *mandamus* to compel the Bishop, as visitor, to appoint one of their nominees as master) that "it is not necessary for a visitor in any case to summon and hear the parties in order to his giving judgment upon it."¹⁴⁴ The court, Ashurst, Buller and Grace JJ. decided that this was not in fact, a case concerning the Bishop's visitatorial authority. But rather concerning a distinct power to appoint a master when the fellows were divided on the subject, and the *mandamus* was issued. However, both Ashurst and

11 L.T. 166. The report in *Philips v. Bury* notes that the visitor of Exeter College, Oxford could visit either by himself or by commissary. This specific statutory provision perhaps precludes the possibility of an inherent right to delegate visitatorial functions. The case largely turned on the question whether the limitation attached to the commission's power to deprive the rector applied also to the Bishop himself.

141. (1970) 7th April, p.7

142. Bridge, *supra*, note 1 at 545

143. *R. v. Bishop of Ely* (1788) 2 T.R. 290; 100 E.R. 167 (K.B.)

144. *Id.* at 322, 174

Buller JJ. had no doubt that the visitor acting as such, had to fulfil certain minimal procedural requirements. Ashurst J. said.

But even supposing that this matter was within the Bishop's visitatorial authority, yet he has not acted in the character of a visitor. The exercise of a visitor's power, in a case like the present, is a judicial act; and a Judge cannot determine without hearing the parties concerned.¹⁴⁵

He should at least have convened the interested parties. The same two judges were members of the court in a second case involving the Bishop of Ely¹⁴⁶ who, this time in his capacity as visitor of Jesus College, Cambridge, had dismissed the appeal of a Fellow removed for writing a seditious pamphlet. A *mandamus* was sought compelling him to rehear the appeal. The court refused to interfere. The visitor had received the arguments of the parties: he had decided the case on its merits. To interfere and control the judgment of the visitor would be "attendant with the most mischievous consequences",¹⁴⁷ as the court was ignorant of the college's statutes whose interpretation had been assigned to another forum. Buller J. said that the right to be heard did not necessarily imply a right to be heard personally.¹⁴⁸ Grose J. maintained the view that the Court had "no authority to say how he should have decided",¹⁴⁹ but it seems clear that the *audi alteram partem* rule applies.

The *nemo iudex in sua causa* rule also applies. In 1727, in *R. v. Bishop of Chester*¹⁵⁰, *mandamus* was issued to the Bishop, as warden of Manchester College, to admit a chaplain. The Bishop had returned that he was visitor of the college, and that the jurisdiction of the courts was consequently excluded. This argument was rejected on the ground that the visitor "cannot visit himself". This was followed by a statute of 1728¹⁵¹ which provided that where the Wardenship of Manchester College and the see of Chester were vested in the same person, visitatorial jurisdiction over the college should be vested in the Crown. Buller J. in the first *Ely* case said:

145. *Id.* at 322, 174

146. 5 T.R. 474; 101 E.R. 267

147. *Id.* at 476, 268

148. *Id.* at 477, 269

149. *Id.*

150. *R. v. Bishop of Chester* (1727), 2 Str. 797; 93 E.R. 855. See also *Marsh v. Huson College* (1880) 27 G.C.R. 605 at 629

151. 2 Geo. 2, c.29

. . . as this was not a visitatorial act it is impossible that the propriety of the bishop's conduct can be inquired into by him as visitor, for this would be to determine upon his own right A visitor cannot be a judge in his own cause unless that power be expressly given to him.¹⁵²

In *Ex parte Jacob*¹⁵³ the divinity professor at the University of New Brunswick sought to have his dismissal quashed on the grounds of breach of natural justice. The court held, *inter alia*, that the acts of a visitor were judicial, and that the Lieutenant-Governor, as visitor, was not precluded from passing judgment on acts to which he had already given his approval as Governor-in-Council. It would seem that this case falls into Buller J.'s category of express provision, for according to Carter C.J.:

the union of the two characters in the Lieutenant-Governor, which are said to be inconsistent, is affected by the Foundation itself, and is not unforeseen or accidental.¹⁵⁴

Nonetheless this would seem to be an appropriate case for the visitor to use his authority to delegate to one with no preconceived ideas, if such authority does in fact exist. Reference has already been made to at least two instances where delegation on at least assistance has taken place: one involving the Saskatchewan Court of King's Bench¹⁵⁵, and the other the Archbishop of Canterbury¹⁵⁶. At least in the former, delegation was expressly authorised, but in the light of Buller J.'s emphatic statement in *R. v. Bishop of Ely*¹⁵⁷ that the visitor must hear the parties concerned, it is doubtful whether there is an *inherent* power to delegate. Clement J.A. in *Vanek*¹⁵⁸ clearly doubted whether there was. The special position existing when the Sovereign is visitor and the powers are exercised by the Lord Chancellor has already been dealt with.

E. Justification

Does the visitor matter? The question has to be asked. Recent cases upholding his jurisdiction have been greeted with wailing and the gnashing of teeth and slow emergence of this antediluvian

152. *Supra*, note 143 at 338

153. (1861) 10 N.B.R. 153

154. *Id.* at 157

155. *Supra*, note 27

156. *Supra*, note 140

157. *Supra*, note 145

158. [1975] 5 W.W.R. 429 at 443

functionary into the twentieth century cannot be expected to be greeted without misgivings. There are, however, strong arguments for its retention, and indeed encouragement.

