

are cut down from £3000 to £20, I think it is only just that the expenses of the action should form a claim for ranking as well as the principal sum.

LORD DEAS was absent.

The Court refused the appeal.

Counsel for Trustee (Appellant)—Trayner—Readman. Agents—Ronald & Ritchie, S.S.C.

Counsel for Claimant (Respondent) — Rhind—Shaw. Agent—P. Morison, S.S.C.

Tuesday, March 18.

FIRST DIVISION.

SCHOOL BOARD OF AIRDRIE AND OTHERS v. THE EDUCATIONAL ENDOWMENT COMMISSIONERS.

Trust—Charitable Trust—Educational Mortification. Scheme for Management of—Educational Endowments (Scotland) Act 1882 (45 and 46 Vict. cap. 59), secs. 1, 13, 15, 30—Person or Body affected by any Scheme—Elementary Education.

Circumstances in which held that a scheme framed by the Educational Endowment Commissioners for the management of an educational mortification intended for the benefit of children in danger by reason of poverty of not obtaining elementary education, and for assisting young men to obtain advanced education, which scheme provided that as much should be spent on elementary education as was being expended thereon when the Educational Endowments Act 1882 passed, and provided for the founding of bursaries for more advanced scholars out of the remaining funds of the endowment, was not contrary to law or disconform to the Act.

Question as to the title of a school board to take a Case for the Court in such circumstances, as being a "body corporate directly affected by the scheme."

The Educational Endowments Act 1882 provides, section 13—"In framing schemes the Commissioners shall save or shall make due compensation for the vested interests of individuals holding any office, place, employment, pension, compensation allowance, bursary, or emolument under or arising out of the educational or other endowment at the date of the passing of this Act, and shall provide that no funds now applied in terms of the founders' directions to free elementary education shall be diverted to any other purpose, except to the extent to which such funds are manifestly in excess of the requirements for the purpose of free elementary education of the localities to which they belong. 'Elementary education' shall mean such education as may be given in the State-aided schools of Scotland pursuant to the provisions of the Education (Scotland) Act 1872, and in terms of the minutes of the Scotch Education Department in force for the time being with respect to the administration of the Parliamentary grant for public education."

Section 15 provides—"In framing schemes it shall be the duty of the Commissioners, with respect alike to the constitution of the governing body and to educational provisions, to have regard to the spirit of founders' intentions, and in every scheme which abolishes or modifies any privileges or educational advantages to which a particular class of persons is entitled, whether as inhabitants of a particular area or as belonging to a particular class in life or otherwise, they shall have regard to the educational interests of such class of persons: Provided always, that where the founder of any educational endowment has expressly provided for the education of children belonging to the poorer classes, either generally or within a particular area, or otherwise for their benefit, such endowment for such education or otherwise for their benefit shall continue, so far as requisite, to be applied for the benefit of such children." And section 30 provides—"If the governing body of any endowment to which a scheme relates, or any person or body corporate directly affected by such scheme, feel aggrieved by the scheme on the ground of the scheme being one which is not within the scope of, or made in conformity with this Act, . . . such governing body, person, or body corporate may, within one month after the first publication of the scheme or amended scheme, submit a Case to the Court of Session, to which the Commissioners shall, and any others directly interested may be parties, for the opinion of the said Court on the question or questions therein stated; and if the Court is of opinion that the scheme is contrary to law on any of the grounds in this section mentioned, the Scotch Education Department shall not approve thereof, but they may, if they think fit, remit the same to the Commissioners with a declaration as hereinbefore provided. Subject to the provisions of the immediately succeeding section, a Case submitted under this section shall be framed, lodged, amended, heard, and otherwise dealt with in the same manner, as nearly as may be, as a Special Case presented in terms of the sixty-third section of the Court of Session Act 1868."

