DENOMINATIONAL TEACHING
AND
THE EDUCATION ACT OF 1902

THE MAINTENANCE OF DENOMINATIONAL TEACHING

A NOTE UPON SECTION 7 (1) OF THE EDUCATION ACT, 1902

BY

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PREFACE

OCCASIONAL opportunities in a quiet life have led me to devote the best attention that I have at my command to the Education Act, 1902, and the two important series of Statutes—the Education Acts and the Charitable Trusts Acts —with which it is connected. I commenced with an "open mind," without any preconception, except a vague opinion that probably the Act did not deserve either every word of Mr. Balfour's praise or every word of Dr. Clifford's condemnation. It was not long, however, before I found myself compelled to conclude that in several cardinal particulars the much-debated legislation of three years ago had been widely misunderstood, and I so far gave reins to my ambition as to form the purpose of writing a short series of notes setting forth what I conceived to be the true meaning and legal effect of the new statute. I had no political object in view—my interest was that of the interpreter, not of the partisan—and I had no intention of appearing on either side of the confused controversy that

accompanied the passing of the Bill and attended upon the administration of the Act. I knew, of course, that some of the questions I proposed to discuss had occasioned perduring displays of rhetoric that could not always be called moderate or helpful, but I hoped to keep myself as free from party prepossessions as from partisan irrelevance. I had, in fact, no more extravagant wish than to do some small thing that might, if Fortune favoured it, lift the discussion of those questions out of the tumult of the hustings into that serene air of academic inquiry where thought is completely practical and reasoning unimpassioned—save by love of truth.

I did not work methodically through the Act, but followed the promptings of vagrant interest and the invitation of chance opportunities. Consequently, it was some time before I found myself face to face with Section 7 and with the primary question which that part of the Act suggests. I knew the ordinary interpretation of the Section, but my own inquiries led to a result so widely different, and which seemed, if true, to be so important, that I thought it best to lose no time in submitting my conclusion to the judgment of "those who know"—whose information might supplement my knowledge or correct my inferences.

This isolated note is, therefore, published in

advance of the others. I dare not hope to convince every one—indeed, it may be that the only conversion wrought will be in my own opinions, but, in the interests of clear thought and sound administration, I beg that those who read it and feel constrained to express dissent will do me this one favour—will point out *precisely* where the negative argument breaks down.

The result that seems so urgently to invite discussion is simply this:—

Local Education Authorities are not empowered by the Act of 1902 to "maintain" religious instruction in non-provided schools.

If this be true, several interesting conclusions follow.

(1) Expenditure by a Local Education Authority, for the maintenance of religious instruction in non-provided schools, is illegal expenditure.

(2) The maintenance of religious instruction in non-provided schools is not one of the duties that can be enforced by writ of mandamus under Section 16 of the Education Act, 1902.

(3) Refusal by a Local Education Authority to "maintain" religious instruction in a non-provided school would not be a "default" within the meaning of the Act of 1904.

(4) A Local Education Authority cannot infer

from Section 7 (1) (*b*) of the Act power to inspect the religious instruction in non-provided schools.

(5) It is not lawful for a Local Education Authority

(*a*) to pay the teachers in non-provided schools for their services (if any) in or towards the giving of religious instruction in those schools, or

(*b*) to prohibit the attendance of any of those teachers at Church whenever their children are lawfully at Church.

(6) Section 13 (1) of the Act of 1902 will not transfer to a Local Education Authority any charitable monies applicable in or towards religious instruction.

(7) Neither "Rome" or any other religious body is—in Dr. Clifford's sense—"on the rates."

(8) As the "Welsh Revolt" is primarily against the alleged obligation to spend "public money" in the maintenance of an unpopular creed, there may now—unless the "revolt" express a permanently intolerant intention—be hopeful prospect of a better peace in Wales than Mr. Lloyd George dreams of.

(9) As the Act of 1902 is, thus far, in undesigned and unconfirming coincidence with the political ideals that underlie "Passive Resistance," there should no longer be any occasion for that unedifying vindication of "law and order" which, by embittering our religious differences,

has widened the intolerable breach between those who ought to be at one.

(10) If, under Section (7) 1 (*a*) of the Act of 1902, Local Education Authorities can fix the hours for secular instruction in non-provided schools, *that* is the one remaining point of dangerous contact between those Authorities and denominational teaching.[1]

One word more, I am a Conservative, and differ as widely as possible from the practical policy of Mr. Lloyd George and from the political philosophy of Dr. Clifford. In Utopia these particulars would be irrelevant to the note which these lines preface, but we are not in Utopia, and, in the world wherein we have actually to live, party allegiance so often depraves thought —even upon matters which are not what is ordinarily called political,—that I assume permission to mention them, lest silence should invite the conjecture that I have been illogically helped to my conclusions by sympathy with administrative injustice, or by symbolism with those scrupulous consciences that prove their loyalty to a perversion of the Gospel by eloquently submitting to the gratifying pleasures of a trivial martyrdom.

Yet another word as to the method of

[1] Fortunately, however, another interpretation of Section 71 (*a*) seems to be not improbable. *See* Appendix.

interpretation I have followed. I have presupposed

(1) that the primary provisions of a Statute are ordinarily to be construed according to their plain grammatical sense;

(2) that accidental expressions in subordinate sections cannot affect the meaning of primary sections, if that meaning be clear, although they may help us to resolve a doubt;

(3) that the intention of individual legislators is not the same thing as the "intention of Parliament," and can never override the plain utterance of Parliament;

(4) that the general structure of an Act is often a valuable guide to the meaning of a particular Section;

(5) that no Act which affects a complex legal and administrative system can safely be interpreted as though it stood alone;

(6) that, ordinarily, we may not infer an important change from words incidental to another purpose;

(7) that a Statute ordinarily means no more than it says, and accomplishes no more than the work it defines.

These presuppositions, however, seem necessarily constituent in the very basis of scientific interpretation.

THE MAINTENANCE OF DENOMINATIONAL TEACHING

A NOTE UPON SECTION 7 (1) OF THE EDUCATION ACT, 1902

Does the Education Act of 1902 *enable or compel a Local Education Authority to "maintain" religious instruction in a non-provided public elementary school?*

The opening words of Section 7 direct that "the local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers; . . ."

What is the effect of this enactment? Does it place "Rome" on the rates? Does it charge the new Local Authorities with the cost of denominational teaching?

These questions have usually been answered in

the affirmative—sometimes with what seems to be authority; but, before examining the grounds of this reply, I will set forth the arguments that point towards a contradictory conclusion.

A. The negative answer rests ultimately upon the contention that the words "public elementary schools" in Section 7 not only indicate the schools that are to be maintained, but also define the range of "maintenance."

a. According to the still subsisting definition in Section 7 of the Elementary Education Act, 1870, a public elementary school is an elementary school "which is conducted in accordance with the following regulations . . . namely,"

"(1) It shall not be required, as a condition of any child being admitted into or continuing in the school, that he shall attend or abstain from attending any Sunday school, or any place of religious worship, or that he shall attend any religious observance or any instruction in religious subjects in the school or elsewhere, from which observance or instruction he may be withdrawn by his parent, or that he shall, if withdrawn by his parent, attend the school on any day exclusively set apart for religious observance by the religious body to which his parent belongs:

"(2) The time or times during which any religious observance is practised or instruction in religious subjects is given at any meeting of the school shall be either at the beginning or at the end or at the beginning and the end of such meeting, and shall be inserted in a time-table to be approved by the Education Department, and to be kept permanently and

conspicuously affixed in every schoolroom; and any scholar may be withdrawn by his parent from such observance or instruction without forfeiting any of the other benefits of the school:

"(3) The school shall be open at all times to the inspection of any of Her Majesty's inspectors, so, however, that it shall be no part of the duties of such inspector to inquire into any instruction in religious subjects given at such school, or to examine any scholar therein in religious knowledge or in any religious subject or book:

"(4) The school shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant." (Education Act, 1870, Section 7.)

Therefore, under Section 7 of the Act of 1902, every elementary school which is "conducted in accordance with" these regulations is entitled to "maintenance," but, obviously, only because it is so conducted, and, one may argue, only *as so conducted.* The Statute uses the words "regulations" and "conditions," but, if—for the sake of simplicity—we use the one word "conditions" to cover also "regulations," we may say that, according to the Act of 1870, a public elementary school is a school which fulfils certain prescribed conditions, and that, under the Act of 1902, such a school is entitled to "maintenance," but, we may argue, it is entitled to "maintenance" only because it fulfils those conditions, and *only in fulfilling those conditions.* In other words, it is

the public elementary school *as such*, and *only as such*, that the Local Education Authority is directed to maintain. This does not mean that the Authority cannot lawfully maintain a school which, besides conforming to the regulations which are normative for public elementary schools, also does something more, but only that the "something more" in such a school cannot lawfully be "maintained" by the Authority. An Act which directs a Local Education Authority to maintain a public elementary school will, of course, warrant the maintenance of everything which, as an essential, is constituent in, or contributory to, either the being or character of the school as a public elementary school, but the warrant will carry no farther. It will not cover the maintenance of anything which is not, in one or other of these ways, essential.

The public elementary school is a certain complexus of regulated and, as we shall presently see, defined activities.[1] If Parliament direct that

[1] The appelative "public elementary school" is an indication of *status*, not of *nature*. When a Church school becomes a public elementary school, we have no ground for assuming that all its functions are, henceforth, functions of a public elementary school, or that it has no other functions than those of a public elementary school.

The word "barrister" is also a mark of status, but a man who is a barrister is, and must inevitably be, more than a barrister. He may be husband or brother, he is probably an elector, and certainly he is an ethical personality, and, as such, has a vocation which not even the most praiseworthy zeal in the courts can entirely fulfil.

it be "maintained" by the Local Authority, that Authority is authorised to maintain that complexus, but *nothing more*, unless the "something more" be contributory, as an essential, to the being or character of the complexus—a *conditio sine quâ non.*

Now, it is quite clear that, prior to the Act of 1902, religious instruction was not one of the *necessary* services of a public elementary school. Indeed, in one large class of schools—the Board Schools, all of which were public elementary schools—it might lawfully be omitted altogether.[1]

It is certain that, until the Act of 1902 came into force, a non-provided school might give only secular instruction, and yet fully satisfy the parliamentary definition of a public elementary school. It may be said that most non-provided schools are subject to trusts which require religious instruction to be given. True, but nothing in the regulations that defined the character of a public elementary school required those trusts to be executed.

If a school subject to such trusts provided no religious instruction, there would, indeed, have

[1] The defining words in the Act of 1870 lay down certain regulations which must be observed in a school that is a public elementary school if religious instruction be therein given, but do not make the giving of religious instruction constituent in the character of a school as a public elementary school, nor did anything in the Minutes of the Education Department make that instruction obligatory.

been a breach of trust, but that breach would not have affected the standing of the school as a public elementary school, and the remedy and the penalty (if any) had to be sought under the Charitable Trusts Acts, not under the Education Acts.

The inference seems plain and inevitable. Religious instruction was not among the ends which Parliament proposed to compass by means of public elementary schools. Had it been, Parliament would certainly have made the proper execution of the religious trusts affecting a denominational school constituent in the character of that school as a public elementary school.

Nor is it sufficient to reply that, as the Charitable Trusts Acts and the practice of the Court already adequately safeguarded the execution of those trusts, there was no need to extend the encouragement of a parliamentary grant to this part of school work. This *may* explain why religious instruction is not grant-earning. It does *not* explain why the religious instruction given in a school which *is* a public elementary school is not constituent in the character of that school *as* a public elementary school.

Had religious instruction been among the ends which Parliament hoped to achieve by means of public elementary schools, it would certainly have made the execution of the "religious-educational" trusts impressed upon a denominational school

"constituent in the character of that school as a public elementary school," even though it had still proceeded to enact, concerning the annual parliamentary grant—

"Such grant shall not be made in respect of any instruction in religious subjects" (Elementary Education Act, 1870, Section 97).

From the indubitable fact that Parliament did not do this, we may, and indeed must, infer that, according to the definition of 1870 (Sections 7 and 97 Elementary Education Act, 1870), religious instruction was not one of the ends of a public elementary school.

β The Act of 1902, however, makes the receipt of a parliamentary grant dependent upon conditions not previously imposed.

"One of the conditions required to be fulfilled by an elementary school in order to obtain a parliamentary grant shall be that it is maintained under and complies with the provisions of this section" (Education Act, 1902, Section 7 (4)).

Now among the provisions of Section 7 is the following:—

"(6) Religious instruction given in a public elementary school not provided by the local education authority shall, as regards its character, be in accordance with the provisions (if any) of the trust-deed relating thereto, and shall be under the control of the managers."

Does this affect the administrative definition of a public elementary school?[1]

I. Clearly, the new condition of 1902 does not directly and in virtue of its own words alter the definition, and we could not *a priori* hold him unreasonable who would argue that the definition of 1870 subsists until Parliament formulates a new definition, or enacts something that is manifestly intended to change the definition, or that necessarily infers a change in it.

Section 7 (4) of the Act, 1870, provides, as we have already seen, that a public elementary school

> "shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant."

Those conditions, in their most general form, are set out in Section 97 of the same Act—

> "97. The conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant shall be those contained in the minutes of the Education Department in force for the time being and shall amongst other matters provide that . . .
>
> "(1) Such grant shall not be made in respect of any instruction in religious subjects :
>
> . . . . . .
>
> but such conditions shall not require that the school shall be in connection with a religious

[1] By "administrative definition," I mean the whole body of particulars—including the articles of the Code—that, at a given moment, constitute and define our conception of a public elementary school.

denomination, or that religious instruction shall be given in the school, and shall not give any preference or advantage to any school on the ground that it is or is not provided by a school board.

