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Charity Scandals as a Catalyst of Legal Change and Literary Imagination in Nineteenth Century England

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CHARITY SCANDALS AS A CATALYST OF LEGAL CHANGE AND LITERARY IMAGINATION IN NINETEENTH CENTURY ENGLAND

*James J. Fishman**

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I. CHARITABLE TRUST REFORM IN THE FIRST HALF OF THE NINETEENTH CENTURY

The Victorian era summons images of propriety, conformity, and probity, yet it also represents a period of greed, hubris, corruption and change. Two of the more publicized scandals in the mid-nineteenth century concerned charitable fiduciaries of the Cathedral Grammar School at Rochester and the St. Cross Hospital near Winchester. Both incidents had political ramifications and served as catalysts for the creation of a permanent administrative body to monitor charities. Both episodes influenced contemporary novelists, particularly Anthony Trollope, who used the two incidents as the basis of his classic novel, *The Warden*, and as an inspiration for his Barchester series which satirized clerical life, and Charles Dickens, who chronicled the Rochester Cathedral matter in his periodical, *Household Words*, and drew from

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it for one of his *Christmas Stories*. In both, clerical reformers attempted to right long-running fiduciary abuses. Beyond their significance as a source of literary inspiration, the Rochester Cathedral Grammar School and St. Cross Hospital represented a clash between vested interests, traditional practices and privileges and a more modern impulse to reform fiduciary behavior.¹

Nineteenth century England, often called the age of reform, was a period of enormous political, social, and economic change. In the first two decades came an increase in the rate of transformation of the economy, the polity and society and a greater stir and movement in all spheres of public activity caused by more "rational and purposeful" control based upon measuring, counting and observing.² Political, economic and governmental institutions developed modern structures and approaches.

Charitable regulation reflected these trends. As part of a broader movement of inquiry, supervision and statutory reform, and in an effort to remedy the social evils of the time, the administration and abuse of charitable trusts became a part of a larger agenda of reform, leading to the creation at mid-century of a national Charity Commission which oversaw philanthropic organizations. The rationale for charitable reform was the hope, largely chimerical, to capture a supposedly huge corpus of charitable assets, a proportion of which were misspent, unspent or devoted to obsolete purposes, and to utilize them for modern needs such as education. In contrast to the past, charities were examined with a new thoroughness and scope. Publicity surrounding charitable scandals provided the impetus for Parliamentary reform. Chancery's inefficient hold of oversight of charities was loosened. At mid-century there was in place a permanent Charity Commission, though of questionable vigor and modest effectiveness.

There had been several investigations of charities in the eighteenth century, but these were local inquiries without official status. Only at the end of the century was there an effort at the national level.³ These early efforts

1. Cf. ROBERT BERNARD MARTIN, *ENTER RUMOUR: FOUR EARLY VICTORIAN SCANDALS* 11-12 (1962).

2. SIR EARNEST LLEWELLYN WOODWARD, *THE AGE OF REFORM, 1815-1870*, at 39 (2d ed. 1962).

3. RICHARD S. TOMPSON, *THE CHARITY COMMISSION AND THE AGE OF REFORM* 78 (1979). In 1713, a history of the charities of Tyndale Ward was published, in Northumberland, presenting a list of donations and texts of governing documents. The author concluded with a plea for local support to petition the Lord Chancellor for a commission to investigate the charities, because some trustees had obstructed his work. An attack on charitable administration in Coventry was published in 1733.

There were other local efforts at this time. Some communities formed local committees to investigate charitable abuses. In Ipswich in 1743, an investigation was made of the town's charities. When the town fathers declined to publish the report, some members of the

were local, uncoordinated, and uncertain in effect. The first inquiry of charities at the national level commenced in Ireland in 1763; through "An Act for the Better Discovery of Charitable Donations,"⁴ a mandatory register of charitable donations was created which could be presented to the bishops at their annual visitations. Copies of wills and administratives were submitted "to the clerk of each House."⁵ Heirs, executors or trustees were to "publish in the Dublin Gazette three times successively every charitable donation or bequest."⁶ In 1764 the Irish House of Lords established a committee of inquiry to examine charities.⁷

Not until the last quarter of the century was there any interest in England in the administration of charities. In the 1780s, Parliament, at the urging of a member, Thomas Gilbert, in the context of his interest in the examination of poor law expenditures and the use of charitable endowments for relief of the poor, passed a statute⁸ which required ministers and churchworkers to furnish

investigating committee published it on their own. They concluded: "It is reasonable to expect that the original design of the donors of publick chantries, should, in the process of time, be forgotten or mistaken; from hence the mismanagement and misapplication of them must needs arise." *Id.* at 79 (quoting RICHARD CANNING, AN ACCOUNT OF THE GIFTS AND LEGACIES THAT HAVE BEEN GIVEN AND BEQUEATHED TO CHARITABLE USES IN THE TOWN OF IPSWICH 2 (1747)). Other local investigatory committees were in Bristol (1737), Much Woolton in Lancashire (1748), and Burscough, Lancashire (1774). The theory behind local investigations was later captured by Justice Brandeis's remark that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman." LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914). Publication of the terms of a charitable endowment was thought to assure better performance or at least protect against its disappearance. TOMPSON, *supra*, at 78. Rowland Rouse, an investigator of the charities of Market Harborough wrote in 1748: "Charitable trusts cannot be made too public, nor the proceedings of those who are interested, as by those means, if any, men will be fearful of perverting their trusts, when the eyes of a whole parish of which they are not willingly shut, may be upon them." *Id.* at 80 (quoting ROWLAND ROUSE, A COLLECTION OF THE CHARITIES AND DONATIONS GIVEN FOR ANY RELIGIOUS OR OTHER PUBLIC USE TO THE TOWN OF MARKET-HARBOROUGH, at xiv (1768)).

4. 3 Geo. 3, c. 75 (1763) (Ir.). The justification was the opportunistic fiduciary. "Whereas the pious intentions of many charitable persons are frequently defeated by the concealment or misapplication of their donations or bequests." *Id.*

5. *Id.*

6. *Id.*

7. It "discovered several charitable bequests . . . which had been withheld, embezzled, and concealed and caused the same to be sued for, paid, and recovered." 4 Geo. 3, c. 75 (1764) (Ir.). This statement was made in 1800 when the Committee was to be abolished and replaced by the Commissioners for Charitable Donations and Bequests which was granted full powers to recover and apply donations. Registration was continued though publication and submission to clerks of the Irish Parliament was not. TOMPSON, *supra* note 3, at 82. The Irish approach was a forerunner of the English registration and oversight methods.

8. Returns of Charitable Donations Act (Gilbert's Act), 1768, 26 Geo. 3, c. 58 (Eng.).

data on charities for the benefit of the poor.⁹ The response from English parishes was nearly comprehensive. Of thirteen thousand parishes only fourteen failed to file, though the information submitted was far from complete.¹⁰

The significance of the Irish experience and the "Gilbert Returns" as they became known, was that they marked the national government's first step toward oversight of the charitable sector and reflected a need for better monitoring. Samuel Wilberforce, the great anti-slavery advocate, led the first effort for English charitable trust reform. He introduced legislation in 1809 based on the Irish registry model, which was rejected by the House of Commons. Subsequent efforts between 1809 and 1811 failed as well.¹¹ In 1812 a registry provision was adopted,¹² but it was unsuccessful.

Despite the inadequacies of the Gilbert Returns and of the local surveys in the eighteenth century, these efforts did draw attention to the charitable sector, its waste and inefficiency, and deficiencies in the administration of charitable trusts. Correction of charitable abuses could only be achieved by involving the attorney general who, acting on information supplied by an individual complainant, might have to pay mightily for his efforts to bring an action in Chancery.¹³ In these proceedings, the attorney general assumed more of a role of mediator than plaintiff or prosecutor.¹⁴ The information was tardy,

9. DAVID OWEN, *ENGLISH PHILANTHROPY, 1660-1960*, at 86 (1964). This statute supplemented another act passed shortly before which called upon overseers to report statistics on Poor Law expenditures for 1783-1785. 26 Geo. 3, c. 56 (1786) (Eng.). Parishes were not expected to provide detailed information but to indicate "by whom, when, and in what Manner, and for what particular Purpose" each benefaction had been made to distinguish between those in land and in money, and to specify the annual income of each. OWEN, *supra*, at 86 (quoting 26 Geo. 3, c. 56 (1786) (Eng.)).

10. OWEN, *supra* note 9, at 86. The report to Parliament noted: upon the face of the said returns, many of the said Charitable Donations appear to have been lost, and that many others from neglect of payment and the inattention of these persons who ought to superintend them, are in danger of being lost, or rendered very difficult to be recovered; and that the matter seems to be of such magnitude, as to call for the serious and speedy attention of Parliament, to amend and explain the . . . [Gilbert] Act by specifying with certainty and precision the objects to which they may think fit to direct their inquiries in order to procure full and satisfactory returns, and the establishment of such measures as may be effectual for the relief of poor persons who were the objects of those Donations, and for carrying the charitable and benevolent purposes of the Donors into execution.

COMMITTEE ON CHARITABLE DONATIONS FOR THE BENEFIT OF POOR PERSONS, 1788, REPORT 9A IX (Eng.).

11. TOMPSON, *supra* note 3, at 90-91.

12. 52 Geo. 3, c. 101 (1812) (Eng.).

13. OWEN, *supra* note 9, at 183.

14. *See Corp. of Ludlow v. Greenhouse*, 4 Eng. Rep. 780 (Ch. 1827); GARETH JONES,

costly, and frustrating. At the beginning of the nineteenth century there were some modest efforts at reform which led to little change.¹⁵ The regulation of charities remained a matter of great laxity.

A. Chancery Discontents

The Chancery Court was supposed to correct the inflexibility of the common law courts and to provide remedies where the common law did not apply. However, the “equity” of the court had almost disappeared under a mass of cumbersome rules and practices. Eldon, the Lord Chancellor, opposed all change.¹⁶ The anticipated system caused loss and misery to thousands of suitors. Chancery cases resembled Dickens’s famous *Jarndyce v. Jarndyce*, as twenty years was not an unusual length for a case in equity.¹⁷

By the nineteenth century, Chancery procedure had become even more elaborate, dilatory, technical and ineffective. A Chancery suit could bankrupt a charity and its trustees.¹⁸ The court was under-staffed. During the eighteenth

HISTORY OF THE LAW OF CHARITY, 1532-1827, at 161 (1969). Under the English practice, if the suit was unsuccessful the person bringing the complaint would have to pay the legal costs of the victor, a strong disincentive to all but the most determined or addled.

15. The Charitable Donations Registration Act, 1812, 52 Geo. 3, c. 102 required the central listing of endowments in the hopes of preventing their loss. The Charities Procedure Act, 1812, 52 Geo. 3, c. 101 was intended to provide a summary remedy, but in the context of Chancery practice, this meant very little. OWEN, *supra* note 9, at 183.

16. Lord Eldon, (1751-1838) born John Scott, was Lord Chancellor for much of the period between 1801-1827. He was an inflexible conservative who opposed Roman Catholic political emancipation, the abolition of imprisonment of debtors, the abolition of the slave trade, and any reform of the Chancery Court. Nevertheless, Eldon was a great chancellor, harmonizing and systemizing Equity. The delays in Chancery under his administration were notorious. In Holdsworth’s words:

But Lord Eldon would often express a clear opinion after hearing the argument, and then as Campbell says, “he expressed doubts—reserved to himself the opportunity for further consideration—took home the papers—never read them—promised judgement again and again—and for years never gave it—all the facts and law connected with it having escaped his memory.”

1 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 437-38 (3rd ed., rev. 1956). For a description of Eldon’s life and achievements, see 3 HOLDSWORTH, *supra* at 595-638.

17. WOODWARD, *supra* note 2, at 471-72. An interesting comment on the state of equity jurisdiction was that when a prizefighter put his opponent at his mercy, he was said to hold him “in chancery.” *Id.* at 472 n.1. Lord Eldon gave way in 1812 before the pressure of public opinion and agreed to allow an additional judge to clear off some of the arrears in his own court; but the procedure of the court remained unchanged until 1828 when Lord Henry Peter Brougham raised the whole question of legal reform. Shortly thereafter, Brougham became Lord Chancellor and Chancery reform occurred. *Id.* at 472.

18. Speaking on a bill in 1846 to create a permanent charity commission, Lord Wrotlesley spoke of Chancery interference and problems:

century, the rules of procedure had become an esoteric body of knowledge known only to the officials of the court.¹⁹ The delays for information were so great that members of Parliament began to complain, often illustrating Chancery's deficiencies with descriptions of fiduciary misdeeds involving charitable trusts.²⁰ In 1818, Sir Samuel Romilly,²¹ a leading Whig reformer, noted that "it was impossible, through the Court of Chancery, to obtain redress

[I]n the Bushbury Grammar School, the income of which was 98*l.*, there was a suit for appointing trustees, for an account, and for removing the master. The suit lasted for twenty-three years; for twelve years there was no school, and the charity houses were in ruins, and the costs were 1,171*l.* Again, in *The Hayward Charities*: in 1831, the master of the school received notice to quit the school premises; he disregarded that notice, and he disregarded three successive notices to quit. The trustees then, very unadvisedly . . . proceeded to eject him by force. For this he brought an action; a second action was brought by his wife, a third by his son, and a fourth by his daughter, in all four actions, for assaults committed on the expulsion. In 1832, the master was restored on petition; and on the hearing of the petition, no less than ninety-nine affidavits were read. Besides these proceedings, there were some in the Exchequer, and a costly Commission to examine witnesses in the country. The costs of one side only exceeded 1,300*l.*, and three of the trustees were reduced to ruin and their property sold.

86 PARL. DEB. (3rd ser.) (1846) 806-07.

19. 9 HOLDSWORTH, *supra* note 16, at 338-43, 370-71; *see also* REPORT OF THE CHANCERY COMMISSIONERS OF 1850, 1852, XXI Parl. Papers, at 5-10.

20. In 1812, a member of Parliament, Michael Angelo Taylor, criticized the delays, noting that the business of Chancery had not increased except for bankruptcy cases. He attacked Lord Eldon for his lack of talent for reaching a quick decision, a charge which, though true, doomed the motion to investigate. 23 PARL. DEB. (2d ser.) (1812) 57. Taylor pointed out that in Hilary Term 1812, only five decrees were pronounced and no appeals were decided, yet 100 cases and 39 appeals arrived from the Master of the Rolls, who in the same period made 102 decrees. *Id.* at 58-59.

21. Samuel Romilly (1757-1818) privately educated, was admitted in 1778 to Gray's Inn and called to the Bar in 1783. In 1806 he became solicitor general and a member of Parliament. He supported law reform attempting to amend the criminal law. On the death of his wife, he shut himself up in his house and committed suicide. 49 DICTIONARY OF NATIONAL BIOGRAPHY, 1885-1901, at 188-91 (Sidney Lee ed., 1897); 13 HOLDSWORTH, *supra* note 16, at 274-81 (for a vignette).

for the abuses of charitable institutions.”²² Still, several procedural and statutory efforts attempted to streamline Chancery were unsuccessful.²³

Not until the 1830s was Chancery procedure reformed. Over the years, certain responsibilities of the court were hived off: additional judges were appointed; the Court of Appeal was established and the staffing reorganized. At last, by the mid-nineteenth century there was substantial reform of Chancery practice. An unintended consequence arose however: these efforts slowed down the creation of a permanent Charity Commission.²⁴ By the first

22. 38 PARL. DEB. (2d ser.) (1818) 1230. If someone brought information to enforce a charitable trust, it was almost always brought by the Attorney General *ex rel* or on relation of an individual, who bore the crown's costs. See *Corp. of Ludlow*, 4 Eng. Rep. 780; JONES, *supra* note 14, at 161. Charitable trustees were paid from the charity's endowment. In the end it was often the innocent relators that were ruined because of the delays and the ongoing costs of Chancery procedure. In his motion to establish a commission to educate the poor, Henry Brougham discussed the difficulties of using Chancery. 38 PARL. DEB. (2d ser.) (1818) 1221. In 1827, Taylor noted that hundreds and hundreds had been ruined by the Court. 17 PARL. DEB. (2d ser.) (1827) 253, 257.

