Judgment of the Lords of the Judicial Committee of the Privy Council on the Petition of Nash and another against a Scheme framed by the Charity Commissioners in relation to the Colchester Grammar School; delivered 14th May 1898.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

This is a petition of appeal to Her Majesty in Council presented under the 39th section of the Endowed Schools Act 1869. The scheme is one for the administration of the Colchester Grammar School. The petitioners are two in number. They describe themselves as inhabitants and ratepayers of the Borough of Colchester, and as parents of sons attending the school. They allege that they are directly affected by the scheme, and feel aggrieved by it, and by the provisions for the School contained therein, and by the decision of the Charity Commissioners on which the scheme is founded, given on or about the 31st March 1894, that the endowment in question did fall within the provisions of Section 19 of the Endowed Schools Act 1869. They pray that the scheme may be remitted to the Commissioners with such

1625. 100.—5/98. [27.] A

declaration as the nature of the case may require.

For the purpose of deciding this appeal it is not necessary to state in detail the origin or history of the endowment. It was effected by Royal Charters, one of King Henry VIII., and one of Queen Elizabeth, conveying lands to the Corporation of Colchester for the maintenance of a free grammar school and for general town purposes. Power to make statutes was vested in the Bishop of London and the Dean of St. Paul's, who have done so at intervals. The statutes now in operation were made by those dignitaries in the year 1844. There was also a body of trustees for the property of the school established by the Court of Chancery in the year 1698, and filled by appointments from time to time.

Both before and after the passing of the first Endowed Schools Act, there has been discussion with the view of framing a new scheme for the school. Some years ago the Charity Commissioners prepared a draft scheme which was opposed on the ground that it contained provisions which, if the endowment falls within Section 19 of the Act of 1869, it ought not to contain except with the consent of the Governing Body. That raised the question whether the endowment does or does not so fall, and the Commissioners thought it necessary to decide that question.

On the 31st March 1894 the Secretary of the Commissioners addressed a letter to the Town Clerk of Colchester, which so far as it relates to and raises the present question is as follows :—

" I am directed by the Charity Commissioners to state " for the information of the Town Council that owing to their " failure to obtain the consent of the several Governing Bodies " of the above-named endowment to the terms of the com- " promise proposed in the published draft scheme the

"Commissioners have been constrained to determine the "question whether the endowment does or does not fall "within the provisions of Section 19 of the Endowed Schools "Act 1869, and they are of opinion that the endowment does "so fall.

"The consequence of this decision is that apart from "consent the Commissioners are precluded by statute from "introducing into the scheme 'any provision respecting the "'religious instruction or attendance at religious worship of "'the scholars' (other than a provision giving exemption to "day scholars on whose behalf it is claimed from attending "prayer or religious worship or lessons on a religious subject) "'or respecting the religious opinions of the Governing Body or "'Masters.'

"The following clauses of the scheme will therefore be "struck out—viz., Clauses 2, 31, 52, 53 (except so much as "secures the exemption above referred to) and words will be "inserted disclaiming (subject as above-mentioned) all inter-"ference with subsisting legal requirements respecting the "religious instruction or attendance at religious worship of "the scholars or the religious opinions of the Governing Body "or Masters.

* * * * *

"With these amendments the Commissioners propose to "submit the scheme in due course to the Education "Department.

"I am however to point out that Clauses 2, 31, and 53 (in "its entirety) as to which there appears to be no controversy "can be retained if the several Governing Bodies assent to the "scheme with such retention. In order to afford opportunity "for the expression of such assent the Commissioners will "wait for a period of four weeks before submitting the scheme "to the Education Department."

After some further negotiations it seems that provisions either identical with, or to the same substantial effect as, the opposed clauses were agreed to. The Charity Commissioners then issued a new draft to which the several Governing Bodies signified their consent in a formal way. That draft is the scheme now under appeal.

The petitioners contend that as the decision of the Commissioners announced in their letter of March 1894 with reference to Section 19 is expressly made subject to appeal by that section, they have a right to challenge it, and if it is found to be erroneous, to require the scheme to

be remitted to the Commissioners for revision. The Commissioners object that it is improper to enter on the question whether the endowment falls under Section 19, first because the petitioners are not persons directly affected within the meaning of Section 39; and secondly, because, assuming that the judgment of the Commissioners is wrong, the scheme is still within their jurisdiction as to all its provisions, and therefore the petitioners cannot be aggrieved by the decision. Their Lordships think that the petitioners fail to meet these preliminary objections. To a certain extent the two objections are mixed up together, because it cannot be determined who is directly affected without examining the scheme to see what interests it affects. Their Lordships will first deal with the second of the objections.

Though Section 19 is very familiar to all engaged in these discussions, it will be convenient to extract the expressions relevant to the present contention, which so far as their Lordships know is quite a new one.

" If . . . any person . . . directly
" affected by such scheme feels aggrieved by
" the scheme on the ground—

" (1) Of any decision of the Commissioners in
" a matter in which an appeal to Her
" Majesty in Council is given by this Act;
or,

* * * *

" (3) Of the scheme being one which is not
" within the scope of, or in conformity with
" this Act;

" such . . . person . . . may . . . petition Her
" Majesty in Council . . . praying Her Majesty
" to withhold her approval from the whole or
" any part of the scheme."