. . . . . .

"Provided that no such minute of the Education Department

. . . . . .

shall be deemed to be in force until it has lain for not less than one month on the table of both Houses of Parliament."

These two sections taken together constitute the 1870 definition of a public elementary school. Does Section 7 (4) of the recent Act change that definition?

The affirmative answer seems an easy inference from the legislation of 1870; but it has no adequate statutory ground, and, if adopted, would lead to at least one result contrary to the clear intention of Parliament.

II. A statutory definition perdures until it be ended or mended by Parliament, and the intention of Parliament to end or mend is ordinarily expressed in some enactment which either

(*a*) formulates a new definition, or
(*b*) makes or infers some alteration in, or addition to, the subsisting definition.

Less frequently

(*c*) we read an amending meaning into an obscure enactment by gathering from other enactments a correspondent intention to amend, or

(*d*) extend the grammatical meaning of an enactment by constructively interpreting it as amending.

Now, it is clear that the Act of 1902 does not formulate a new definition of a public elementary school. Nor does Section 7 (4) of that Act directly and in virtue of its own words alter the definition. Its immediate effect is only to add certain new particulars to the conditions that must "be fulfilled by an elementary school in order to obtain an annual parliamentary grant."

But does it infer an alteration?

A public elementary school must "be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant" (Elementary Education Act, 1870, Section 7 (4)).

Does this compel us to infer that Section 7 (4) of the later Act—which, in so many words, requires a new condition to be fulfilled,—now forms part of the administrative definition of a public elementary school? Must we perforce conclude that a school, in order to be recognised as a public elementary school, must now fulfil this new condition—must be maintained under and comply with the provisions enacted by Section 7 of the Act of 1902?

Let us look once more at the primary definition of 1870:—

"7. Every elementary school which is conducted in accordance with the following regulations shall be a

public elementary school within the meaning of this Act. . . .

. . . . . .

> "(4) The school shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant."

If we substitute "conditions from time to time required" for "conditions required," the suggested inference would, I think, be clear and necessary.

But have we any warrant for making the substitution? We cannot pretend that the two phrases are equivalent, or that the absence of reference to the future in the actual text of the Statute is, *primâ facie*, insignificant.

The plain, grammatical sense of this Sub-section does not *compel* us to infer that conditions later than those of 1870 *necessarily* furnish new particulars to the administrative definition of a public elementary school. We may, indeed, by a study of some later condition, be led to believe that it does, in fact, furnish new particulars to the definition; but, if we reach this conclusion, it is not by inference from Sub-section 4, but from the nature of the given condition and from its context,—from its context, that is, as determined, not merely by its place in the statute which enacts it, but by its place in the general body of the law. We then say either that

Sub-section 4 is patient of the change, or that it has been constructively amended; but the change itself we infer, not from Sub-section 4, but from the meaning and effect of the new legislation.

Section 7 (4) of the Act of 1870 enacts that a public elementary school "shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant.

In Section 97 of the same Act we have those conditions stated in their most general form.

"The conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant shall be those contained in the minutes of the Education Department in force for the time being, . . . "

It seems reasonable to hold that Section 97 is explanatory of Section 7 (4)—to read it, indeed, as continuing the definition commenced in Section 7. That section speaks of "conditions required to be fulfilled," and Section 97 tells us what those conditions are—says that the "conditions required to be fulfilled" shall be those that it immediately proceeds to indicate.

It is clear, then, that we have in Section 97 the conditions referred to in Section 7 (4).

Look yet again at the wording of Section 97. "Minutes of the Education Department in force for the time being." These words make Section

97 not only definitive, but also regulative. Not only does it express the then present mind of Parliament as to the conditions then to be fulfilled by the then existing schools: it legislates also for the future. It is, as its grammatical structure plainly shows, a general regulation —general, not only for all public elementary schools, but for all present and future time. Indeed, it is *only* a general regulation, and the administrators of thirty years ago could infer its then present effect only from words that covered the future as well. It contains precisely that provision for future change which is absent from Section 7 (4), but the provision is made by the very same words that regulate the present. The Section is temporally universal over everything but the past, and legislates for a particular time— be that time present or future—only by one general rule.

Just, then, as Section 7 (4) of the 1870 Act is the primary definition of a public elementary school, so Section 97 is the primary determinant of the conditions which a public elementary school must fulfil "in order to obtain an annual parliamentary grant." They are primary, not only in time, but also in law.

It seems, then, perfectly reasonable to read Sections 7 and 97 as constituting one definition— the 1870 definition of a public elementary school. In the text of the Act they are, it is true, widely

separate, but this results from the structure of the Act, and probably subserves nothing more important than now a draughtsman's and now an administrator's convenience.

The definition of a public elementary school given in Section 7 is, clearly, an incomplete definition, for its last sub-section leaves unanswered a question of the first importance. It says that a public elementary school "shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant." But what are those conditions? Until we know them we can do nothing. Section 7 is ineffectual unless and until supplemented by Section 97.[1] It is difficult to see how this relation between the two sections could be more accurately expressed than by describing them as co-efficient in one statutory definition.

Now, in Section 97, Parliament legislates "by reference." The conditions it thereby prescribes are "those contained in the minutes of the Education Department for the time being." In this way it makes provision for future change. The Minutes referred to constitute what has been ordinarily called "The Day-School Code." But that Code is not a finally-completed *corpus* of regulations,—any permissible change can at any

[1] And, of course, unless and until Section 7 be thus supplemented, other parts of the Act also must remain ineffectual.

time be brought about by means of the Minute-making power.[1]

The omission of such a provision for the future from Section 7 (4) now becomes clearly intelligible. Parliament did not enact a rigid definition; it provided for change, but it made the Minutes of the Education Department the instruments of change.

The omission also becomes significant. According to Section 7 (4), not every change in the "conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant" affects the administrative definition of a public elementary school, but only changes made by Minute. It may well be that other changes—statutory changes—also affect the definition; but, if they do, the result follows, not by inference

[1] Suppose Parliament to enact a new condition, and that to be afterwards embodied in a Minute. It will then be one of the conditions "contained in the Minutes of the Education Department in force for the time being" (Section 97). Will this new condition, when thus embodied, add new particulars to the administrative definition of a public elementary school? Apparently not. The last clause of Section 97 provides that

"no such Minute of the Education Department . . . shall be deemed to be in force until it has lain for not less than one month on the table of both Houses of Parliament."

Evidently, when Parliament made provision for a change in the definition of a public elementary school by departmental Minute, it had in view only Minutes of a merely departmental authority, not those that repeat its own enactments. Therefore, Article 77 of the Code—which virtually repeats Section 7 (4) of the Act of 1902—does *not* add new particulars to the administrative definition of a public elementary school.

from Section 7 (4), but by inference, in each case, from the principiant change.

We have already seen that Section 7 (4) of the Education Act, 1902, does not itself directly add new particulars to the administrative definition of a public elementary school. We now conclude that the numerically correspondent section of the Elementary Education Act, 1870, affords no ground for inferring such an addition from the new condition of 1902.

III. But can we discover any other ground for this inference, or can we discover any sufficient and compelling reason for a constructive extension of the 1902 enactment?

(1) We must, in the first place, call attention to an important distinction.

An inference of change grounded upon Section 7 (4) of the Act of 1870 would, in virtue of its ground in the primary definition of a public elementary school, be immediately legislative—would establish the change—unless we could somewhere discover clear evidence that the change, if made, would be contrary to the legislating intention of Parliament. But an inference of change grounded elsewhere would, ordinarily, not be authoritative unless *supported* by a manifest or reasonably presumed intention. An amendment of a primary enactment may not be inferred from a secondary enactment or from an incidental expression, unless the inference be thus supported.

Now, in the present case, no such support exists. On the contrary, Parliament has given a clear indication that it did *not* intend the new condition of 1902 (Section 7 (4), Education Act, 1902) to infer a change in the definition of a public elementary school.

(2) Section 7 of the Education Act of 1902 consists of seven sub-sections.

The first commences as follows:—

"(1) The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers; but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with:"

Then follow certain clauses—*a*, *b*, *c*, *d*, *e*—in which these conditions and provisions are set forth.[1]

Sub-sections 2, 5, 6, and 7 relate, in various ways, to the management of non-provided schools, and to the duties and powers therein of the Managers and the Local Education Authorities.

[1] We have not even the slightest authority for interpreting "the following conditions and provisions" in Sub-section 1 as including the conditions and provisions in Sub-sections 2–7. In their grammatical sense—and this sense is always binding, unless sufficient reason be shown to the contrary—these words refer only to the conditions and provisions in Sub-clauses *a–e*, and the Act nowhere sanctions another interpretation.

Sub-section 4, as we have already seen, enacts that—

"(4) One of the conditions required to be fulfilled by an elementary school in order to obtain a parliamentary grant shall be that it is maintained under and complies with the provisions of this section."

Obviously, if a non-provided public elementary school cease to comply with the conditions and provisions contained in the Sub-clauses (*a*, *b*, *c*, *d*, *e*) of Sub-section 1, it will lose its right to maintenance by the Local Authority, and then—because no longer maintained under and compliant with the provisions of Section 7—will also lose its grant.

Failure to comply with the provisions of Sub-sections 2, 5, 6, 7, entails, however, only loss of grant, and, before our argument be ended, we shall see that there is an entirely reasonable and valid ground for this distinction.

But, if Sub-section 4 add new particulars to the administrative definition of a public elementary school, then a non-provided public elementary school that fails to comply with the provisions of Sub-sections 2, 5, 6, 7, will cease to be a public elementary school, and suffer, not only loss of grant, but loss of "maintenance."

This, however, would abolish the distinction between "offences" under Sub-section 1 and "offences" under the later Sub-sections. Now, as this distinction is clearly made by Parliament,

we presume—and are, we think, methodologically bound to presume—that it expresses a correspondent legislative intention. But an inference that would import, through Sub-section 4, new particulars into the administrative definition of a public elementary school would, as we have seen, lead to a result inconsistent with that intention. As, however, that result follows necessarily, if Sub-section 4 be construed as adding new particulars to the administrative definition of a public elementary school, we conclude that Parliament—whose necessarily presumed intention is inconsistent with that result—did *not* intend Sub-section 4 to be so construed.

No inference can override the legislative intention of Parliament. Therefore, the suggested inference, from secondary grounds,[1] that Sub-section 4 alters the administrative definition of a public elementary school, if logically possible, were legally inadmissible.[2]

[1] That is, from secondary enactments and incidental provisions and expressions. (*See* p. 24.)

[2] We have seen that Section 7 (4) of the 1870 Act does not *compel* us to infer that the numerically correspondent section of the Act of 1902 enters into the administrative definition of a public elementary school. But suppose that Section contained the words "conditions from time to time required" instead of "conditions required," how should we then interpret Section 7 of the Act of 1902? Precisely as we now interpret it.

There would still be the clear distinction between the "offences" under Section 7 (1) and those under other parts of that Section, and then, as now, we would be compelled to presume from this distinction a correspondent legislating intention of Parliament.

This intention, being later than that of 1870, would override it,

(3) *a.* But may we not interpret Section 7 (4) of the Act of 1902 constructively? Undoubtedly we may, if sufficient reason for such an interpretation be shown.

A constructive interpretation that would make that Section infer new particulars into the administrative definition of a public elementary school would, however, be an *extensive* interpretation,—it would give to the words of the Statute a meaning wider than that they grammatically possess.

Such interpretation should never be used in judicial or administrative work unless the facts be compelling—unless, for example, it be necessary in order

(1) To make an enactment intelligible or practicable;
(2) To make plain a "legislative intention of Parliament" which has otherwise been rightly presumed;
(3) To harmonise enactments which, without it, were so discordant as to be abortive; or
(4) To avoid an inadmissible conclusion.

It may, perhaps, be argued that the last of these grounds would abundantly justify a constructive extension of Section 7 (4).

and would so far amend its resultant legislation as to prevent the inference of Section 7 (4) of the Act of 1902 into the administrative definition of a public elementary school.

The altered Section 7 (4) of the Act of 1870 would make this inference logically necessary; but the inference would, as we have seen, be inconsistent with the legislating intention of 1902. Therefore, although logically necessary, it would be legally inadmissible.

The argument would run as follows:—

Before the recent legislation the two categories "public elementary school" and "school in receipt of parliamentary grant" were co-terminous and co-incident. All public elementary schools were participant in that grant, and no grant was made to any school not a public elementary school.

If, however, the administrative definition of a public elementary school be not altered by Section 7 (4) of the Act of 1902, there may now be public elementary schools which are not entitled to a grant. There is, however, nothing in the Education Acts—outside the Sub-section we are discussing—that suggests the existence of the new category, nor could it have concrete existence without entailing at least one highly-inconvenient result.

A non-provided public elementary school might break all or any of Sub-sections 2, 5, 6, and 7—thereby forfeiting its claim to a parliamentary grant—and yet still remain a public elementary school.

The Local Authority would, therefore, be bound to maintain it—for the Act does not make the continuance of maintenance dependent upon compliance with Sub-sections 2–7 — and would have to make good, out of its general funds, the deficit caused by loss of grant.

This result would be so inconvenient that

the interpretation which leads to it—the interpretation, that is, which restrains Sub-section 4 from altering the administrative definition of a public elementary school—is clearly inadmissible.

If, however, we constructively extend the meaning of Sub-section 4, so as to make Sub-sections 2–7 contributory to that definition, this result would be prevented. A non-provided public elementary school that did not comply with those Sub-sections would not only lose its grant—it would cease to be a public elementary school, and, therefore, could no longer be maintained by the Local Authority. If maintained at all, it would be by other than public monies.