23. An effort to deal expeditiously with breaches of charitable trusts was proposed by Romilly. The statute, passed in 1812, provided that upon a breach of a charitable trust, two or more persons could present a petition to the Lord Chancellor or Master of the Rolls and they were required to hear the petition in a summary manner. 52 Geo. 3, c. 101 (1812) (Eng.). It did not work. Lord Eldon interpreted the statute so restrictively that it was ineffective. See *In re Bedford Charity*, 36 Eng. Rep. 696 (Ch. 1819) (noting that a petitioner under the statute had to have a direct interest); *Att'y-Gen. v. Green*, 37 Eng. Rep. 391 (Ch. 1820) (holding that both information and petition could not proceed together under the Act); *Ex parte Skinner*, 35 Eng. Rep. 1013 (Ch. 1817) (concluding that the Act does not apply if the breach of trust was not by trustee); JONES, *supra* note 14, at 165-67. In 1819, it was provided that the Charity Commissioners could certify and refer to the attorney general matters involving breaches of trust or any other cause of complaint, for which orders or discretion of the Court of Chancery were necessary. 58 Geo. 3, c. 91 (1819) (Eng.). This was to be a summary procedure, but giving the matter to Chancery meant little in terms of expedition. See JONES, *supra* note 14, at 168 n.4.

The ever-increasing backlog of Chancery cases led to the creation in 1813 of a Vice-Chancellor to assist the Chancellor. 53 Geo. 3, c. 24 (1813) (Eng.). This actually slowed things down, as the new official could only decide cases specially delegated to him by the Chancellor, and the parties could thereafter appeal to the Chancellor, thus prolonging the process even more. 1 HOLDSWORTH, *supra* note 16, at 442. As a result of repeated motions in Parliament, a commission was appointed in 1824 to inquire into the state of the court. The head of the commission was none other than Lord Eldon, the Chancellor who was increasingly criticized for the state of Chancery! To little surprise, the Commissioners concluded that “they were satisfied, ‘that much misconception has arisen relative to that causes of that delay . . . that much of it is imputable, neither to the court, nor to its established rules of practice; but to the carelessness of some parties, the obstinacy or knavery of others, or the inattention or ignorance of agents.’” *Id.* No reference was made to the lack of judicial staff, nor to Chancery procedure.

24. See 15 & 16 Vict., c. 80, 86 (1852) (Eng.); 9 HOLDSWORTH, *supra* note 16, at 375-76; TOMPSON, *supra* note 3, at 206-07.

two decades of the century, it became clear that reform of charitable trusts would have to occur through Parliamentary action, rather than through the courts.

B. The Impetus for Reform of Charitable Trusts

Though the nineteenth century was an age of startling new developments in politics, the economy and society, certain persistent problems remained. The first quarter of the century was a golden era of charitable chicanery. A common problem was that property left to trustees to administer for the benefit of the poor had appreciated enormously in value. The beneficiaries of the charitable trusts received the sum originally bequeathed, but the trustees took the remainder. The great universities and public schools were part of this maze of misappropriation, as was the Church of England. Though the clergy were frequent perpetrators of this practice, the early nineteenth century church was a foundation of society, if not of the Conservative and later Tory Party, and seemed immune to reform.²⁵

The episodic efforts to document charitable trusts in the eighteenth century showed that assets had disappeared or had been misappropriated at an alarming rate, as well that the misapplication of charitable assets was commonly known. In 1795, Lord Kenyon noted the lamentable state to which grammar schools were reduced: "empty walls without scholars, and every thing neglected but the receipt of the salaries and emoluments."²⁶ Even Lord Eldon, who opposed all Chancery reform, admitted that "Charity Estates all over the Kingdom were dealt with in a manner, most grossly improvident, amounting to the most direct breach of trust."²⁷

C. The Charity Commission

From 1786, when the Gilbert Returns were filed and public attention was first called to the unfortunate status of charities, until midway through the nineteenth century, little had been done to uncover their real condition. Cases of abuse and spoliation were occasionally exposed by proceedings. It was known that in many instances charitable lands were leased to the friends of

25. FRANCES HAWES, HENRY BROUGHAM 107 (1957); G.F.A. BEST, TEMPORAL PILLARS: QUEEN ANNE'S BOUNTY, THE ECCLESIASTICAL COMMISSIONERS, AND THE CHURCH OF ENGLAND 70-71 (1964). One writer has described the late-Victorian Church of England as "The Tory Party at prayer." ANDREW ROBERTS, SALISBURY: VICTORIAN TITAN 26 (1999).

26. *The King v. Archbishop of York*, 101 Eng. Rep. 664 (Ch. 1795).

27. *Att'y-Gen. v. Griffith*, 33 Eng. Rep. 406 (Ch. 1807).

trustees, and not infrequently to trustees themselves.²⁸ The extent of charitable fiduciaries' misdeeds was publicized by a Scottish politician, Whig reformer Henry Brougham, one of the more remarkable figures in nineteenth century English public life.²⁹

Possessed with a constant enthusiasm for causes and suspecting that many were generated by political opportunism, Brougham had two long-term interests: legal and educational reform. These became united when he focused upon the administration of charitable endowments and their abuse by trustees. Brougham was primarily interested in education, particularly - in the blunt language of the times - for the "lower orders of society."³⁰ He pointed out that 120,000 children in London alone were without an education, and between two and four thousand were rented out by their parents to professional beggars!³¹

As a lawyer, Brougham was appalled by the laxity with which charitable trusts were handled, and believed that if they were more properly

28. JOHN PETER FEARON, *THE ENDOWED CHARITIES: WITH SOME SUGGESTIONS FOR FURTHER LEGISLATION REGARDING THEM* 8-9 (1855).

29. Henry Peter Brougham (1778-1868), a lawyer, inventor, leading Whig politician, and reformer, was educated at the University of Edinburgh and was a founder of the *Edinburgh Review* in 1802, a leading journal of the day. He was a member of the Scots and English Bar and became a member of Parliament as a Whig in 1810. Brougham served as legal advisor and defender to Queen Caroline in the annulment action initiated by King George IV. A noted orator and reformer, he criticized the slave trade and urged educational, parliamentary, and legal reform. A founder of the University of London and the Society for Diffusion of Useful Knowledge which made books available at low prices to the working class, Brougham became Lord Chancellor in 1830 and commenced the effective reform of Chancery. He was the primary force behind the Charity Commission. See generally CHESTER NEW, *THE LIFE OF HENRY BROUGHAM TO 1830* (1961); HAWES, *supra* note 25. According to Professor Woodward, Brougham had many of the qualities of a leader. He was quick, versatile, sharp in debate, rash in temper and judgment, and distrusted by the whig magnates who were jealous of his parliamentary reputation and disliked his novel habit of introducing subjects like education into the business of the house. WOODWARD, *supra* note 2, at 349. The political diarist Charles C.F. Greville said of him: "Brougham is . . . a . . . very remarkable instance of the inefficacy of the most splendid talents, unless they are accompanied with other qualities, which scarcely admit of definition, but which must serve the same purpose that ballast does for a ship." CHARLES C.F. GREVILLE, *THE GREVILLE MEMOIRS: A JOURNAL OF THE REIGNS OF KING GEORGE IV AND KING WILLIAM IV* 100 (Henry Reeve ed., 1874). His strong commitment to reform and argument, middle class origins and undisguised ambition, made him viewed throughout his career with the kind of distrust that followed another self-made striver in the next century, Richard M. Nixon. See 13 HOLDSWORTH, *supra* note 16, at 195-200 for an excellent vignette of Brougham.

30. Brougham's full motion was to establish a "Committee on the Education of the Lower Orders." See, 38 Parl. Deb. (2d Ser.) (1818) 815.

31. NEW, *supra* note 29, at 211. Brougham's *PRACTICAL OBSERVATIONS UPON THE EDUCATION OF THE PEOPLE* (1825) sold 50,000 copies in a few weeks and quickly went through twenty editions. ASA BRIGGS, *THE AGE OF IMPROVEMENT* 223 (1959).

administered, their assets could be marshalled to provide the country with a better educational system.³² In May, 1816, he proposed a Select Committee on the Education of the Lower Classes in the Metropolis (i.e. London) which was readily agreed to by Parliament.³³ The original 1816 committee amassed a wealth of information on the condition of education. Additionally, unsolicited testimony poured in from around the country indicating that charitable endowments were grossly misappropriated, diverted, and used for every purpose save education of the poor.³⁴ The committee's report found numerous abuses.³⁵ Brougham also found deficiencies in schools outside of London. Consequently, he introduced a bill to investigate all charities and to expand the investigation of education of the poor to areas including and beyond London.

In an effort to place the committee on a more permanent footing with a grander mission, Brougham flung accusations with underpinnings of truth, charges difficult to counter in the context of parliamentary debate.³⁶ Using a technique that a later demagogue mastered, Brougham, to no challenge in commons, stated: "I hold in my hand forty or fifty more instances of abuse, extracted from the numerous returns made by the resident clergy."³⁷

32. OWEN, *supra* note 9, at 184.

33. 34 PARL. DEB. (2d ser.) (1818) 1230-34.

34. ROBERT STEWART, HENRY BROUGHAM, 1778-1868: HIS PUBLIC CAREER 122-23 (1985).

35. 38 PARL. DEB. (2d ser.) (1818) 1230-34.

36. In debate Brougham outlined some of the abuses involved with charitable trusts:

- In Charles I's reign £4000 were left for the use of a school. Land was purchased, but the amount of rent received was but £196, five percent on the original purchase, 150 years previously and only £10 more than received a few years after the Restoration. *Id.* at 595-96.
- Other schools and charities possessed lands valued in the thousands of pounds but they were let for very small sums or for extraordinarily long periods.
- Charitable funds disappeared. *See id.* at 599.
- In the county of Norfolk, a school was founded in 1680, for educating forty children. None were taught; the estates produced £300 per year and the accounts had not been audited for thirty years. *Id.*
- In other cases schools lapsed, but teachers remained, still receiving their sinecures. *Id.* at 600-02.
- A charity had special visitors appointed who had not attended to their duties in twenty years.
- In some cases schoolmasters received a salary but did no teaching. The funds were intermingled and the trustees deceased. In others, the trustees were alive but had pocketed the endowment. *Id.* at 1219.

37. *Id.* at 599. The later demagogue was Senator Joe McCarthy who held in his hand a number of purported communists serving in the U.S. Department of State. Brougham's charge may have been more grounded in reality. In the course of debate, Brougham listed

Brougham urged that his committee examine education and charities throughout the land.³⁸ The expanded commission passed in commons, but the bill was eviscerated in the House of Lords when exceptions were granted to universities and institutions which had visitors.³⁹ Similarly, the commission was precluded from bringing legal proceedings. Finally, some of the greatest opponents to the proposal were appointed to the commission.⁴⁰

In response to the watering down of the new commission, Brougham published "A Letter to Samuel Romilly, M.P." in October of 1818 which, though a political broadside, went through at least twelve editions⁴¹ and was the most widely read of Brougham's publications. In it he not only criticized the emasculation of his commission, but also listed a variety of charitable wrongdoings.⁴²

several classes or types of fiduciary wrongdoing and reasons why the returns of charitable assets were lower than they should have been:

- 1) Trustees have insufficient powers for the profitable management of the funds under their care. For example, they could not sell or exchange lands in the middle of towns. Presumably this was so because they had to go to Chancery in a *cy pres* petition, which was expensive and would take forever.
- 2) There was a diminution of revenue because of loss of property through defects in the original charitable instrument and a consequent extinction of the trustees without the possibility of supplying their replacements.
- 3) Trustees exhibited negligence in all its branches, including carelessness, ignorance, indolence, all of the sins of omission by which men suffer the affairs of others to perish in their hands when they have the management of them gratuitously, and subject to no efficient check or control.
- 4) Various kinds of wilful abuses. 38 PARL. DEB. (2d ser.) (1818) 595-96.

The bill was opposed by Eldon for cutting back the power of visitors, to which Brougham responded with an attack on Chancery procedure. See 13 HOLDSWORTH, *supra* note 16, at 214-15.

38. 37 PARL. DEB. (2d ser.) (1818) 815.

39. Charitable Foundations Act, 1819, 59 Geo. 3, c. 81 (Eng.). Some of the most egregious violations involved charities and schools where the visitors did not visit.

40. OWEN, *supra* note 9, at 186-87.

41. NEW, *supra* note 29, at 218. The author has used HENRY BROUGHAM, LETTER TO SAMUEL ROMILLY (9th ed. 1818) [hereinafter LETTER TO ROMILLY].

42. Though Brougham used specific examples, they were types of charitable abuse believed to be widespread. They included the following:

- A corporation in Hampshire, entrusted with the management of estates above £2000 for the use of the poor, let them for 2 or £300 in fines (fines were equivalent to points on a mortgage. They were an amount paid at the time the renewal of the lease came up, and as often as not went into the pocket of the trustees. Because of the fine, which was an up-front payment, the lease renewal was at a lower rate than the market would permit), but there was no accounting how the fines were applied and charitable assets were used to pay the debts of the corporation. LETTER TO ROMILLY, *supra* note 41, at 8-9.

Despite the exaggerations and several pamphlets produced in defense and opposition, the *Letter* had an unexpected effect. In 1819, the government adopted almost all of Brougham's positions, excepting institutions with special visitors until 1831. Parliament created a Select Commission on Public Charities,⁴³ which in the course of twenty years exposed charitable chicanery but also fiduciary fidelity.

In a typical burst of nineteenth century English reformist enthusiasm, the Select Committee on Education of the Lower Orders in the Metropolis expanded into a commission that investigated all charitable endowments and conducted a massive survey of nearly 30,000 charities. The commission labored for the better part of two decades, produced forty volumes of reports and cost £250,000 by the time it finished its efforts. The Brougham Commission's final report appeared in six parts between 1837 and 1840, and

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- Abuses involving clergy nepotism, misappropriation and visitors who do not visit. *Id.* at 8-9.
 - Charities with substantial endowments educating or providing alms for too few given the resources available or attainable if the property was properly managed. Two estates in Croydon were burdened by 90 year leases but which should bring in between 1000 and £1500. *Id.* at 9.
 - School lands at St. Bees Cumberland, had been let for 1000 years plus another lease for mineral rights to the family of the trustees of the school. *Id.* at 12. This controversy dated back to 1742. The Charity Commissioners visited the school in September 1819, concluded the leasing was illegal and certified it to Chancery, which in 1827 cancelled the lease. TOMPSON, *supra* note 3, at 111.
 - Abuses which continued because of the weakness of the legislation approving the commission.
 - Some school masters, often clergymen, would receive a salary and housing for teaching, but did none. At other times he might take the salary and lodging, teach no charity pupils but conduct a proprietary school teaching modern subjects.

LETTER TO ROMILLY, *supra* note 41, at 10-11.

- Schools which had received educational endowments for the children of the poor to learn Latin or Greek for entry into the church benefitted the well-to-do, parents of the poor desiring more practical education for their children in an industrializing society.

In the *Letter to Romilly*, Brougham rolled out the notorious Pocklington school, which had a large endowment where but one boy was taught, and the school room had been converted into a saw-pit. Yet, the school had visitors from no less than St. John's College, Cambridge! *Id.* at 9-10. Brougham had used Pocklington before in the House of Commons. Here, Brougham was playing loosely with the truth. According to Tompson, fellows from St. John's had visited the school in 1817, held a public meeting, and made a set of recommendations to the Master, just what visitors were supposed to do. TOMPSON, *supra* note 3, at 111-12. At the time the *Letter to Romilly* was published, the school had been taken down and rebuilt. However, after the school was rebuilt, it was found to be educating only twenty boys on an income of £1,000. *Id.*

43. Charitable Foundations Act, 1819, 59 Geo. 3, c. 81 (Eng.).

recommended the establishment of a permanent Charity Commission, which took Parliament nearly twenty years to adopt.

