Judgement of the Lords of the Judicial Committee of the Privy Council in the matter of the Trustees of St. Leonard Shoreditch v. *The Charity Commissioners (in the matter of the Scheme for the Management of the Foundations); delivered March 25th*, 1884.

Present:

THE LORD CHANCELLOR.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.

THEIR Lordships have considered the arguments which they have heard, and they do not think it necessary to call upon Counsel to reply to them.

It may be convenient, first, to notice the last point suggested by Dr. Phillimore upon the 9th clause of the Act of 1869, which gives power in very large and general terms to the Commissioners, "by the scheme, in such manner as may "render any educational endowment most con- "ducive to the advancement of the education "of boys and girls, or either of them, to alter "and add to any existing and to make new "trusts, directions, and provisions in lieu of any "existing trusts, directions, and provisions which "affect such endowment and the education "promoted thereby, including the consolidation "of two or more such endowments, or the "division of one endowment into two or more "endowments"; the words "educational endowments" having a very large interpretation, which includes education at school of boys and girls, or either of them, and exhibitions tenable at a school or university or elsewhere. In this case the

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endowments appear to have been used till the scheme was made for the purpose of the education at school of boys and girls; and the Commissioners, for whatever reason, have thought that those endowments may be made useful if they are not any longer applied in carrying on the particular schools in the parish of St. Leonard Shoreditch, bnt are applied in exhibitions for the benefit of a larger area of schools for boys and for girls. Their Lordships are unable to find any solid reason for saying that this was not within the powers of the Commissioners. Taking it to have been within their powers, no question is or can be raised as to the way in which they have exercised them; and that is not a proper subject of appeal if the scheme was not in that respect unauthorised by the Act.

Having disposed of that particular objection, there remains the principal one, which is, that this is a denominational charity within the meaning of the 19th clause of the Act of 1869 and the 7th clause of the Act of 1873. Now it is impossible to read the 19th clause of the Act of 1869 without being struck by the care and anxiety which the Legislature has exhibited there to prevent denominational restrictions from being applied to any school as to which there was not demonstrative evidence that the original founders of the school had not only formed, but expressed, an intention that the children should be instructed according to the doctrines or formularies of a particular Church, sect, or denomination, or, in the added words of the later Act, should be members of a particular Church, sect, or denomination. It is impossible not to be struck by the anxiety which the Legislature has displayed to exclude, not only every uncertain, but also every merely probable, implication from practice alone of such an intention; for it is required, first of all, that the denominational

purpose should be manifested by the express terms, either of the original instrument of foundation, or of some statutes or regulations. Perhaps it is not absolutely necessary to say that regulations within the meaning of the clause could not have been oral, but it is tolerably plain that there would be great difficulty in the proof of any such oral regulations, even if binding; and certainly the other words, "instrument of foundation or statutes," point with great distinctness to written instruments. The Legislature, by requiring "express terms," going for the present no further, has manifested a clear intention to exclude mere implication. It is not that only. Not only must it be done by the express terms of that which, in two cases at all events, must necessarily be an instrument in writing, and in the third case could scarcely be otherwise; but the instrument of foundation, statutes, or regulations, must in the next place have been made by the founder or by his authority, and if by the founder of course in his lifetime. What is meant by founder, and what is meant by authority? Now, in the ordinary case of a foundation by one or more individual persons who created the endowment, there is of course no difficulty in the application of those words. But their Lordships have here to deal with a charity not so founded, but which was commenced by subscriptions in Michaelmas 1705. The Bishop of Oxford was asked at that time to preach a charity sermon for the school; and in the list of benefactions the first benefaction appears to have been given in 1706, and it goes on at different dates; a collection being made for building in 1722.

Now let us consider what is the reasonable manner of applying to such a charity the word "founder." It is reasonably clear that not every

subscriber or contributor could be a founder having control over the school, or capable within the meaning of the Act of Parliament of impressing on it, by his own act, or by his own authority, a denominational character. It is also reasonably plain, when you have once started with a foundation in 1705, though by small beginnings, yet that everything afterwards added, every accretion to the original subscriptions, which was not an endowment for any new and special purpose, must be taken to be upon the footing of the original foundation; not a new foundation, but something contributed for the purpose of the original foundation. You are carried back, therefore, in considering who ought to be regarded as the founder or founders, to the very inception of the charity, to the very first subscriptions, in this case to the years 1705 or 1706. Now it is quite conceivable that a number of persons might have met at that time, and might have come to a common agreement as to the purposes for which they should subscribe and solicit subscriptions; and if that had been embodied in writing, and if they had solicited subscriptions on the footing that either they themselves were to make a law for the charity and give it statutes, or that this was to be done by others in a particular manner, or if in any original documents soliciting subscriptions there had been a written law laid down for the charity expressing the purposes for which it was to be founded, those persons so initiating the subscriptions, and so declaring the purpose for which they were made and solicited, might be regarded as founders within the meaning of this clause. But it appears to their Lordships to be quite impossible to attribute that character to those who come after them—whether they contributed to the building fund or any other fund in aid of the existing charity or not. They did

not found the charity; they found it existing; they merely aided and assisted it.

