

*Judgment of the Lords of the Judicial Committee of the Privy Council on a Petition in the matter of a Scheme of the Charity Commissioners for the Administration of Hodgson's Schools, at Wiggonby; delivered 6th June, 1878.*

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Present :

LORD SELBORNE.

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

FIVE objections were taken by the Appellants, the Governors of the Wiggonby School, to the scheme settled by the Charity Commissioners for the future administration of that Foundation, under the endowed Schools Acts; as to two of which their Lordships did not think it necessary to hear the Respondents. They are clearly of opinion that the provision in the Deed of Foundation of the 19th October, 1792, which permits persons of the name of Hodgson to be, or to continue, at the school after the age of manhood, does not make the endowment of this Charity, or any part of it, less an "educational endowment," within the meaning of sections 5 and 24 of the Endowed Schools Act of 1869, than it would have been if no such privilege had been granted to those persons; the whole endowment being applicable "for the purposes of the education at school of boys or girls," and no part of it being applicable or applied to any "other charitable use." If any adult persons named Hodgson at any time took advantage of the option given them to remain in the school, they did not become the subjects of

a distinct and separate trust, but merely continued to participate with boys and girls in the benefits of an education intended for boys and girls as its ordinary recipients. And, with respect to the objection founded on the 28th clause of the Scheme, their Lordships are of opinion that the clause is so worded as to make it impossible for the Governors to do anything under it which is inconsistent with any provision of the Endowed Schools Acts. It was suggested that it might enable them, indirectly, to do hereafter what could not have been done directly by the Scheme itself (unless by the consent of the Appellants, which was not given), without infringing the 19th section of the Act of 1869. But their Lordships (reading this clause, as they are bound to read it, in connection with another clause, that numbered 37 in the Scheme), are of opinion that it would have no such effect.

There remain three other objections, which their Lordships will consider, not exactly in the same order in which they were presented to them.

The first relates to the appointment of the Rector of Aikton for the time being as an *ex-officio* Governor, which was said to be a "provision respecting the religious opinions of the governing body," contrary to the concluding words of section 19 of the Act of 1869.

It has been decided, by Her Majesty in Council, that, in cases falling within the 17th section of the same Act, the holder for the time being of an ecclesiastical office in the Church of England cannot lawfully be made an *ex-officio* member of the governing body of an educational endowment; the Commissioners being by that section required to provide, in every scheme to which it is applicable, "that the religious opinions of any person shall not in any way affect his qualification for being one of the governing body." The ground of that decision may be presumed to have been that particular religious tenets are implied in, and are necessary conditions of, the tenure of an ecclesiastical office, and must, therefore, "affect the qualification," consisting in the incumbency of such an office.

The words at the end of section 19 are very different. They direct, not what a scheme shall, but what (without the consent of the existing Governors) it shall not provide. What they

prohibit is, not a qualification for a particular place on the governing body, which may be "in any way affected" by a man's religious opinions, but any provision "respecting the religious opinions of the governing body." And this occurs in a section relative to a particular class of denominational schools, of which it is intended to preserve (subject only to a conscience clause) the denominational character, and which, for that reason, are thereby expressly exempted from the operation of the 17th section, unless the existing Governors consent that they shall be made subject thereto.

Their Lordships agree with the argument of the Respondent's Counsel, that the object of the concluding part of section 19 was only to fortify the former part of the same section, and to prevent the Commissioners from making particular religious opinions more or less necessary, in these cases, than they were before, to qualify, generally, for the office of Governor. This particular school is a Church of England school in the strictest sense; and by the law, as settled by the House of Lords in the Ilminster School case, all the members of its governing body ought properly, before the scheme was made, to have been members of the Church of England. No religious opinions are implied in the office of Rector of the parish of Aikton, except those which, independently of the scheme, would have been held, by the Court of Chancery, to be necessary to qualify for the office of Governor or Trustee. In the plain and natural sense of the words, "any provision respecting the religious opinions of the governing body," there is here no such provision; and to say that the office of Rector shall not in this case be made a qualification for one place on that body, merely because the holder of that office must necessarily belong to the Church, in the Catechism of which the children of this school are to be instructed (and instructed publicly in the church by the Rector himself), and the worship of which they are required to attend, would, in their Lordships' opinion, be to contravene the spirit of the entire section by an unnecessary implication from the letter of this part of it.