The commissioners discovered a number of misapplications of charitable assets to personal use which had the sanction of tradition.⁴⁴ If the commissioners could not mediate a resolution of the fiduciary wrongdoing, they could certify an action to Chancery. There were friendly and hostile actions. If Chancery was the only authority that could resolve a property or trust settlement, or a declaratory judgment, an uncontested petition might be entered. If the abuse was maintained in the face of the commissioners' injunctions, the commission could bring suit by an information through the attorney general.⁴⁵ The threat of certification was used as a tool for compliance,⁴⁶ though sometimes the investigations of the commissioners were resisted.⁴⁷ Not all of the commission's work involved intentional breaches of fiduciary obligation. There were also *cy pres* actions where the original purposes of the trust had failed or times had changed, or the trust instrument needed a variance.

The commissioners occasionally faced singular problems which they resolved in unique ways. In 1836, a commissioner, Edmund Clark, visited Symond's Almshouses in Hereford. He found that the almshouse given for "four poor men,"⁴⁸ had passed into the patronage of a Mr. Lewis, who discovered that the only persons left in the houses were four women, the widows of the persons legally placed in residence. Mr. Lewis doubted whether the charitable corpus, destined for the use of poor men, could be lawfully given to poor women. He consulted with his attorney, and it was settled

44. TOMPSON, *supra* note 3, at 140-45. See *infra* Part IV for the discussion of St. Cross Hospital.

45. TOMPSON, *supra* note 3, at 144. Certification of either kind was approved by the General Board on the recommendation of reporting Commissioners. A copy of the report was sent to the solicitor for the Attorney General who took opinion from counsel, and if counsel so recommended, the Attorney General endorsed and placed the case in Chancery. *Id.*

46. *Id.* at 145.

47. Richard Pretyman, a member of the clerical family that gathered preferments the way organized crime families collect carting companies, was the warden of Meer Hospital in Lincoln. A foundation originally meant to support thirteen poor persons had been reduced to the relief of six at a cost of £24 per annum. The buildings had completely disappeared, and since Pretyman had become warden in 1817, he had earned over £14,000 by fines and the sale of timber. When charity commissioner John Macqueen sought to examine the records of Meer hospital, he was refused access by the Dean of Lincoln Cathedral. Commissioner Macqueen, after extended stonewalling by the Dean, had the case turned over to the Attorney General. G.F.A. Best, *The Road to Hiram's Hospital: A Byway of Early Victorian History*, 5 VICTORIAN STUD. 135, 140-43 (1961).

48. TOMPSON, *supra* note 3, at 190.

between them that the widows must be ejected and four men were forthwith appointed to fill their places. In the words of the commissioner's report:

But a decree and its execution are very different matters. The widows stood upon the defensive, and when an attempt was made to storm the premises, the doors were locked and the inmates appeared at the upper windows armed at all points with very offensive weapons. In short the widows gained the day & left Mr. Lewis in a dilemma. He could not pay them because they were not men & he could not pay his nominees because they were not in the almshouses & he was therefore under the painful necessity of keeping the money in his pocket—a thing which has by lapse of time become habitual & he almost fainted when I told him he would be responsible for the arrears.⁴⁹

Commissioner Clark advised Mr. Lewis to place the money in a savings bank and the commissioners resolved that Lewis pay the arrears to the poor men and to continue their allowance as it became due. When the widows passed on, the proper tenants would obtain possession.⁵⁰

The commissioners had enormous flexibility and produced annual reports which largely were fact-finding.⁵¹ The scope of the Charity Commission's inquiry was impressive. By 1834, 26,751 charities had been examined through half of Wales, and six English counties remained untouched.⁵² Approximately four hundred had been referred to the attorney general for prosecution, most of which were acted upon, though that meant getting involved in the maws of Chancery.⁵³ Another 2,100 trusts were reformed or renovated in some way.⁵⁴

D. Efforts to Create a Permanent Charity Commission

As early as 1835, the commissioners proposed the formation of a Permanent Board of Commissioners for the Superintendence of Charities, a structure similar to what was eventually adopted two decades later.⁵⁵

49. The report appears in TOMPSON, *supra* note 3, at 190.

50. *Id.* at 91.

51. OWEN, *supra* note 9, at 190.

52. *Id.*

53. *Id.* at 193.

54. *Id.* at 197.

55. Parl. Paper 449 (1835) (Eng.), *cited in* FEARON, *supra* note 28, at 13-15. The committee's report of that year illustrated the kinds of problems that afflicted charitable grammar schools under the existing regulatory structure by describing the situation of the Berkshire grammar school which, even though under the superintendence by a special visitor, and administered by the Court of Equity, the Master was appropriately titled and ran the school without any restraining control. The endowment was wasted by the costs and delays of legal proceedings. The institution had the resources to educate a large number of children. However, the committee found a master and usher, the latter the son of the master and appointed by him

However, only indirectly did this massive survey lead to the establishment of the first Charities Commission in 1853.⁵⁶

From 1841 to 1846, Sir Robert Peel's government attempted to pass legislation that would have acted on the recommendations of the 1835 Brougham Committee report which, *inter alia*, recommended a permanent charities commission.⁵⁷ Unlike reform's old antagonist, Lord Eldon, Lord Chancellor Lyndhurst⁵⁸ brought forward legislative proposals between 1844 and 1846 where they became entangled in party politics. The Lord Chancellor pointed out the inadequacy of Chancery for small charities and offered examples of the ruinous costs.⁵⁹ The universities, the public schools, the hospitals, voluntary associations and sectarian religious philanthropies all demanded and received exemptions, while the guilds against which numerous informations had been filed and which expended charitable funds on lavish dinners did not.⁶⁰ Though bills were introduced by the Whig government, in the next few years they were defeated, and as in the past the major institutions sought exemption from their coverage.

when a minor, the trustees receiving considerable stipends from trust property, the school-house dilapidated, no boys being educated, and surplus revenue exhausted by litigation and other expenses. FEARON, *supra* note 28, at 13-17.

56. TOMPSON, *supra* note 3, at 202.

57. Sir Robert Peel (1788-1850) made his original reputation as an able and incorruptible administrator while serving as Chief Secretary for Ireland in 1812. In 1822, as Secretary of State for the Home Department, he led a comprehensive reorganization of the criminal code. In 1829, after passage of the Metropolitan Police Act, 10 Geo. 4 c.44, Peel created the London police force who were called bobbies after him. He is considered the founder and first leader of the Conservative Party. Peel became prime minister in 1834 and 1841. In his second administration he reduced the scale of protective tariffs, reinstated the income tax, and repealed the corn laws in 1846. The latter act led to his resignation. *See generally* TRESHAM LEVER, *THE LIFE AND TIMES OF SIR ROBERT PEEL* (1942); NORMAN GASH, *PEEL* (1976).

58. Lord Lyndhurst (1772-1863) born John Singleton Copley in Boston (son of the portrait painter of the same name) served three times as Lord Chancellor. He attended Trinity College, Cambridge where he excelled. Lyndhurst was called to the Bar in 1804. He became a member of Parliament in 1818, Solicitor General the following year, Attorney General in 1824 and Master of the Rolls in 1826. He succeeded Lord Eldon that year. He had little interest in legal principle but was not a judge for the lawyers but for the parties. *BIOGRAPHICAL DICTIONARY OF THE COMMON LAW* 128 (A.W.B. Simpson ed., 1984); *see also* 16 *HOLDSWORTH, supra* note 16, at 5-27.

59. OWEN, *supra* note 9, at 199-200; 86 *PARL. DEB.* (3d ser.) (1846) 747; 85 *PARL. DEB.* (3d ser.) (1846) 149.

60. OWEN, *supra* note 9, at 200. Even today, establishment charities often resist more efficient regulation. For example, when the State of New York desired to consolidate a wholly unworkable registration system lodged in the Secretary of State's office to the Attorney General, a logical repository, larger nonprofits opposed the move.

The expiration of the Charity Commission did not mean that all charitable trusts had been reformed or that the public interest turned elsewhere. From the expiration of the last commission in 1837, applications were constantly made by parties seeking redress of grievances concerning the internal governance of charities.⁶¹ These complaints came by petitions to the Crown, memorials⁶² to the Lord Chancellor and other equity judges, the secretary of state for the home department, the attorney general, the solicitor general and members of Parliament, hopeful that the last would bring the matter before the house.⁶³

Under such pressures in September 1849, the government established, on a temporary basis, a more regular machinery for the preliminary examination of such claims: a Royal Commission of Inquiry under the sign manual.⁶⁴ The purpose of the Royal Commission

was to inquire into those cases of charity malpractice which were investigated by and reported upon by the Charity Commissioners, but not certified to the attorney general, and to report what proceedings, if any should be taken, thereupon. As it was not appointed under Parliamentary authority it had not compulsory powers and its authority was challenged in many cases.⁶⁵

There were several reasons for the delay in implementation. One was that Brougham was behind the proposal. Other reforms and issues overlapped and were more important: changes in Chancery practice and procedure, the establishment of the Poor Law and Ecclesiastical commissions.⁶⁶ The bills were progressively watered down from an independent commission, to a commission of existing judges, to an administrative commission under the courts.⁶⁷ Charitable trust reform was opposed by the church, the courts,

61. FEARON, *supra* note 28, at 35.

62. Memorials are statements of facts forming the basis of, or expressed in the form of, a petition or remonstrance to a person in authority.

63. FEARON, *supra* note 28, at 35.

64. The sign manual was a direction of the crown under the Queen's signature and at the suggestion of the Attorney General. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 432 (2d ed. 1977 & Supp. 2000).

65. FEARON, *supra* note 28, at 35. In their first report dated June 25, 1850, the temporary commission recommended that nine cases be referred to the attorney general, who successfully proceeded in eight. The Commission's existence generated additional complaints. It urged the government in its 1850 report for "some public and permanent authority, who should be charged with the duty of supervising the administration of all these charitable trusts." OWEN, *supra* note 9, at 201 (quoting ROYAL COMMITTEE FOR INQUIRING INTO CASES, FIRST REPORT, 1849, cmnd. 1850, at 4). Bills were introduced annually but unsuccessfully from 1850 to 1852. *Id.* at 36-40.

66. In 1846, a charities bill failed by one vote and got tangled in party politics and the Corn Law struggle. OWEN, *supra* note 9, at 199.

67. TOMPSON, *supra* note 3, at 210. The general direction of the reform campaign was

municipal corporations—the last among the most corrupt institutions—as well as the universities; in a word, by the establishment.⁶⁸ It was one thing for the charity commissioners to terrify the small trustees. It was quite another to tackle the big institutions. The creation of a permanent charity commission required a new round of scandals. To these mid-Victorian misdeeds, we now turn.

II. CLERICAL ABUSES AND CHURCH REFORM

As with other institutions in society in the eighteenth and early nineteenth centuries, the Church of England was grounded in class, rank, heredity and deference. Its leaders were supporters of, indeed part of the status quo. Within the church, the economic division between the privileged minority and depressed majority was deep, and the gulf was widened by the accumulation of pluralities and other sinecures, such as prebendaries in cathedrals.⁶⁹ Although pluralism, long a subject of criticism, had been regulated since the Reformation, the statute was ineffective in curing the abuses.⁷⁰ It presented a general rule that any person possessing a benefice with the cure of souls of the value of £8 per annum or more would be required to forfeit it upon installation to any other benefice with such cure of souls.⁷¹ However, a vast schedule of exceptions enabled holders of multiple livings to purchase dispensations, such

really a matter of finding an acceptable formula for the administration of charitable trusts that would bring some order to trust management with the least disturbance to existing institutions.

68. *Id.* at 209-10.

69. NORMAN SYKES, *CHURCH AND STATE IN ENGLAND IN THE XVIIITH CENTURY* 147 (1934). Pluralism is the holding of more than one benefice. The endowment of cathedrals was divided up into separate positions, each designed for the support of one member of the cathedral chapter. These acquired the name of “prebends” because they supplied or furnished—*praeberere* in Latin—a living to their holders, who in turn came to be known as “prebendaries.” The prebend normally consisted of the revenue from one of the cathedral’s estates. In the nineteenth century, the Ecclesiastical Commission made them honorary offices. OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 1318 (F.L. Cross & E.A. Livingstone eds., 1997); WILLIAM LAW MATHIESON, *ENGLISH CHURCH REFORM, 1815-1840*, at 131 (1923).

70. *Spiritual Persons abridged from having Pluralities of Livings*, 1530, 21 Hen. 8, c. 13 (Eng.).

71. *Id.* at ¶¶ IX, XI. MARTIN, *supra* note 1, at 161-62. “Cure of Souls” is technically the exercise of a clerical office involving the instruction by sermons and admonitions of the faithful in a determined district, by a person legitimately appointed for the purpose. A parish priest in his parish would have the power to cure souls. The “cure of souls” involves the canonical mission of holy orders which may allow for administration of the sacraments and jurisdiction. The power of holy orders are common to all priests by virtue of their valid ordination, but the power of jurisdiction resides in the parish priest assigned to a particular parish. Cf. WILLIAM H. W. FANNING, 4 *CATHOLIC ENCYCLOPEDIA* (1908), available at <http://www.newadvent.org/cathen/04572a.htm> (last visited Mar. 7, 2005).

that pluralism remained widespread amongst the higher clergy.⁷² In 1801, the Henrician statute was suspended.⁷³ An 1819 Act construed dispensations, which permitted the holding of more than one benefice, but the problem was not tackled directly or thoroughly.⁷⁴ Typically, the cleric holding multiple benefices was non-resident in some, merely collected the tithes and living.⁷⁵ For example, at Rochester Cathedral, all six canons held multiple benefices. By 1835, normally only one was resident in Rochester at any time, the day to day administration of chapter business being left in the hands of the chapter clerk, a local solicitor. One canon did not set foot in Rochester for seven years, and the dean spent most of his time living at West Farleigh, near Maidstone.⁷⁶

Politics and abuse of office infused clerical appointments from two vantage points: within the church itself and from the secular realm. Appointments in the clerical hierarchy were political decisions. The habit of keeping clerical preferments within a family was common. The highest ranking clerics holding multiple benefices never set foot in some of their preferments, nevertheless accumulating substantial sums of money.⁷⁷

In the first half of the eighteenth century there was sporadic criticism of the abuses of pluralism and non-residence, though it was part of more general

72. SYKES, *supra* note 69, at 147. An allied abuse was the cathedral's retention of a large number of prebends to which no duties whatsoever were attached and residence was not required. *Id.* at 149; *see also* MATHIESON, *supra* note 69, at 22-24.

73. 41 Geo. 3, c. 102; 42 Geo. 3, c. 86 (1802) (Eng.).

74. 59 Geo. 3, c. 40 (1819) (Eng.); 13 HOLDSWORTH, *supra* note 16, at 420.

75. Over sixty percent of the benefices in England were held by non-resident clerics. SYKES, *supra* note 69, at 217. Nonresidence was pervasive and not always the clergyman's fault. In nearly 5,000 parishes there was no habitable parsonage and many of the livings were so poor that two or more had to be cobbled together. In 1811, it was estimated that of 7167 incumbents with stipends of over £150—the border between comfort and poverty—3611 were nonresident. MATHIESON, *supra* note 69, at 22.

76. Paul A. Welsby, *The Cathedral Since 1820*, in FAITH AND FABRIC: A HISTORY OF ROCHESTER CATHEDRAL, 604-1994, at 115 (Nigel Yates ed., 1996).

77. For example, Bishop Sparke of Ely, his son, and his son-in-law enjoyed more than £30,000 a year of church endowments. Archbishop Manners-Smith (1755-1828) presented seven of his relatives to sixteen benefices. His predecessor in the see of Canterbury, who was said to have left an estate of one million pounds, provided his elder son with £12,000 per year and a younger one with £3000 per year from benefices and other well-paid offices. WOODWARD, *supra* note 2, at 508; Best, *supra* note 47, at 135, 137-38. Lower ranking clergy also cobbled together preferments and benefices. In fairness to the clerical footsoldiers, the lower ranking were poorly paid, were responsible for the maintenance of their residences, did not receive pensions until the end of the nineteenth century, and had large expenses directly correlated to their ascension in the clerical hierarchy. *See* BEST, *supra* note 25, at 13-21.

motives to embarrass the government.⁷⁸ Church reform commenced in the 1780s and gathered force in the early decades of the next century.