This was a Case presented to the Court of Session under section 30 of the Educational Endowments (Scotland) Act of 1822, in which the Court was asked to determine whether a scheme proposed by the Commissioners appointed under the said Act for administering a trust left by the late William Forrest of Meadowside, was, in the particulars set forth in the Case, not within the scope of, or made in conformity with, the said Act, and was contrary to law. The truster died on the 23d May 1860, leaving a trust-disposition and deed of mortification executed on 6th March 1858, which proceeded on the narrative that he was desirous "of promoting, providing, and supplying the means of a common elementary education to a limited number of poor or destitute children, or labourers' or workmen's children, who may be in hazard of not receiving an elementary education, and assisting a few young men who might be in want of means for obtaining a more advanced education." The trustees and governing body of the mortification were the Sheriff-Substitute of Lanarkshire at Airdrie, the minister of the parish of New Monkland, the minister of the *quoad sacra* parish of Clarkston, the minister of the West Church at Airdrie, and the Provost of Airdrie *ex officio*.

By the first purpose of the deed £150 was to be set aside yearly to aid in promoting the education of 150 destitute children, or such children as required aid to acquire an elementary education, 100 of whom it was provided were to have been born or to have resided three years within the bounds of the burgh of Airdrie, and the remaining 50 were to have been born or to have resided three years within the parish of Clarkston. This sum of £150 was burdened with several liferents. The only other clause of the trust-deed which requires to be referred to for the purposes of this case was the fifth, being the clause of residue, by which the trust-deed provided that should the residue amount to a sum of more than £30 sterling yearly, it was to be laid out and applied in the education of "an additional number of children as aforesaid, who may be in danger of not receiving a common or elementary education."

The annual income derived from the trust-estate had averaged for the four years preceding the present case £495 or thereby of permanent income, and in addition there was a fluctuating revenue of about £206 or thereby derived from the interest obtained from the price of minerals which were being worked, from which source about £1000 had been funded.

When the trust came into operation £69 only was applicable for its educational purposes, but in 1874 an additional sum of £30 became available, and since that date £66 per annum had been devoted to the elementary education of children in Airdrie, and £33 for the like purpose in Clarkston. This sum of £99 was the whole amount applied for the purposes of free elementary education under the trust-deed. The amount of the annuities still outstanding was at the date of this case £81, and this with the £99 made up the sum of £180 provided by the first and fifth purposes of the trust-deed.

The Commissioners appointed under the Educational Endowments Act framed a scheme for the administration of Forrest's Trust, and submitted it to the Scotch Education Department in terms of the Act.

The scheme contained, *inter alia*, the following provisions:—(23) That the governors, after paying the necessary expenses of management and burdens and taxes affecting the endowment, should (a) set aside free income to the extent of £150 for the educational purposes thereafter detailed, out of which sum the existing annuities were to be met; and (c) that any surplus of revenue was to be devoted along with the £150 to the educational purposes detailed in the scheme. "The governors shall apply the sum of £100 yearly in paying, in whole or in part, as they may think fit, the fees of scholars, with books and stationery, at public or State-aided schools in the burgh of Airdrie and in the parish of Clarkston, in the proportion of two-thirds in the burgh of Airdrie and one-third in the parish of Clarkston, for elementary education as defined in the Educational Endowments (Scotland) Act 1882. The free scholars shall be children whose parents or guardians, not being in receipt of parochial relief, are in such circumstances as to require aid for providing elementary education, and are persons who in the opinion of the governors ought not to be required to apply to the parochial board for such aid." One-third of the children

were to be children under ten, and the other two-thirds children over ten, the latter to be selected by competitive examination. Then followed certain provisions as to the payment of school fees in the case of children under and over ten years of age. "24. The governors, after satisfying the provisions of the immediately preceding section, shall apply two-thirds of the remaining funds . . . in establishing school bursaries, to be called the Forrest School Bursaries, each of the yearly value of not less than £5 nor more than £10. These bursaries shall be awarded by competitive examination, in the proportion of two-thirds in the burgh of Airdrie and one-third in the parish of Clarkston, among children attending the public or State-aided schools in the burgh of Airdrie and parish of Clarkston who have passed the fifth standard of the Scotch Code, or such standard as may from time to time be fixed by the Scotch Education Department, pursuant to the Education (Scotland) Acts, as that entitling children to total exemption from the obligation to attend school, and whose parents are in such circumstances as to require aid for giving their children a higher education; these bursaries shall be tenable for two years at public or State-aided schools in which efficient instruction is given in the higher branches." "25. The governors shall apply the remaining third of the said funds in founding bursaries, to be called the Forrest Bursaries, each of the yearly value of not less than £10 nor more than £15. These bursaries shall be awarded by competitive examination among pupils attending public or State-aided schools in the burgh of Airdrie and parish of Clarkston whose age at the date of the competition shall not exceed fourteen years; they shall be tenable for such period, not exceeding three years, as the governors may determine, at such schools for higher education or technical instruction as they may approve."