Before leaving this point, it may be right to notice a passage in the will of the foundress, which was referred to in the Argument, to the effect that it was her

“ meaning and desire that no Minister of the Gospel in holy orders officiating at any church or chapel shall, at any time, be schoolmaster of the said school, nor any of the Trustees for the time being.” Their Lordships understand this passage, not as directing that no Clergyman officiating at any church or chapel shall be a trustee, but that neither any such clergyman, nor any one of the trustees for the time being, shall ever be schoolmaster of the school.

The objection with which their Lordships think it convenient next to deal had reference to the 33rd and 34th clauses of the scheme, which were said to confer upon the Charity Commissioners larger powers of deciding questions arising under the scheme, and binding all persons interested by such decisions, than belong to them by law under the Acts defining their general powers as to Charities; and it was suggested, that such larger powers were in excess of the objects for which the Commissioners were authorized to provide by schemes under the Endowed Schools Acts. Their Lordships are not satisfied that the difference between these particular clauses and the general powers of the Commissioners is a really substantial one, or is at variance with the spirit and general intention of the Acts by which those powers are conferred; but, taking that difference to be as great as it was contended to be by the Appellant’s Counsel, it does not follow that these clauses are therefore *ultra vires*. The 23rd section of the Act of 1869 authorizes the Commissioners to insert in any scheme “ all powers and provisions that may be thought expedient for carrying its objects into effect; ” and their Lordships have reason to believe that these particular clauses are in a common form, which has been adopted in many schemes for other Endowed Schools already approved by Her Majesty in Council. Their purpose, that of establishing in the Commissioners, with respect to the cases for which they provide, a species of arbitral or visitatorial jurisdiction, sufficient to indemnify the Governors and to bind the objects of the Charity within certain limits, may reasonably have been thought expedient for carrying the objects of the scheme into effect. And it is to be observed that they relate only to questions affecting the regularity or the validity of proceedings “ under the scheme,” and as to the proper construction or

application of the provisions "of the scheme." Their Lordships, after full consideration, are of opinion that it cannot be held to be *ultra vires* of the authority by which the scheme itself was made, so to provide for the settlement of questions of this nature arising under that scheme.

The objection which their Lordships have reserved for consideration in the last place arises under the 11th section of the Act of 1869, which is thus worded:—"It shall be the duty of the Commissioners, in every scheme which abolishes or modifies any privileges or educational advantages to which a particular class of persons are entitled, and that whether as inhabitants of a particular area or otherwise, to have due regard to the educational interests of such class of persons." The 39th section of the same Act makes any scheme, "not having due regard to any educational interests" in the cases contemplated by this 11th section, the proper subject of an Appeal (by the governing body) to Her Majesty in Council.

The Appellants say, that in the present scheme due regard is not had to the educational interests of three classes of persons, who have hitherto, under the deed and will of the foundress, enjoyed special privileges or educational advantages, which will be abolished or modified by the scheme, viz:—(1.) All persons of the name of Hodgson, whencesoever coming, who may think fit to attend this school; (2.) All children of poor persons within the parish of Aikton not having real estate worth 20*l.* per annum; and (3.) All children of poor persons within the parishes of Brough-by-Sands and Beaumont not having real estate worth 12*l.* per annum. By the deed and will the benefits of the foundation were open to these three classes of persons (under some limitations, as to age, affecting the two latter of them), and to them alone. The objection is, that the scheme supersedes all provisions of the deed and will by which these privileges and advantages were conferred, and makes its own provisions the sole rule (subject to an immaterial exception in clause 37) for the future administration of the Charity; and that there is no provision in any part of the scheme by which any educational interests of any of these classes of persons are directly or indirectly regarded, except the 29th clause. That clause gives certain opportunities of

competing for scholarships or exhibitions to boys or girls educated either in the school of the foundation, or in "some elementary school in any of the parishes mentioned in the schedule" (being ten parishes in Cumberland, of which Aikton, Brough-by-Sands, and Beaumont, are three), with an absolute preference, as to scholarships, of duly qualified candidates from the school of the foundation, and a *cæteris paribus* preference, as to exhibitions, of candidates from the school of the foundation, or from "an elementary school in the parish of Brough-by-Sands or of Beaumont."