In the first quarter of the nineteenth century, the church came under an intense tide of criticism.⁷⁹ "Political radicals, religious dissenters, unbelievers, the press and public opinion generally, were united against an institution which they regarded as privileged, corrupt and negligent in the discharge of its duties."⁸⁰ The criticisms were varied. The inequitable distribution of the church's wealth, pluralism, non-residence, sinecures, nepotism and idleness were the chief targets of outrage, particularly when the wealth of the "great clergy" was seen against the poverty of the "lesser clergy." Additionally, the money and the men were concentrated in established areas, while the new towns, with their rapidly growing populations, received negligible spiritual ministrations, because money was not available for clergy and for new church buildup.⁸¹ Rich and affluent deans and chapters were particular targets of criticism, because of their supposed idleness, pluralism and non-residence.

Church reform proceeded on a number of fronts.⁸² The repeal of the Test and Corporation acts, together with the removal of disqualification of Roman Catholics for public office, opened the floodgates.⁸³ An 1831 publication of an exposé of church revenues, *The Extraordinary Black Book*, revealed enormous areas of abuse: widespread pluralism and a vast disparity of revenue within the clergy and between the various bishoprics.⁸⁴ As these practices

78. SYKES, *supra* note 69, at 51.

79. In Dicey's words: "[N]o one among all the current institutions of the country was, to outward appearance, more open to attack and less capable of defense than the United Church of England and Ireland." ALBERT VENN DICEY, *LAW AND OPINION* 313 (2d ed. 1914).

80. Welsby, *supra* note 76, at 115.

81. *Id.*

82. Best, *supra* note 47, at 136.

83. The Corporation Act of 1661, 13 Car. 2, c.1 (Eng.), and the Test Act of 1673, 25 Car. 2, c. 2 (Eng.), barred from office all those who did not conform to the Church of England, whether Catholic or Protestant. The exclusion was applied to municipal (local) offices and all military, executive, and administrative offices under the crown. The test required the receiving of the sacrament according to the rites of the Church of England. 2 HENRY HALLAM, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 27-28, 91-93 (Garland Publg., 1978) (1846). The Test Act of 1678 did not apply to Dissenters, i.e. non-Anglican protestants, so they could sit in Parliament but suffered other disabilities. See R. W. Davis, *The Strategy of "Dissent" in the Repeal Campaign, 1820-1828*, 38 J. MOD. HIST. 374 (1966). The Test Act was repealed in 1828, 9 Geo 4, c. 17 (1828) (Eng.), and the Catholic Emancipation Act in 1829, 10 Geo. 4, c. 7 (1829) (Eng.); SYKES, *supra* note 69, at 51. Article VI of the U.S. Constitution states "no religious test shall ever be required as qualification to any office or public trust under the United States." U.S. CONST. art. VI.

84. SYKES, *supra* note 69, at 53. The book was first published anonymously by John Wade in 1820 and expanded and republished in February, 1831. MATHIESON, *supra* note 69, at 25, 62, 174.

came under attack, an administrative reform movement took place within the church and in Parliament which attempted to end some of the worst abuses. However, the church was at best reluctant, and Parliament reformed ecclesiastical laws in piecemeal fashion.⁸⁵ Pluralism was formally prohibited by Parliament in 1838, but this did not stop the patronage or the abuses.⁸⁶ The restriction was evaded by installing the clergyman into a lay benefice, a spiritual office without the cure of souls, in other words a temporal position.

A Parliamentary Report recommended the appointment of a body of commissioners to manage episcopal and cathedral endowments, prohibiting non-resident holders of preferences, reducing the incomes of the richest bishoprics, and cross-subsidizing poorer parishes.⁸⁷ In 1835 and 1836, ecclesiastical commissioners undertook reform of the church itself, and their reports formed the basis of legislation that revolutionized the administration and financial management of the church.⁸⁸ The ecclesiastical commission was established in 1835 and in the following year, set out plans for the complete overhaul of cathedrals. This was opposed by all cathedral clergy, but "in 1840 the Deans and Chapters Act⁸⁹ received the Royal Assent."⁹⁰

The church and its clergy were in transition. Though this was a period of reform, many clerics, including ones central to this narrative, ignored the indicia of change and continued the old practices and customs. Others supported reform or cast a critical eye on the conventions of the past. They were bound to come into conflict.

85. Best, *supra* note 47, at 136.

86. Pluralities Act of 1838, 1 & 2 Vict., c. 106 (Eng.). Section 2 limited the number of benefices a spiritual person could hold to two. The acceptance of a preferment contrary to the Act would vacate a former preferment. An 1817 statute dealt with non-residence and the appointment of curates to perform the absent benefice-holder's clerical duties. 57 Geo. 3, c. 99 (1817) (Eng.). It was repealed and consolidated with other statutes that promoted residence by offering housing and other benefits and restricting the practice. See 43 Geo. 3, c. 107 (1803) (Eng.); 55 Geo. 3, c. 147, § 12 (1815) (Eng.); 56 Geo. 3, c. 52 (1816) (Eng.); 1 Geo. 4, c. 6 (1820) (Eng.); 6 Geo. 4, c. 8 (1825) (Eng.); 7 Geo. 4, c. 66 (1826) (Eng.); 12 HOLDSWORTH, *supra* note 16, at 418-19.

87. WOODWARD, *supra* note 2, at 509; 6 & 7 Will. 4, c. 77 (1836) (Eng.); 3 & 4 Vict., c. 113 (1840) (Eng.).

88. Best, *supra* note 47, at 136; SYKES, *supra* note 69. For legal developments see 15 HOLDSWORTH, *supra* note 16, at 198-218.

89. 3 & 4, Vict., c. 113 (1840) (Eng.).

90. Welsby, *supra* note 76, at 117. Deans were to receive £1000 annually and each canon £500. The money saved was to be directed to augmenting the stipends of poorer clergy and to increase the number of parochial clergy. The patronage of the deans remained untouched, and there was a grandfather clause which safeguarded the interests of existing office holders. *Id.* at 118.

III. THE ROCHESTER CATHEDRAL GRAMMAR SCHOOL

On the road to Dover, twenty-eight miles southeast from London, lies the ancient town of Rochester. Its cathedral, which dates as far back as the twelfth century, resembles that of Canterbury, though of more modest size.⁹¹ In 1542, the cathedral church was endowed with estates which had belonged to the dissolved monastery and church of St. Andrew in Rochester. The statutes of the cathedral, written in 1545, provided for a dean and six prebendaries, a master selected by them, and for the creation of a school for twenty poor boys whose tuition and maintenance was to be paid from the income of the estates and who were to receive a yearly stipend of £2,5s, 6d.⁹² In the mid-nineteenth century, the Rochester Cathedral Grammar School became a widely publicized focus of charitable misappropriation and clerical greed.

The school was supposed to educate a total of forty boys, but by the spring of 1838 the headmaster had no pupils. He was encouraged to resign in 1841, and the dean took the fateful step of hiring the Reverend Robert Whiston as his successor.⁹³ Experienced litigators may be familiar with the obsessive plaintiff, an individual whose lawsuit or sense of injustice becomes his *raison d'être*. Such a man was Robert Whiston, whose cause was a dispute with the dean and chapter of Rochester Cathedral over the size of scholarships paid to boys at his school and at Oxford and Cambridge. Born in 1808, one of eleven children of a solicitor, Whiston was educated at the Repton School, had "gone up" to Trinity College, Cambridge where he read classics and was elected a fellow of the college in 1833. That same year he became headmaster of a proprietary school in Rochester.⁹⁴ The cathedral paid Whiston £150 per

91. Rochester is the second or third oldest Bishopric after Canterbury. A Saxon church was built on the site at the beginning of the seventh century. Norman builders rebuilt and expanded the Cathedral, and it was dedicated in 1130. GEORGE HENRY PALMER, *THE CATHEDRAL CHURCH OF ROCHESTER: A DESCRIPTION OF ITS FABRIC AND A BRIEF HISTORY OF THE EPISCOPAL SEE* 3, 10 (1897). There were subsequent additions. On March 20, 1540, the monastery attached to the cathedral was ordered closed. See generally Welsby, *supra* note 76.

92. *The Queen v. Dean & Chapter of Rochester*, 156 Eng. Rep. 1181, 1182 (Q.B. 1851). The letters authorized the opening of a children's school. In addition to the dean, prebendaries, canons, and school-master, provision was made for a deacon, a sub-deacon, six lay clerks, a master of the choristers, eight choristers, an upper and an under master of the grammar school, twenty scholars, six poor men, a porter who was also to be a barber, a butler, a chief cook, and an assistant. PALMER, *supra* note 91, at 19. "A yearly pension of £5 was to be paid also to four scholars, of whom two were to be members of [Oxford and two of Cambridge]." *Id.*

93. RALPH ARNOLD, *THE WHISTON MATTER* 10-11 (1961).

94. *Id.* at 11-18. Whiston did not take orders until 1840. He had no desire to be a parish priest but wanted to head one of the great public schools. Rochester could be such a springboard. For additional biographical information, see 3 FREDERIC BOASE, *MODERN*

annum, and he had the right to teach private students for which he charged £14 per annum.⁹⁵ The Rochester Cathedral School reopened in 1844. Whiston attracted students, and things went well.

On February 9, 1848, Whiston questioned whether the chapter⁹⁶ should increase the scholarships they gave to four undergraduates at Oxford and Cambridge.⁹⁷ The statutes required that the Dean and Chapter maintain, from cathedral revenues, four poor scholars at Oxford and Cambridge. The students, called exhibitors, were to be paid £5 for the first four years of their residence. The sum was increased for graduate study.⁹⁸ In June, 1848, Whiston sent another missive to the same effect. His principal argument was that the statute required the maintenance of twenty poor boys and four scholars at the universities, and the dean and chapter ought to pay these youths, not at the same level as specified in the sixteenth century statutes, but at a sum to reflect three centuries of inflation.⁹⁹ The chapter-clerk responded that the dean and chapter did not doubt the correctness of the facts mentioned regarding the change in the value of money, but did not feel they were obliged by the statutes to increase the stipends.¹⁰⁰

The cathedral endowments had increased substantially over three centuries, and the chapter considered the endowment their own after providing the sums mandated in the foundation statutes. As a consequence, the cathedral dignitaries enjoyed substantial incomes all out of proportion to the incomes of ordinary clergy. Their appointments to the prestigious cathedral posts were based upon social or political influence. Dr. Robert Stevens, the dean, had been chaplain to the Speaker of the House of Commons where he came into contact with many members of Parliament. He had been appointed to the

ENGLISH BIOGRAPHY 1306 (2d ed. 1965).

95. ARNOLD, *supra* note 93, at 15.

96. A chapter is the body of canons of a cathedral church, presided over by the Dean of the Cathedral. At Rochester Cathedral, the chapter consisted of the Dean and five canons. The chapter serves as a corporate body, analogous to a board of directors.

97. ARNOLD, *supra* note 93, at 20-21, 49. At the time, the chapter was supporting only two students.

98. ROBERT WHISTON, CATHEDRAL TRUSTS AND THEIR FULFILMENT 3-5 (1849). The foundation statutes of all English cathedrals were the same, promulgated at the same time, and endowed such schools and scholarships from lands and estates expropriated from monasteries. They required that the endowment should find some scholars in the universities, an obligation to maintain a certain number of students proportionate to their wealth and a number of poor boys in grammar schools.

99. Best, *supra* note 47, at 144-45.

100. Whiston v. Dean & Chapter of Rochester, 7 Hare 532, 541 (V.C. 1849). The chapter-clerk, Mr. Essell, was a local solicitor.

deanship in 1820 but presided infrequently, supposedly because of ill health, which did not prevent him from remaining in the post until 1870.¹⁰¹

Whiston kept writing letters through the summer and fall. In December 1848, he applied twice to the Bishop of Rochester¹⁰² as visitor to adjudicate the matter. Whiston injudiciously pointed out that while the stipends of the boys had remained the same, the compensation of the Dean and Canons had been substantially augmented. The bishop brushed him off stating he would have to consult with his legal advisors and that the Ecclesiastical Commissioners were interested in the question and thus would cause delay.¹⁰³ Finally, in April 1849, his eminence informed Whiston that the Court of Chancery was the proper tribunal before which he should bring his complaint.¹⁰⁴ The Bishop added, "If I send you to Chancery, Mr. Whiston, you'll stay there twenty years."¹⁰⁵ Whiston sought legal counsel which supported the headmaster's views.¹⁰⁶

The next month, Whiston published *Cathedral Trusts and their Fulfillment*, a well-researched pamphlet on opportunistic clerical fiduciaries who disregarded cathedral statutes to pursue their own interests. Using statistics prepared by the ecclesiastical commissioners, Whiston devastatingly made his point and demonstrated a general misuse of cathedral funds throughout the country for the benefit of the higher ranking clergy. The pamphlet went through several editions, turned Whiston into a national figure and highlighted the old issue of cathedral endowments.¹⁰⁷ Whiston showed

101. ARNOLD, *supra* note 93, at 26-27. Dean Stevens also held a prebend in Lincoln Cathedral and the vicarage of West Farleigh. The canons all held multiple benefices. One had been appointed by his father, who was Bishop of Rochester at the time. Welsby, *supra* note 76, at 116.

102. Dr. George Murray, Bishop of Rochester, was the son of Lord George Murray, Bishop of St. Davids and more importantly, the nephew of the fourth Duke of Athol who controlled substantial ecclesiastical patronage. At the age of 23 Murray was appointed Archdeacon of the Isle of Man and shortly afterwards became Bishop of Dodor and Man. In 1827, he was transferred to the see of Rochester, but the stipend was insufficient for his needs and lifestyle, and he also became Dean of Worcester Cathedral. This plurality was so glaring it had attracted the Ecclesiastical Commissioners, and Dr. Murray struck a bargain whereby they would increase his stipend in Rochester to £4500 if he would resign the Worcester deanery. ARNOLD, *supra* note 93, at 32-33. With this background, his eminence could hardly have been sympathetic to Whiston's claim.

103. *Whiston*, 7 Hare at 542. There were several other communications from Reverend Whiston offering legal advice, namely that the Ecclesiastical Commissioners could not interfere. *Id.* at 542-43. The Bishop responded that with the probability that the matter might come before him as visitor, he could not entertain any ex parte communications. *Id.* at 543.

104. *Id.* at 542-43.

105. ARNOLD, *supra* note 93, at 54.

106. *Whiston*, 7 Hare at 542; ARNOLD, *supra* note 93, at 42-44.

107. The discussions in Chancery and Queen's Bench cite the original edition. The

that the sums going into deans' and canons' pockets had increased enormously since the time the foundation endowments had been established at rates far exceeding inflation, while the sums to beneficiaries was in many cases less than the statutes mandated.¹⁰⁸ He argued that the cathedrals should follow the intentions of the founder, though they had not, and he imputed neglect of duty by the Bishop of Rochester for failure to hear his appeal. He also suggested the bishop was guilty of the same behavior complained about when he had been Dean of Worcester.¹⁰⁹

author has had access to the second edition which differs slightly in pagination.

108. Whiston created a chart demonstrating the increment in stipends for the Deans and prebendaries of all the cathedrals. The figures for Rochester were:

	1542	1840
Dean	£100	£1426
Prebendaries	20	680
Minor Canons	10	30*
Headmaster	13,6s	150

* Raised by statute since 1840 to £150.

WHISTON, *supra* note 98.

Gross Receipts Per Annum				Expenses of Grammar Schools & Chapters Per Annum				Net Receipts of Deans	
Avg. 3 yrs.		Avg. 7 yrs.		Avg. 7 yrs.		Avg. 7 yrs.			
1542	1837	1542	1838	1542	1834	1542	1834	1542	1834
(End)		(End)		(End)		(End)		(End)	
£821	£7178		£7044	£99	185 6d	£126 13s 1d		£220	£5511

Id. at 103. Other dioceses demonstrated similar results. Only Durham had increased the stipends since 1542.