The cardinal point in this argument is at the words "so inconvenient." Undoubtedly, if the inconvenience were great—if the Act or parts of the Act were made unworkable, or if great injustice were done—it would urgently invite a constructive widening of Sub-section 4, for we cannot suppose an intention in Parliament to enact something unworkable, or to do wrong.

But would there, in fact, be "inconvenience"?

In practical administration there would probably be none of any relevantly significant importance.

The category, it is true, looks unfamiliar, but its statutory grounds are clear, and the practical differences which it connotes—

(1) the difference between "offences" under

Sub-section 1 and those under Sub-sections 2–7.

(2) the difference between Sub-section 1 and the other Sub-sections, in their relation to the school as a teaching institution,

are, as we shall presently see, quite reasonable. It is, moreover, so far from being in conflict with "the principles of 1902," that, as we shall also presently see, it illustrates and defines one of the fundamental principles of the Act—the principle, that is, of public control over public elementary education.

(*b*) The primary object of Part III. of the Act is not, as some impassioned sophists would have us think, to relieve churchmen's pockets, but to give the new Local Authorities effective responsibility for and control over public elementary education. This responsibility and this control are given, in general terms, by Section 5.

> "The local education authority shall throughout their area have the powers and duties of a school board and school attendance committee under the Elementary Education Acts, 1870 to 1900, and any other Acts, including local Acts, and shall also be responsible for and have the control of all secular instruction in public elementary schools not provided by them, and school boards and school attendance committees shall be abolished."

Section 7 (1) makes the gift effectively operative in non-provided schools.

"The local education authority shall maintain and keep efficient all public elementary schools within

their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers; but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with:—

"(*a*) The managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds, and if the managers fail to carry out any such direction the local education authority shall, in addition to their other powers, have the power themselves to carry out the direction in question as if they were the managers; but no direction given under this provision shall be such as to interfere with reasonable facilities for religious instruction during school hours;

"(*b*) The local education authority shall have power to inspect the school:

"(*c*) The consent of the local education authority shall be required to the appointment of teachers, but the consent shall not be withheld except on educational grounds; and the consent of the authority shall also be required to the dismissal of a teacher unless the dismissal be on grounds connected with the giving of religious instruction in the school; . . ."

This enactment makes the new authorities more than school boards and more than school attendance committees, for it gives them powers over non-provided schools which the earlier authorities did not possess.[1]

[1] For example, a School Board had no power either to control the secular instruction or to organise the teaching staff in a denominational school.

The dualism of our educational machinery is,[1] however, still maintained. Voluntary schools are not transferred *en masse* to the new Authorities. They still retain a distinctive character as "non-provided," a separate *ratio essendi*, and independent rights. But the Local Education Authorities are given certain powers over them, and certain rights in them. Those powers and rights are conferred and defined by Section 7 (1) of the Education Act, 1902, and, because non-provided schools, even in their character as public elementary schools, pass only in part into the hands of the Local Authorities, that clause is necessarily distributive—it divides the powers and duties of maintenance and management between the Local Education Authorities and the Managers. It requires the Local Education Authorities to maintain non-provided public elementary schools, but makes the continuance of maintenance dependent upon the acceptance by Managers of this distribution of powers and duties, and upon the proper fulfilment by them of the obligations that this distribution leaves with them. If, in any individual case, Managers do not discharge their own duties properly, and do not permit the Local Education Authority to exercise the powers expressly or by necessary inference conferred

[1] "Dualism" because, since 1870, our national machinery for elementary education has been constituted in part by "provided" schools, and in part by "non-provided" schools.

upon it, in that case the right to maintenance ceases.

In principle, this provision seems to be entirely reasonable. Whether the distribution actually effected by the clause be perfectly just is another question, and one that does not, here and now, concern us. It will be answered variously according to the preconceptions and policies of men—sometimes according to their various convictions—but not even convictions upon such a matter should be allowed to affect either the interpretation or the administration of the clause, for interpretation and administration are ethical arts, and not even a misinformed conscience can rightfully corrupt them.

Now, the duties and powers distributed by Section 7 (1) are those that are essentially relevant to the existence of a school as a public elementary school. In the later Sub-sections we have other matters regulated which, although important, are not thus essential.

Section 7 (1) charges a Local Education Authority with the duty of efficiently maintaining all necessary non-provided public elementary schools within its area.

It gives that authority

(1) The right of inspection,

(2) full control of all expenditure, "other than expenditure for which . . . provision is to be made" by Managers,

and (3) effective control over

(*a*) the secular instruction,

(*b*) "the number and educational qualifications of the teachers to be employed for such instructions,"

and (*c*) the appointment and dismissal of teachers.

It secures to that Authority use of the school premises, including "the teacher's dwelling-house (if any)," and divides the cost of keeping the school buildings efficient between the Managers and the Local Authority. The things herein dealt with—buildings, teachers, secular instruction—are the essential constituents of a public elementary school: the powers and duties hereby distributed are those essential to the continuance of such a school as a teaching institution.

Turn now to the other Sub-sections:—

"(2) The managers of a school maintained but not provided by the local education authority, in respect of the use by them of the school furniture out of school hours, and the local education authority, in respect of the use by them of any room in the schoolhouse out of school hours, shall be liable to make good any damage caused to the furniture or the room, as the case may be, by reason of that use (other than damage arising from fair wear and tear), and the managers shall take care that, after the use of a room in the schoolhouse by them, the room is left in a proper condition for school purposes.

"(3) If any question arises under this section between the local education authority and the managers of a school not provided by the authority, that question shall be determined by the Board of Education.

"(4) One of the conditions required to be fulfilled by an elementary school in order to obtain a parliamentary grant shall be that it is maintained under and complies with the provisions of this section.

"(5) In public elementary schools maintained but not provided by the local education authority, assistant teachers and pupil teachers may be appointed, if it is thought fit, without reference to religious creed and denomination, and, in any case in which there are more candidates for the post of pupil teacher than there are places to be filled, the appointment shall be made by the local education authority, and they shall determine the respective qualifications of the candidates by examination or otherwise.

"(6) Religious instruction given in a public elementary school not provided by the local education authority shall, as regards its character, be in accordance with the provisions (if any) of the trust deed relating thereto, and shall be under the control of the managers: Provided that nothing in this subsection shall affect any provision in a trust deed for reference to the bishop or superior ecclesiastical or other denominational authority so far as such provision gives to the bishop or authority the power of deciding whether the character of the religious instruction is or is not in accordance with the provisions of the trust deed.

"(7) The managers of a school maintained but not provided by the local education authority shall have all powers of management required for the purpose of carrying out this Act, and shall (subject to the powers of the local education authority under this section) have the exclusive power of appointing and dismissing teachers."

Only three of these—5, 6, and 7—are, directly or indirectly, incident upon the school itself—upon the school as a teaching institution.

Section 7 (6) relates only to religious instruction, and this, as we have seen, does not form part of the constitutive work of a public elementary school.

The first part of Section 7 (5) is permissive, and cannot be broken. The latter part does not affect either the general organisation or the work of the school, or the control of that organisation and work. The function it regulates is not a function of the school. The power it confers is exercised, not within the school, but outside the school, over persons who, as candidates, are also outside the school. An offending school, if efficient as a public elementary school before its offence, would be no less efficient afterwards. Why, then, should it not be maintained by the Local Authority?

It may be said that, although the function regulated by the latter part of Section 7 (5) is not a function of the school, it is a function which, in its exercise, is constitutive of the school, no less than the powers and functions of appointment regulated by Section 7 (1). We reply—

(1) that the case provided for by this part of Section 7 (5) is one of small importance, and one, moreover, that in practical administration would not be frequent;

(2) that, even if this provision were not complied with, the Local Authority could still, under Section 7 (1), give directions as to the number and educational qualifications of the pupil-teachers to be employed in

the school, and could refuse consent on educational grounds to any particular appointment;

(3) that the Local Education Authority could refuse to pay the salary of any teacher improperly appointed, or to recognise him as a member of the staff, whether the impropriety resulted from an offence under Sub-section 1 or Sub-section 5;

(4) that an appointment which disobeyed a direction under Section 7 (1) would entail loss of maintenance;

(5) that an appointment not accordant with the latter part of Section 7 (5) would not be a valid appointment, and would, therefore, leave a deficiency in the staff which

(1) might, under the Code, deprive the school of its status as a public elementary school, and thereby destroy or suspend its right to maintenance, and

(2) would certainly involve disobedience to whatever direction had been issued under Section 7 (1) regulating the number and constitution of the school staff, and would thereby, also, entail loss of maintenance;

(6) that the offence could hardly be committed unless the Manager or Managers representing the Local Authority were negligent.

The second part of Sub-section 7 also regulates a function which, although not a function of the school, is constitutive of the school as a teaching institution, and the practical conclusions which seemed obligatory when, a moment ago, we were considering the similar regulation in Sub-section 5, seem obligatory in this case also.

We conclude, therefore, that reasonable grounds can be shown for the difference, consequent upon

our interpretation of Section 7 (4), between Section 7 (1) and the rest of Section 7, and for the different penalty that we infer for offences against Section 7 (1) and for offences against Section 7 (5 and 6).

But if these offences be reasonable, then the category of "a public elementary school not in receipt of an annual parliamentary grant" is also reasonable, for it is constituted by those differences.

(*c*) But not only is this new category reasonable; it illustrates and defines one of the fundamental principles of 1902—the principle, that is, of public control.

(1) It illustrates that principle because, in virtue of Section 7 (1), a school falling within the category would—in all the instructional work constitutive of its character as a public elementary school—be completely under the control of the Local Authority.

(2) It defines that principle by showing that, although public control extends over the whole of secular instruction, a religious offence—if so we may inaccurately but conveniently term offences under Section 7 (6)—is not within the range of "public" interest.

In this way it accurately illustrates the characteristic dualism of our national machinery for elementary education.

(*d*) There still, however, remains the clear and inevitable inference that, if the definition of "public elementary school" be not altered by Section 7 (4), a Local Authority may, at any time, be required to maintain a public elementary

school that is not grant-earning, and this conclusion may, at first sight, not unreasonably seem anomalous.

But we suggest that the anomaly is only apparent, and disappears upon a closer scrutiny of the Act.

It has already been shown that the withdrawal of maintenance is reasonably made the penalty for a breach of the "conditions and provisions" of Section 7 (1), *a*, *b*, *c*, *d*, *e*, and that it is, just as reasonably, *not* made the penalty for a breach of the subsequent clauses of Section 7.

Let us now look more closely at Section 7 (4).

It runs as follows :—

"One of the conditions required to be fulfilled by an elementary school in order to obtain a parliamentary grant shall be that it is maintained under and complies with the provisions of this section."

It does *not* say—

"All the provisions and conditions of this section must be complied with before a school can obtain a parliamentary grant,"

but only—

"An elementary school in order to obtain a grant must be maintained under and comply with the provisions of this section."

Analysis may show that, in order to satisfy this condition, all the provisions and conditions of Section 7 must be complied with, but we cannot assume this at the outset: there is nothing in the wording of Section 7 (4) to compel or warrant

the inference that the earning of a parliamentary grant is dependent upon obedience to *every* provision and the fulfilment of *every* condition in Section 7.

We notice immediately that the grant-earning subject of the clause is "an elementary school," and it is also "an elementary school" that is to be maintained under and to comply with the provisions of Section 7. Here "elementary school" must of necessity mean the school as an institution, not as bricks and mortar, for

(1) grants are earned and obtained only by teaching institutions, not by buildings;

(2) the school which is to be maintained under Section 7 (1) is an institution, and not merely a building;

(3) and only a living institution can comply with provisions, for buildings are quite indifferent to our regulative contrivings, and even to the precepts of Parliament.

Therefore, the provisions which, according to Section 7 (4) cannot be broken without loss of grant, must be provisions immediately relevant to the life and work of the school as an institution —must be provisions with which an institution can make immediate compliance.

Now, obviously, the provisions of Section 7 (2) are not provisions of this nature. They relate to the use of the school buildings and school furniture "out of hours"—that is, when the school, as

an institution, is only potentially existent, and cannot comply with any provisions, or be subject to any duty. Moreover, the earlier part of Section 7 (2) merely declares a liability. That part cannot be broken by any ingenuity of rebellion—not even by the most energetic "passive resistance"—for no man can be other than "liable" if Parliament make him "liable."

The earlier part of Section 7 (5) probably relates to the school as an institution, but it is only permissive, and cannot be broken. The latter part gives certain powers to the Local Authority, but it is probably one of the provisions that condition the right to a parliamentary grant. A school in which pupil-teachers had been appointed otherwise than in the manner prescribed by this part of Section 7 (5) could not be said to comply with the provisions of Section 7, for it would violate one of those provisions in its very constitution as a teaching organisation.

Section 7 (6) claims careful scrutiny. It does *not* make religious teaching compulsory in all non-provided public elementary schools. Nor is this surprising, for some of those schools are not subject to any trusts for religious education. But where religious instruction is given in such a school, it must, "as regards its character, be in accordance with the provisions . . . of the trust deed relating thereto." Further, it must be under the control of the Managers. Obviously, all this

affects the school as a teaching institution. A school in which the religious teaching did not accord with the relevant provisions of the Trust Deed governing the school, or was not under the control of the Managers, would not, as a teaching institution, comply with the provisions of Section 7.

The first part of Sub-section 7 is probably only enabling. It creates no new competence, but simply makes it certain that no earlier rights shall intervene to obstruct the lawful action of the new Managers.

The second part, however, is of a different character, and probably constitutes one of the conditions with which an elementary school must comply "in order to obtain a parliamentary grant" (Section 7 (4)). It is not directly incident upon the school, but, nevertheless, a school in which teachers were appointed or dismissed otherwise than in accordance with it would not comply with the provisions of Section 7.

