

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Petition of Ross and
Others v. The Charity Commissioners, in the
matter of the Charities of St. Dunstan-in-the-
East; delivered July 7th, 1882.*

Present:

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

SIR JOHN MELLOR.

THIS is a Petition of the rector of the parish of St. Dunstan-in-the-East, the churchwardens, and certain other persons, trustees of property belonging to the parish administered under a scheme of the Court of Chancery, made on the 15th June 1867.

It appears that in the parish of St. Dunstan-in-the-East there are several charitable endowments given by various donors and at various periods in the history of the parish. The property so given was held for charitable purposes, but none of the uses were for educational purposes, except as regards a small annuity of 10% which was given by Sir John Moore.

In the year 1852 an information, at the relation of the Attorney General, was filed against the churchwardens for an account of the charities, and for a scheme for their due administration. The suit was delayed for a considerable time; but ultimately, on the 15th June 1867, a scheme was settled, and approved by an Order of the Court. No decisive action had been taken to carry its objects into execution before the passing of the "Endowed

R 2795. 100.—7/82. Wt. 3701. E. & S.

A

Schools Act, 1869." The scheme of the Court of Chancery provided for the appropriation of a large part of the charitable income to the purposes of education. The 25th section of it prescribes the manner in which the property shall be dealt with. It is as follows:—"The trustees shall, subject to the provisions of this scheme, apply the income arising from the charities in the following manner, that is to say"—then follows a detailed description of the payments to be made for the benefit of the church and parish, other than for educational purposes, viz.:—"To the rector, 210*l.*; the afternoon lecturer, to cease as after mentioned, 84*l.*; other officers and servants of the church and parish, to be reduced as herein-after mentioned, 329*l.*; other expenses of divine worship, about 160*l.* 9*s.* 10*d.*; repairs (not exceeding), or such larger sum as Charity Commissioners approve, 200*l.*; to be laid by every year for structural repairs for the first five years and then to be reduced to 100*l.* a year, to be so laid by, 200*l.*; management (not exceeding), 120*l.*; subscription to Tower ward schools, 50*l.*; present gifts and subsequent annuities to the poor (to be increased as herein-after mentioned to 400*l.*), about 280*l.*; gifts to the prisons, about 35*l.*;" (the total of those payments amounts to 1,668*l.*) The clause then provides, "and the entire surplus in the support and maintenance of the schools herein-after mentioned."

The scheme provides for the school, and the manner in which it shall be established, by the clauses commencing with clause 35:—"The trustees shall be at liberty to apply the moneys herein-after authorised to be raised and accumulated, and the surplus income of the charities, after providing for the specific payments by this scheme provided, in

“ the purchase of a site and the erection thereon
 “ of a school premises suitable for a middle-class
 “ day school, to be called St. Dunstan’s College,
 “ capable of accommodating 400 boys.” The
 following clauses are material to the questions
 raised on the Appeal. Clause 47 provides “ that
 “ there shall be four masters of the school.
 “ The head and second masters shall be graduates
 “ of one of the English Universities, or of
 “ Trinity College, Dublin; and all the four
 “ masters shall be members of the Church of
 “ England, and competent to give instruction in
 “ the various branches of education herein-after
 “ mentioned.” Section 44 contains the follow-
 ing provision :—“ The instruction to be afforded
 “ in the school shall include the principles
 “ of the Christian religion, according to
 “ the doctrine of the Church of England.”
 The 45th provides :—“ Such number of day
 “ scholars shall be admitted by the trustees
 “ to receive instruction at the school as can
 “ be properly accommodated, and each day
 “ scholar whose parent, or person standing to
 “ him *in loco parentis*, shall reside or have
 “ his or her place of business or employment
 “ in the parish of St. Dunstan-in-the-East,
 “ shall pay to the trustees such sum, not
 “ exceeding 2*l.* per annum, and all other boys
 “ shall pay to the trustees such sum, not
 “ exceeding 8*l.* per annum, as the trustees shall
 “ direct.” Then provision is made in clause 56
 for the foundation of scholarships, and in clause 57
 of exhibitions.

