

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Petitions of the Trustees of Archbishop Holgate's School at Hemsworth and others against a Scheme of the Charity Commissioners relating to that Foundation and other Charities ; delivered 5th March 1887.*

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Present :

THE LORD CHANCELLOR.

LORD FITZGERALD.

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

The Trustees of this Endowment have appealed to Her Majesty in Council under the provisions of the Endowed Schools Act, 1869, against the scheme framed by the Charity Commissioners and approved by the Education Department. They have taken four grounds of objection.

The first objection is that the removal of the site of the Grammar School from Hemsworth to Barnsley is not within the scope of the Act. Removals of sites are not expressly mentioned in the Act. On the other hand, they are clearly within the range of the powers conferred on the Commissioners by Section 9, which authorizes them to make any new trusts, directions, and provisions in lieu of any existing ones. It is difficult to say that any operation which is within the powers conferred by the Act is not within its scope. But without relying absolutely on Section 9, their

Lordships find in the preamble ample ground for saying that the Legislature contemplated that the removal of sites might be found expedient. That preamble refers to the report of the Commission of Inquiry and to the changes recommended by it, and states that such objects cannot be effected without the authority of Parliament. Except on one or two specific points, the Act supplies no other guide to the objects at which the Commissioners should aim. Mr. Charles did not dispute that one object much insisted on by the report was the removal of schools from localities where they are of little or no use to other localities where they may be of great use. He only contended that in this case the removal is injurious to the frequenters of the schools. That raises a question of policy, which may be submitted to the Education Department or to the House of Parliament, but which is not the subject of appeal. Their Lordships have no hesitation in saying that the removal is within the scope of the Act.

The second objection is of the same kind, only directed to a small portion of the scheme. Under a scheme made by the Court of Chancery on the 28th July 1857 for Archbishop Holgate's Hospital in Hemsworth, a sum of 300*l.* a year is devoted to the purposes of Holgate's Grammar School, and it is provided that the Trustees of the Hospital may, after the expiration of 36 years, if they shall be of opinion that the Hemsworth Grammar School is not in an efficient state, apply to the Court for liberty to discontinue the payment. It is suggested that the removal of the school from Hemsworth disturbs the provisions of the Chancery scheme, and affects the revenues of the Hospital, which is an endowment not within the Act. Their Lordships are of opinion that this yearly payment is so long as it lasts an educational endowment within Section 5 of the Act, and that the power given by the Chan-

cery scheme to the Trustees at the end of 36 years is not in any way disturbed by the present scheme.

The third objection is founded on what are commonly called the conscience clauses, which are introduced by the 48th clause of the scheme. This is a point on which the Commissioners have no discretion. They must embody in their scheme the provisions of Sections 15 and 16 of the Act, unless the case falls within the exceptions provided by Section 19. The Trustees contend that this endowment does fall within that section.

The exceptions allowed by Section 19 apply to "any educational endowment the scholars "educated by which are . . . required by the "express terms of the original instrument of "foundation, or of the statutes or regulations "made by the founder, or under his authority "during his lifetime, or within 50 years after "his death (which terms have been observed "down to the commencement of this Act), to "learn or be instructed according to the doctrines "or formularies of any particular church, sect, "or denomination." The Trustees contend that Archbishop Holgate's statutes order that the scholars shall be instructed according to the doctrines and formularies of the Church of England, and that such course of instruction has always been followed.

Their Lordships will not enter upon the controversy whether Holgate's statutes prescribe what the Trustees contend, or whether the usages he prescribed were, or could be, followed down to the commencement of the Act of 1869. On the 27th June 1861 the Court of Chancery established a new scheme for this endowment, and that scheme is the instrument by which it is at present governed. At that time the question now raised must have been before the Court.