In these Sub-sections, then, there are certain provisions which, by Section 7 (4), are made provisions conditioning the right to a parliamentary grant. If a non-provided public elementary school fail to comply with these provisions, or with any one or more of them, it cannot obtain a grant. But, unless disqualified under the Code, it will continue to be a public elementary school, and, as such, *so long as it complies with the provisions and*

conditions of Section 7 (1), it will be entitled to maintenance.

But, if such a school continue entitled to maintenance, the Local Authority will be compelled to make up, out of its general funds, the deficiency of income caused by the loss of the grant. The school, therefore, would not suffer because of its nonconformity. Is this result tolerable? Does it not make the penal inference from Section 7 (4) practically ineffective?

Once more, why should a school suffer from such nonconformity? If efficient as a public elementary school prior to its disobedience, there will be nothing in its disobedience to affect its efficiency, and, if it continue efficient, why should it not also continue to receive maintenance? Cessation of maintenance would entail cessation of control, and it surely cannot be counted to us for unrighteousness that our interpretation of Section 7 (4) would retain public control—exercised in virtue of Section 7 (1)—over every public elementary school that is doing efficient work.

But let us look more closely at the four possible offences against Sub-sections 5–7, and we will turn first to Sub-section 6.

Two offences seem possible under this Sub-section.

Religious instruction in a non-provided public elementary school might

(*a*) be under other control than that of the statutory Managers, and

(*b*) might not be, "as to its character," in accordance with the Trust Deed.

Neither of these offences are relevant to the work of a public elementary school, and, therefore, loss of maintenance would be an incongruous penalty.

It might conceivably be argued that, after "the appointed day," the control of the religious instruction in a non-provided public elementary school would, in virtue of Section 7 (6), actually and immediately pass into the hands of the statutory Managers, and could not be elsewhere. If this were so, whoever gave that instruction, and whatever the instruction given, the control of the Managers would be omnipresent—exercised even in abstention. Were this interpretation valid, the first provision of Sub-section 6 could not be broken, and where there is no offence, there cannot be penalty.

It seems, however, the more probable opinion that the control of the Managers must be practically and deliberately exercised, even though exercised only to continue an existing arrangement. If this opinion be valid, it follows that if the religious instruction be controlled otherwise than by, or according to the decision of, the statutory Managers, the penalty inferred from Section 7 (4) may become incident.

In fact, however, the Managers' power of control can hardly remain unexercised if the representative Managers be vigilant.

If Foundation Managers be obstructive, they can, if they be Foundation Managers by virtue of a Trust Deed, easily be removed from office by an order under the Charitable Trusts Acts, or if they be Foundation Managers, by virtue of an order issued by the Board of Education under Section 11 of the Act of 1902 they can be directly or indirectly dealt with under Section 11 (8).

It seems probable that offences against this part of Section 7 (6), if they ever occur, will be exceedingly rare, and will always imply negligence on the part of the representative Managers, for, however obstructive or negligent the Foundation Managers, the non-Foundation Managers could always take steps that would, at least indirectly, make the new control of religious instruction effectively real.[1]

If they fail in this duty, the penalty will be incurred, and, if it be imposed, will fall upon the Local Authority. But if the Local Authority

[1] Section 7 (6) amends the Trust Deeds of all non-provided public elementary schools—not indelibly, but for so long as they continue to be public elementary schools. Therefore, if any person, other than a statutory Manager, exercised control over the religious instruction, he would be acting contrary to the terms of the Trust, and, under the ordinary law relating to charitable trusts, could be restrained from that interference.

rest content with Managers who will not perform their duties, it must also rest content—according to its disposition—with the loss of grant consequent upon their default, and must commit itself, in resignation or in hope, to the justice or forgetfulness of its constituents.

It seems probable that offences against the first enactment in Section 7 (6), although not likely to be frequent, will also arise most frequently from the representative Managers,—from non-Foundation Managers who make themselves the agents of conciliar decrees or the instruments of a conciliar policy. Individual Managers could probably be restrained from depraving or corrupting religious instruction, but the necessary legal process would be slow and costly, and might easily arouse passions and prejudices that a legislator were wise to leave slumbering. Moreover, if successful against particular offenders, A and B, it could not prevent Councils appointing new Managers who would repeat the offence. Parliament has, therefore, created a safeguard which ought to be effectual. It has made the offence penal, and the penalty is one that reasonably falls upon the Local Authority,—reasonably, because the offence would not ordinarily be committed without the initiating approval of the Local Authority, or persisted in without its continued countenance.

As to Sub-sections 5 and 7, we have already seen that offences against these would probably

entail loss of maintenance, as well as of grant—not by inference from Section 7 (4), but by inference from the Code or from Section 7 (1).

If, then, we look at practical rather than theoretical results,[1] we shall conclude that our suggested interpretation of Section 7 (4) would entail upon a Local Authority the cost of maintaining a non-provided public elementary school not in receipt of an annual parliamentary grant only where the Authority itself, because of its own impropriety, might fairly and without anomaly be held subject to penalty.[2]

(*e*) We conclude, therefore, that no ground can be shown for a constructive widening of Section 7 (4) of the Act of 1902 in such a way as to make it alter the administrative definition of a public elementary school.

But we have already seen that Section 7 (4) does not itself directly make a change in the

[1] Nor in thus limiting our outlook shall we depart from sound principles of interpretation, for legislation is a practical art, and the legislative intention of Parliament is always practical—is an intention to regulate practical affairs, not to cover the theoretical possibilities of a situation.

[2] We are now in a position to take a general view of the penalties inferred from Section 7.

If a school cease to be a public elementary school, or if—continuing to be a public elementary school—it offend against Section 7 (1), it loses both grant and maintenance.

If, continuing a public elementary school, it offend against any one or more of Sub-sections 5–7, it loses the grant, and, probably, an offence against Sub-section 5 or Sub-section 7 will indirectly entail loss of maintenance as well.

definition, and that no statutory or other grounds can be shown for inferring such a change from it.

We further conclude, therefore, that the definition is not changed, that Section 7 (4) of the Education Act, 1902, does *not* alter the administrative definition of a public elementary school.

γ. Thus far we have argued—

(1) that, according to the administrative definition of a public elementary school derived from the Act of 1870, religious instruction is no part of the work of such a school, and

(2) that Section 7 (4) of the Act of 1902 does not add to this definition.

Even, however, if—ambitious, like Mr. Benjamin Kidd, to be supra-rational—we admit that Section 7 (4) modifies the administrative definition of a public elementary school by adding to it, we must also admit

(1) that the new legislation does not make religious instruction compulsory, even in schools governed by Trust Deeds which require that instruction to be given, and

(2) that it does not alter the legal incidence of the primary religious obligations of our Trust Deeds.

(1) Nothing in the Act of 1902 places any constraint upon any one to cause religious instruction to be given in a non-provided public elementary school.

If religious instruction be given in a school, that instruction must be, "as to its character," in accordance with the relevant provisions of the

Trust Deed governing the school. But Section 7 (6) does not make religious instruction compulsory. Even if a public elementary school be governed (subject to the Education Acts) by a Trust Deed that requires religious instruction to be given, there is nothing in Section 7 (6) that makes the giving of that instruction obligatory. The opening words of that Sub-section only require that, *if religious instruction be actually given in such a school*, it shall be instruction of the kind given indicated by the Trust Deed.

If the provisions of the Trust Deed be neglected, and no religious instruction of any kind be given, the school will not thereby cease to be a public elementary school, nor will it incur the penalty inferred from Section 7 (4) of the Act of 1902. There will then undoubtedly be a breach of trust, but it is a breach for which the Act of 1902 does not provide either remedy or penalty.

If, however, religious instruction be given, and it be not in character accordant with the governing provisions of the Trust Deed—if, for instance, Roman Catholic or Swedenborgian teaching be given, *per impossibile*, in a Church of England school—then, under Section 7 (4), the offending school will lose its grant, and if it be true—as it is not—that Section 7 (4) adds certain particulars to the administrative definition of a public elementary school, it will cease to be a public

elementary school, and will thereby lose its claim on the Local Education Authority for "maintenance." This punishment, however, will be a punishment for giving the wrong kind of religious instruction, and would not be incurred by failure to provide religious instruction. That also would be an offence, but an offence not punished by the Act of 1902.

But if Section 7 (4) add new particulars to the administrative definition of a public elementary school, does it make religious instruction one of the permissible functions of such a school—a function which, under Section 7 (1), a Local Authority is bound to "maintain"? Apparently not. Immediately, it does no more than this: it determines the character of the religious instruction in a denominational non-provided school, *if there be, in fact, any religious instruction given therein.* We can, indeed, hardly say that it does even this, for in such a school the character of the religious instruction lawfully permissible therein is determined primarily by the Trust Deed. Immediately, Section 7 (6) only confirms this primary determination. Mediately, however, through Section 7 (4), it enforces this determination by one of the most severe threats that our statutory machinery for elementary education enables Parliament to make: "If the religious instruction actually given be, in character, other than that prescribed by the Trust Deed,

the Board of Education will refuse to recognise the school as grant-earning."[1]

And the moment it was resolved to place the religious instruction in non-provided schools under the control of the new bodies of statutory Managers, this—or some equally effective safeguard of religious trusts—became, if not necessary, at least pre-eminently desirable.

Probably we could not hold the opening words of Section 7 (6) to be *necessary*—in the strict sense that, had they not been enacted, the religious teaching in denominational non-provided schools would have been left shelterless, for that teaching was already under the strong protection of the law relating to charitable trusts.

The Trustees of a denominational school derive from their Trust Deed power to use their trust property, or to permit it to be used, for certain defined purposes. Without the express authority of Parliament or of some Court of competent jurisdiction, or of the Board of Education, "as Charity Commissioners," they have not ordinarily any lawful power to use or permit the use

[1] If it be true that Section 7 (4) is now integral in the administrative definition of a public elementary school, the threat is even more severe.

"If the religious instruction actually given be, in character, other than that prescribed by the Trust Deed, the school will cease to be a public elementary school, and will lose both grant and maintenance."

But we have no statutory ground for inferring this degree of severity.

of the premises for any purpose that is not one of the purposes thus defined, nor, if the deed contain any provisions regulating the constitution or conduct of the school, have they, without similar authority, any lawful power to depart therefrom. They could be restrained from any unlawful use, or any exercise of unlawful powers, and, through the intervention of the Court, they themselves can restrain from offence any other person or persons misusing the trust-property, even though the culprits were statutory Managers under the Act of 1902.

Parliament has, indeed, more than once, made a general grant of "enabling powers," and thereby removed, in individual cases, certain restrictions arising out of a charitable trust. For instance, in 1870 it enacted that

> "The managers of every elementary school shall have power to fulfil the conditions required in pursuance of this Act to be fulfilled in order to obtain a parliamentary grant, notwithstanding any provision contained in any instrument regulating the trusts or management of their school, . . ." (Elementary Education Act, 1870, Section 99);

and a similar gift of competence has since been made for "the fulfilment of any conditions, the performance of any duties, and the exercise of any powers" under the Act of 1902 (Education Act, 1902, Schedule III. (7)).

Again, Section 23 of the Act of 1870 permits a denominational school to be transferred to a

Local Authority upon such terms as suspend the trust completely.[1]

But Parliament has done nothing to weaken the legal constraint of those provisions of a Trust Deed which determine the character of the religious instruction in a denominational school.

This constraint, however, is immediately a constraint upon the executants of a Trust Deed —upon Trustees and upon Managers who hold office under a Trust Deed. But Managers under the Act of 1902 are, primarily, Managers of a public elementary school. They constitute a statutory body which exists only in virtue of a parliamentary enactment, and they are, primarily, executants, not of a Trust Deed, but of an Act of Parliament. Therefore, as statutory Managers, they are not, in any case, bound by the denominational provisions of the Trust Deed governing their school. In some cases, it is true, individual members of the statutory body are also Trustees or Managers under the Trust Deed, but, *as statutory Managers*, they are neither constrained nor bound by the religious provisions of the Deed. As statutory Managers, their powers are derived from Parliament, their duties are determined by Parliament, and nothing that Parliament has done makes them immediately subject,

[1] Because of the provisions for re-transfer in Section 24, it is probably more accurate to say "suspend" than "terminate."

as statutory Managers, to the denominational obligations or restrictions of the Trust Deed governing their school. They are indeed—as statutory Managers—Managers "for the purpose of the Trust Deed," but only "so far as respects the management of the school as a public elementary school" (Education Act, 1902, Section 11 (6)). This definition of function leaves denominational teaching beyond the range of their competence as statutory Managers, for the provision and "management" of denominational instruction is neither integral in nor essentially ancillary to the management of their school as a public elementary school.

To these Managers Parliament has given the control of the religious instruction in non-provided public elementary schools, and by the opening words of Section 7 (6) has made each body of statutory Managers subject to the denominational trusts governing their school—not necessarily to those trusts in their entirety, but in so far as they determine the character of the religious instruction to be given.

Had those opening words not been enacted, the powers of the new Managers—as to religious instruction—would, it is true, have been no greater. The character of the religious instruction would, in each case, still have been determined by the provisions of the Trust Deed. Those provisions ordinarily make religious

instruction of a certain kind obligatory. *That* kind *must* be given, and no other kind can lawfully be given. The giving of any other kind could be stopped by process at law. Now, the gift of control carries with it no power to change the nature of that which is controlled. Therefore, had the opening words of Section 7 (6) not been enacted, the powers of the statutory Managers over religious instruction would have been strictly limited,—not only by the nature of those powers (which are merely powers of control), but, also, by the nature of that (a special kind of religious teaching) which was made subject to those powers.