109. *Whiston*, 7 Hare at 544-46. Other actions by the Rochester Cathedral Chapter served to minimize the payouts. Instead of supporting four scholars at Oxford and Cambridge, they were supporting but two. ARNOLD, *supra* note 93, at 49. The chapter interpreted its statutes literally. *Id.* Thus, students of Rochester Cathedral School were not selected for university scholarships until they had matriculated for one year. *Id.* By this time, the recipient often had reached his twentieth birthday and became ineligible as the statutes required exhibitioners to be between fifteen and twenty. *Id.* The chapter's estates were based on fines, the rents remaining at a low level and the fine, a lump-sum payment upon renewal, went to the chapter. *Id.* at 48-49. The cathedral statutes also provided for the maintenance out of the cathedral's revenue, of "six poor men borne down by poverty and afflicted with want, or wounded in war, or mutilated, or decrepit with age, or otherwise crippled and reduced to misery." *Id.* at 75. The six bedesmen were to clean the cathedral and ring the bells and were to receive an annual stipend of £6, 13s, 14d. *Id.* The last appointment had been in 1774, so the sums saved could be added to the surplus reserved for the dean and canons. *Id.* at 62, 75.

The publication of *Cathedral Trusts* made Whiston a popular martyr-figure, a defender of the poor, unfairly deprived of his position by unjust stewards of the endowment, the dean and chapter.¹¹⁰ Rich and affluent deans and chapters were particular targets of criticism because of their supposed idleness, pluralism and non-residence.¹¹¹ In fairness, the dean and chapter of Rochester, and most of the other higher clergy, merely followed precedent. The demand for support of the university scholars was correct. More questionable was the duty to increase the stipends to reflect the appreciation of the cathedral endowments, and whether the schools should provide the scholars free board. If the original intention of the schools was to cater to the working classes, then free board was important. In fact, the scholars were children of the middle class.¹¹² Ironically, Whiston had been treated quite well himself. His salary of £150 when appointed was far above the statutory figure of £13 6s 8d, and a new schoolroom was built for him for £800.¹¹³

The chapter's response to the publication of *Cathedral Trusts* was unambiguous: Whiston was summarily fired.¹¹⁴ The hostile reaction to Whiston's charges are understandable, for the schoolmaster had reopened the debates from the 1830s that the wealth of the cathedral chapters should be shorn and distributed to parish churches and lower clergy.¹¹⁵ Those efforts had been successfully resisted by 1840, but now were placed before the public in a more dangerous way by a sympathetic, persuasive, persecuted and obstinate clerical foe. Whiston again appealed to the Bishop of Rochester, who refused

110. *Id.* at 8.

111. Welsby, *supra* note 76, at 115.

112. ARNOLD, *supra* note 93, at 82-83. Whiston himself demanded that his pupils possess some knowledge of Greek and Latin, which weeded out children of working class parents. *Id.* at 83.

113. Welsby, *supra* note 76, at 122. The cathedral's financial situation was more complicated than Whiston allowed. All incoming revenues with the exception of renewal fines for leases were paid into the Domus Fund. Out of the Domus Fund were paid all stipends and expenses to repair and maintain the cathedral. If there was a surplus, it was kept in the Fund. The renewal fines on leases were kept separate and were divided among the dean and chapter as soon as they came in. Until 1820 there had been a surplus in the Domus Fund which was expended on repair work to the cathedral. Since 1842, the Fund had not been able to meet all expenses, and the dean and chapter had to dig into their own fines. If the chapter had fulfilled its obligations as Whiston demanded, the money would have come from the Domus Fund and the depletion would have to be made up by the dean and canon's dividends from renewal fines. *Id.*; ARNOLD, *supra* note 93, at 176-77.

114. The grounds were that *Cathedral Trusts* had cast odium on the dean and chapter and contained many scandalous and libelous passages. The instrument of termination is reprinted in *Whiston*, 7 Hare at 544-48. Whiston was removed on October 19, 1849 but given his salary until Christmas. *Rochester Cathedral Grammar School*, TIMES (London), Oct. 22, 1849, at 5d.

115. ARNOLD, *supra* note 93, at 49.

to intercede. He then went into Chancery seeking an injunction preventing his removal. Whiston ignored the termination and continued to teach! The chapter hired a successor. The new official headmaster, Reverend Henry Meers, had fewer students than the crusader, some openly hostile.¹¹⁶

At the beginning of August 1849, the vice chancellor reached a decision. Reverend Whiston's removal, without affording him the opportunity to defend himself, was a wrong. But the issue, however, was who had jurisdiction to address that wrong.¹¹⁷ Since the master of the grammar school was not a beneficiary of the trust establishing the endowment nor were the dean and chapter trustees, Chancery had no jurisdiction. This was a matter for the school's visitor, the bishop, whose decision was final. The Court of Queen's Bench could only be called upon in a writ of mandamus to order a visitor to act or by a writ of prohibition to restrain the visitor from exceeding his jurisdiction.¹¹⁸

Thereafter, the dean and chapter reinstated Whiston so as to bring charges and properly dismiss him pursuant to the church's statutes. Whiston did not appeal his second dismissal to the Bishop but sought mandamus¹¹⁹ in Queen's Bench to obtain an order restoring him to his position. Whiston argued that he had not appealed to the bishop because his eminence was interested in the matter.¹²⁰ Queen's Bench presented Whiston with an unsatisfactory verdict, noting that the bishop, if not an interested party, was the proper visitor for the cathedral which encompassed the grammar school; and holding that he was not so interested, and the court was not authorized to interfere.¹²¹ In 1851 Whiston appealed yet again to the bishop.

Meanwhile, in 1850 Whiston had published another edition of *Cathedral Trusts*.¹²² His earlier effort was a best seller and its allegations never refuted.

116. One of the students razed Meers, formerly chaplain to a jail, who responded corporeally. Meers was charged with having unlawfully assaulted and beaten one of the foundation scholars for coughing. He was sentenced to pay £3, 21s costs. *Rochester Cathedral Grammar School*, TIMES (London), Mar. 22, 1850, at 5e.

117. *Whiston*, 7 Hare at 561.

118. *Id.* at 561-62. Queen's Bench heard supreme and general jurisdiction over criminal and civil cases. In 1873, it was merged into the Queen's Bench Division of the High Court of Justice and heard appeals from inferior tribunals.

119. The writ of mandamus is a judicial writ or formal order in the name of the sovereign at the request of a petitioner who alleged his interests were hurt by the failure of an official to act.

120. These allegations were also publicized anew in the *Times*. See *The Bishop and the Dean and Chapter of Rochester*, TIMES (London), Dec. 16, 1852, at 5a; *The Whiston Controversy*, TIMES (London), July 28, 1851, at 5f; *Worcester Cathedral*, TIMES (London), Aug. 19, 1851, at 8a.

121. *The Queen v. Dean*, 117 Eng. Rep. 1181, 1193 (Q.B. 1851).

122. Although called the fourth edition, it was really the second. The editions

He now expanded the scope of alleged wrongdoing. He demonstrated that churchmen had amplified their compensation by taking fines and surplus revenues of the cathedrals, that some had used the university scholarships for their children, and at some other cathedrals, the students had to kick back funds to clerical officials. Additionally, the Bishop of Rochester, who was to judge Whiston, was accused of chiseling the scholarship boys when Dean of Worcester.¹²³

By now the broader public was beginning to take notice. National newspapers published letters by Whiston on the controversy; periodicals reported the Whiston affair.¹²⁴ *Punch*, the humor magazine, published an "Ode to the Reverend Robert Whiston" which mocked the dean and chapter.¹²⁵ The

denominated the second and third were reprints of the first with a few additions that brought matters in his dispute with the dean and chapter up to date. The fourth edition was an expansion in the scope and detail of clerical wrongdoings involving cathedral trusts.

123. ARNOLD, *supra* note 93, at 125-29.

124. The Household Narrative, the monthly supplement to Dickens's Household Words followed the matter. *See infra* note 226.

125. *Ode to the Rev. Robert Whiston, Late Master of the Rochester Grammar School*, 22 PUNCH (LONDON CHARIVARI), Apr. 10, 1852, at 149, 156. The lines went:

Ah! why did you publish Cathedral disclosures,
Of a good Dean and Chapter such painful exposures,
That they've everywhere roused very great indignation
Against those holy gentry for gross malversation!
Such grounds 'tis no wonder that you were dismissed, oh,
Wicked BOB WHISTON.

And so it appears that you can't be contended
With the sack by those preachers of meekness presented,
And in open Court seek to make good your assertions:
You had better admit them unfounded aspersions
Than their truth in that obstinate manner insist on,
Wicked BOB WHISTON.

Don't you know - though the maxim is not in the Bible -
That the greater the truth is, the greater the libel?
Had you falsely accused them of positive stealing,
The offence had been less than abuses revealing,
By charges, a basis of fact that exist on,
Wicked BOB WHISTON!

In accordance, of course, with their sacred profession,
They might have forgiven the little transgression
Of slander; you humbly beseeching their pardon;
A sinner repenting they could not be hard on;
As it is, they'd deprive you of means to subsist on,
Wicked BOB WHISTON.

dispute attracted the attention of Parliament. In March, 1851, a member moved for the return of the appointment of bedesmen to Rochester Cathedral which had lapsed.¹²⁶ In July of the same year, another member, Francis Mowat, called attention to the Rochester Cathedral Grammar School and to the administration of educational trusts confided to cathedrals. Whiston's charges were described sympathetically. The Church of England was reproached. Even one who opposed Whiston's actions praised *Cathedral Trusts and Their Endowments* as a great service.¹²⁷ On June 30, 1851, an M.P. criticized the Rochester chapter and the bishop.¹²⁸ In response to the publicity, other cathedrals such as Canterbury increased their stipends to scholars.

The bishop then agreed to hear Whiston's appeal. It commenced on April 5, 1852, adjourned after a few days, and resumed for five days of hearings in June. The bishop appointed as legal assessors to assist him, Baron James Parke of the Court of Appeal and Dr. Stephen Lushington, Diocesan Chancellor.¹²⁹ In five days of hearings, Whiston more than ably defended himself. He spoke for seventeen hours, and his filibuster placed the dean and chapter on trial for misappropriating funds. For good measure, he criticized the bishop for failing to visit as he was supposed to.¹³⁰

A large number of spectators attended the hearings, and they were exhaustively covered by the press. The Bishop of London supported

You expect to be trusted with children's tuition!
 You, a fellow who'd train them direct to perdition!
 You, a vile anti-shovel hat pamphlet inditer!
 Don't you know what you're called by a reverend writer?
 On account of your book he cries out, Atheist on,
 Wicked BOB WHISTON.

Id.

126. This was part of the original foundation statutes. Whiston, rather than the chapter, selected the beneficiaries who were aged or disabled veterans. ARNOLD, *supra* note 93, at 138.

127. 118 PARL. DEB. (3d ser.) (1851) 572-98.

128. ARNOLD, *supra* note 93, at 140.

129. Stephen Lushington (1782-1873) educated at Eton and Christ Church, Oxford, was called to the bar in 1806. He was a judge in the Admiralty Court from 1838-1867. An able advocate and a vigorous reforming member of Parliament, Lushington was an expert in civil and ecclesiastical law. BIOGRAPHICAL DICTIONARY OF THE COMMON LAW, *supra* note 58, at 328.

Baron James Parke (1782-1868) was the son of a Liverpool merchant educated at Trinity College, Cambridge. "Called to the Bar in . . . 1813, he was appointed a puisne judge of the King's Bench in 1828, but was transferred to the Court of Exchequer in 1834, where he sat for 22 years" *Id.* at 402. When he resigned from the bench his peerage was conferred. *Id.* at 402-03.

130. ARNOLD, *supra* note 93, at 187.

Whiston.¹³¹ Though the appeal was recessed till June, the *Times* had already reached a decision. It suggested that:

“Jarndyce v. Jarndyce” was nothing [compared to the way Mr. Whiston has been tossed backwards and forwards from Dean to Bishop to Chancery to Queens Bench] It was not just—it was not dignified—it was not decent, that a body, composed of ecclesiastical personages of high standing and consideration should shrink from discussion in open court where charges of such importance had been preferred against them. Mr. Whiston is no vulgar pamphleteer¹³²

The *Times* summed up the political ramifications of the hearing: “Whatever may be the strict legal rights of dismissal . . . it appears to us that Mr. Whiston’s removal from his employment will shed but scant lustre on their administration.”¹³³ Even if Whiston was removed, the dean and chapter had lost the public relations battle.

After four months of deliberation, on October 20, 1852, the bishop and his assessors reached a compromise verdict that satisfied no one. Whiston was restored to his position. However, his charges in *Cathedral Trusts* were found libelous.

But taking into consideration that [Whiston] may have been in some degree misled by legal opinions of high authority, . . . and considering, also, that some of the statutes of the cathedral had not been carried into strict execution, though such disuse may have been sanctioned by practice prevailing during a long series of years¹³⁴

Though reinstated to his position, Whiston would receive no compensation from the date of his removal to January 1, 1853. The bishop admonished the clergyman against repetition of the charges. The *Times* correctly remarked in an editorial: “it is impossible to regard the decision as other than an unwilling one”¹³⁵ and later criticized a press release by the dean and chapter which downplayed its defeat.¹³⁶

Whiston accepted the decision, but in a letter to the press stated that the central question as to whether the chapter had taken for itself a disproportionate share of the cathedral revenues at the expense of the salaries of the exhibitioners and grammar boys remained unresolved, and he looked to

131. See *Cathedral Trusts*, TIMES (London), Apr. 6, 1852, at 8a; *Whiston and the Rochester Canons*, TIMES (London), Apr. 10, 1852, at 4e.

132. *Whiston and the Rochester Canons*, TIMES (London), Apr. 10, 1852, at 4e.

133. *Id.*

134. *The Dean and Chapter of Rochester and the Rev. R. Whiston*, TIMES (London), Oct. 22, 1852, at 5f.

135. *Id.*

136. The *Times* also noted that while “Whiston may be gagged, the press of this country is free,” and called the Bishop “unwilling and ungenerous.” TIMES (London), Dec. 13, 1852, at 4e.

the support of the press should he decide to re-open his challenge. He threatened to go back to Chancery.¹³⁷ In response, the chapter decided “to increase the stipends of several persons of the cathedral establishment whose statutable [sic] payments and allowances have not been heretofore augmented.”¹³⁸ Each bedesman received an additional £8 per annum, each exhibitioner an additional £25 10s per annum.¹³⁹ These increases still did not establish the principle that the cathedral revenues should be more evenly distributed. Under Whiston’s leadership, the numbers of students and their academic achievements increased. “He had become a national figure, while the dean and chapter had become a national scandal.”¹⁴⁰ Subscription lists to pay his litigations fees were opened around the country.¹⁴¹

Whiston did not retire until 1877, remaining a thorn in the side of the dean and chapter to the end. He constantly complained about one thing or another, and if he did not get his way, appealed to the bishop as visitor. His major criticisms were that the chapter did not confine university scholarships to boys from the Cathedral Grammar School and the method of selection of scholars to his school was tinged with favoritism.¹⁴² “And so the struggle proceeded, month after month, year in and year out, until his retirement.”¹⁴³

As one might expect, Whiston’s leave was not of good cheer. His behavior had become even more controversial. In 1868, it was discovered the headmaster had given advance copies to the students of the annual examination conducted by the dean and chapter.¹⁴⁴ In 1877, pursuant to the scheme provided under the Endowed Schools Act,¹⁴⁵ the Rochester Cathedral Grammar School ceased to be controlled solely by the dean and chapter. A more diverse governing body was appointed. Competitive scholarship

137. ARNOLD, *supra* note 93, at 197; *The Bishop and the Dean and Chapter of Rochester*, TIMES (London), Dec. 16, 1852, at 5a; *The Dean and Chapter of Rochester*, TIMES (London), Jan. 20, 1853, at 5c.

138. ARNOLD, *supra* note 93, at 197.

139. *Id.* at 197; Welsby, *supra* note 76, at 125.

140. Welsby, *supra* note 76, at 122.

141. *The Whiston Fund*, TIMES (London), May 23, 1853, at 4a. Whiston’s litigation expenses were £1500. Over £2200 was raised and the surplus was used to present him with a silver salver and tea kettle. *Testimonial to the Rev. R. Whiston*, TIMES (London), Nov. 1, 1854, at 19f.

142. ARNOLD, *supra* note 93, at 207; see *Bishop of Rochester’s Visitation of the Cathedral*, TIMES (London), Apr. 3, 1854, at 9f (noting that where the Bishop declined to intervene in several disagreements between the dean and chapter and Whiston).