For in 1860 the rules governing endowments on these points were altered by the Act commonly known as Lord Cranworth's Act, 23 & 24 Vict., cap. 11. That Act binds all governors of endowed schools to make rules to provide for admitting to the benefits of the school the children of parents not in communion with the church, sect, or denomination according to the doctrines or formularies of which religious instruction is to be afforded under the endowment. But it excepts from this obligation all cases in which the instrument regulating the endowment contains nothing expressly requiring the children educated under such endowment to learn or to be instructed according to the doctrines or formularies of such church, sect, or denomination. That exception has a wider range than the exception in the Act of 1869, but it rests on the same principle, and on the point now in controversy is expressed in the same terms. The Court of Chancery provided, in the 31st clause of the scheme of 1861, that religious instruction in the Liturgy, Catechism, and Articles of the Church of England shall be given, not to all boys, but "to such of the boys whose parents, or persons standing to them *in loco parentis*, shall be in communion with that Church, and to such other boys whose parents, or other persons standing to them *in loco parentis*, shall not object in writing to their receiving such instruction." The framers of the scheme must have considered that this endowment did not fall within the exception of the Act of 1860. But even if we suppose that they gave no consideration to the matter, or that they construed Holgate's statutes wrongly, the scheme has in point of fact effected a breach of the system on which the Trustees contend that the school was administered from the time of its foundation. After the 27th June 1861 it ceased to be an

endowment the scholars educated by which were required to learn or to be instructed according to the doctrines or formularies of the Church of England.

The fourth objection belongs to a class of questions attended by great difficulties, difficulties which must be very serious to the Commissioners who have to decide in the first instance, and are greater still to those who sit in appeal, because the Commissioners must be guided very much by discretion, and appeals on matters of discretion are proverbially difficult. The Trustees contend that the Commissioners have not obeyed the directions given to them by Section 11 of the Act of 1869.

That section is as follows:—

“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 interest of such class of persons.”

By Section 5 of the Endowed Schools Acts 1873 the protection thus given to particular classes of persons is extended to persons in a particular class of life.

The first step then is to ascertain to what privileges or advantages any classes are entitled under the scheme of 1861, which now regulates the endowment. It will be remembered that Holgate founded a Grammar school for teaching Hebrew Greek and Latin, and in other respects of a type that was generally found to be quite unsuitable for the wants of the great bulk of persons using the schools in later times. The Court of Chancery therefore divided the foundation into two parts. The scheme of 1861 provides for the maintenance of a Grammar school in Hemsworth open to all comers on payment of substantial fees. This school is of the type now generally known as first grade (Clauses 18, 29,

37, 48). It provides also for the maintenance of an elementary school called the Parish school in Hemsworth, open to the parishioners of Hemsworth at small fees with power of remission in cases of poverty (Clauses 18, 34, 38, 39). Then there is a provision adopted from Holgate's statutes, that the trustees shall elect "from poor men's children, being husbandmen or men of occupations, living in the parishes of Hemsworth, Felkirk, South Kirby, Ackworth, Royston, and Wragby," six boys to be educated free of cost. These boys may be admitted at the age of five years, and are to be entitled to the education of the Grammar school; but if not of ability to be placed there, are to be first placed in the Parish school (Clause 36). There is a further provision for the election of a Holgate scholar from among the six free boys, with emoluments which may amount to 30*l.* a year for five years (Clause 51). But this is only to be effected when there are sufficient funds, which, as their Lordships understand, has not yet occurred.

Under the present scheme, then, the parishioners of Hemsworth are a class entitled to have the Parish school maintained in Hemsworth; and the poor men, being husbandmen or men of occupations, living in the six parishes, which expressions their Lordships hold to mean generally the poor of the parishes, are entitled to have the six boys elected from among them, and to a Holgate scholar when the funds are sufficient; all to be educated in one of the Hemsworth schools.

It is contended that the inhabitants of Hemsworth are entitled to have the Grammar school maintained in Hemsworth. But, in the Sutton Coldfield case, L. L. R., 7 App. Ca., 91, it was held that the word "entitled" must be construed strictly, meaning "legally entitled." Now

the Grammar school is open to all comers, and, as a matter of law, the inhabitants of Hemsworth have no higher title than the public at large. Undoubtedly they enjoy advantages from the proximity of the school, but so do other persons who are near enough to use the school; and that incidental advantage does not confer a legal title. It is true that actual enjoyment would be one thing to be considered on the question of due regard, but so also would be the value of the thing enjoyed, and the extent to which it is enjoyed. And it is clear that the proposal to remove the Grammar school rests on the fact that the work it does is quite insignificant.