But had Section 7 (6) not bound each body of statutory Managers to observe the denominational provisions of the Trust Deed governing their school—in so far, that is, as those provisions determine the character of the instruction to be given in the school—it would, as we have seen, have been difficult to enforce the denominational provisions of a Deed upon a body of Managers resolved to deprave or corrupt the teaching they controlled. Parliament has, therefore, in Section 7 (4) and Section 7 (6) created a safeguard which ought to be effectual, and may fairly be called, if not a legal, at least an administrative necessity.

(2) But upon whom are the primary denominational obligation of our Trust Deeds now incident?

Before the Act of 1902 religious instruction in a denominational public elementary school governed by a Trust Deed was provided by the Managers or by the Trustees. The school premises were held upon trusts which made a certain kind of religious teaching obligatory, and Trustees or Managers who neglected or refused to discharge the obligation legally incumbent upon them as executants of the trusts could be removed from office by a simple and inexpensive procedure under the Charitable Trusts Acts.

When the Act of 1902 was passed, what changes did it make in this legal and administrative system? At first sight, only two :—

Section 7 (6) placed the religious instruction under the control of the new body of Managers constituted by Section 6 (2).[1]

Section 7 (4), by its inference of penalty, created a new safeguard for the essential religious trusts.

But the legal obligation which aforetime admittedly rested upon Trustees or Managers,

[1] "(2) All public elementary schools not provided by the local education authority shall, in place of the existing managers, have a body of managers consisting of a number of foundation managers not exceeding four appointed as provided by this Act, together with a number of managers not exceeding two appointed—

"(*a*) where the local education authority are the council of a county, one by that council and one by the minor local authority; and

"(*b*) where the local education authority are the council of a borough or urban district, both by that authority."

or both, to fulfil their Trusts, by causing religious instruction of a specified kind to be given in their schools, still remained with them. It was not transferred, either expressly or by inference, to the Local Education Authorities or to the new bodies of Managers. There is nothing in the Act of 1902 that enforces, or can, by inference, be held to enforce, this initial obligation. The incidence of the opening words of Section 7 (6) is not upon the Local Education Authorities, but upon the new Managers. It does not require, or even permit, a Local Authority to provide religious instruction: it only imposes upon each body of statutory Managers the duty of so exercising their control of that instruction as to keep the instruction accordant, "as regards its character," with the provisions of the Trust Deed governing it.

Each Local Authority is required to "maintain and keep efficient all public elementary schools" within its area that are necessary (Education Act, 1902, Section 7 (1)), but it is impossible to derive from these words any duty to provide or maintain religious instruction.

That instruction forms no part of the constitutive work of a public elementary school.

If a school be an efficient public elementary school, the religious instruction given in the school—if any be given—does not form one of the regulated activities that make it an efficient public elementary school, and, if no religious instruction be given, the absence of that instruction does not detract from efficiency.

If a school that is a public elementary school be a subject to trusts which require religious instruction to be given, it can still be perfectly efficient as a public elementary school even though, in breach of trust, no religious instruction be given.

It follows, therefore, that a Local Authority could completely and perfectly discharge its duties under Section 7 (1)—could "maintain and keep efficient all public elementary schools" within its area which are necessary—*without spending one penny upon religious instruction.* Certainly the "maintenance-duty" of a Local Authority towards the denominational schools in its area does not go beyond the meaning of the words just quoted, and, if the duty imposed by those words can be perfectly and completely fulfilled without the maintenance of religious instruction, an Authority has, under Section 7 (1), no obligation to maintain that instruction.

But, as its power of maintenance under Section 7 (1) is strictly correlative to its duty of maintenance under that Section,—co-extensive with it and co-terminous,—if it have no *duty* to maintain religious instruction in non-provided schools, it has no power to maintain that instruction in those schools.

Therefore, **expenditure by a Local Authority upon religious instruction in non-provided public elementary schools is illegal expenditure.**

We conclude, then, that the primary denominational obligations of our Trust Deeds are now

incident where they were aforetime incident,—upon the Trustees and Trust-Managers of our denominational schools.

δ. I. It may, perhaps, be suggested that Article 17 of the Code makes religious teaching a "legitimate function" of a public elementary school. But this Article is confessedly based upon Section 97 (1) of the Elementary Education Act, 1870, and we must, I think, regard its effective meaning as determined exclusively by the meaning of that Section.

In Section 7 of the same Act, Parliament sets forth "*Regulations for Conduct of Public Elementary Schools.*"

"Every elementary school which is conducted in accordance with the following regulations shall be a public elementary school within the meaning of this Act.

. . . . . .

"(4) The school shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant."

In Section 97 we have "*Conditions of Annual Parliamentary Grant.*"

"The conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant shall . . . provide that

"(1) Such grant shall not be made in respect of any instruction in religious subjects:

. . . . . .

"but such conditions shall not require that the school shall be in connection with a religious denomination or that religious instruction shall be given in the school, and shall not give any preference or advantage to any school on the ground that it is or is not provided by a school board."

Obviously, in these Sections Parliament has declared the functions of a public elementary school only *viâ negationis*. A public elementary school, as such, is entirely secular. Religious instruction may, indeed, be given in a school which is a public elementary school, but that instruction, if it be given, makes no direct contribution to the character of the school as a public elementary school, nor does a school possess that status either more or less securely or more or less completely if religious instruction be not given in it. The presence and the absence of religious teaching are both utterly irrelevant to the status of a school as a public elementary school. If, however, religious teaching be given, the school must be conducted in accordance with the first and second Regulations of 1870.

"(1) It shall not be required, as a condition of any child being admitted into or continuing in the school, that he shall attend or abstain from attending any Sunday-school, or any place of religious worship, or that he shall attend any religious observance or any instruction in religious subjects in the school or elsewhere, from which observance or instruction he may be withdrawn by his parent, or that he shall, if withdrawn by

his parent, attend the school on any day exclusively set apart for religious observance by the religious body to which his parent belongs:

"(2) The time or times during which any religious observance is practised or instruction in religious subjects is given at any meeting of the school shall be either at the beginning or at the end or at the beginning and the end of such meeting, and shall be inserted in a time-table to be approved by the Education Department, and to be kept permanently and conspicuously affixed in every school-room; and any scholar may be withdrawn by his parent from such observance or instruction without forfeiting any of the other benefits of the school:" (Elementary Education Act, 1870, Section 7 (1)(2)).

An elementary school may be selective: it may confine its work within certain social or denominational lines, but a *public* elementary school may not be guarded by any shibboleth,—it must be open to all. This, then, is the practical problem solved by the Conscience Clause: "How can an elementary school, established and conducted for the children of a particular religious denomination, be made a *public* elementary school?—How can it be thrown open?—How can its educational utility be made catholic?"

And, of this problem, the Conscience Clause, although we have now grown used to it, may well have been thought, in 1870, the least obvious solution. It would certainly have illustrated a simpler theory had Parliament excluded religion altogether from our schools. On the other hand,

many would have found in the universal establishment of "simple Bible-teaching" or of undenominationalism, an edifying proof of political and religious progress. But Parliament neither proscribed an old religion nor created a new one. It neither suppressed nor modified the religious functions of non-provided elementary schools. It said nothing more than this: "You must admit all children. You may continue your own religious observances and teaching for your own children, but you may not compel dissentients to take part in the one, or to receive the other."

In this way, the denominational elementary school, without ceasing to be denominational, has become a *public* elementary school, but it is *public* only in so far as it is secular. It retains all its old functions, and some of these are outside everything that is constitutive of its character as a public elementary school. As a teaching institution it has a nature wider than anything denoted by its character as a public elementary school. *In that character it is entirely secular.* It is as an instrument for secular instruction, and only as such, that it is regulated by Acts of Parliament and Minutes of the Board of Education. Every reference in these — elsewhere than in the Kenyon-Slaney Clause—to its additional religious activities is only for the purpose of establishing and safeguarding its "public" character, and it is "in respect" of

its secular instruction alone that Parliament makes a grant.

Clearly, then, Article 17 of the Code must be construed, not as declaring a function of a public elementary school, but as continuing to denominational schools their old liberty to be denominational,—as recognising in the teaching institution which *is* a public elementary school, a range of function wider than that denoted by its character *as* a public elementary school. If the Article were otherwise construed, — if it were understood to make religious instruction a "legitimate function" of a public elementary school, — it would be inconsistent with the Statute upon which it is based, and would bring us face to face with the conclusion that a purely secular voluntary school—one in which religious teaching was neither given nor permitted—would not be a public elementary school. But this conclusion no one could accept, for it would be entirely without statutory authority.

Article 17, however, does more than permit denominational schools to continue denominational: it also permits provided schools to be religious, and herein it but re-affirms the liberty prospectively recognised by the Cowper-Temple Clause (Elementary Education Act, 1870, Section 14). But if a provided school give religious teaching, that school, also, has "a range of function wider than that denoted by its char-

acter as a public elementary school." Nothing in the Statutes or in the Code compels to think that a provided school must be *merely* a public elementary school. That, also, if its governing Authority so will, may, as a teaching institution, be more than a public elementary school,—may have a nature wider than its status as a public elementary school, and exercise at least one function not constituent in its character as a public elementary school. Parliament — influenced by a false theory of the State which, unfortunately, has dominated English politics for many years, and is mistakenly regarded by many earnest people as the chief secular safeguard of religious liberty,—has endeavoured to give provided schools a more than denominational range of religious usefulness by establishing for them a new religion that no one believes. Fortunately, the Conscience Clause rules in provided no less than in non-provided schools. No child is compelled by the State to accept the vague and half-articulate *credenda* of Undenominationalism. The provided school, no less than the non-provided school, is "public" only in so far as it is secular. In so far as it is religious, it is not "public" but sectional. Although it be ordinarily called undenominational, it is no less truly denominational than the ordinary Church School, and neither in the one case nor the other does the denominational work become constituent in the

character of the school as a public elementary school.

Article 17, then, does *not* make religious teaching a "legitimate function" of a public elementary school.

In so far as a school that is a public elementary school—be it provided or non-provided—is a religious instrument, it is not a "public," but a denominational school. Its religious teaching lies outside the regulations that make its secular work genuinely public. It is a public elementary school, not in any degree or way because of its religious work, but because only of its secular work—in spite of its religious work, we may say, if it be for once permissible to use the crude emphasis of popular speech.

II. Other Articles in the Code make the purely secular character of the public elementary school as such, clearly apparent.

The Annual Grant is, ordinarily, a *per capita* grant based upon the average attendance.

"Except where it is specially provided otherwise, the sum mentioned is the amount of a year's grant for each unit of average attendance" (Article 96).[1]

[1] *Cp.* The Free Education Act, 54 & 55 Vict. c. 56 :—

"I. (1) After the commencement of this Act, there shall be paid, out of moneys provided by Parliament, and at such times and in such manner as may be determined by regulations of the Education Department, a grant (in this Act called a fee grant) in aid of the cost of elementary education in England and Wales

By Article 12 an "attendance" is defined as attendance at "secular instruction."

Ordinarily, a public elementary school must meet not less than 400 times in a year (Article 83), but the Code nowhere lays down either the initial or terminal hours of meeting. In Article 12 it defines the "minimum time constituting an attendance," but this minimum time is to be devoted solely and exclusively to secular instruction. It is evident from Section 7 of the Act of 1870 that a school which is a public elementary school may be open for religious instruction before the secular instruction begins, and may continue open for religious instruction after the secular instruction has ceased.[1] But, except by the necessity which it creates of devoting a defined minimum time to secular instruction (Article 12) "at each morning and afternoon meeting" of the school (Minute, 7th February 1871), the Board of Education leaves

at the rate of ten shillings a year for each child of the number of children over three and under fifteen years of age in average attendance at any public elementary school in England and Wales (not being an evening school), the managers of which are willing to receive the same and in which the Education Department are satisfied that the regulations as to fees are in accordance with the conditions in this Act."

[1] "The time or times during which any religious observances practised or instruction in religious subjects is given at any meeting of the school shall be either at the beginning or at the end or at the beginning and the end of such meeting" (Elementary Education Act, 1870, Section 7 (2)).

the duration of the religious instruction—not only in non-provided, but also in provided schools —quite unregulated.

Again, consider Article 86.

"86. The school or infant class must be efficient. A school or class is regarded as satisfying this Article if the inspector does not recommend the withholding of the grant under Article 98 or Article 101 (*a*). The grant will not be withheld under this Article until the following conditions have been fulfilled :—

"(1) The inspector must report the school or class inefficient and state specifically the grounds of such judgment, and the Board must, with the report, give formal warning that the grant may be withheld under this Article, if the inspector again reports the school or class to be inefficient.

"(2) The inspector must, not less than twelve months later, and after a visit paid with due notice, again report the school or class inefficient, and again state specifically the grounds of such judgment.

"(3) If within fourteen days after the receipt of the second adverse report of the inspector appeal is made by the managers or by the local authority against his decision, the school must be visited and such adverse report must be confirmed by another inspector."

We have already seen that it is no part of the duty of His Majesty's Inspectors "to inquire into any instruction in religious subjects" given in a school which is a public elementary school, "or to examine any scholar therein in religious knowledge or in any religious subject or book," and, because the powers of an Inspector are

precisely correlative to his duties, it is evident that an Inspector has no *power* to inspect what it is not his *duty* to inspect. We might therefore securely infer that Article 86 is normal only for secular instruction.