143. Welsby, *supra* note 76, at 123; ARNOLD, *supra* note 93, at 208.

144. ARNOLD, *supra* note 93, at 209-10. He also attempted to bribe one of the cathedral’s exhibitors, who had not been educated at the Cathedral Grammar School, to resign his scholarship so one of his students could receive it. *Id.* at 210.

145. Endowed Schools Act, 1869, 32 & 33 Vict., c. 56 (Eng.).

examinations were introduced and a grant from the ecclesiastical commissioners provided for new buildings and even running water, largesse which the dean and chapter had refused. One of the terms of the scheme, vigorously opposed by the incumbent, was the appointment of a new headmaster.¹⁴⁶ Whiston died in his 87th year on August 3, 1895, on which day by pure coincidence, the anthem at evensong in the cathedral was Purcell's "O Give Thanks."¹⁴⁷

IV. ST. CROSS HOSPITAL

The quiet setting of St. Cross Hospital in the Hampshire dales was the scene of one of the more notable charity scandals of the age. The contrast between the idyllic surroundings and its corrupt practices was nicely pointed out in 1819 by John Keats. The poet was living in Winchester and often took walks past St. Cross:

Then I pass through one of the old city gates and then you are in one College-Street through which I pass and at the end thereof crossing some meadows and at last a country alley of gardens I arrive, that is, my worship arrives at the foundation of Saint Cross, which is a very interesting old place, both for its gothic tower and alms-square and for the appropriation of its rich rents to a relation of the Bishop of Winchester.¹⁴⁸

Not for another thirty years did Keats's observation of the appropriation of charitable assets become a cause celeb, but the problem of opportunistic fiduciaries had bedeviled the institution since its earliest days.

When Keats wrote, the Master of St. Cross hospital was the Reverend Francis North who had been presented with the office in 1808 by his father, Brownlow North, the Bishop of Winchester. The Reverend North's uncle and brother to the Bishop was Frederick Lord North, a Prime Minister to George III.¹⁴⁹ Lord North had eased his brother's clerical advancement and when he

146. ARNOLD, *supra* note 93, at 210. Inspectors sent to evaluate the school had reported unfavorably.

147. Welsby, *supra* note 76, at 123. His obituary appeared in the TIMES (London), Aug. 5, 1895, at 8. A posthumous reconciliation of sorts occurred in 1929 when a tablet to Whiston's memory was unveiled in the northwest corner of the Lady Chapel in the cathedral. ARNOLD, *supra* note 93, at 211.

148. Letter from John Keats to George and Georgiana Keats, (Sept. 21, 1819), in THE LETTERS OF JOHN KEATS, 1814-1821, at 209 (Hyder E. Rollins ed., 1958).

149. MARTIN, *supra* note 1, at 138. Frederick Lord North (1732-1792) represented Banbury for forty years. Prime Minister from 1770 to 1782, one of his first acts was the retention of the tea duty in the American colonies. His ministry responded to the Boston Tea Party with the Coercive Acts of 1774. He resigned after news of Lord Cornwallis's surrender at Yorktown. He became Second Earl of Guildford, whose title eventually devolved on his nephew, The Master of St. Cross Hospital. See PETER D. G. THOMAS, LORD NORTH (1976).

achieved his bishop's mitre at the young age of thirty, the Prime Minister was questioned about the suitability of creating a bishop of such tender years, to which he replied: "Indeed, my brother is no doubt young to be a bishop, but when he is older he will no longer have a brother Prime Minister."¹⁵⁰ Though the See of Winchester was less prestigious than Canterbury or York, it paid more than both.¹⁵¹ Upon his death in 1820, Bishop North's income was estimated at £28,000, probably an exaggerated figure. But the Bishop had, in addition, the patronage of twelve prebends, six minor canonries, and some seventy livings which he could and did dispense among relatives and friends.¹⁵² The Bishop of Winchester provided handsomely for his family, though not out of his own pocket. The Reverend Francis North had received from his doting father preferments and benefices of £4500, consisting of the livings of St. Mary's Southampton, Old and New Alresford, and Medstead, as well as a prebendall stall.¹⁵³

In 1808, when Bishop North decided to appoint his son to the Wardenship of St. Cross Hospital, he knew full well that because of Francis's other benefices, he could not hold another. The bishop might have been concerned with criticism by the church-going public,¹⁵⁴ so he invested his son into the mastership but without enforcing the cure of souls which had been conferred on the immediate predecessors. By divesting the wardenship of its ecclesiastical character, it became a temporal appointment, avoiding the problem of pluralism and enabling Francis North to keep its rich fruits.

If a cleric had multiple benefices, it was virtually impossible for him to minister at several places at the same time, so he would hire lower ranking clergy at nominal wages to officiate to the local flock. Reverend North, who lived in Old Alresford in the house provided by that benefice and only

150. MARTIN, *supra* note 1, at 141; *see also* 41 DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 21, at 146-47.

151. In the felicitous phrase of the day, "If Canterbury be the 'higher rack,' Winchester is the better manger." *St. Cross Charity*, TIMES (London), Dec. 10, 1853, at 8e.

152. MARTIN, *supra* note 1, at 144. In 1817, Bishop North appointed a grandson, Brownlow, Jr., then seven years old, to be Principal Registrar and Keeper of Registers and Scribes throughout the whole diocese, and on that very same day the remarkable child was nominated to the same office in the Commissary Court of the County of Surrey. Henry Holloway, *St. Cross Hospital*, TIMES (London), Dec. 10, 1853, at 10e.

153. To keep this figure in perspective a skilled laborer in the building trades in this period earned a little more than £40 annually, and then only in times of full employment. MARTIN, *supra* note 1, at 14. PETER HOPEWELL, ST. CROSS: ENGLAND'S OLDEST ALMSHOUSE 106 (1995); *St. Cross Charity*, TIMES (London), Nov. 12, 1853, at 8b; MARTIN, *supra* note 1, at 144. The Warden's chief critic, Reverend Henry Holloway, estimated that North had received over the years £121,900 and an excellent house from St. Mary's and about £80,000 and another excellent house from Alresford. Holloway, *supra* note 152, at 10e.

154. HOPEWELL, *supra* note 153, at 106-07.

appeared at St. Cross on rent collection days when he did not send his steward,¹⁵⁵ appointed a parish clerk to perform religious duties. Still, for forty-five years, he took the fees of the parishoners for marriages, baptisms, and burials.¹⁵⁶

St. Cross Hospital is an almshouse whose original charter specified that it was to feed and house thirteen poor men and additionally provide free dinners to two hundred others.¹⁵⁷ The endowment for this largesse consisted of land which was leased, tithes from several churches, and additional contributions. Over the centuries, the properties belonging to the hospital increased, and land values appreciated.¹⁵⁸ The management of the properties fell to the master who, according to custom and a document drafted in 1696 called the "Consuetudinarium," or "customary," was entitled to the surplus revenues after providing for the care of the poor and the repairs of the house. The costs of caring for the inhabitants and other beneficiaries increased at a much lower rate than did the income from the properties.

Because North's predecessor had suffered from dementia, leases had not been renewed in a timely fashion, so there were a number due for renewal at the start of his tenure. Land was leased not in terms of years, but in lives, such that renewals occurred infrequently; some of the rents had been set in the sixteenth century. North did increase the cost to the lessees but kept the increment for himself because the land was leased on fines.¹⁵⁹ Fines simply were single sums of money paid by tenants for leases, as distinct from the

155. *Id.* at 107.

156. Henry Holloway, *St. Cross Hospital*, TIMES (London), Nov. 11, 1853, at 4f; *St. Cross Charity*, Dec. 10, 1853, at 8e; MARTIN, *supra* note 1, at 161-62. At the Hospital, the duties of chaplain were delegated to a clergyman named Williams who had to perform the daily services for which the salary was £80 per annum and the right to occupy the master's house. Reverend Williams was compelled however to pay rent to the master for use of a large garden attached to the house! *Death of the Earl of Guilford*, TIMES (London), Feb. 1, 1861, at 7d. The curate of Adershot received a mere £15 per year. Henry Holloway, *Lord Guilford's Resignation of Airesford and St. Mary's*, TIMES (London), Jan. 6, 1854, at 9a. For more than thirty years, Reverend R. Lewin, perpetual curate of Yatley, Hants received £24 per year minus a small sum for tithes. The tithes of Yatley amounted to £570 per annum and were let by the Master of St. Cross and taken away annually by his agent. R. Lewin, *The Rev. The Earl of Guilford*, TIMES (London), Apr. 19, 1854, at 5e. On two occasions, Lewin requested from the master one guinea per year—about £1.05—on behalf of the parochial poor in favor of a Sunday School and on another occasion for relief caused by a potato disease. North refused.

157. LEWIS MACNAUGHTEN HUMBERT, MEMORIALS OF THE HOSPITAL OF ST. CROSS AND ALMS HOUSE OF NOBLE POVERTY 14 (1868). The charter is reprinted in *Atty-Gen. v. St. Cross Hospital*, 51 Eng. Rep. 1103 (Rolls. 1853).

158. MARTIN, *supra* note 1, at 159.

159. HOPEWELL, *supra* note 153, at 108.

more familiar annual payments of rent.¹⁶⁰ Fiduciaries of property faced a common conflict of interest. Fines often went to the clergymen or trustee. If the rental term of the lease which went to the beneficiary was kept low, the amount of the fine could be increased. There was a substantial motivation to increase the fine so as to take advantage of the opportunity. The charity commissioners, visiting St. Cross in 1837, noted that taking a fine of two years rent for a lease of one life, eight years for two lives, and sixteen years for three lives encouraged the letting of long leases for multiple lives because of the greater profit to the Master.¹⁶¹

At St. Cross the fines became the property of the master, with small deductions for the maintenance of the hospital and for other clergy. Under the fine system, the future was mortgaged to benefit the present. During his nearly half-century of incumbency, Reverend North received, according to estimates, from £45,000 to £305,700. The annual expenses of the Hospital were a little over £1000.¹⁶² North did make improvements and provided for the inmates, but the Bishop of Winchester, as visitor on the Master's suggestion, reduced the number fed to twenty.¹⁶³

In 1827, Reverend North became the sixth Earl of Guildford, a title which brought with it two estates worth £18,000 annually. He gave up his prebendary stall in Winchester Cathedral but retained all other benefices.¹⁶⁴ Though the master had no need of the hospital's emoluments, greed has never been limited by need; or in R. B. Martin's words: "[H]e apparently felt that his formal lack of ecclesiastical connection with the Hospital negated any need for Christian charity."¹⁶⁵

What can explain the earl's grasping behavior? He did do the minimum work required of his post. Other almshouses were managed far more corruptly than St. Cross. Guildford had not shirked his duties, rather narrowly

160. The amount of the fine was calculated in proportion (a) to the acreage and merit of the land, and (b) to the period of years for which the lease ran, either in years or 'Three lives'-i.e. until the death of the longest lived of three persons. BEST, *supra* note 25, at 64 n.1.

161. Parl. Papers XXIV 817, 843 (1837-1838) (Eng.).

162. In contrast, Ralph Martin offers a more sober estimate of £2,000-3,000 annually. MARTIN, *supra* note 1, at 160. Over the forty years of North's term, this would amount to between £80,000 and £120,000, not an insubstantial sum.

163. North also raised the brethren's allowance by £6 5s; paid for a doctor to attend to them when sick; provided for a new gown given at Christmas for each valued at £19; gave an extra dinner at Christmas, and spent £6000 on repairs. Though he reduced the hundred-hall poor, non residents who were given funds for food, he increased the stipend of the remaining to 1s per week. HOPEWELL, *supra* note 153, at 107-08.

164. *Id.* at 109.

165. MARTIN, *supra* note 1, at 115.

construed.¹⁶⁶ The Earl concealed nothing, and in fact seemed not to comprehend why he was so criticized. He did no less than former masters. Compared to some of his infamous predecessors, he didn't seem so bad at all.¹⁶⁷ When the Brougham Commissioners visited, they found the premises in excellent condition and agreed with the master that if he raised the inmates' stipends as they wished "new grounds for dissatisfaction would not fail to occur in the minds of men solely without any occupation."¹⁶⁸

As a peer from one of the more prominent families in the country, the earl had other resources. There are two possible explanations for his behavior. The first was the weight of custom. It had been the practice of masters to pocket revenues in excess of costs needed to maintain the hospital, and in this regard Guildford differed only in degree from his immediate predecessors. He happened to be the beneficiary of an appreciation of land values of which he, rather than the Hospital, took advantage. Change does bypass some, and Guildford seemed unaware of the new mores. A more likely rationale was the indebtedness of the North family estates. He used the revenues to pay off all of the mortgages, and when they were redeemed, he resigned his preferments.¹⁶⁹

As Keats's comment indicates,¹⁷⁰ the abuses at St. Cross were commonly known. In 1843, the warden had renewed the lease of Crondale, a large property belonging to the hospital. The act garnered notoriety through an exposé in the *Hants Independent*. The fine for the property was £13,000 with the master receiving £10,706 for his share. Because the lease rent was £5 or £6 per annum, the benefit to the hospital was nil. The fair market rental value of the property was £2000 per annum.¹⁷¹ From all of the property owned by the hospital, £4000 annual revenue could have been derived and four times the number of poor supported. As the revenues of the hospital increased, the objects of charity diminished, because for the most part the master had

166. Best, *supra* note 47, at 147.

167. See HOPEWELL, *supra* note 153, at 38-41, 46-49, 76-77, 105.

168. Parl. Paper XXIV, 843 (1837-1838) (Eng.).

169. TIMES (London), Feb. 1, 1861, at 7d. The first part of the nineteenth century was a period of increased aristocratic indebtedness, though debt was a constant feature of life before then. See David Cannadine, *Aristocratic Indebtedness in the Nineteenth Century*, in ASPECTS OF ARISTOCRACY 37, 39 (1994). Compare David Spring, *The English Landed Estate in the Age of Coal and Iron: 1830-1880*, 11 J. ECON. HIST. 3-24 (1951), with F.M.L. Thompson, *The End of a Great Estate*, 8 ECON. HIST. REV. 36 (2d ser. 1955). The earl also had seven children, including five sons who may have needed his support.

170. See THE LETTERS OF JOHN KEATS, *supra* note 148, at 209.

171. HOPEWELL, *supra* note 153, at 109; MARTIN, *supra* note 1, at 166-167; THOMAS HINDE, A FIELD GUIDE TO THE ENGLISH COUNTRY PARSON 84 (1983). The article in the *Hants Independent* is reprinted in HOPEWELL, *supra* note 153, at 109.

appropriated the income to his own use. However, it would take a more extensive effort than a few articles in local newspapers to end the Earl's abuses. That campaign was to be waged by Reverend Henry Holloway.

Holloway was a retired clergyman who relocated to the parish of St. Faith where St. Cross Hospital was located. The parish church of St. Faith had been pulled down in 1507 and never rebuilt. The members of the parish were accustomed to using the church or chapel of the Hospital of St. Cross and to attend services there where also the rites of christenings, marriage, and burial had been performed.¹⁷² The tithes of the parish were paid to the Master of St. Cross.¹⁷³ Reverend Holloway felt that the parishioners were not receiving their tithings' worth. St. Faith Parish did not even have its own curate though it was forwarding tithes of £260 annually. Holloway then discovered that the earl was not legally, or claimed not to be, rector of the parish. He then began writing letters to the newspapers.¹⁷⁴ Once Reverend Holloway got the Master of St. Cross within his cross-hairs, he was indefatigable in his efforts to end the abuses at St. Cross and to punish the earl. The *Times* and other newspapers picked up on his accusations.

In 1849, the hospital and its greedy master garnered national attention. Parliament passed a resolution requesting an inquiry into the revenues of the hospital and their appropriation by the master with a view to placing the hospital on a footing to secure the greatest benefit to the public. On July 31, 1849, the Crown gave directions to the attorney general to commence an information in Chancery; one was filed in September.¹⁷⁵ The information prayed for a declaration "that the master . . . had no right[s] to any part of the income . . . and that the system of letting, at inadequate rents and on fines, was improper and ought to be discontinued," and asked for an accounting and other relief which would carry out the original purpose of the trusts establishing the hospital.¹⁷⁶ The earl truthfully responded that he had been publicly acquitted of all malversion in 1837 by the charity commissioners.