This scheme not having been carried into
 execution, and the Attorney General being of
 opinion that the part of the property which
 had been appropriated by it to educational uses
 fell within the provisions of the “Endowed
 Schools Act, 1869,” the Charity Commissioners
 were applied to, and in due course the scheme

was prepared by them which is the subject of the present petition.

The scheme of the Commissioners altered and modified in various respects the scheme approved by the Court of Chancery, but it is unnecessary to go at length into its provisions. It will be sufficient to refer to such of them as are made material by the objections which have been urged at their Lordships' bar.

The first objection to the scheme is one of considerable importance. It is that the scheme has no validity at all, and is not authorised by the "Endowed Schools Act," inasmuch as it has been made without the consent of the old governing body. The objection, as originally submitted to their Lordships by Mr. Charles, was that the endowment was not an educational endowment within the meaning of the Act; but, after a short discussion during the argument, Mr. Charles gave up that point; indeed, it was impossible to maintain it, because these endowments distinctly fall within the definition of "educational endowments" given in the fifth section of the Act:—"In this Act, unless the context otherwise requires, the term 'educational endowment' means an endowment or any part of an endowment which, or the income whereof, has been made applicable or is applied for the purposes of education at school of boys and girls, or either of them, or of exhibitions tenable at a school or an university or elsewhere, whether the same has been made so applicable by the original instrument of foundation or by any subsequent Act of Parliament, letters patent, decree, scheme, order, instrument, or other authority." It is plain that this is an educational endowment falling within the second branch of this interpretation of the words. The endowment has been made applicable to

the purposes of education by a scheme and an Order of the Court of Chancery. The objection ultimately relied on was rested on the 14th section of the Act, sub-section 1:—"Nothing in this Act shall authorise the making of any scheme interfering (1) with any endowment or part of an endowment (as the case may be) originally given to charitable uses, or to such uses as are referred to in this Act, less than 50 years before the commencement of this Act, unless the governing body of such endowment assent to the scheme." The governing body has not assented to this scheme, but dissents and petitions against it. The contention is that this property having been appropriated to educational uses by the scheme of the Court of Chancery within the last 50 years, it cannot be dealt with without the consent of the governing body appointed under that scheme; but, on looking at the words of the Act, it is plain that the sub-section refers only to the original foundation of a charity within that period. The words are:—"Endowment originally given to charitable uses, or to such uses as are referred to in this Act." Now, none of the properties in this case were originally given to such uses within the period of 50 years before the Act. The original donations, it is admitted, were long anterior to such period. The scheme settled and approved by the Court of Chancery can in no way be considered as the original gift within the meaning of the Act. The Court is not the founder or the donor of the charity. It is merely the authority which has appropriated to educational purposes property originally given to charitable uses. Their Lordships are therefore of opinion that this endowment does not fall within the words which are relied upon, and, consequently, that the objection made to the

scheme arising from the want of assent of the old governing body must fail.

This objection is the only one to the scheme in its entirety. But three objections have been submitted to their Lordships upon different parts of the scheme, which, it is said, contravene the provisions of the "Endowed Schools Act." One of those objections arises on section 11 of the Act, which is in these terms:—"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." Also, by the fifth clause of the Amendment Act of 1873, it is provided:—"It shall be the duty of the Commissioners in every scheme to have the same regard to the educational interests of persons in a particular class of life as they are by section 11 of the principal Act required to have to the educational interests of any particular class of persons."