According to that Article the condemnation of a school as inefficient must be based upon the Inspector's Report. An Inspector can, however, report upon—what? Only upon matters which are subject to his powers of inquiry and examination. Religion, however, is not one of those matters (Elementary Education Act, 1870, Section 7 (3)). Therefore defective religious teaching cannot be a ground of "inefficiency," nor can sound religious teaching be constituent in "efficiency." The only instruction that, by its quality, determines the character of a school as "efficient," within the meaning of the Code, or that entails the penalty consequent upon "inefficiency," is secular instruction.

In other words, it is only as purely secular that a school is subject to Article 86.

We shall be confirmed in this conclusion if we refer to Articles 98 and 101 (*a*). A school or class is regarded as efficient (Article 86) "if the Inspector does not recommend the withholding of the grant under Article 98 or Article 101 (*a*)."

Article 98.—"Grants are made for infant schools and classes under this Article; and every

school or class for which a grant is made under this Article is an infant school or class.

. . . . . .

"A principal grant of 17s. or 16s. is made for infants' schools and classes.

"The Board shall decide which, if either, of these grants shall be paid after considering the report and recommendation of the inspector upon each of the following four points :—

"(*a*) The suitability of the instruction to the circumstances of the children and the neighbourhood.

"(*b*) The thoroughness and intelligence with which the instruction is given.

"(*c*) The sufficiency and suitability of the staff.

"(*d*) The discipline and organisation.

"The inspector will recommend the higher grant, unless he is unable to report favourably upon the school under these heads.

"The course of instruction for infant schools and classes is given in Article 15 (*a*).

Article 101.—"Grants are made for schools for older scholars under this Article, and every school for which a grant is made under this Article is a school for older scholars."

"*Principal Grant*"

"(*a*) A principal grant of 22s. or 21s. is made for schools for older scholars.

"(i.) The Board shall decide which, if either, of these grants shall be paid, after considering the report and recommendation of the inspector upon each of the following four points :—

"(*a*) The suitability of the instruction to the circumstances of the children and the neighbourhood.

"(*b*) The thoroughness and intelligence with which the instruction is given.

"(*c*) The sufficiency and suitability of the staff.

"(*d*) The discipline and organisation.

"The inspector will recommend the higher grant unless he is unable to report favourably upon the school under these heads.

"The course of instruction for schools for older children is given in Article 15 (*b*).

"(ii.) The instruction should be in accordance with a syllabus, which must be produced to the inspector at his visit. The inspector may disapprove any portion of the syllabus which he considers unsuitable.

"Specimen schemes of instruction suited to schools in various circumstances may be obtained on application to the Board.

"(iii.) In reporting upon the sufficiency and suitability of the staff, the inspector will have regard to the fitness of each teacher for the work allotted to him (or her).

"(iv.) In reporting upon the discipline and organisation the inspector will have special regard to the moral training and conduct of the children, to the neatness and order of the school premises and furniture, and to the proper classification of the scholars, both for teaching and examination. But he will not interfere with any method of organisation adopted in a training college, if it is satisfactorily carried out in the school. To meet the requirements respecting discipline, the inspector must be satisfied that all reasonable care is taken in the ordinary management of the school, to bring up the children in habits of punctuality, of good manners and language, of cleanliness and neatness, and also to impress upon the children the importance of cheerful obedience to duty, of consideration and respect for others, and of honour and truthfulness in word and act."

The courses of instruction given in Article 15 (*a b*) are *purely secular*, and if the curriculum of a school be in accordance with this Article, and be approved by His Majesty's Inspector, it completely satisfies the relevant requirements of the Board of Education (Article 85 *b*).

According to Article 101 (*a*), iv., an Inspector, "in reporting upon the discipline and organisation" of a school, is to have "special regard to the moral training and conduct of the children," but, clearly, the range of his official interest in the matters is to be distinctively secular.

> "To meet the requirements respecting discipline, the inspector must be satisfied that all reasonable care is taken, in the ordinary management of the school, to bring up the children in habits of punctuality, of good manners and language, of cleanliness and neatness, and also to impress upon the children the importance of cheerful obedience to duty, of consideration and respect for others, and of honour and truthfulness in word and act."

III. *We conclude, then, that the public elementary school, as such, is entirely secular*—we have, indeed, found reason to believe that it is called "public" because it is secular. If a school which is a public elementary school have functions other than those which, in their regulated exercise, constitute it a public elementary school, those other functions are—so far as we have seen—neither controlled nor assisted by Parliament. No grant

is made "in respect of any instruction in religious subjects" (Elementary Education Act, 1870, Section 97 (1)). It is no part of the duty of His Majesty's Inspectors "to inquire into any instruction in religious subjects," or to examine any scholar "in religious knowledge or in any religious subject or book" (Elementary Education Act, 1870, Section 7 (3)). "The time or times during which any religious observance is practised or instruction in religious instruction is given at any meeting of the school" must, indeed, be "inserted in a time-table to be approved" by the Board of Education, and, under a Minute dated 7th February 1871, the approval of the Board is given by the signature of the Inspector. But in that same Minute it is laid down

"(3) That the inspector may approve any time-table which, while conforming to Section 7 (2) of the Education Act, in respect of the time or times appointed for religious observances or instruction, sets apart for instruction in secular subjects at least two consecutive hours at each morning and afternoon meeting, and one hour and a half at each evening meeting of the school.

"(4) That the inspector shall not express any opinion as to the time or times appointed for religious observances or instruction, or as to the nature of such instruction, but shall confine himself to seeing that the prescribed amount of time is secured for secular instruction."

That the Board's approval of a time-table so signed is not general, but limited, is clearly shown

by a supplementary "Circular to Her Majesty's Inspectors," dated 31st May 1871.

"I am directed to remind you that before approving a time-table under the minute of 7th February 1871, you must ascertain that it conforms to Section 7 of the Elementary Education Act.

"This is all that is essential in order that you should affix your signature.

"To prevent any misunderstanding on this point, I am to request that you will enter on time-tables which satisfy the prescribed conditions, 'Approved on behalf of the Education Department *as fulfilling the requirements of Section 7 of the Elementary Education Act*, 1870.'"

Before approving the time-table of a denominational school, the Inspector satisfies himself that the "public" character of the school is properly safeguarded, according to the provisions of Section 7 of the Act of 1870, and, until Circular 512[1] was issued, it was only at this point and in this way that he came into contact with the religious functions of the school.

ϵ. "But," we may be asked, "if the public elementary school, as such, be purely secular, how can you explain the existence of the Kenyon-Slaney Clause?" If religious instruction in a non-provided school were a "legitimate function" of that school as a public elementary school, it

[1] An examination of Circular 512 would not fall within the scope of the present note. The argument in the Circular, however, is not immediately directed to the question now before us.

might well appear persuasively reasonable to place it under the control of the statutory Managers. But, if religious instruction be not constituent in the character of the school as a public elementary school, and if it be not, save incidentally—through its accord with certain conditioning regulations—contributory to that character, upon what ground could the statutory Managers—who, primarily, are only Managers of the school in so far as it is a public elementary school—claim to control it?

The question is an interesting one, but it should be addressed to the legislator, not to the expositor. If the jurist or administrator be at all bound by the presuppositions of a clause, he is bound only by those that are logical, not by those that are merely historical—by its presuppositions in the order of thought, not by its presuppositions in the order of genesis. Now, it cannot be contended that the Kenyon-Slaney Clause logically presupposes more than a secular character in the public elementary school as such.[1] It presupposes only an adequate ground, and a capacity in the Managers adequate to the new work committed to them. And "adequate ground" can

[1] The non-provided public elementary school in which religious instruction is given is, of course, not merely secular, but, as we have already seen, that school is more than a public elementary school, and in this fact we have the ground of its wider character.

easily be discovered without supposing a doctrine that is inconsistent with the Code and with the primary enactments of Parliament.

For example, it might be represented

(1) that, here in England, the State has never been indifferent to religion;

(2) that the Church of England—ever since the ambiguous Reformation gave to its catholicity that distinctively insular expression which some find so satisfying—has been largely subject to a control which (in fact, if not always in law) has been lay control;

(3) that, because the political, or, as some would say, the civic results of religious teaching are so important, no considerable religious denomination can rightly claim to be wholly private, and, therefore, exempt from measures intended primarily to safeguard the moral interests of the Commonwealth;

(4) that the clause is, in fact, an effective instrument for dealing with difficulties that—so people say—are not adequately met by the Conscience Clause.

Fortunately, neither jurist nor administrator would be bound by these representations. He would notice them only because they effectually exclude the suggested inference from the Kenyon-Slaney Clause of a religious character in the public elementary school as such. They disclose a *ratio essendi* for the clause which is quite adequate, and does not infer that character. Therefore, that character is not a logical presupposition of the clause, and, therefore, the clause does not affect our conception of a public elementary school. It

is perfectly consistent with the opinion that the public elementary school as such is wholly secular.

κ. It may perhaps be said

(1) that the opening words of Section 7 (6)—"Religious instruction given in a public elementary school not provided by the Local Education Authority"

imply

(*a*) that religious instruction may be given in a non-provided public elementary school;
(*b*) that, if it be given in such a school, it is a function of a public elementary school;

and

(2) that, if this be so, religious instruction in such a school must, under Section 7 (1), be maintained by the Local Education Authority.

Of course, religious instruction may be given in a non-provided public elementary school, if the Trust Deed of the school prescribe it, but, if given, it is given—according to the argument we are setting forth—because the school is a non-provided school subject to certain trusts, not because the school is a public elementary school. It is the *non-provided* school that is the instrument of the religious instruction, not the public elementary school. But, nevertheless, the non-provided school which is thus instrumental *is* a public elementary school, and may conveniently be spoken of as such. As a non-provided school it has a *nature* which, according

to our interpretation of the Education Acts, is not wholly expressed in or denoted by its *status* as a public elementary school, but—this notwithstanding—it *is* a public elementary school. There are not two institutions—a non-provided school and a public elementary school—but only one institution, the non-provided school that is a public elementary school.

Therefore, although "religious instruction may be given in a public elementary school," it is not —if given—"a function of a public elementary school."

Therefore, because not constituent in the character of the school as a public elementary school,[1] it cannot be maintained under Section 7 (1) by the Local Authority.

λ. It may, perhaps, be urged that Parliament has nowhere recognised the distinction here shown between *nature* and *status*,—between, let us say, the denominational school, in the fulness of its concrete reality, and that distinguishable but not, in fact, separate part or aspect of it which is a public elementary school. Possibly this is true, but Parliament has done more than recognise the distinction,—it has created it. The distinction was made, even though not named, when Parliament, in 1870, permitted schools which were not merely secular to receive the

[1] Nor, as we shall presently see, contributory, *as an essential*, to the being of the school as a public elementary school.

status of public elementary schools as purely secular. The actual national school is, in fact—primarily, as some would say—a religious institution, but, if recognised as a public elementary school, that public elementary school (which is narrower in its range of function than the national school), is wholly secular, regulated and safeguarded by the Code, made "public" by the Conscience Clause.

When Parliament created the *status* of "public elementary school," and permitted denominational schools to receive that *status*, and to continue denominational, it created also the distinction upon which we insist.

But, when once the distinction was made, Parliament had, until 1902, no occasion to advert to it. The Act of 1870 created the "public elementary school" as the administrative unit for public elementary education, and, in legislating for that education, Parliament had, until 1902, no occasion to concern itself with whatever teaching functions were exercised, beyond the definition implied in the Code and the Conscience Clause, by schools which were public elementary schools. Ordinarily, those other functions were religious, and in most denominational schools they were governed by Trust Deeds or instruments of a similar nature. In each individual case they were subject to the Charitable Trusts Acts, and in a large number of cases they were

subject also to the laws ecclesiastical, or to the domestic tribunal of some religious denomination. They were, thus, already under adequate control, and, as they did not contribute to public elementary education, the Elementary Education Acts made no attempt to regulate them.

Because the distinction, when once made, ceased to invite practical interest, it has not always been remembered. Even Parliament has sometimes veiled the awful majesty of its omnicompetence in the language of human frailty, and has made our legislators seem less remote from "the ordinary of Nature's workmanship" by condescending to express its will through homely infelicities.

Thus, as we have already seen, in Section 7 (6) of the Education Act, 1902, it uses the words "a public elementary school," when "a school which is a public elementary school" had been more accurate, but, as we have also seen, no practical inconvenience results from this, nor does it modify our interpretation of the Act.

Section 20 of the Elementary Education Act, 1876, presents a more serious difficulty.

> "The conditions required to be fulfilled by schools in order to obtain annual parliamentary grants shall provide that the income of the schools shall be applied only for the purpose of public elementary schools."

If it be true

(1) that religious instruction is *not* a "purpose of public elementary schools," and
(2) that "income" means the whole income of the school as a teaching institution,

then, it would follow that no part of the income of a school that is a public elementary school could lawfully be spent in the "maintenance" of religious teaching.

But this conclusion would be absurd. Therefore, either

(1) religious instruction is a "purpose of public elementary schools," or
(2) "income" does not here mean the whole income of the school as a teaching institution.

The primary enactments of Parliament and the principal provisions of the Code make it clear, however, that the public elementary school, as such, is purely secular.

Therefore, religious teaching is *not* a "purpose of public elementary schools."

Therefore, "income" cannot mean the whole income of the school as a teaching institution.

What, then, does it mean? Apparently this—the whole income of the school as the "grant-earning subject,"—the whole income pertaining to or arising out of that distinguishable but not in fact separate part of a school's life which, if Section 20 be complied with, is grant-earning.

However we interpret "the purpose of public elementary schools," we must, I think, take the

reference to "income" in this sense. It covers only the income of the school as "the grant-earning subject." If a school have other income, that other income may and, indeed, must be applied otherwise than to "the purpose of a public elementary school," but Parliament, in legislating for public elementary education, is not interested to control the expenditure of it. Parliament is, however, most practically interested to control the expenditure of "the grant-earning subject."