The present Case was presented under section 30 of the Educational Endowments Act 1882 by the School Board of Airdrie, the School Board of Clarkston, and the Provost, Town Council, and Magistrates of Airdrie, who were the parties of the first part, against the Commissioners appointed and acting under the Educational Endowments Act of 1882, who were the parties of the second part.

The first parties averred that they were bodies corporate directly affected by the said scheme, and that they felt aggrieved because the scheme was not within the scope of, or made in conformity with, sections 13 and 15 of the Act. They contended that the proposed division of the sums provided by the first and fifth purposes of the trust for the furtherance of elementary education was a violation of the express directions of the trust, and was not warranted by the statute; and in the second place, that the proposed division was contrary to section 13, in respect that it was in effect a division of funds now applied in terms of the founder's directions to free elementary education, which funds were not in excess of the requirements of the localities for that purpose—that the amounts to be expended on elementary education should not be reduced below £180 per annum, and that the scheme had not regard to the spirit of the founder's intentions, and was otherwise contrary

to the provisions of the 15th section.

The Commissioners, although they became parties to the present Case, took objection to the title of the first parties to submit the Case to the Court, as not being the governing body of the endowment in question, and as not being bodies corporate directly affected by the said scheme. This objection was met by the governing body sisting themselves during the hearing of the cause as parties to the Case.

Argued for the second parties—On the question of title, school boards could not in any sense be called bodies corporate affected by the proposed alterations, and therefore they had no *locus standi* under section 30. They could not plead that they had in any way suffered by the scheme, and have no title to present this Case apart from the governing body. There was no question of law in the Case, only one of expediency. *2d. On the merits*, the proposed scheme was not antagonistic to sections 13 and 15 of the statute, and the sum provided under it for free elementary education was more than the amount at present devoted to it. The proper meaning of the words in section 13, “no funds now applied,” is no funds when the Act came into operation. The Commissioners had a discretionary power to alter the particular directions of the founder so long as they do not alter the spirit of his intentions. The changes here proposed were within the scope of the Act.

Argued for the first parties—On the question of title, the objectors had a good title to interfere, and this was acknowledged by the Commissioners, in so far as a member of each of the objecting school boards was among the members proposed for the new governing board. The words “directly affected” were equivalent to “had a title to call to account” in law apart from the statute. For a somewhat similar case see *Merchant Company of Edinburgh v. Heriot's Hospital*, M. 5750. *2d. On the merits*, the proposed scheme was virtually a breach of trust; the money was being diverted by it from the poorer classes of Airdrie—see *Magistrates of Dundee v. Morris*, 23 D. 493. The scheme was not in conformity with the Act, in respect that it contravened sections 13 and 15, and the Commissioners were acting *ultra vires* in the alterations they proposed to effect. The meaning of the trustor was that his whole funds, less the annuities and bursaries, were to be directed to elementary education. Under the scheme the birth and residential qualifications dropped out, and mere attendance at school was to take its place. No doubt the statute gave the trustees a very ample discretion, but as they had exceeded that discretion the objectors were entitled to use the statutory remedy.

At advising—

LORD PRESIDENT—As this is the first case which has been presented to us under the 30th section of the Educational Endowment Act of 1882, it is necessary that we should attend carefully to the question of our jurisdiction under the statute. Now, the 30th section provides that—“(1) If the governing body of any endowment to which a scheme relates, or any person or body corporate directly affected by such scheme, feel aggrieved by the scheme on the ground of the scheme being one which is not within the scope of or made in

conformity with this Act, he may submit a Case to the Court of Session;” and then follows a sub-section conferring the same power upon any person holding office who feels aggrieved by the proposed scheme not having made due compensation for his vested interests, but that matter does not arise in the present case.

