

*Judgment of the Lords of the Judicial Committee of the Privy Council in the matter of the Endowed Schools Act, 1869, and in the matter of a scheme for the Management of Alleyn's College of God's Gift at Dulwich, and for the Management of the Picture Gallery, endowment of the Foundation of Sir Peter Francis Bourgeois and Margaret Desenfans; delivered January 27th, 1876.*

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Present :

LORD SELBORNE.

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is a petition which, being presented since the Endowed Schools Amendment Act of 1873, has to be dealt with by their Lordships as if it were an appeal between parties, and their Lordships are required to do what was not usual upon the references made under former Acts, to state in open court the nature of the report or recommendation which they propose to make to Her Majesty in like manner as in the case of any such appeal. The Petitioner is here in respect of the right of appeal given to him, as he alleges, by the 39th section of the Endowed Schools Act of 1869, which, so far as relates to this petition, is thus worded:—"If the governing body of any  
" endowment to which a scheme relates, or any  
" person directly affected by such scheme, feels  
" aggrieved by the scheme on the ground of  
" the scheme not saving or making due compensation for his or their vested interest as

“ required by the Act,” then power is given to such person in respect of that grievance to appeal to Her Majesty in Council. It is therefore in respect of the private right of the Petitioner, Dr. Carver, and not in respect of any of those considerations of expediency which the Legislature thought fit to delegate to the Commissioners, that their Lordships are now to exercise this jurisdiction. Dr. Carver says that he has a vested right, which, under the 13th section of the Act of 1869, ought to have been saved or duly compensated, and that this has not been done in the scheme proposed by the Commissioners. The material words of that scheme are:—“It shall be the duty of the “ Commissioners to provide in any scheme for “ saving or making due compensation for the “ following vested interests.” Then are enumerated five different kinds of interests, one of which is in these words:—“Such interest as “ any teacher or officer in any endowed school “ appointed to his office before the passing of “ the Endowed Schools Act, 1868, may have.” It is not in any way attempted by that part of the section to define the terms of the tenure of the teacher or officer whose interest should be saved or compensated. The words are “such interest as any teacher or officer,” appointed before a certain time, “may have.” It would be very difficult for their Lordships, having to look to substance and not to form or technicality in such a case, to accede to the argument, that any teacher or officer of a school who had an interest the value and nature of which was defined by Act of Parliament, and who had not been deprived of that interest by any lawful authority, would not be entitled *primâ facie* under that clause to have his interest saved or compensated.

It was argued by Mr. Fry on the part of the Commissioners that the interest of Dr. Carver

was not to be regarded as within the meaning of the clause, because, as their Lordships understood him, it was an interest less than freehold, and in some sense (as he said) held at the will, not precisely of the governors acting in the ordinary way by a majority, but of a certain majority, at a meeting, constituted in a certain manner and convened in a certain manner, of the governors; no such meeting ever having been convened, and no such majority ever having had existence. Their Lordships are clearly of opinion that the cases which were cited have no application to a question of this nature. One of them did not contain any similar qualifications as to the power of removal, and therefore would be for this purpose entirely irrelevant. The other, the case of the Grimsby School, did contain some similar qualifications, but the question was of a totally different nature. It was whether, under the particular terms of a clause in a Railway Act, the interest in lands held (as the Court assumed for the purpose of decision) by the same tenure by which the office of schoolmaster was held was an interest greater in contemplation of law than an estate from year to year. The Judges held that the office, determinable as it was by certain means at the pleasure of the parties, who, if all the conditions were fulfilled, would have to use those means, was not technically and legally an interest of a larger nature than an estate from year to year. Their Lordships are of opinion that this authority also is wholly irrelevant to the present question; and that in the present case the Legislature has carefully guarded the power of removal, so as to give a very substantial vested interest to this gentleman, until that power shall be lawfully exercised, which it never has been.

The only question therefore which remains is

whether that interest has been saved or duly compensated by the scheme against which the appeal is made. Now, the interest (putting aside everything else except the pecuniary interest of the petitioner, for their Lordships are not satisfied that there is anything else material to be considered,) is constituted by Act of Parliament, an Act of Parliament indeed which the Commissioners under the later statute have power to alter, provided the conditions of the later statute are complied with. But if in respect of the saving of the interest of Dr. Carver the conditions of the later statute are not complied with, then the original Act of Parliament remains in full force, and his right is a statutory right under an Act of Parliament. That Act of Parliament gives him a title to these emoluments. Under the 49th section he is to have, first of all, a fixed salary or stipend of 400*l.* per annum; and, secondly, a payment of 3*l.* per annum for every boy, exceeding the number of 50, who shall have *bond fide* attended the school for a period of not less than three calendar months during the then preceding half year. By the 59th section, power is given to the governors to fix and determine from time to time the amount of capitation fees to be paid by all the boys attending the upper school, except the foundation scholars, those capitation fees being fixed *ad interim* at certain sums varying according to age; and the governors have in point of fact, by virtue of the power then given to them, since increased those sums. That being the power of the governors in respect of capitation fees, the 60th section says, "The annual amount of the capitation fees to be received from the boys as aforesaid shall be paid and applied by the governors as follows; viz., one moiety thereof shall be paid half-yearly to the master of the college." So that