The investigation and litigation lasted for four years. Documents supposedly lost at the time of the Consuetudinarium, which established the procedures under which St. Cross operated, were discovered.¹⁷⁷ Meanwhile, Reverend Holloway brought the conflict closer to home. "In 1851, [he] . . . obtained a *mandamus* directing the parishioners to elect a

172. Att'y-Gen. v. St. Cross Hosp., 44 Eng. Rep. 303, 304-05 (Ch. 1856).

173. Tithes were the tenth part of agricultural produce or personal income set apart for the support of the church.

174. MARTIN, *supra* note 1, at 169; HOPEWELL, *supra* note 153, at 109-10.

175. MARTIN, *supra* note 1, at 169.

176. *St. Cross Hosp.*, 51 Eng. Rep. at 1107.

177. MARTIN, *supra* note 1, at 170.

churchwarden of the parish of St. Faith,” and was himself so elected in 1853.¹⁷⁸ This enabled him to investigate the parish’s and thereby St. Cross’s, records.

A. The Master’s Defense

Lord Guildford offered three defenses to his conduct: 1) not all of the funds were to be used for charitable purposes and his right to surplus revenues was based upon the “Consuetudinarium” drafted in 1696 and reflecting customs in effect at the time and before; 2) the master had applied revenues of the hospital to repairs and maintenance of the house, and he thought he was entitled to do what his predecessors had done; and 3) the mastership was an ecclesiastical benefice with no obligation to account save to the Bishop of Winchester as visitor, who had complete and exclusive jurisdiction.¹⁷⁹ Therefore, Chancery had no jurisdiction. The last defense was particularly feeble, as there was substantial precedent to the contrary.¹⁸⁰

Even more damaging was evidence discovered by the intrepid Reverend Holloway and commented upon by the *Times*.¹⁸¹ In 1832, in response to the Bishop of Winchester’s annual circular to all incumbents of clerical livings, Guildford replied, “The mastership of the hospital is not an ecclesiastical benefice. I was nominated to the hospital merely as guardian, and have no cure of souls; nor was I inducted into the church, which is a chapel belonging to the hospital. I am not subject to ecclesiastical jurisdiction or residence.”¹⁸² In 1833, his lordship wrote that he was not the incumbent of St. Faith’s, having nothing to do with its officers or procedural arrangements. And stating, “in 1836,—‘I have the most perfect evidence of my rights at St. Cross. I am not on the bishop’s books as rector, and am not so.’ [And again, in] 1845,—‘I have no clerical office in the hospital.’”¹⁸³

The earl apparently was unaware of the concept of perjury, for in 1849 in an answer to the information filed by the attorney general, he stated that

178. *St. Cross Hosp.*, 44 Eng. Rep. at 305. A churchwarden is a lay officer who looks after the secular affairs of the church and who is the legal representative of the parish.

179. *St. Cross Hosp.*, 51 Eng. Rep. at 1109.

180. In 1332, 1336 and 1337 proceedings took place to determine whether the hospital was free of the cure of souls and it was so established. *St. Cross Hosp.*, 51 Eng. Rep. at 1112. In 1373 by Papal Commission and in 1561 the Court of Exchequer found St. Cross to be a lay foundation. There was also a document dated between 1386 and 1405 which reached the same conclusion.

181. See Henry Holloway, *St. Cross Hospital*, *TIMES* (London), Nov. 11, 1853, at 4f (information repeated by the *TIMES* (London) on Nov. 12, 1853, at 8b.).

182. *Id.*

183. *Id.* The reason for these responses was that the Earl would be forced to resign his other lucrative preferments if St. Cross was a religious benefice.

“‘[t]he Mastership’ . . . ‘is an *ecclesiastical benefice* to which I was instituted and *inducted*, and read in in the church on . . . the 4th of January, 1808.’”¹⁸⁴ The *Times* wondered whether it was reasonable for a man not to know whether he was an officer or chaplain on a battleship.¹⁸⁵

B. The Decision

The decision was issued by Sir John Romilly, Master of the Rolls, on August 1, 1853.¹⁸⁶ After tracing the tangled and litigious history of St. Cross, the Almshouse of Noble Poverty, and the Church of St. Faith, the court found that the trusts’ original, singular and continuous purpose was to preserve the hospital for the benefit of the poor.¹⁸⁷ The court then focused on the “*Consuetudinarium*” and its drafters rather than on the behavior of the incumbent master. It suggested that the Master and brethren who drafted the “*Consuetudinarium*” had the original documents in their possession which showed the object and destination of the charity to be the opposite of what they drafted: “A more barefaced and shameless document than this ‘*Consuetudinarium*’ could not well, in my opinion, have been framed, nor could a more manifest and probably wilful breach of trust have been committed by the master and brethren.”¹⁸⁸ To allow a practice to continue, even if it has continued for a century and a half, would be against the original trust and give a direct premium to fraud in the administration of charities.

The court dismissed the argument challenging its jurisdiction; a benefice was not made spiritual, because it could be held only by a person in holy orders. If a hospital is established for the relief of the poor and if there is no

184. *Id.*

185. *TIMES* (London), Nov. 12, 1853, at 8c. Today, we would be shocked by such a man of the cloth’s prevarication. The *Times* had a different focus:

Are we to accept Lord Guilford’s assertions constantly made during a period of thirteen years, or his subsequent oath? Such embarrassment is painful enough in the case of an ordinary individual, but, in common decency, it should never have been forced upon the public in the instance of an English nobleman, whose wealth at least should have placed him above all temptation to such dishonest arts.

Id.

186. John Romilly (1802-1874), Master of Rolls and second son of Sir Samuel Romilly, was educated at Trinity College, Cambridge and called to the bar in 1827. He became a Member of Parliament in 1832 and a Queens Counsel in 1843. He was appointed solicitor general in March 1848 by Lord John Russell, attorney general in July 1850, and master of the rolls in 1851. Unlike some chancery judges, such as Lord Eldon, he decided cases quickly, without considering principle and was frequently reversed. 17 *DICTIONARY OF NATIONAL BIOGRAPHY*, *supra* note 21, at 186-87.

187. *St. Cross Hosp.*, 51 Eng. Rep. at 1113.

188. *Id.* at 1113.

cure of souls attached to it, it is a lay foundation; St. Cross was so established. The Bishop of Winchester's visitorship was described as nominal, whose duties do not superintend the performance of offices of the trust.¹⁸⁹ That was the responsibility of Chancery.

An injunction was issued ending the old system of leasing on fines. However, the court did not order a return of the forty years of revenue pocketed by the earl, because the prayer of relief did not seek restitution. He was ordered to repay those fines received since the filing of the information in 1849. The leases entered into on behalf of the hospital could not be avoided, as the rent plus fines and other considerations paid by the lessees amounted to fair value.¹⁹⁰ The court required the master to keep the buildings in repair, out of his revenues, a substantial sum, which hoisted in some small way Guildford on his petard, for he had contended in the litigation that such expenditures were part of his responsibility under the "Consuetudinarium".¹⁹¹

The hospital was placed into receivership and a new scheme established for its governance. St. Cross was removed from the sole control of the Master, and placed under the responsibility of fifteen trustees. Subsequent leases could have a term no more than twenty-one years.¹⁹² The master was placed on a salary of £250 and required to "read prayers every Morning and perform 2 full services every Sunday in the Church of St. Cross," and on holidays, he "became the incumbent of St. Faith's."¹⁹³ The new scheme did not go into effect until Lord Guildford resigned his postion.¹⁹⁴

C. Aftermath

On a number of increasingly bizarre fronts, Reverend Holloway continued his struggle to correct the injustices done to the parish of St. Faith. He demanded the attorney general commence a new action to seek restitution of all fines. Disagreeing with the analysis of the Chancery Court, Holloway argued that St. Cross was an ecclesiastical benefice, that Guildford had no right to hold it because he had not been properly ordained for the position, and

189. *Id.* at 1114.

190. *FEARON, supra* note 28, at 76.

191. Nor did the court require the Earl to pay the costs of the litigation which amounted to £6000. The Hospital bore that expense.

192. *MARTIN, supra* note 1, at 173. Because of the reduced revenue from leases which did not come up for renewal for many years and the costs of the litigation, St. Cross was in a difficult financial situation, and had to sell an advowson to meet expenses. *Id.* at 174. An advowson is the right of presentation to a benefice or living.

193. *Id.* at 173.

194. *Id.*

therefore he should be forced to restore forty years of compensation received from the position.¹⁹⁵

After the receiver had been appointed to oversee St. Cross's affairs, Holloway, professing to act as churchwarden of St. Faith, insisted that the church or chapel of St. Cross was the parish church of St. Faith rather than the hospital's house of worship.¹⁹⁶ On the seventh of May 1854, Holloway physically took over St. Cross's chapel. He demanded the curate officiating in the absence of the chaplain that day produce his license from the Bishop to preach in the building. The curate, a Mr. Crokot, responded that he had no such license but possessed a letter from the bishop authorizing him to act in the absence of the chaplain.¹⁹⁷ Preventing Crokot from performing the service, Holloway performed it himself.¹⁹⁸ He announced he would do the same on successive Sundays.

Sundays normally were days with little entertainment outside of the home, save religious worship. The takeover of the Chapel of St. Cross provided a particular treat to residents of the Village of St. Cross and Wintonians, who journeyed from the city to witness the confrontation.¹⁹⁹ The purpose of Holloway's "guerilla action" was to trigger a legal response by the hospital or Bishop of Winchester to request an injunction against the churchwarden from interfering or interrupting services in the Chapel of St. Cross and performing the services himself. These proceedings, Holloway hoped, would allow him to test the legal issues concerning the relationship between St. Faith and the St. Cross. His efforts succeeded.²⁰⁰ A few weeks

195. *St. Cross Charity*, TIMES (London), Oct. 10, 1853, at 6b; *St. Cross Charity*, TIMES (London), Dec. 10, 1853, at 8e; Henry Holloway, *St. Cross Hospital*, TIMES (London), Dec. 10, 1853, at 10b. Holloway peppered the *Times* with letters. One almost can feel some sympathy for the disgraced earl when his antagonist wrote to complain about the repair work mandated by the decision under the supervision of the Master's architect. Henry Holloway, *The Church of the Hospital of St. Cross and St. Faith*, TIMES (London), Jan. 3, 1854, at 10b. Holloway tried to organize a tithe strike, asking parishioners to withhold their tithes from the hospital. He also hoped to rebuild St Faith from the tithes Guildford had appropriated. See HOPEWELL, *supra* note 153, at 112.

196. *Atty-Gen. v. St. Cross Hosp.*, 52 Eng. Rep. 236, 236-37 (Rolls. 1854). In July 1446, Cardinal Beaufort connected the Church and Parish of St. Faith with St. Cross, reserving certain rights to himself and his successors. After the parish church of St. Faith was demolished, the parishioners worshipped in the chapel of St. Cross.

197. HOPEWELL, *supra* note 153, at 112-14.

198. *St. Cross Hosp.*, 52 Eng. Rep. at 237.

199. HOPEWELL, *supra* note 153, at 114. The *Times* noted approvingly that "many of the more respectable inhabitants of St. Cross absented themselves from the church." *Scene at St. Cross*, TIMES (London), May 19, 1854, at 8e. The second week was much more quiet, as Reverend Crokot remained in the background, with Holloway reading the service.

200. Holloway claimed that St. Cross was an ecclesiastical benefice, that Chancery had

later an injunction was granted by the Master of the Rolls, who stated: "It is the policy of the English law not to permit a person to take the law into his own hands, and to enforce his right by force."²⁰¹ Holloway, who was given the right to proceed with his petition in any court he felt appropriate, appealed to the Court of Appeal. That court, after tracing the history of St. Faith and its tortuous history with the Hospital, gave short shrift to Holloway's arguments, concluding that a union of the parish with the hospital could not be presumed and that the churchwarden had no right to interfere with the chapel.²⁰²

In 1850, during the course of the information, Guilford resigned his livings.²⁰³ The Earl made several offers to resign from St. Cross, but the Bishop of Winchester would not accept the resignation until early 1855 after payment of £2587 1s 3d in repairs, and two sums of £603 1s 11d and £504 17s 9d for fines he had received since the filing of the information.²⁰⁴ Guilford died in 1861 in his 89th year. The *Times* noted in its obituary: "[A]ll the world knows how [St. Cross] was for 40 years plundered by its appointed guardian."²⁰⁵

no jurisdiction, that his acts had been bona fide for purpose of trying them at law, and that if he had done wrong he was guilty of brawling and should be disciplined by an Ecclesiastical Court. *St. Cross Hosp.*, 52 Eng. Rep. at 237-38 (1856).

201. *Id.*

202. *St. Cross Hosp.*, 44 Eng. Rep. 303. Though Holloway was not successful in the tribunals of justice he did triumph in the court of local opinion. On August 10, 1854 the Winchester Working Men's Committee formed for the purpose of receiving subscriptions to honor the persistent clergyman presented him with a watch "in consideration of his zealous and unceasing efforts to restore the noble privileges and charities of the Hospital of St. Cross, trusting that the same disinterested spirit, which has hitherto prompted him, will shortly make him triumph over the many obstacles that surround his benevolent exertions." *Testimonial to the Rev. H. Holloway*, *TIMES* (London), Aug. 14, 1854, at 7a. For other efforts by this Anglican Don State, see HOPEWELL, *supra* note 153, at 114-15.

203. St. Mary's and Old and New Alresford, and Medsted which were valued then at £4000 annually, exclusive of their houses, glebe and fees. *Lord Guildford's Resignation of Alresford and St. Mary's*, *TIMES* (London), Jan. 6, 1854, at 9a. According to Reverend Holloway, hardly an impartial observer, Guilford resigned so as to retire quietly from St. Cross and to stay proceedings seeking to recover profits he took from the Hospital. Holloway estimated those profits at over £90,000. *TIMES* (London), Jan. 6, 1854, at 6c. Holloway calculated that the Earl received over the years £121,900 from St. Mary's exclusive of glebe, fees and an excellent house, from Alresford about £80,000. *TIMES* (London), Dec. 10, 1853, at 6b. When Guilford left Alresford, among the possessions he sold were fifteen four-poster beds, 62 cases of wines and spirits, and two butts of ale. HINDE, *supra* note 171, at 84.

204. MARTIN, *supra* note 1, at 174.

205. *Death of the Earl of Guildford*, *TIMES* (London), Feb. 1, 1861, at 7d.

V. CHARITY SCANDAL AS A SOURCE OF LITERARY INSPIRATION

In the nineteenth century as today, scandal sold newspapers. From 1849, the press gleefully pursued the dean and chapter of Rochester Cathedral and particularly, the Earl of Guildford, a most attractive foil. The *Times* and other national newspapers abetted both Whiston and Holloway by publishing virtually every letter the indefatigable reformers penned, no matter how repetitive.²⁰⁶ The misuse of charitable endowments became a subject of widespread comment and public concern, and inspired literary imagination. Whiston was able to implicate virtually every cathedral in England. St. Cross was particularly notorious and attractive to the press and public. Its master was a peer, a peer in orders no less, and a pluralist. There were other hospitals worse-run with more corrupt fiduciaries,²⁰⁷ but St. Cross's single notoriety probably rested in the public's fascination and delight in seeing a clerical peer in the box, and its belief that "abuses conducted by the aristocracy were sure to be fruitier than the abuses of common plebeian stock."²⁰⁸

In 1852, Anthony Trollope's position as a surveyor for the post office brought him to Salisbury; he noted: "whilst wandering there one mid-summer evening round the purlieus²⁰⁹ of the cathedral I conceived the story of *The Warden*—from whence came that series of novels of which Barchester, with its bishops, deans, and archdeacon, was the central site."²¹⁰ On July 29, 1853 two days before the decision in *Attorney-General v. St. Cross*, Trollope commenced writing *The Warden*, his first commercial success.²¹¹ He undoubtedly drew upon the situation of the master of St. Cross Hospital for the general outline of the story, as he mentioned both controversies in the novel.²¹²

206. The letters frequently repeated the content of the communication in a news story the same day.

207. Charles Dickens was horrified by reports of another almshouse, Charterhouse, and printed an article, probably by his associate Henry Morley, in his periodical *Household Words*. See Lionel Stevenson, *Dickens and the Origin of "The Warden,"* 2 TROLLOPIAN 83, 84-86 (1947).