Their Lordships are of opinion that unless, upon the true construction of the scheme, children of the three classes who were the objects of the foundress' bounty are still admissible, as of right, upon fair and equitable terms, to the school itself, due regard has not been had to their educational interests, by merely giving them these occasional chances of competing, when educated elsewhere, for scholarships and exhibitions. Their Lordships do not doubt that it was intended by the Commissioners (as they have been assured by the Commissioners' counsel at the bar) that all such children, if resident within such a distance as might be consistent with their attending the school as day scholars (and indeed all other children, whether of the three parishes favoured by the foundress or of any others who might be able to do so) should be admissible to the school under such reasonable regulations as the governing body might from time to time make. And if it were clear that the scheme had provided for this, their Lordships would have thought that sufficient regard had been shown to the educational interests of those classes (although their exclusive privileges would have been abolished), subject only to the question whether they ought, under any circumstances, to have priority in the order of admission to the school. But the difficulty is, that the scheme nowhere directly says what children—of any classes or class whatever—are to be admissible to the school, and contains no rules whatever as to their admission. All this seems to be left to the Governors. The capacity of the school buildings (which are to be enlarged) is, indeed, to be "suitable for not less than 100 day scholars," and it may be inferred, from clauses 24, 25, and 28,

that the Commissioners had in view the general character and conditions of a public elementary school, capable of receiving the benefits provided for such schools by the Elementary Education Act of 1870. But even if the Elementary Education Act of 1870 could for this purpose be referred to, there is nothing in that Act which, being read into this scheme, would show that children from the parishes of Brough-by-Sands and Beaumont, or persons of the name of Hodgson not residing in the parish of Aikton, would be admissible, as of right, to the school. There being nothing to that effect in the scheme, the very large powers of making regulations, conferred upon the Governors by clause 32, would seem to enable them (if they should think fit) to exclude these classes of children, or some of them; or, at all events, to decline to recognize them as entitled of right to the benefit of the Charity. It may be that, as the school buildings are situate in the parish of Aikton, there would be a necessary inference in favour of the right of poor children of that parish; but their Lordships do not see how, without falling back on the directions (which are exclusive) contained in the deed and will of the foundress, such an implication could be extended to children from the other two parishes, or to persons of the name of Hodgson not resident in Aikton.

Their Lordships, therefore, have come (though reluctantly) to the conclusion, that there is not in this scheme enough to satisfy the requirements of the 11th section of the Act of 1869; and they think it their duty to advise Her Majesty to remit it to the Charity Commissioners for amendment; with a declaration, that, in its present form, it is defective, as not having due regard to the educational interests of the several classes of persons who were entitled, under the deed and will of the foundress, Margaret Hodgson, to the privileges or educational advantages which it is intended to abolish or modify.

Although it would not, in their opinion, be proper, by Her Majesty's Order, to give any further directions for the government of the Commissioners, it may be useful for their Lordships to add, that they do not adopt the view that any new privilege, preference, or exclusive advantage need be given,

by any scheme under these Acts, to a class originally favoured, when the Commissioners think it right to abolish the original privilege or advantage. In the present case, it appears to them, that if children named Hodgson, who can conveniently attend the school as day-scholars, and children from the three parishes originally favoured, are recognized as entitled to be educated, under reasonable regulations, in this school, no preference or advantage need be conferred upon them beyond this, that, as the school is to be limited to 100 children, it may probably be right to give them priority of admission, *cæteris paribus*, if the number of duly qualified applicants for admission should at any time exceed the number of vacancies for the time being in the school. As to age, and as to examination (if the Governors should think it right to submit candidates for admission to a competitive or any other kind of preliminary examination), their Lordships see no reason why they (the Hodgsons included) should not be placed on exactly the same footing with other children, not of the favoured classes; who may, if found better qualified in these respects, be admitted in preference to them. And their Lordships think that due regard may well be paid to the educational interests of the Hodgsons, without allowing them to remain in the school beyond the age which may be limited as to other scholars.

Their Lordships do not think that this is a case which either the Appellants or the Respondents ought to be ordered to pay costs.