he is entitled under those clauses of the Act of Parliament as long as he holds his office, from which he cannot be arbitrarily removed in substance, though he may be removed at the will and pleasure of a certain majority of a meeting called and constituted in a certain manner, to the 400*l.* per annum, the 3*l.* per annum for every boy above the first 50, and to one half the capitation fees, whether those fees may be greater or less, which the governors may receive; and as the other half of the capitation fees is applicable to other purposes for which it is the duty of the governors to provide, it cannot be assumed that they will either raise or reduce the amount of those fees from time to time by virtue of the power which they possess arbitrarily, or for any purpose relative only to differences of opinion between themselves and the head-master, or in fact for any purpose not in their view conducive to the due execution of their trusts. Turning from those rights which the head-master has under the Act of Parliament, the scheme which has been settled by the Commissioners appears to their Lordships most materially to vary them, and in a manner as to which their Lordships certainly cannot assume that the substituted right would be in any way the equivalent of that which would be taken away. In the first place, the scheme by the 88th section of it fixes, either absolutely or relatively to certain rates different from those of the Act of Parliament (for the construction is in that respect controverted), the maximum amount of stipend which Dr. Carver personally and individually shall from henceforth receive. He shall receive the fixed stipend of 400*l.* without change, so far as that amount is concerned. The mode of payment and the security for it will have to be noticed afterwards. Then having, as to other and future masters, fixed new

rates quite different from and less than those of the Act of Parliament to be paid according to the number of the boys, it goes on to say that Dr. Carver "shall not so long as he shall continue " to be Master of Dulwich College receive payment at a lower rate than that at which he " received payment in the year ending 31st " December 1872." Sir William Harcourt for Dr. Carver suggested that the true interpretation of that provision was, that he should never receive less than the fixed sum of 2,307*l.*, being the aggregate amount which he received in the year 1872, and *prima facie* their Lordships were disposed to think that this would be the true interpretation of the clause. On the other hand it was suggested that this was not so, but that the words "payment at a lower rate," when read in connection with the antecedent words of the same clause, speaking of the rate of so much for each boy, varying according to the number of boys, which future masters were to receive, justified the conclusion that it was intended to refer to a certain conventional rate of payment agreed upon for a limited time, since expired, between Dr. Carver and the governors, being a different and a lower rate than that mentioned in the Act of Parliament; under which agreement Dr. Carver had consented to receive, and had actually received the amount paid to him for the year ending 31st December 1872. Whatever may be the true interpretation, and their Lordships do not think it necessary to decide it, the substance is the same; the emoluments of the year 1872, a year when they were governed not by the Act of Parliament, but by a special and temporary convention and agreement between Dr. Carver and the governors, are, according to this scheme, to be made the fixed rule for the future remuneration. Their Lordships on

that ground only would have been quite prepared to say that Dr. Carver's rights are not preserved by the scheme.

But the matter does not rest there, because, by an earlier section of the scheme, the 20th, a new destination of the endowment funds of the college is proposed, which carries off to perfectly new objects distinct from the upper school a sum estimated on both sides at 3,000*l.* a year, or thereabouts, which, but for that new destination, would be applicable to the payment of Dr. Carver's statutory stipend under the 49th section, that is, the 400*l.* a year, and the 3*l.* a year for every boy beyond the first 50. It proposes to make that 3,000*l.*, for other purposes (purposes altogether foreign to the school), a new first charge before anything is to be applied to the payment of Dr. Carver's salary; and it in fact leaves as applicable to the school under any circumstances, out of the endowment fund, only 1,400*l.* a year for exhibitions, as a maximum, besides certain repairs and such annual sum to be paid to Dr. Carver while he continues master of the college as may be equal to the excess of the annual income by the scheme secured to him as master of the college over the annual sum by the same scheme directed to be paid to any future master of the college. Their Lordships are by no means satisfied that, in the state of the finances of the college which is disclosed by the papers before them, there would not be a substantial interference with the security given by the existing Act of Parliament to Dr. Carver for the payment of what is from time to time due to him, as well as a substantial alteration by the other clause, the 88th, of the amount which he is entitled to receive. It is said that, looking to the past, and to the necessity which has been found for encroaching by his own consent on the payments

which he would have been entitled to under the Act of Parliament, in order to provide a proper staff of assistant masters for the school and exhibitions—it is said that, looking to those circumstances, it may reasonably be concluded that whatever is offered him by the scheme is an equivalent, and, as was put in argument, “due compensation” for what is taken away from him. Their Lordships cannot come to that conclusion when they find that for those purposes, for which by his consent his rights have hitherto been waived, there has been available hitherto the sum of 3,000*l.*, which it is now proposed to take away and divert to totally different purposes. Looking at the whole substance of the case, as well as according to the strict letter of his rights, their Lordships are satisfied that Dr. Carver’s rights are not saved by this scheme. As to due compensation being made for them, their Lordships are not satisfied that this is a case within that part of the clause at all. If he had been deprived of his mastership by the scheme, it would have been a case for compensation, but as he is continued master, their Lordships apprehend it is a case for the saving of his rights; if, however, it were proper to consider that in such a case as this due compensation might be made for rights partially taken away while in other respects they remain, their Lordships would still be of opinion, for the reasons which have been given, that due compensation is not made by this scheme.

Under these circumstances their Lordships will humbly advise Her Majesty to declare that the petitioner, Dr. Carver, has a vested interest in his office and in the emoluments thereof within the meaning of the 13th section of the Endowed Schools Act of 1869, and that such interest is not saved, nor is due compensation



made for the same, by the scheme of the Charity Commissioners, and with that declaration their Lordships will humbly advise Her Majesty to remit the scheme to the Commissioners.

The only question which remains is that of costs. Their Lordships say nothing about the costs of any of the Respondents, but they think that Dr. Carver's costs ought to be paid by the governors out of the funds of the charity in their hands.