When visitatorial prestige was at its peak, in the seventeenth and eighteenth centuries, it was the only authority of its kind in the land. It was in some respects a fore-runner of the modern administrative body, having exclusive cognizance over a limited sphere of activity.¹⁵⁹ Indeed the words of eighteenth century judges justifying their refusal to “meddle” in university affairs are remarkably similar to those of modern administrative lawyers proclaiming the merits of such bodies as labour relation boards, such as expertise, initiative, and expense:

And it is a more convenient method of determination of controversies of this nature: it is at home, forum domestic, and final in the first instance, and they should be judged in a short way *secundum arbitrium boni viri*; it is true this power may be abused, but if it is exercised in a direct manner it is much less expense that suits at law, or in equity.¹⁶⁰

If the court's reluctance to meddle, rather than any notable expertise on the visitor's part has been a motive force in the development of university law, there is no reason why a suitably qualified person could not be found to fill the role.

That practical aspect is clearly an important consideration. Bishops, alas, will probably no longer be acceptable.¹⁶¹ McConnell has observed that the functions involved call not for a lawyer as much as someone with an “awareness of the ethos of the institution”.¹⁶² In view of what has gone before, however, a legal training would be valuable. McConnell's suggestion that the visitor should be elected by the members of a University for a period of, say, five years (with jurisdiction presumably extended to those entitled to vote) has its merits as a practical mode of appointment. On the other hand, it clearly runs counter to the history of the institution. The whole point of the visitor used to be that he was the representative of the founder, whose duty was basically to

159. See Mullan, “The Modern Law of Tenure” in *The University and the Law*, ed. Janisch (Faculty of Law, Dalhousie University, Halifax, 1975), 102, at 103 (hereinafter Janisch.)

160. *Att.-Gen. v. Talbot*, *supra*, note 31 at 674; 187

161. For a light-hearted look at episcopalian involvement in these matters see Janisch, *supra*, note 159 at 94-100

162. McConnell, “The Errant Professoriate: An Inquiry into Academic Due Process”, (1973), 37 Sask. L. Rev. 250, at 278

administer the founder's property according to his laws. To define the visitor as, essentially, the representative of the incorporators is a considerable conceptual leap, destroying the distinction between governor and governed emphasised in *Wilson*. Perhaps "consultation" would suffice.

The workload is unlikely to be overwhelming though there are signs of increasing activity in the strictly academic field. The assumption of a visitatorial authority by the court, as in Saskatchewan, has its merits, but it negates many of the advantages of the system, particularly where time and money are concerned.

The strongest objection that can be made by visitatorial jurisdiction is that it takes away the right of a person to have the termination of his status in an institution discussed in the courts. However these are problems which the courts seem to be, for one reason or another, reluctant to discuss. When there is a visitor they have the perfect excuse not to intervene. Even when the question of visitatorial jurisdiction is not raised, the courts have often either denied that the plaintiff has the right to succeed,¹⁶³ or have in the exercise of their discretion in the particular circumstances of the case, chosen to deny that right to the applicant.¹⁶⁴

Consequently the curious situation exists that the people most likely to protest at the "exclusive" nature of visitatorial jurisdiction, namely students and teachers, are the people most likely to benefit from it. This is especially true of teachers. The legal position regarding tenure is dubious, even today. In *Craig v. University of Toronto*¹⁶⁵ an attempt was made to give legal status to the "conception of tenure held by the academic community, and operating as a custom or usage".¹⁶⁶ That "conception" is the sort of consideration to which a visitor would probably pay acknowledgement. It is his duty to regard not only the statutes, but also the customs and standards of his institution, "the *jus commune*, as it were, of societies."¹⁶⁷

Finally, the visitor would be a guarantee of autonomy. The university is threatened by the state on many fronts, especially

163. As, e.g. in *Orr v. University of Tasmania* (1957), 100 C.L.R. 526 (H.C. of A.)

164. As, e.g. in *Glynn*, [1971] 2 All E.R. 89

165. *Craig v. Governors of University of Toronto* (1923), 53 O.L.R. 312 (W.C.)

166. Laskin, "Some Cases at Law" in *A Place of Liberty*, ed. Whalley (Toronto: Clarke, Irwin Co., 1964), 177 at 185

167. *Lamprey*, *supra*, note 72 at 215, 902

financially. The existence of an automatic right of appeal from a university tribunal to the courts could give the tribunal, if not the university, the appearance of an administrative agency. A comparison with trade unions and clubs fails to take account of the unique position of the university. Of course this argument is not so potent if a declaration is all that is being sought from the courts; and if one is to retain access to the courts for jurisdictional error, including failure of natural justice, the number of cases reaching the courts may not be greatly reduced. Nonetheless appeal to the visitor could be a valuable mode of redress of internal grievances.¹⁶⁸

168. For recent judicial notice of the advantages of visitatorial jurisdiction see the still unreported decision of the Canadian Federal Court of Appeal in *Martineau and Butters v. Matsqui Institution* (decision handed down February 5th 1976) where Jaccett C.J. said "If there is to be a review [of disciplinary proceedings in a penal institution] of a sufficiently speedy character that would not insert unwieldy and unworkable characteristics into disciplinary proceedings . . . such review cannot be by the procedures of an ordinary court but must be by specially designed procedures and by special Tribunals of a kind sometimes referred to as "visitors". See also Select Committee on Student Relations, *supra*, Chapter 1, note 73, at para. 208.