It is said that these provisions have not been regarded by the Commissioners, because, whilst under the scheme of the Court of Chancery, the boys belonging to the parish of St. Dunstan-in-the-East were entitled to be admitted as day scholars for a sum not exceeding 2*l.* a year, by the scheme of the Charity Commissioners that sum has been greatly exceeded. The scheme of the Charity Commissioners, section 40, is this:—"All boys, including boarders, except as herein provided, shall pay tuition fees, to be fixed from time to time by the governors, at the rate of not less than 8*l.* nor more than 16*l.* a year for any boy, except that for any boy whose parent, or person occupying the place of parent, resides or has his place of business or employment

“ in the parish of St. Dunstan-in-the-East, and
 “ who is in the opinion of the governors in need
 “ of such aid out of the endowment, the tuition
 “ fee shall be one half of that which would
 “ otherwise be payable by such boy.” A
 similar distinction in favour of the boys of
 St. Dunstan’s parish is made in the case of
 boarders; a distinction, it is to be observed,
 which was not made in their favour, as boarders,
 in the Chancery scheme.

Although the Charity Commissioners have increased the amount which the boys of St. Dunstan’s parish are liable to pay for tuition fees, and have added the condition that the trustees shall be satisfied that aid is needed by the parents of such boys, their Lordships cannot say that they have failed in their duty to have due regard to the educational advantages of the class of persons entitled to favourable distinction under the former scheme. It is perfectly true that they have altered those conditions, but it was entirely within their power to do so, as the Act enables them to modify educational privileges and advantages; and their Lordships certainly would not interfere with their discretion in making alterations and modifications, unless they saw that it was so wrongly exercised that the Commissioners could not have paid due regard to these privileges and advantages. Changes may happen in parishes which may render it desirable to modify existing privileges: the education given may be better; the means of parents living in the parish may be more ample; all matters of this kind may be taken into consideration by the Commissioners, whilst having due regard to the interests of the classes entitled to educational advantages. It is for them to decide on the extent and degree of modification which new circumstances may require to be made, and it is

not for this Committee to override their discretion, unless they are satisfied that it contravenes the provisions of the Act.

The next objection arises upon sections 18 and 19 of the "Endowed Schools Act." The scheme of the Court of Chancery, section 37, provides that "there shall be four masters of the school. " The head and second masters shall be graduates " of one of the English Universities, or of Trinity " College, Dublin; and all the four masters shall " be members of the Church of England, and " competent to give instruction in the various " branches of education herein-after mentioned); and section 44 of the Chancery scheme provides that "the instruction to be afforded in the school " shall include the principles of the Christian " religion, according to the doctrine of the " Church of England." It was contended that having regard to these provisions, the 65th section of the scheme of the Charity Commissioners, providing that "no person shall be disqualified " for being a master in the College by reason " only of his not being, or not intending to be in " holy orders," was unauthorised and wrong. By the "Endowed Schools Act" it is provided in section 18:—"In every scheme (except as herein- " after mentioned) relating to an endowed school, " the Commissioners shall provide that a person " shall not be disqualified for being a master " in such school by reason only of his not " being or not intending to be in holy orders." The exception is contained in section 19, which enacts as follows:—"A scheme relating to," sub-section 2:—"Any educational endowment the " scholars educated by which are in the opinion " of the Commissioners (subject to appeal to Her " Majesty in Council, as mentioned in this Act) " 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 in his lifetime, or within
 “ 50 years after his death, (which terms have
 “ been observed down to the commencement of
 “ this Act,) to learn or to be instructed accor-
 “ ding to the doctrines or formularies of any
 “ particular church, sect, or denomination, is
 “ excepted from the foregoing provisions
 “ respecting religious instruction and attendance
 “ at religious worship (other than the provisions
 “ for the exemption of day scholars from attend-
 “ ing prayer or religious worship, or lessons
 “ on a religious subject, when such exemption
 “ has been claimed on their behalf), and respecting
 “ the qualification of the governing body and
 “ masters (unless the governing body, consti-
 “ tuted as it would have been if no scheme under
 “ this Act had been made, assents to such
 “ scheme).” The governing body, of course,
 have *not* assented to the provision complained
 of. The question is, whether the present endow-
 ment falls within this exception. That raises
 very much the same question as the first which
 their Lordships have discussed. The words to be
 construed are:—“ 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 in
 “ his lifetime, or within 50 years after his death,
 “ to be instructed according to the doctrines of
 “ a particular church, shall be excepted.” The
 original foundation of these endowments, as far
 as we know it, does not provide for the religious
 education of scholars. In fact, the original founda-
 tion, except with regard to an annuity of 10*l.*, has
 nothing to do with education at all. The words
 of the Act clearly apply to the original founda-
 tion by the founder or donor of the property for
 charitable uses, and to statutes and regulations
 made by him, and cannot be held to comprehend