The question for our consideration is, whether the proposed scheme is within the scope of or made in conformity with the Educational Endowments Act 1882? The ground upon which the scheme is challenged is that it is not in conformity with the Act, for it cannot be said, I think, that it is not within the scope of the Act. At the same time it is desirable, I think, to keep in mind what is defined to be the scope of the Act. Now, the 7th section of the statute provides that it is the duty of the Commissioners in re-arranging educational endowments to have special regard to secondary or higher education in public schools in those localities to which the endowments belong, or in such manner as will secure to the inhabitants of those localities the benefit of such endowments, and if the Commissioners think fit, they may provide for establishing or aiding industrial museums and libraries. That is the scope of the Act, but of course in dealing with any scheme the Court is bound to see that nothing in the scheme is inconsistent with the general intentions of the testator.

Now Forrest in the narrative of his trust-deed declares that he was “desirous of promoting, providing, and supplying the means of a common or elementary education to a limited number of poor or destitute children, or labourers’ or workmen’s children who may be in hazard of not receiving an elementary education, and assisting a few young men who may be in want of means for obtaining a more advanced education.” He had thus two objects in view substantially different in character—first, to provide elementary education for a limited number of poor children; and second, to aid a few young men to obtain a more advanced education than their private means admitted of.

By the first purpose of the trust-deed the trustees are directed to set aside £150 sterling for the purpose of assisting and promoting the education of 150 destitute children, or such children as require aid to acquire an elementary education, of which number 100 shall either have been born or shall have resided for three years at least within the present or future parliamentary bounds of the said burgh of Airdrie; and the remaining 50 shall either have been born or shall have resided three years within the present bounds of the parish of Clarkston. This provision is however burdened with certain annuities which have not as yet lapsed, but at the death of the annuitants the sums falling in are to be devoted to the instruction of such poor children as may be in danger of not receiving a common education. The trustor then goes on to provide for the founding of certain bursaries in the University of Glasgow, to which I need not refer, as these are not affected by the proposed scheme.

The last purpose of the trust-deed is in these terms:—“I hereby direct and appoint my said trustees, or their foresaids, if there shall be any residue of the foresaid rents, interest, dividends, duties, and revenues of the said several lands, bonds in security, and others before disposed and

transferred, and if the said residue shall amount to the clear yearly sum of £30 sterling, to lay out and apply the said residue in the education of an additional number of children as aforesaid, who may be in danger of not receiving a common or elementary education, and who are natives or residents as aforesaid." Now, one cannot read this clause without seeing that the intention of the founder was to provide elementary education only when that was indispensably necessary, and to bestow aid upon those who without such assistance would be "in danger of not receiving such education," while the provision limiting it to those "who are natives or residents as aforesaid" shows that the trustor did not intend his means to be applied indiscriminately to the education of children of the poorer classes.

Had this deed been made subsequent to the passing of the Education Act of 1872, it would have been found that the object which the trustor had in view was to a large extent anticipated by that statute, and he might possibly have disposed of his estate otherwise. We must therefore take into consideration the fact that there are now very few children who require assistance in order to obtain an elementary education, or who are prevented on the ground of poverty from obtaining any education at all. Owing to the liferents payable by the trust, the sum hitherto expended by the trustees in elementary education has been only £99. That amount has been devoted to carrying out the first purpose of the trust-deed, and it is not intended to diminish that sum, for the scheme sets aside £100 to be thus dealt with. With regard to the remainder of the sum, the Commissioners provided that the governing body were to apply two-thirds of it in founding school bursaries and bursaries for higher education. "The governors shall apply the remaining third of the said funds in founding bursaries, to be called the Forrest Bursaries, each of the yearly value of not less than £10 nor more than £15. These bursaries shall be awarded by competitive examination among pupils attending public or State-aided schools in the burgh of Airdrie and parish of Clarkston, whose age at the date of the competition shall not exceed fourteen years; they shall be tenable for such period not exceeding three years as the governors may determine, at such schools for higher education or technical instruction as they may approve." One cannot doubt that, if the scheme is unobjectionable otherwise, it is quite consistent with the scope of the Act as defined in section 7, because while provision is made for free elementary education to a certain extent, there is also provision made for secondary education, or higher and technical education.