For instance, it could not rightly permit its grants to be spent otherwise than in public elementary education—that is, "for the purpose of elementary schools," and, as "The Law of Public Education"[1] reminds us, it may rightly prevent Managers from reckoning expended capital monies as "grant-earning income."

B. This, then, is the argument for a negative answer to the question with which we started: "Does the Education Act of 1902 enable or compel a Local Education Authority to 'maintain' religious instruction in a non-provided public elementary school?"

It is contended

(*a*) that nothing in the Act of 1902 either expressly or by inference transfers the duty of maintaining that instruction to the Local Education Authorities,

(*b*) that the duty of maintenance imposed by Section 7 (1) is limited to those particulars which are

[1] "The Law of Public Education in England and Wales," by G. Edwardes Jones and J. C. G. Sykes, pp. 292, 293.

constituent in or contributory, as essentials, to the character of a school as a public elementary school,

(*c*) that religious instruction in a non-provided public elementary school is not thus constituent or contributory,

and it is inferred that,

therefore, a Local Education Authority is neither compelled nor empowered to "maintain" religious instruction in such a school.

The affirmative answer may be more briefly dealt with.

It is usually presented as a direct inference from the opening words of Section 7 (1) of the Education Act, 1902, and, ordinarily, the inference is unreasoned. We may assume that it is thought to be inevitable and self-evident, for no attempt is made to analyse the statutory premiss, and to show precisely the constituent elements of meaning that constrain the advance of thought from the words of the Statute to the administrative conclusion that is held to be a necessary conclusion.

Section 7 (1) of the Act of 1902 opens in this way:—

"The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, . . ."

The inference—

"Therefore, denominational teaching in a non-provided public elementary school must be maintained by the Local Education Authority"

appears to presuppose either

(I.) that "the public elementary school," as a legal and administrative entity, is identical and co-terminous with "the school that is a public elementary school"—that the words "all public elementary schools" are precisely equivalent to "all schools that are public elementary schools," or

(II.) that religious instruction is

(1) constituent in or contributory, as an essential, to the character of a public elementary school, or

(2) is a "legitimate function" of a public elementary school.

I. The argument implying this presupposition may be set forth as follows :—

Section 7 of the Act of 1870 makes no distinction between *nature* and *status*.

The school as *a whole* is called a public elementary school.

Therefore, it is the school as a whole that, under the Act of 1902, is to be maintained by the Local Education Authority.

Therefore, if denominational teaching be a constituent function of the school, that teaching, not less than the secular teaching given in the school, is to be maintained by the Local Authority.

To this we reply :—

1. Section 7 *creates* the distinction between nature and status.

2. The apparent designation of the *whole* school as a public elementary school is an accident of verbal expression, and does not compel the inference that a Local Authority has to maintain *all* the functions of a denominational public elementary school.

(1) This point has already been demonstrated.

(2) Section 7 of the Act of 1870 commences in this way :—

"Every elementary school which is conducted in accordance with the following regulations shall be a public elementary school within the meaning of this Act."

Therefore, in a given individual case, we may say—

This elementary school—because it is conducted in accordance with the relevant statutory provisions,—is a public elementary school.

But this proposition does not require us to believe that the words "public elementary school," although applied to the school as a whole —that is, to the school as an institution—denote all the constitutive functions of the school.

Take another case. The proposition "This man is a barrister" does not constrain us to believe that he is *only* a barrister. Because he is a man, he is necessarily more than a barrister.

So it is with the denominational public elementary school. Just as the achievements which make a man a barrister do not exhaust the constituent functions of his life, or express every constituent in his nature, so the regulated activities which, by enactment of Parliament, make a denominational school a public elementary school do not exhaust the constituent functions of its life or express every constituent in its nature.

The name public elementary school has its ground in the nature of denominational school as a teaching institution, but that ground is not co-extensive with that nature.

A public elementary school is a teaching institution that does a given kind of work in accordance with certain prescribed regulations. It is, in fact, a certain defined complexus of regulated activities, and, if it be a denominational school, that complexus is integral in a larger complexus.

A direction to maintain a public elementary school has its term in the defined complexus of regulated activities. If, in a given case—in the case, for example, of a denominational school—there be other activities not constituent in that complexus, those other activities will not be included in the term of the direction to maintain, unless it can be shown that they are contributory, as essentials, to the *esse* of the defined complexus.

But we have already seen that the religious work of a denominational public elementary school is not thus contributory. Therefore, Section 7 (1) of the Act of 1902 neither empowers nor compels a Local Authority to maintain that work.

II. 1. The earlier course of our argument has already demonstrated that religious instruction is not constituent in that complexus of regulated activities which constitutes a public elementary school. Neither is it in any way contributory, as

an essential, to the character of a school as a public elementary school. Religious instruction in accordance with the Trust Deed is constituent in the *esse* of the ordinary denominational school, which is an institution governed by specific trusts and existent only in virtue of and, primarily, as the instrument of those trusts, and if religious instruction were, in some like manner, necessary to the very existence of a school as a teaching institution for the purposes of public elementary education, one might, perhaps, not unreasonably claim maintenance for that teaching from the Local Education Authority. But if, for any reason, religious instruction can no longer be given in a non-provided school, or the school itself continued as non-provided, Sections 19 and 23 of the Elementary Education Act, 1870, afford wide facilities for continuing the school as a public elementary school wholly maintained by the Local Authority without charging that Authority with the duty of maintaining denominational teaching therein.

Besides, the primary duty of the Local Education Authority, towards a denominational school is to maintain and keep efficient a public elementary school in premises provided by the Managers. But the Managers of a denominational school governed by trusts can "provide" the premises only if they be able to continue the use of them —subject to the Education Acts—in accordance

with the terms of their trust. If they cannot, their school has reached the legal term of its existence, and application should be made to the Board of Education for a Scheme, under the Charitable Trusts Acts,

(*a*) to give the school a new start by removing restrictions that the Managers cannot remove, or
(*b*) to make some other use of the Trust property.

If a denominational school cease to fulfil its religious obligations, then—unless re-started under more favourable trusts—it comes to an end. The Managers no longer have a school that they can provide. Indeed, they themselves cease to exist as Managers—although, happily, not as individuals.

II. 2. An examination of the Statutes and the Code has led us to conclude that religious instruction is *not* a "legitimate function" of the public elementary school *as such*,—it forms no part of that defined complexus of regulated activities which constitutes a public elementary school. It may be, and ordinarily is, a "legitimate function" of the school that *is* a public elementary school—but it is not constituent in the activities that make that school a public elementary school, nor is it contributory, as an essential, to the *esse* of those activities. From what statutory words, then, can we infer that the cost of it must be borne by the Local Authority?

III. It may, perhaps, be said that the administrative conclusion we are now discussing is

actually inferred, not from the bare letter of statutory words, but from those words interpreted according to the well-understood and manifest intention of Parliament.

But what is meant by "the intention of Parliament"? It is easy to say what is not meant—or, at least, what ought not to be meant. The intention of Parliament is not identical with the intentions of individual legislators,—with the intentions declared to constituents, or expressed in Parliamentary debates,—nor are these equivalent to it. It does not denote even the intentions of Ministers. These are sometimes quite admirable, but they determine the legal effect of a Parliamentary enactment only when a Minister has done his work so badly that the unsupplemented text of his legislation bears no probable meaning. A draughtsman's intention is, of course, even less frequently determinant.

It is sometimes half-forgotten

(1) that the *explicandum* in juristic interpretation is a *law*—not a policy or a purpose;
(2) that the method of juristic interpretation is grammatical and logical, not historical or pragmatist.

Meaning is determined by *content*, not by genesis, and legal effect is determined by meaning and by systematic position in the *corpus legum*—not by some antecedent intention.

If a Minister's legislative work be so bad that

we can make it reasonably effectual only by inferring a meaning from his antecedent intention, that intention becomes determinant of meaning, not *virtute sua*, but because, in the circumstances, we make use of it as indicating the intention of Parliament. It is from this latter intention, and from no other, that we can properly infer a meaning for an obscure or defective text.

But this interpretative intention of Parliament is not an actual *prius* in the order of history. It is a logical postulate, and when we suppose it as existent we do so by a necessary convention of juristic methodology.

It were strictly true to say that all juristic and administrative interpretation of the law aims, if it be not abnormal, at nothing more than this—giving true effect to the intention of Parliament. It is this legislating intention that creates law—that gives to written words the force of law. Where a Statute, taken in its plain, grammatical sense, has a clear and practicable meaning, we ordinarily take that meaning to be the true meaning of the Statute, and make no attempt to discover the intention of Parliament—although according to juristic methodology the chosen meaning is made law only by that legislating intention. But when the enacted text will not yield, even to our most patient study, a probable meaning, then we must essay discovery of "intention," in order to infer from it, when found, a meaning

that will make the refractory text reasonably effectual.

Legislation is an entirely practical art: it always aims at doing something. A law is not an opinion: it is a practical precept. It always prohibits, commands, or permits. Indeed, it is essential in the very idea of law that, in one or other of these ways, something be done.

Now, as jurists and administrators we have to interpret the laws. They are our *data*, and we cannot for a moment entertain the thought that any one of them is not a law—*i.e.* does nothing. Our first postulate—and it seems inevitable—is this:—Parliament never legislates in vain: its every utterance has some practical result,—some result in enlarging, controlling, or defining the activities of men,—and the object of our interpretation is to ascertain that result. Behind every enacted sentence we presume a legislating intention which makes that sentence law and determines its meaning. If that meaning be clear we do not ordinarily advert to the presumed intention, but sometimes the obscurity of our text makes that advertence necessary. How do we then infer that intention which, when we have found it, we make interpretative? We infer it, if possible, from something that Parliament has done, and, primarily, from other parts of the Statute in which the obscure text occurs. If we say that the antecedent intention of a Minister

enters into the ground of this inference, we illustrate the ultimate resources of our methodology, but the induction we point to is one that can very rarely be necessary.

It follows from this that the "intention of Parliament" cannot set aside the plain, grammatical meaning of an enactment, if that meaning be clearly shown, by the relevant context of law, to be the true meaning. In the meaning thus known to be true we *have* the "intention of Parliament." Indeed, that intention exists only as a presupposition of that meaning: it has no other content or end than that meaning, and no other power than power to make that meaning law. Clearly, then, it cannot set aside that meaning.

We ordinarily infer a meaning from the intention of Parliament only when enacted words remain ambiguous or obscure, even when read in connection with their full context of law, or when they yield a meaning which, upon *statutory grounds*, we cannot believe to be their intended meaning.

Now, the negative conclusion—that the cost of denominational teaching in non-provided schools is *not* thrown upon the Local Authorities—rests upon grammatical meaning and statutory definition. It is reached by *exact and necessary inference from enacted words precisely interpreted*, and it does not entail any results that suggest error.

Therefore, the canons of scientific interpretation compel us to accept it as truly expressing the legislative intention of Parliament—that is, as binding law.

Therefore, neither "Rome," nor any other religious denomination, is, in Dr. Clifford's sense, "on the rates."

APPENDIX

HOURS OF SECULAR INSTRUCTION

A further Note on Section 7 (1) (a) of the Education Act, 1902

Section 7 (1) (*a*) of the Education Act, 1902, provides that the Managers of a non-provided public elementary school

"shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds, . . ."

Does this section enable a Local Authority to fix the initial and terminal hours of the secular instruction in a non-provided public elementary school?

(*a*) From the words of the section it is apparent that directions "as to the secular instruction to be given in the school" must have their term in the instruction itself.

Now, a direction thus determined must, when carried out, make some change in the instruction

—in the instruction itself. After it has been carried out, the school—as a teaching institution—will "function differently." In other words, its instructional work will be different—different in one or more of the particulars that make its work instructional and, in co-ordination one with the other, constitute its teaching activity.

But a direction altering the limiting hours of secular instruction—a direction, for example, to commence and finish that instruction half-an-hour earlier—would leave the instruction untouched. The school would "function" precisely as before. No constituent in its instructional work would be in any way or in the least degree affected. Therefore, such a direction as to hours—because its term would not be in the instruction itself—could not be given under Section 7 (1) (*a*). It might, perhaps, be said, with sufficient accuracy, to have its term in the *giving* of secular instruction, but a direction as to the *giving* of secular instruction in the school is not identical with a direction as to the *secular instruction to be given* in the school, and cannot be subsumed under it.

The relation indicated by the words "as to" seems, indeed, very vaguely defined, but it *must* be a relation between "direction" and "instruction." However we interpret "as to" we cannot interpret it otherwise than as determining "direction" to "instruction" — as making "instruction" the term of "direction." We cannot

argue that, because the relation is vaguely defined, any direction can be subsumed under it that has the least reference to or connection with instruction,—that is incident, not upon the instruction itself, but only upon something ancillary or circumstantial to the instruction, or upon some extrinsic incident or characteristic of it. In *one* particular the relation is not vaguely defined. It precisely fixes the term of "direction." Nothing can be subsumed under it that is not determined to "instruction,"—to instruction itself.

If we so interpret the words "as to," their seeming vagueness disappears. They are not vague, but catholic, and admit every direction and every kind of direction that has its term in secular instruction.

Thus interpreted, the first condition in Section 7 (1) (*a*) becomes a beautifully precise instrument for placing the instructional work carried on by the "secular side" of a non-provided public elementary school completely under the control of the Local Authority, and for thus far accomplishing one of the primary purposes of the Act. It is, indeed, difficult to see what better words Parliament could have used. It was impossible to foresee every kind of direction that might become necessary or desirable. The legislative intention of Parliament was to give "control" and attach responsibility. Therefore,

it says, in effect, to the Local Authorities: "You may give whatever direction you at any time will to give, provided only that it be direction having its term in secular instruction." What better words could have been chosen than those actually used? Directions "as to the secular instruction to be given in the school"—the term of the direction is precisely indicated, but any and every direction having that term can, upon proper occasion, be issued. Could the definition of authority be more accurate, or the gift of control more complete?