a scheme of the Court of Chancery appropriating to educational purposes property which had been already given for charitable uses. Their Lordships, therefore, think that this objection also fails.

The only remaining objection, upon which there has been a good deal of discussion, relates to the sum of 120*l.* "for management," which is included in the list of payments applicable to other than educational purposes in the Chancery scheme, and is omitted from the income now assigned to the old trustees. The second section of the scheme of the Charity Commissioners provides for the appropriation of income to uses other than educational, as follows:—"The yearly or other sums applicable " under the clauses of the above-mentioned " Chancery scheme numbered respectively 25, 26, " 27, 28, 29, 31, 32, and 33, except the sum " payable for 'management'—such yearly sums, " except as aforesaid, being the part of the " endowment of the foundation applicable, subject, " as in that scheme provided, for purposes not " educational, shall be paid out of the income of " the foundation, by the governing body herein- " after constituted and called the governors, to " the trustees constituted under the said Chancery " scheme." All, therefore, which was appropriated to charities other than educational by the Chancery scheme is still to be paid, except the sum of 120*l.* for management.

The right to petition Her Majesty to withhold her approval from a scheme depends, as far as this question is concerned, on sections 39 and 24 of the "Endowed Schools Act." The part of section 39 which is relied on is sub-section 3: "If the governing body of any endowment to " which a scheme relates, or any person or body " corporate directly affected by such scheme, " feels aggrieved by the scheme on the ground:

“ —(3) of the scheme being one which is not
“ within the scope of or made in conformity
“ with this Act;” such governing body may
petition Her Majesty. It is said that this scheme
is not made in conformity with the Act, because
it contravenes section 24, sub-section 1, which is
this : — “ Where part of an endowment is an edu-
“ cational endowment within the meaning of this
“ Act, and part of it is applicable or applied to
“ other charitable uses, the scheme shall be in con-
“ formity with the following provisions (except so
“ far as the governing body of such endowment
“ assent to the scheme departing therefrom), that
“ is to say :—(1) the part of the endowment or
“ annual income derived therefrom which is
“ applicable to such other charitable uses shall
“ not be diverted by the scheme from such uses.”
No part of the money which, by the scheme of
the Court of Chancery, is directly made applicable
to charitable uses is diverted by the new scheme.
But it is said it throws upon the old trustees the
expenses of management. Now that is by no
means clear in point of fact. Under the Chancery
scheme the trustees had the whole management
and control of the property. But by virtue of
the Act, and of the present scheme of the Com-
missioners, the property is vested in the Official
Trustee of Charity Lands, and is to be managed
and administered by the governors under that
scheme. They alone have the management of
the property, and are responsible for it; and
they are to pay, and the trustees to receive,
certain specific sums for specific purposes. The
provision made by various clauses of the Chancery
scheme, for the management of the property and
payment to those who managed it, seems to be
superseded by the new provision made for its
management by the scheme of the Commissioners.
Their Lordships are not satisfied upon the facts,

as far as they have been brought to their knowledge, that the Commissioners have contravened the provisions of the Act in not continuing to the trustees the sum assigned for the expenses of management in the scheme of the Court of Chancery.

Their Lordships, therefore, are of opinion that this Petition fails, and that no grounds have been established for advising Her Majesty to withhold her approval from the scheme of the Commissioners. They have considered the question of costs, but are not disposed to make any Order with regard to them.