The petitioners do not any longer contend that they can bring their case within head (3) of the

grounds of appeal; because, as before stated, on either view of the applicability of Section 19, the scheme, having received the consents required by that section, is in conformity with the Act. They are therefore driven to contend that they have a right to appeal from the declared opinion of the Commissioners that Section 19 is applicable, and if they succeed, to have the scheme remitted on the speculation that the Commissioners may alter their minds on points which in either view of Section 19 are within their competence.

It would be very unfortunate if the Act had given an appeal on an abstract matter of this kind, not involving any illegality or irregularity. Certainly their Lordships cannot find any warrant for it in the words of the Act. The person entitled to appeal must be aggrieved, not by the abstract decision, but by the scheme on the ground of the decision; that is, by some practical result of the decision taking effect in the scheme. It is true that Section 19 says that the opinion of the Commissioners is subject to appeal; and so it is, but only "as mentioned in "this Act," that is, as mentioned in Section 39; and the right of appeal there given is an appeal against the scheme and does not arise till the scheme has been approved by the Education Department. Moreover, if the opinion of the Commissioners is overruled, the remedy is to make a declaration to that effect, and to remit the scheme in order that it may be brought into conformity with the declaration (Section 43). But this scheme contains nothing which is not in conformity with the declaration prayed for by the petitioners. The Commissioners and the Education Department might consistently with such a declaration approve of the very scheme now under appeal. Her Majesty in Council cannot properly be asked to pronounce a decision quite barren of legal result.

In point of fact, so far as the scheme deviates from the strict lines to which the Commissioners are confined by Section 19, it is in favour of the views of the petitioners. The only clause which they point to as embodying a grievance to them is Clause 33 which requires the Master, who by the existing statutes of 1844 must be in Holy Orders, shall henceforward be a member of the Church of England. But it is within the discretion of the Commissioners to make that less stringent provision with the consent of the Governing Bodies, which as before mentioned has been given.

The result is that in the judgment of their Lordships the petitioners are not aggrieved by any part of the scheme which rests on the disputed decision of the Commissioners, and that they cannot, even if they had a *locus standi* for any appeal, ask for a review of that decision. Whether or no they have such a *locus standi* is the subject of the first preliminary objection, and is a question of considerable importance in the working of these Acts.

The right of appeal on legal grounds is carefully limited by Section 39 as regards both the subjects of appeal and the persons who are entitled to appeal. The petitioners have no right unless they are directly affected by the scheme. They do not show how they are directly affected except by describing themselves in the terms above stated. That description is not supported by evidence, but it may be taken for the purpose of this argument as being accurate. The school is for those who belong to Colchester and in a sense all who belong to the place have an interest in and are affected by a scheme for such an important institution as its school. It is manifest that such an interest as that is not within the meaning of the term "directly affected." That term points rather to a personal and individual interest as

distinct from the general interest which appertains to the whole community among which the endowment works.

But it is said that they have boys who are at the school and that they are directly affected through these boys. Assuming that what affects the boy affects the parent, do these boys fall within the class of persons mentioned in Section 39 as directly affected by this scheme? The scheme does not turn any boy out of the school nor remove the school away from him; nor in any way deprive him of the benefits of the education he is receiving. It is not alleged that the boys are on the foundation of the school; they appear to be ordinary pupils attending it. But even if they were on the foundation, and if they were interfered with, what right of appeal would they have? Section 13 of the Act, which deals with vested interests, provides only for the vested interests of boys who were on the foundation when the Act passed, *i.e.* on the 2nd August 1869. Section 39 gives a right of appeal to persons whose vested interest is not treated as required by the Act. It is clear that even boys on the foundation, if they have come upon it later than the year 1869, have no right of appeal given to them on the ground that their own interests are affected. It would be extravagant to hold that it was intended to give them a right of appeal against the scheme on other grounds because they are persons directly affected, when they cannot appeal in their own personal interest. Yet their Lordships are asked to affirm a more extravagant proposition, viz., that the parent of every boy who happens to be at school when the scheme is approved has a right of appeal against any appealable matter which is not in conformity with his views.

In the *Hemsworth School* case, 12 App. Ca. p. 444, the scheme complained of removed the

site of the school from Hemsworth to Barnsley. A petition of appeal was presented by inhabitants of Hemsworth whose children were at the school. It was held that inhabitants as such had no *locus standi* for appealing; they could only appeal in respect of some vested interests of their boys, and the vested interests saved by the Act had been spent many years before. This decision accords in principle with the previous decisions in the cases of *Haydon Bridge School*, 3 App. Ca. p. 872, and *Sutton Coldfield School*, 7 App. Ca. p. 91, and it is even more closely applicable to the present case. Indeed so far as the facts of the present case constitute any distinction, they are less favourable to the right of appeal than those of the Hemsworth case, for the removal of the school did affect the interests of the Hemsworth boys in a material sense, only it was not the sense contemplated by the Act in Sections 13 and 39. The argument perhaps was not presented as it has now been presented for the petitioners, but the decision clearly governs the present case.

The petitioners have no such right as they claim. They may at due times make representations to the Education Department or to the Houses of Parliament, but they cannot appeal to the Queen in Council. The Commissioners ask for costs, but costs have never been given to them in such cases, and their Lordships do not see any reason to depart from the usual course. They will humbly advise Her Majesty to dismiss the petition.