If, however, we venture to depart from this accuracy of interpretation, and (indifferent to the sovereign proprieties of speech and thought) permit ourselves to think that directions "as to the secular instructions to be given in the school" can have their term elsewhere than in the instruction itself, then we degrade a splendidly-adjusted instrument into a crude and illiterate expedient.

β. (I.) But does this interpretation of "directions . . . as to the secular instruction to be given in the school" permit us to take the immediately following word "including" in its natural sense?

At first sight, more than one explanation seems possible of the clause in which this word is initial.

We may say—

(1) that it defines the range rather of the Managers' obedience, than of the directions as to secular instruction,

(2) that it *adds* to the powers of Local Education Authorities by enabling those Authorities to give directions concerning matters which, had the clause not been enacted, would have been beyond their competence,

(3) that it makes plain part of the denotation of the immediately precedent words—"as to the secular instruction to be given in the school."

(1) We can say that Section 7 (1) (*a*) defines the range of the Managers' obedience only because that obedience is the necessary correlate of the directive powers given or recognised by the section. The immediate subject of definition is "range of powers," not "range of obedience."

This explanation does not take account of the fact that the relation indicated by the word "including" is a relation between two groups of *directions*, nor does it make clear how the second group is included in the first. What is the character common to the two groups which enables us to subsume directions "with respect to" teachers under directions "as to" secular instruction?

(2) That which is *added* to another thing cannot be said to be *included* in that other thing—even after the addition—unless the word "included" be used in a quite non-natural sense.

(3) This explanation accurately preserves the natural sense of "including." But if the words "directions . . . as to the secular instruction to be given in the school" denote, among other things, directions "with respect to" teachers, what is the meaning that gives to those words a denotation so extensive? Either of two meanings will suffice. The phrase, "directions . . . as to the secular instruction to be given in the school" will cover directions "with respect to" teachers equally well whether it mean only, as we suggest it does, "directions that have their term in the secular instruction" or whether it denote also directions concerning matters in any way relevant to or connected with the secular instruction. But the second of these interpretations has already been rejected, and we cannot establish it by presuming it from a clause to which it is not necessary.[1]

There remains, then, the explanation that the words "directions . . . as to the secular instruction to be given in the school" denote, among other things, directions "with respect to" teachers, because these latter directions *are* directions as to secular instruction.

We have already seen that "as to the secular instruction" means "determined to the secular instruction"—to the secular instruction itself.

[1] Not necessary, because there is another and better explanation of the clause—namely, the one given in the next paragraph.

"Directions . . . as to the secular instruction" are directions that have their term in the secular instruction. But *that* is where directions "with respect to" teachers have *their* term. Therefore, directions as to secular instruction constitute a group which includes directions "with respect to" teachers.

It must not be forgotten that the term of a direction is something more than merely verbal. A direction which, when carried out, alters the instructional work of a school—makes it, in some particular or particulars, different from what it was before—has its term in the instruction, even though instruction be not mentioned in the verbal form of the direction. We are dealing with concrete things—not with mere words—with Local Authorities, on the one hand, and the instructional work of schools, on the other,—and any direction which alters that work is a direction that has its term therein. Once more—because we are dealing with concrete things, not with mere words—we may not separate the instructional work of a school from the teaching organism by which that work is carried on. That work is, indeed, the organism in action—nothing more, and nothing less. We cannot say that, therefore, any direction which has its term in the teaching organism is a direction "as to"—that is, determined to—instruction, but we can and must say that a direction which so affects the teaching

organism as to modify its functioning—alter its work—has its term in instruction. Now, because "instructional work" is but a name for the work done by the school through its teaching staff, directions that affect the constitution of that staff—"directions with respect to the number and educational qualifications" of its constituent members—will affect, in some way or ways, and in some particular or particulars, the instructional work of the school. Better teachers will teach better, and a school will do better work if it have an adequately large staff than if it be under-manned.

Therefore, "directions with respect to the number and educational qualifications of the teachers to be employed for" secular instruction, "and for the dismissal of any teacher on educational grounds," are directions that have this practical term in secular instruction.

Therefore, they are directions "as to" secular instruction, and form part of—are included in—the general body of those directions.

Therefore, in Section 7 (1) (*a*) the word "including" bears its natural meaning, and in no way suggests even the slightest departure from the strictly logical meaning and use of the earlier words "as to."[1]

[1] Our inquiry into the second clause of Section 7 (1) (*a*) suggests, however, the propriety of qualifying our conclusion as to "hours." Under that Section any Local Authority *can* give a direction "as to" the initial and terminal hours of the secular instruction in any non-provided public elementary school or

But, if "directions . . . as to the secular instruction to be given in the school" include directions "with respect to teachers," why are the latter separately mentioned? The answer must, I think, be—*ex abundanti cautelâ.* Nor can we regret this careful providence of the Legislature. Had this separate mention not been made, we could, indeed, have inferred the true extension of the words immediately antecedent, but, in the work of practical administration, we might have sought too curiously for and attached too great importance to the verbal term of a direction "as to" secular instruction, and have been less than properly mindful of the sovereign fact that, because a direction is practical, its term must also be practical, and should be sought primarily in the actual or foreseen results, not in the mandatory words.

II. Suppose, *per impossibile*, that we found reason to reject the foregoing account of the relation between the two sets of directions mentioned in Section 7 (1) (*a*), and were compelled to think that the second clause of that Section "*adds* to the powers of Local Authorities, by enabling them to give directions concerning matters which, had that clause not been enacted,

schools within its area, if it can show that the direction, when carried out, would alter the instructional work of the school or schools affected by it. But, in ordinary cases, this could not be shown.

would have been beyond their competence." This interpretation would constrain us to "denaturalise" the word "including," but it would not affect our interpretation of the words "as to."

If "directions with respect to" teachers be additional, the words of the first clause ("directions . . . as to the secular instruction to be given in the school") do not cover them.

But, if "directions . . . as to the secular instruction to be given in the school" denote, not only directions having their term in the instruction itself, but, also, all other directions that deal with matters in any way relevant to or connected with that instruction, then "directions . . . as to the secular instruction to be given in the school" *would* cover directions "with respect to" teachers.

But, *ex hypothesi*, these latter directions are additional.

Therefore, the relation established by the words "as to" does *not* include other directions than those indicated by the logical meaning of the relating words.

We reach the same result if we say that Clause 2 "extends" the range of Clause 1, by making it include certain specified directions which, *ex hypothesi*, are not directions determined to "the secular instruction to be given in" a non-provided school. This does not denaturalise "including," but, if the extension be indeed an extension, then the words in Clause 1 cover the directions "with

respect to" teachers only in virtue of the extension.

Their denotation, indeed, is altered, but only so far as to make it include the additional particulars of Clause 2. The relation "as to" now includes those additional particulars, but nothing has happened to bring within it any other directions not determined to the instruction itself.

But a direction "as to" hours is neither a direction falling within the additional particulars of the second clause, nor is it one of the directions included within the unextended relation established by the words "as to."

Therefore, a direction as to "hours" cannot be given under Section 7 (1) (*a*).

γ. Section 7 (1) (*a*) concludes with this proviso:—

"no direction given under this provision shall be such as to interfere with reasonable facilities for religious instruction during school hours;"

It may, perhaps, be argued—

(1) that this provision is intelligible only if the Local Authority would, were the provision absent, have power to give directions that would restrict "reasonable facilities for religious instruction;"

(2) that, ordinarily, only a direction as to "hours" could restrict those facilities, and, because we cannot suppose Parliament to have legislated without a practical end, the conclusion may be drawn;

(3) that, therefore, "directions . . . as to the secular instruction to be given in the school" must cover directions as to "hours."

Now, if it were true—

(1) that directions as to the hours of secular instruction are the *only* directions that could interfere with reasonable facilities for religious instruction, and

(2) that the Local Authority, if without power to regulate hours, could not *think* itself competent to give other directions that would restrict those reasonable facilities,

this inference might be probable.

But would the proviso indeed be without adequate ground if the Local Authorities could not direct when secular instruction should begin and end? In a denominational school religious instruction and secular instruction are, or may be, so widely in contact and so variously related—for they are functions of one teaching institution and, in ordinary cases, are given by the same staff—that it is impossible to say beforehand what "directions . . . as to secular instruction" would or might interfere with religious liberty. Therefore, Parliament wisely made no attempt to enumerate or classify directions, but it enacted a general prohibition of interference. In effect, it said to the Local Authorities: "We will not endeavour to make a list of the powers already given by the earlier clauses of Section 7 (1) (*a*), but we warn you that those clauses do not confer any power to give directions that would 'interfere with reasonable facilities for religious instruction in school hours.' We cannot settle beforehand what directions as to secular

instruction would or might interfere with those facilities, but we enact the general prohibition."

It follows from this that the proviso which concludes Section 7 (1) (*a*) does not presume the existence of this or that particular power. It only presumes that powers exist or *might be thought to exist*, which, if left unrestricted, would or might have interfered with reasonable facilities, and this presumption is valid even if the Local Authorities have not power to give directions as to hours.

Therefore, we cannot infer this power to the Authorities from the terms of the proviso. If they possess this power, it must be inference from the antecedent enabling clauses of the section, and not from its terminable prohibition.

δ. The following passage is from "The Law of Public Education in England and Wales":—

> "It was stated on behalf of the Government in the House of Commons, on the 8th December 1902, that this power to give directions included a power to direct that fees should be abolished in the school, . . ."

This interpretation of the "power to give directions" supposes that the words "as to" have a meaning wider than their logical meaning. Had they this wider meaning, they might suffer or compel the inference that directions "as to" initial and terminal hours of secular instruction would be a direction "as to" secular instruction.

Now, statements "on behalf of the Government" are sometimes of sovereign importance,—when, for example, they declare or explain a policy,—and even for the scientific interpretation of law they are not always quite valueless. It may sometimes happen that such a statement discloses grounds for a probably valid inference of meaning, or at least directly indicates, not the legislating intention of Parliament—certainly not *that*—but the historically antecedent intention of the legislating Ministers, and sometimes—very rarely, but sometimes—this temporal *prius* is contributory to interpretation. In the present case, however, the interest of the statement—as a statement "on behalf of the Government"—appears to be principally psychological:—

(1) In the first place, a direction to abolish school fees is not a direction that has its term in secular instruction. If given and carried out, it would not, in any particular, alter the instructional work of the school or schools subject to it.

Therefore, a power to abolish school fees could be inferred from the words that permit a Local Authority to give directions 'as to' secular instruction, only if 'as to' were taken in the depraved sense already rejected, and this departure from logical precision of interpretation could be justified only by a legislative intention of Parliament, somewhere sufficiently expressed, to convey that power *by those enabling words*.

That intention is, however, nowhere disclosed. Therefore, we may not and cannot infer the depraved meaning that would, in its turn, infer the power.

(2) Parliament has, indeed, elsewhere clearly disclosed an intention to enable the Local Authorities to abolish school fees, but the words that disclose the intention are themselves sufficient to confer the power, and, therefore, reference to Section 7 (1) (*a*) is unnecessary, and, if made, would be ineffectual and improper.[1]

The disclosure is made in Section 14, which clearly presumes the competence of the Local Authorities to abolish school-fees, and, therefore, is sufficient to effectively create it.

"Where before the passing of this Act fees have been charged in any public elementary school not provided by the local education authority, that authority shall, while they continue to allow fees to be charged in respect of that school, pay such proportion of those fees as may be agreed upon, or, in default of agreement, determined by the Board of Education, to the managers."

"So long as they allow fees to be charged." The matter is clearly recognised as falling within the administrative discretion of the Local Authority. But a discretion recognised by Parliament must be a real discretion—for the Legislative Power does not play with words. Therefore, under Section 14, the Local Authority has power to permit or to terminate the payment of fees in non-provided public elementary schools.[2]

[1] Ineffectual, because only an interpretative necessity could warrant the degradation of "as to." An unnecessary reference would be entirely without result.

Improper, because, if the intention be otherwise accomplished, the reference would be merely arbitrary.

[2] But not to impose them—at least, not under Section 14.

We conclude, therefore,

(1) that the power of the Local Authorities to abolish fees is not derived from Section 7 (1) (*a*);

(2) that the existence of that power will not warrant —because it does not compel—a depraved widening of the cardinal enactment in that section;

(3) that, as no ground has been shown for thus enlarging the extension of the words "as to," those words must be interpreted with logical precision.

If, however, they be so interpreted, they will not, in ordinary cases, confer on the Local Education Authorities power to give directions "as to" to initial and terminal hours of the secular instruction in non-provided schools.[1]

[1] If the main argument of this Appendix be valid, it is quite clear that a Local Authority cannot derive any power from Section 7 (1) (*a*) to issue "Regulations as to Religious Instruction," such as the 2nd and 4th of those issued by the Education Committee of the Northants County Council.

"2. TIME OF RELIGIOUS INSTRUCTION.

"Secular instruction in all Schools shall commence not later than 9.45 A.M., and occupy the School hours for the rest of the day."

"4. PLACE OF RELIGIOUS INSTRUCTION.

"In consideration of the answer given in the House of Commons by Sir W. Anson to Mr. Halsey, on Friday, the 10th June last, religious instruction of children attending an Elementary School shall not be given in any place other than the School during the hours in which the School is open, unless it be in connection with the withdrawal of children under the Conscience Clause."

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