The next step is to ascertain how far the scheme abolishes or modifies the privileges or advantages of any class. As regards the Parish school, which provides for the mass of the parishioners of Hemsworth, the effect is that that school is left in possession of whatever it now has, and has its resources augmented by the addition of 40*l.* a year. But the scheme combines the endowment of the Grammar school with that of Barnsley, and establishes the joint school in Barnsley. To that extent it modifies the privileges of the poor inhabitants of the six parishes. The scheme provides for six Holgate scholarships, which shall entitle the holder to free education and also to 10*l.* a year. But instead of being educated at the Grammar school in Hemsworth, which will not exist, the scholarships are to be tenable at the Grammar schools in Barnsley, or in Wakefield, Pontefract, or Doncaster (Clause 53). And, instead of electing the scholars from "poor men" being husbandmen or men of occupations in the six parishes, the Trustees are to elect from "boys who are and have for not less than three years been scholars in any of the public elementary schools" in the six parishes.

It is clear that the Commissioners have paid

regard to the privileges and advantages now existing. But the Trustees say it is not due regard. How difficult it is to lay down what is due regard is shown by the judgement of this Court in the case of Hodgson's school (3 App. Cases, 869). There the scheme abolished certain privileges, and gave nothing substantial in lieu of them; and it was found impossible to say there had been due regard. But even then this Committee came reluctantly to their conclusion, and their language shows that any substantial privilege adapted to the altered construction of the school would have satisfied them that due regard had been paid.

It seems not unreasonable to ask those who complain of want of due regard, to suggest what would be due regard, especially when they are the Trustees of the endowment, and are possessed of the fullest knowledge of all its circumstances. Now in this case the Trustees held a conference with Mr. Fearon, an Assistant Commissioner, on the 18th August 1882. They were then under the belief that the proposal to remove the school could not be resisted, and they made proposals on that footing. Their proposals, so far they affect the scheme, were as follows:— (1) that an additional 40*l.* per annum should be applied to the parish school; (2) that 60*l.* per annum should be provided for exhibitioners, being children of parents living in the six parishes; (3) that the new school should be of the second grade. All the proposals have been carried into effect, only with the modification that the exhibitioners are to come from elementary schools.

The draft scheme proposed scholarships of 5*l.* a year, and a larger number than six. Upon that the Trustees recommended that there should be only six of the value of 10*l.*, because, considering the distance from Hemsworth to Barnsley



or Pontefract, a scholarship of 5*l.* a year would practically be of little benefit to children of parents residing in the six parishes. In accordance with this recommendation the Commissioners altered the number and amount of the scholarships.

The draft scheme did not contain the provision which confines the scholarships to boys at the elementary schools, and on the 11th October 1883 the Trustees sent in objections, the first of which was that the class of life and area of habitation of original beneficiaries is almost entirely disregarded. Upon this the Commissioners, conceiving that the objection as to class meant that the interests of the poor had been disregarded, inserted the limitation to elementary schools.

It is admitted by the Counsel for the Trustees that this limitation is as good a way as can be devised for securing the benefits of an endowment to the poorer classes. But it turns out that they complain of this very limitation, and contend that the "poor men, husbandmen" and men of occupations" mean the substantial middle class, and that it is this class who are injured by a provision calculated to benefit the poorer classes. As before intimated, their Lordships hold that it is the poorer classes who were meant mainly to benefit by the free places. They must hold this somewhat novel objection of the Trustees to be a groundless one, and say that the Commissioners have paid due regard to the privileges and advantages which their scheme modifies.

There is another petition by a number of persons who state that they are parents of children attending Hemsworth School. They take the same objections as the Trustees take, and also the objection that the scheme does not save or make due compensation for their vested

interest and the vested interest of their sons, as required by the Endowed Schools Acts. These gentlemen have no *locus standi* for appealing except in respect of vested interests. The Act does not direct that any interest of a boy on the foundation of a school shall be saved or compensated unless he was there at the time of the passing of the Act, viz., on the 2nd August 1869. Of course there is no such boy. The petition fails, and ought not to have been presented.

Their Lordships will humbly advise Her Majesty that both appeals ought to be dismissed.

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