It remains, however, to be seen whether any of the objections stated by the parties to the details of the scheme are of a kind contemplated and provided for in the statute. These objections may be divided into two sets—one under section 13, and the other under section 15 of the statute. In section 13 it is provided that "no funds now applied in terms of the founder's directions to free elementary education shall be diverted to any other purpose, except to the extent to which such funds are manifestly in excess of the requirements for the purpose of free elementary education of the localities to which they belong;" and the same section defines elementary education

thus—"Elementary education' shall mean such education as may be given in the State-aided schools of Scotland pursuant to the provisions of the Education (Scotland) Act 1872, and in terms of the Minutes of the Scotch Education Department in force for the time being with respect to the administration of the Parliamentary grant for public education." So that according to this section there was to be no diversion from free elementary education of any of the funds "now applied" to it, unless they be in excess of the requirements of the localities to which they belong.

The objection to the scheme under this section appears to me to be entirely unfounded, and to proceed upon a misconstruction of the statute. For it is contended that the whole £150 along with the £30 and the residue dealt with in the last purpose of the trust-deed must all be devoted in terms of this section to free elementary education. I cannot so construe the statute. It provides that no fund now applied, that is, *de facto* at the date of the Act applied, in terms of the testator's directions, is to be interfered with. We have seen that £99 per annum was the whole of the amount applied in terms of the testator's will at the date of the passing of the Act, and that that sum is not interfered with by the scheme. On the contrary, that £100 is under it to be devoted to the same object. The objection, therefore, founded on the 13th section cannot be sustained. But the 15th section provides:—"In framing schemes it shall be the duty of the Commissioners, with respect alike to the constitution of the governing body and to educational provisions, to have regard to the spirit of founders' intentions, and in every scheme which abolishes or modifies any privileges or educational advantages to which a particular class of persons is entitled, whether as inhabitants of a particular area or as belonging to a particular class in life or otherwise, they shall have regard to the educational interests of such class of persons: Provided always, that where the founder of any educational endowment has expressly provided for the education of children belonging to the poorer classes, either generally or within a particular area, or otherwise for their benefit, such endowment for such education or otherwise for their benefit shall continue, so far as requisite, to be applied for the benefit of such children." It appears to me that the first part of this section allows a very wide discretion as regards the power of the Commissioners. They are to have regard to the educational interests of a particular class, but that does not necessarily mean that they are to provide for their free elementary education. On the contrary, the words are obviously selected and used for the purpose of giving the Commissioners discretionary powers to do what they think most expedient for the educational interests of that class, whether as regarded elementary or secondary education. As regards the second part of this section, I think that the Commissioners have exercised a wise discretion in providing not only what is requisite, but beyond what is requisite, for the interests of the particular class whom the testator desired to benefit. When this case was first presented to us the only parties to it were the School Board of the burgh of Airdrie, the School Board of the parish of Clarkston, and the Provost, Magistrates,

and Town Council of the burgh of Airdrie. An objection of a somewhat formidable character was taken to the title of these parties, upon which I do not desire to express any opinion, as that objection has been entirely obviated by the governing body becoming parties to the Case.

LORD DEAS and LORD MURE concurred.

LORD SHAND being one of the Commissioners delivered no opinion.

The Court pronounced the following interlocutor:—

“Find and declare that the scheme complained of is not, in respect of any of the objections maintained by the governing body, beyond the scope of, or disconform to the provisions of the Educational Endowments Act 1882, and is not contrary to law: Authorise the governing body to pay their own expenses and those of the Commissioners out of the funds of the Endowment.”

Counsel for First Parties—Pearson—Graham Murray. Agent—Alexander Wylie, W.S.

Counsel for Second Parties—J. P. B. Robertson—Gillespie. Agent—Donald Beith, W.S.

Wednesday, March 19.

FIRST DIVISION.

[Lord Fraser, Ordinary.

SHARP v. RETTIE.