The question in this case is, whether the conditions of this clause of the statute are shown to have been fulfilled as to the charity which had its foundation or inception in the only sense which can bring the words of the clause into play at all,—as early as 1705 or 1706. The clause says that there must be express terms. Here it is admitted there is no original instrument of foundation at all; there are no statutes, therefore they may be laid aside. Then we come to the other word "regulations," and we must find by proper evidence the express terms of some regulations which were made by the founder, or by his authority; and it is clear that there are no regulations of which the express terms appear, directly or indirectly, made by the original founder, or by his authority; and that last term, "by his authority," is not without any limit of time, but must be either in his lifetime or within 50 years after his death.

If it is sound reason that the original founders must be taken to be those persons who first subscribed to and collected subscriptions for this charity in the years 1705 and 1706, what is there upon which the conclusion can possibly be founded, that any regulations requiring in express terms that the scholars should be instructed according to the doctrine or formularies of the Church of England, or should be members of that Church,—what is there from which it can be inferred that any such regulations were ever made, and still more that they were made within 50 years after the death of the original founders, and by their authority? The only thing brought forward in support of the conclusion that there were any such regulations consists of certain entries in books, which show that as a matter of fact the children were

taken to church, and probably that they were instructed in the catechism. Suppose it to be so, there is all the difference in the world between a practice for the time being and statutes or regulations expressly requiring that such a practice should always be observed. The clause in the Act would not be satisfied without statutes or regulations in express terms; and the manifest purpose of the clause would be defeated as to almost every school in the kingdom, not of very recent origin indeed, if it were held that mere practice should be taken as sufficient evidence of there having been at some time or other regulations made under the authority of the founder expressly requiring that practice always to be observed.

That disposes of everything except the regulations of 1774. Now, if their Lordships had thought it necessary to hear Counsel for the Commissioners, it is probable that some argument might have been addressed to them as to the effect of those regulations, and whether they would be sufficient, even if made within 50 years, or by the founder, to establish the denominational character of these schools. But, not having heard the Counsel on the other side, their Lordships are ready to assume, for the present purpose, that what appears upon the face of those regulations, if they had been made by the original founders, might have been enough. They do not, of course, decide that it would have been so. But what is the evidence that those regulations were made by the authority of the original founders, or were made within 50 years after their deaths, which may also be assumed for this purpose to mean the death of the last survivor. The original foundation was nearly 70 years before the date of those regulations,—of those orders. It is more probable than not, at all events, that the original founders were in 1705 at least persons of full age,—21 years of

age. They might have been living within the 50 years before 1774. The burden of proof as to this is upon those who allege that the case is brought within the clause of the statute, and no attempt has been made to prove that any one of the original fcunders was living within 50 years before 1774, which would be necessary to make it come within the limit of time, unless we are to assume that Mr. Collman was one of the original founders. All, however, that we know about Mr. Collman is, that at a date considerably later than the original foundation, 1718, he appears as a trustee and as *de facto* treasurer, and taking an active part in the management of the charity. His name does not appear in the list of benefactors as an original contributor; and if he was not, he was not a founder who could himself have made statutes or given any authority to do so. Then there is an equal defect of the necessary evidence of authority, even if it were known that some of the original founders were living within 50 years of 1774. What is the evidence that the rules and orders of that date were made by the authority of those original founders? The authority of some of those original founders might not have been enough—it must have been that of all the original founders. Is the mere fact that the management of the charity was carried on by certain trustees enough to lead to an inference of law that they might at any time make rules impressing a new character, a more definitely denominational character than it had before, upon the foundation. They might, if that doctrine were tenable, have in many other respects altered the conditions of the charity, and might have made it more or less beneficial according to their mere will and pleasure. It was admitted—no other answer could have been given to the question—that if they had changed its character, and

made it denominational in any new or different way, as for instance a Roman Catholic school or a Jews' school, in 1774, they would have been guilty of a gross breach of trust, for which no authority whatever could have been presumed, and which the Court of Chancery of that day would most undoubtedly have corrected. If they could not impress upon it any new denominational character, could they impress upon it any denominational character of a binding nature different from that which it originally had? Could they do that which this clause contemplates,—exclude from the school, if otherwise admissible to it, any persons who were not willing to learn or to be instructed according to the doctrine or formularies of any particular Church, sect, or denomination—not merely exclude them by way of management or discipline from year to year, but as by statute and regulation for ever?

It would be impossible to infer that the original founders intended, under mere ordinary powers of management, to give any such authority to the managers for the time being. The result is, that the case is not brought within this clause of the statute, either by the orders of 1774 or by any other means; and that the petition fails.

Their Lordships will therefore humbly recommend Her Majesty that the Scheme of the Charity Commissioners relating to these foundations should be approved.