208. Best, *supra* note 47, at 147.

209. Purlieus are outside areas.

210. ANTHONY TROLLOPE & HENRY M. TROLLOPE, AN AUTOBIOGRAPHY OF ANTHONY TROLLOPE 80 (Dodd, Mead & Co. ed., 1912) (1883).

211. *Id.* at 83.

212. At the beginning of the second chapter of *THE WARDEN*, Trollope writes: "The well-known case of the Hospital of St. Cross, has even come before the law courts of the country and the struggles of Mr. Whiston, at Rochester have met with sympathy and support." ANTHONY TROLLOPE, *THE WARDEN* 12 (Everyman's Library 1991) (1855). "Archdeacon Grantly, the son-in-law of the Master of Hiram Hospital is a personal friend of the dignitaries of the Rochester Chapter and the author of a pamphlet in support of the Earl of Guildford." *Id.* St. Cross is mentioned several other times.

Trollope stated that he had no direct knowledge of clerical life, politics or individuals,²¹³ and several have suggested that the Rochester Cathedral School case was an important influence on all of the Barsetshire novels, because it enabled him to capture a feeling for the time, politics and social setting of the church, and the complexity of clerical society.²¹⁴

As noted, *The Warden*, published in 1855, was Trollope's first commercial success. The story concerns Hiram's Hospital, a charitable institution, whose income has grown in real terms through the centuries, but the twelve old bedesmen²¹⁵ have not benefitted. The surplus has created a pleasant sinecure for the mild-mannered Warden, Reverend Septimus Harding, a fact which John Bold, a local surgeon with a passion for causes, makes known to the *Jupiter*, a national paper. Harding becomes the object of unpleasant publicity, and his son-in-law, the combative Archdeacon Grantly, bullies him to dispute the case along party lines. Reverend Harding sees the anomaly in his position, and with considerable personal courage resigns.²¹⁶

Hiram's Hospital is recognizable as St. Cross,²¹⁷ but Trollope's portrait of Warden Harding is far more subtle and morally interesting than the master of St. Cross. The Reverend Harding was not a grasping pluralist, who performed his responsibilities through an ill-paid deputy, but a good man in a difficult situation-receiving substantial pay for little work and an unjustified battering from the press.²¹⁸ Trollope chose not to draw a stereotype or caricature of the Earl of Guildford. He clearly understood that the situation was more complex than the readers of the *Times* believed. The novelist

213. TROLLOPE & TROLLOPE, *supra* note 210, at 81.

214. Best, *supra* note 47, at 148-50; N. JOHN HALL, TROLLOPE: A BIOGRAPHY 134 (1991).

215. Originally the term was applied to pensioners who prayed for their benefactors. Later it was applied to inmates of an almshouse.

216. The novel ends in an atmosphere of goodwill. Bold withdraws his accusations, marries the Warden's daughter, and Harding receives a new preferment in the Cathedral Close.

217. There were other almshouses in the news at that time. Mere Hospital in Lincoln and Spital Hospital in Lincolnshire, controlled by the notorious Pretymans, were as bad or worse than St. Cross. Best, *supra* note 47, at 138-43; see also *Att'y-Gen. v. Pretymans*, 4 Beav. 462 (1841) (Eng.). Some have contended that St. Cross was not the source of *The Warden*, suggesting that Charterhouse or the parish of St. Ervan's and its rector John Pope Cox was the source. See Carol H. Ganzel, *The Times Correspondent and The Warden*, 21 NINETEENTH-CENTURY FICTION 325, 330-35 (1967). Trollope's inspiration came from a number of sources including the Whiston Affair, but it is clear that St. Cross was primary. Trollope had spent years at Winchester School, the public school whose playing fields are but a few meadows away from St. Cross. While there, he surely knew of the Hospital and perhaps of Guildford, who was then Master. His description of the approach to Hiram's Hospital, TROLLOPE, *supra* note 212, at 8-9, resembles exactly that of St. Cross.

218. HALL, *supra* note 214, at 134-35.

focused upon two evils or wrongs: the church's possession of funds and endowments, which had been intended for charitable purposes, but which had been allowed to become incomes for idle church dignitaries; and the undeserved severity of the recipients of such incomes by the press.

Trollope perceived with a subtlety the public missed that not even Guildford was a chief sinner:

When a man is appointed to a place, it is natural that he should accept the income allotted to that place without much inquiry. It is seldom that he will be the first to find out that his services are overpaid. Though he be called only to look beautiful and to be dignified upon State occasions, he will think £2000 a year little enough for such beauty and dignity as he brings to the task. I felt there had been some tearing to pieces which might have been spared.²¹⁹

Trollope saw the moral ambiguity of Guildford's actions and the difficult, if not painful, adaption of old institutions to new values. At the heart of *The Warden*, and the controversy surrounding the Master of St. Cross lies the conflict for those whose principles were shaped by earlier conventions and their need to adjust to new values calling into question previously acceptable behavior.²²⁰

In 1851, *Household Words*, a magazine edited²²¹ by Charles Dickens, published a short story, *The History of a Certain Grammar School*, based directly upon the Whiston Affair as it so far had evolved.²²² The story was written by Theodore Alois William Buckley²²³ who followed the style and plot techniques of Dickens.²²⁴ Charles Dickens certainly knew of the Rochester Cathedral Grammar School affair, and the headmaster himself later became a

219. TROLLOPE & TROLLOPE, *supra* note 210, at 81-82.

220. Cf. Best, *supra* note 47, at 136.

221. "Conducted"—in Dickens's word—indicating a greater control.

222. *The History of a Certain Grammar School*, in 3 HOUSEHOLD WORDS, Aug. 1851, at 457-61 [hereinafter *The History*]. Household Words was a weekly periodical, majority owned, edited, contributed to and reflective of Dickens's philosophy and voice. THE UNCOLLECTED WRITINGS OF CHARLES DICKENS: HOUSEHOLD WORDS, 1850-1859, at 14 (Harry Stone ed., 1969). It printed fiction, criticism, history, and commentary for all classes of readers, covering every imaginable topic from ballooning to wine to living with cannibals. Each issue contained twenty-four double columned printed pages and was very successful averaging 36,000-40,000 in sales, a large circulation for the time. *Id.* at 20-21. EDGAR JOHNSON, CHARLES DICKENS: HIS TRAGEDY AND TRIUMPH 21-25 (Viking Press 1977) (1952).

223. An acquaintance of Dickens, Buckley (1825-1856), a brilliant self-taught classical scholar who received a scholarship to Oxford, was bedeviled by the use of opium and alcohol. He supported himself by writing for periodicals and translating and editing classical texts. ANNE LOHRLI, HOUSEHOLD WORDS 218 (1973).

224. Arnold incorrectly assumes that Dickens wrote the story. See ARNOLD, *supra* note 93, at 145-46.

familiar acquaintance.²²⁵ His monthly news-supplement to *Household Words*, *The Household Narrative of Current Events*²²⁶ had carried reports of the protracted series of hearings whereby Whiston got reinstated.²²⁷

Dickens maintained a dictatorial control over every detail in both publications.²²⁸ If Trollope was able to empathize with his characters and draw upon the moral ambiguities of his novels' protagonists, the *The History of a Certain Grammar School* expressed, as in much of Dickens's own fiction, no normative doubts—the characters were good or they were bad, and the plot devices were familiar. The story is a thinly disguised version of the Rochester Cathedral Grammar School matter, which presumably the readership of the periodical immediately recognized. An abbey is suppressed during the Reformation and replaced by the Cathedral of St. Rochford de Tamesis. In time, the dean and chapter of St. Rochford appointed the Reverend Adolphus Hardhead, a good caricature of Whiston, "an excellent scholar, a firm but gentlemanly disciplinarian and one who took an enthusiastic interest in his occupation," to the headmastership of the St. Rochford Cathedral Grammar School.²²⁹ Whiston was a good scholar,²³⁰ certainly enthusiastic, and very stubborn. Reverend Hardhead's troubles bore semblance to those of Whiston. He wrote and published a pamphlet, "On the Present Application of the Endowments of Grammar Schools, with Hints towards establishing a Committee of Inquiry on This Important Subject," which alleged "an unaccountable increase in the incomes of the Dean and Canons and a most extraordinary stagnation and standstill in the funds allotted to the Scholars."²³¹ The Whiston figure was persecuted by the Chapter who tried to ruin him. The

225. Whiston and his sister dined at Gad's Hill Place, Dickens's residence from 1856. Gad's Hill was two miles outside of Rochester. Philip Collins, *Dickens and the Whiston Case*, 58 *THE DICKENSIAN* 47, 48 (1962); see Letter from Charles Dickens to Rev. Robert Whiston (Apr. 3, 1861), in 3 *THE LETTERS OF CHARLES DICKENS* 213 (Walter Dexter ed., 1938). Dickens's children may have attended Whiston's school, and Dickens did visit watching soccer matches. Collins, *supra*. Dickens alluded to the Whiston matter in a speech in 1857, referring to "[t]hat sort of school of which we have a notable example in Kent," where the endowments were "monstrously perverted from their original purpose, and which, in their distorted condition, are struggled for and fought over with the most indecent pertinacity." Address at Warehousmen and Clerks' Schools Fourth Anniversary Dinner (Nov. 5, 1857), in *THE SPEECHES OF CHARLES DICKENS* 241 (K.J. Fielding ed., 1960).

226. *THE HOUSEHOLD NARRATIVE OF CURRENT EVENTS* presented without editorial comment is a summary of important news. JOHNSON, *supra* note 222, at 360.

227. *THE HOUSEHOLD NARRATIVE OF CURRENT EVENTS*, 62 (1850); *id.* at 153 (1851); *id.* at 225 (1852); Collins, *supra* note 225.

228. JOHNSON, *supra* note 222, at 361.

229. *The History*, *supra* note 222, at 155.

230. See ROBERT WHISTON, *DEMOSTHENES* (1859).

231. *The History*, *supra* note 222, at 461.

Bishop of Rochford, "who had claimed the prerogative of being the only man justified in interfering in the matter . . . refused to interfere at all," shades of the Bishop of Rochester driving Whiston into Chancery.²³² Unlike *The Warden*, the *History* did not refer directly to the dispute, and it didn't have to. When the *History* was published, the matter on which it was based had not concluded; the author created his own happy ending.²³³

In one of Dickens's Christmas stories, "The Seven Poor Travelers," he writes in Chapter 3: "I thought I should like to see one of the Minor-Canons come out upon his top step, and favor us with a little Christmas discourse about the poor scholars of Rochester; taking for his text the words of his Master relative to the devouring of Widows' houses."²³⁴ It has been suggested that the personalities connected with "Clousterham Cathedral" in *Edwin Drood* contain reminiscences of the canons who disputed with Whiston, and the "Tory Jackass", Mr. Sapsea, may be based on Mr. Essell, Clerk to the Rochester Chapter.²³⁵

VI. THE CREATION OF A PERMANENT CHARITY COMMISSION

The misuse of charitable endowments at St. Cross and the Rochester Cathedral School served as a catalyst, after nearly twenty years of effort, to create a permanent charity commission. These scandals led to a transformation of public and political opinion of the scope of fiduciary misdealings and the need for a permanent vehicle to combat it. On August 1, 1853, as the Master of the Rolls was delivering the judgment in *Attorney-General v. St. Cross*, the House of Commons was debating the bill that was to become The Charitable Trusts Act of 1853.²³⁶ There was enormous indignation over both scandals. They became the impetus for the final approval of the bill creating a permanent charities commission which had been considered unsuccessfully ten previous times.²³⁷

232. *Id.*

233. Though the dispute was unresolved, Reverend Hardhead was presented with a valuable living by a sympathetic cabinet minister, and could mock his enraged opponents.

234. Charles Dickens, *The Seven Poor Travelers*, in *CHRISTMAS STORIES* 92 (Oxford Univ. Press 1956) (1862).

235. Collins, *supra* note 225, at 48. The clerk of a chapter was often a solicitor, who in the Rochester Cathedral School matter was the line of first offense or defense of the dean and chapter.

236. Charitable Trust Act, 1853, 16 & 17 Vict., c. 137 (Eng.).

237. MARTIN, *supra* note 1, at 179.

Though the commons bill was watered down in lords,²³⁸ the Charitable Trusts Act created a permanent charity commission of four commissioners, three of whom were to be paid and two barristers of at least twelve years experience.²³⁹ The commission had investigatory and subpoena powers.²⁴⁰ Charitable trustees were to submit annual accounts to the commission.²⁴¹ Perhaps the most important provision was to place the custody and management of charity funds under the management of the commission.²⁴² However, the commission lacked some essential plenary and jurisdictional powers.²⁴³

The Charity Commission gathered additional powers for specific tasks over the remainder of the century,²⁴⁴ but it never received the legal authority

238. The government's original proposal would have permitted the Charity Commission to reorganize "obsolete or vicious" endowments, trusts that had failed, and those which had "tended to the encouragement of pauperism or immorality"—two Victorian codewords. 126 PARL. DEB. (3d ser.) (1853) 1017. One of the political compromises urged by the government was an exemption for Catholic charities because of their questionable legality. OWEN, *supra* note 9, at 201. Many Catholic charities had been established to provide masses for the dead and were violative of the law against superstitious uses. Others had failed to enroll under the Mortmain Act of 1736, 9 Geo. 2, c. 36 (Eng.). If they were placed under the aegis of the proposed Charity Commission, many such charities would have been invalidated. 129 PARL. DEB. (3d ser.) (1853) 1158. The exemptions for Catholic Charities were prolonged from time to time by special acts 19 & 20 Vict., c. 76 (1856) (Eng.); 20 & 21 Vict., c. 76 (1857) (Eng.); 21 & 22 Vict., c. 51 (1858) (Eng.). Eventually, Roman Catholic charities became subject to the operation of the Charitable Trust Act, 23 & 24 Vict., c. 134 (1860) (Eng.).

239. 16 & 17 Vict., c. 137, § 2 (1853) (Eng.).

240. *See id.* §§ 1-13.

241. *See id.* § 10.

242. The secretary of the commission was to serve as Treasurer of Public Charities, a corporation in which could be vested charity property. *Id.* §§ 47-50. Additionally, the Act created the Official Trustees of Charitable Funds to whom charity trustees might give over funds for holding and investments at no cost to the trustees or the charity. *See id.* The income from the investment would be returned to the charity and applied in furtherance of the organization's purposes.

243. To undertake any action reorganizing a charity ranging from replacing trustees, to utilizing *cy pres* to alter obsolete endowments, or if *cy pres* would not suffice but a more sweeping restructuring was necessary and the charity had an income over £30 or was located in London, the Commissioners would have to apply to Chancery or develop a plan and present it to Parliament for enactment, which became almost impossible. OWEN, *supra* note 9, at 202, 205. During the first fifteen years of the Commission's existence only eighteen bills passed through Parliament. *Id.* at 207. Though the Commissioners could inquire and certify matters to the attorney general, they had little power to initiate anything themselves. The Commission had no powers of audit. It could not direct charitable assets to more useful charitable purposes. RICHARD EDWARD MITCHESON, CHARITABLE TRUSTS: THE JURISDICTION OF THE CHARITY COMMISSION (1887). The commission obtained the power to direct charitable assets in 1874.

244. For reorganizing the charities of London and the endowments of schools, see City of London Parochial Charities Act, 1883, 46 & 47 Vict., c. 36 (Eng.) and the Endowed Schools

or resources it believed necessary. Though scandals involving charitable endowments were not in short supply, never again was the public's interest so mesmerized or the politicians so responsive as with the Rochester Cathedral and St. Cross matters. Perhaps Molière was correct when he wrote: "It is public scandal that constitutes offense, and to sin in secret is not to sin at all."²⁴⁵

Act, 1874, 37 & 38 Vict., c. 87 (Eng.).

245. See JEAN BAPTISTE POQUELIN DE MOLIERE, *THE MISANTHROPE & TARTUFF*, act 4, sec. 5 (1666).