Shipping Law—Ship—Claim for Wages by Engineer—Counter Claim of Damages—Neglect of Duty by Seaman—Merchant Shipping Act (17 and 18 Vict. c. 104), secs. 243, 244—Exclusion of Civil Remedy—Retention of Wages to meet Claim of Damage.

In an action for payment of wages at the instance of the engineer of a vessel against the owner, the defence was that the owner had a claim of damages for injuries caused by the misconduct and neglect of duty of the pursuer, which he was entitled to set off against the claim for wages. No entry of the misconduct complained of had been made in the ship's log at the time as provided for by sections 243 and 244 of the Merchant Shipping Act 1854. *Held* that the owner's claim of damages was not thereby barred, since these sections related only to summary criminal prosecutions, and did not supersede the civil remedy which the owner had at common law.

This was an action at the instance of John Sharp, an engineer residing in Leith, against Peter Rettie, master and owner or part-owner of the steamship “Escorial” of Glasgow, for the sum of £123, 0s. 5d. said to be due to him as wages.

The pursuer was engaged by the managing owners of the “Escorial” on 3d April 1883 to join the ship, then at Glasgow, as first engineer for a period not exceeding one year, for a voyage to Singapore and other ports in Chinese waters

and home to port of discharge in United Kingdom, at £16 per month of wages. By the articles of shipping he agreed to conduct himself in an orderly, faithful, and sober manner, and to be at all times diligent in his duty; “And it is hereby agreed that any embezzlement or wilful or negligent destruction of any part of the ship's cargo or stores shall be made good to the owners out of the wages of the person guilty of the same.”

The pursuer stated that he served on board the vessel under the agreement from 4th April until 8th December 1883, when the vessel arrived in Leith and his engagement terminated. He further stated that for the period he served on board the vessel there was due to him wages amounting to £130, 13s. 2d.; that he had received £7, 12s. 9d. to account at different dates, leaving a balance of £123, 0s. 5d., being the sum sued for.

The defence was that the pursuer had caused injury to the boilers, engines, and machinery of the vessel by his misconduct, and that there thus arose a claim of damages for a larger sum than that sued for, which the defender was entitled to set off against the pursuer's claim. In the statement of facts for the defender it was averred—“(Stat. 3) Before the said steamship left Glasgow her boilers were thoroughly scaled and cleaned, and her engine overhauled, and they and the whole machinery of said steamship were in a thorough state of repair when she left Glasgow.”“(Stat. 4) The said steamship arrived in Antwerp on 9th April last, where she loaded some cargo, and remained at that port for six days. Some slight repairs on the machinery of said steamship were done at that port on the pursuer's orders and under his supervision, and on the voyage from Antwerp to Marseilles she made a quick passage. (Stat. 5) The owners' instructions to the pursuer were that he was to make good use of his time during the voyage and at the various ports at which the said steamship was to call, to keep his engine, boiler, and machinery in a thorough state of repair, and for that purpose to see that the boilers were scaled and cleaned when necessary. (Stat. 6) At the ports of Marseilles, Manilla, Saigon, and Hong-Kong, on the outward voyage, the said steamship lay a considerable time taking in and discharging cargo, and at all of these ports the pursuer had ample opportunity of doing any repairs and cleaning that were necessary to the efficient upkeep of the boilers, engine, and machinery. (Stat. 7) At Hong-Kong, where the said steamship lay from 6th to 13th August, the pursuer was all the time drunk and quite incapable of properly attending to his work. He was on this occasion reprimanded by the defender. (Stat. 8) At all the ports mentioned in article 6, where the said steamship lay a considerable time, the pursuer instead of attending to his duty and getting the boilers cleaned and engine and machinery put in order for the run, wilfully neglected his duty, and failed to clean the boilers and overhaul the machinery so as to keep them in an efficient state of repair. (Stat. 9) On leaving Hong-Kong a pump-rod broke, and in consequence the steamer had to put back to Hong-Kong for repairs. If the pursuer had been attending to his duty this accident ought to have been foreseen and prevented. (Stat. 10) On the homeward run, and while the said steamship was at Singapore on 30th September and 1st October, the pursuer was ashore