

part of the child. I am therefore prepared to concur in the proposed judgment on the ground that the death of the child was occasioned through the fault of the Police Commissioners of Glasgow, in not having fenced a dangerous place directly abutting on one of the public streets.

The Court found the defenders liable in damages to the pursuer, and assessed the same at £50.

Counsel for Pursuer—Salvesen—A. S. D. Thomson. Agent—A. B. Cartwright Wood, W.S.

Counsel for Defenders—Lees—Craigie. Agents—Campbell & Smith, S.S.C.

Wednesday, March 8.

SECOND DIVISION.

[Lord Wellwood, Ordinary.]

BROOK v. KELLY.

Voluntary Church—Construction of Code of Statutes of Voluntary Religious Body.

By the code of statutes of a cathedral church in connection with the Episcopal Church of Scotland it was provided that the clergy of the church were to be appointed by the bishop, and were to consist of a provost and three or more canons residentiary, who were to hold their offices *ad vitam aut culpam*. The code also appointed a board of management, and provided that with them "will rest the due provision . . . for the fitting support of the provost and canons of the cathedral."

An action brought by one of the canons, who had been appointed by the bishop, but whose appointment had never been ratified by the board of management, against the board for £150 per annum, or such other sum as might be proved to be available for his fitting support, held to be irrelevant—*diss.* Lord Trayner, who was of opinion that the pursuer was entitled to participation in any funds for behoof of the canons in the hands of the board of management, and that proof should be allowed to show if such funds existed.

By the code of statutes of the Cathedral Church of St Andrew, Inverness, which is in perpetual connection with the Episcopal Church of Scotland, it is provided, section 4, that "the clergy of the Cathedral shall be appointed by the Bishop, and shall consist of a provost and of three or more canons residentiary, who, together with the treasurer or other representative of the Board of Management, shall constitute the chapter. The clergy of the chapter shall hold their offices *ad vitam aut culpam*, and shall be subject to the canons of the Episcopal Church of Scotland." By section 13 of the said code of statutes it is provided that "the temporal affairs of the Cathedral shall be vested in a Board of Management,

consisting of the Bishop and chapter, the several canonical lay representatives of the diocese, and the lay trustees of the Cathedral. To this Board is entrusted the management and administration of the funds of the Cathedral (subject to the disposition of any persons who may hereafter confer gifts and endowments for behoof of the Cathedral), the due ordering and arrangement of the congregation, and the maintenance of order during divine service, the appointment of the necessary officials except as above provided for, and the care and preservation of the buildings. With the Board of Management will rest the due provision for the maintenance of divine service, and for the fitting support of the provost and canons of the Cathedral."

About the end of the year 1891 the Reverend Alfred Brook resigned his charge of the Scottish Episcopalian Mission Church of St Andrew at Tain at the request of the Right Reverend James Butler Knill Kelly, Bishop of the Cathedral Church of Saint Andrew at Inverness, and was appointed by the Bishop a supernumerary clergyman or diocesan chaplain in connection with the Cathedral Church.

On 2nd January 1892 the Reverend Alfred Brook, by deed of appointment under the hand of Bishop Kelly, was appointed a canon of the said Cathedral Church, and on the following day was installed in presence of the congregation.

On 30th March last Bishop Kelly wrote Canon Brook, terminating his tenure of the office of diocesan chaplain at the expiration of three months from that date, viz., on 30th June, and stating that the salary which he received was wholly derived from that office, and must cease with the tenure of it. On the following day (31st March) Canon Brook intimated to the Board of Management of the Cathedral the contents of the Bishop's letter, and requested them to provide a "fitting support" for him, in terms of section 13 of the foresaid code of statutes. He, however, on 4th April, received from the treasurer an extract from the minutes of meeting of the Board of Management held on 1st April, which bore that the said Board declined to make any such provision. Some time after the Bishop wrote Canon Brook extending the period during which he was to hold the office of diocesan chaplain to 30th September. A correspondence ensued between the agents of the respective parties, but although pressed to provide Canon Brook with fitting support or maintenance, the Board of Management refused to do so.

Thereupon Canon Brook raised an action against the Board of Management to have it found and declared that the defenders were bound to make due provision for the fitting support of the pursuer as one of the canons of the Cathedral out of the funds in their hands as such Board of Management, and to have the defenders decerned and ordained to pay the pursuer £150 annually, or such other sum as might be shown in the course of the process to be available for the fitting support of the pursuer as a canon foresaid.

The pursuer alleged in his condescendence that the Bishop had given him to understand before his appointment that he would have a stipend of not less than £150 a-year. The other two residentiary canons of the Cathedral received salaries of £200 and £150.

The pursuer pleaded—“(1) The pursuer, as canon of the Cathedral of Inverness, is entitled to fitting support, and the defenders, the Board of Management thereof, are bound to provide him therewith, and the sum concluded for being fair and reasonable in the circumstances, decree ought to be pronounced in terms of the conclusions of the summons, with expenses. (2) The pursuer having been appointed canon of the Cathedral Church, Inverness, the defenders, as the Board of Management thereof, are bound to supply him with fitting support out of the funds under their charge. (3) The pursuer having been duly appointed a canon of the Cathedral by the defender Bishop Kelly, acting under and in conformity with the statutes of the Cathedral, the defenders the Board of Management thereof are bound under said statutes to provide him with ‘fitting support.’ (5) In virtue of his appointment as canon residentiary of said Cathedral, and the foresaid code of statutes, the pursuer is entitled to decree of declarator as craved.”

The defenders pleaded—“(1) The pursuer’s averments are irrelevant and insufficient to support the conclusion of the summons. (2) The defenders are not bound to provide for or maintain pursuer under the code of statutes. (3) The defenders never having undertaken to pay pursuer £150 per annum, or any part of said sum, ought to be assoilzied.”

On 23rd January 1893 the Lord Ordinary (WELLWOOD) repelled the first plea-in-law for the defenders, and allowed parties a proof of their averments.

“*Opinion.*—In repelling the defenders’ first plea-in-law and allowing a proof, I intend to decide no more than this, that if under the code of statutes of St Andrew’s Cathedral, Inverness, the Bishop appoints a residentiary canon, the Board of Management *prima facie* are bound to make due provision for his fitting support, having regard to the funds at their disposal and the nature and extent of his duties. Under article 4 of the code the Bishop has power to appoint three or more residentiary canons. The appointment is *ad vitam aut culpam*. Articles 9, 10, and 11 prescribe the canons’ duties; the office is or may be no sinecure. Article 13 provides, *inter alia*, that due provision shall be made by the Board of Management for the fitting support of the Bishop and canons. It runs as follows—[*His Lordship read the article*]. The substance of these provisions is, that the Bishop is given power to appoint certain residentiary canons, who have certain duties allotted to them, involving residence and abandonment of other pursuits; that they are entitled to remuneration for the duties thus performed; and that by the statutes the duty of providing this remuneration is thrown upon the Board of Management.

“It may be that on inquiry it may be shown that there are no funds at present available for an allowance to the pursuer, or that the pursuer accepted the office of canon in the knowledge and on the understanding that he was to receive no remuneration except as supernumerary or diocesan chaplain. But the pursuer denies this, and avers that there are funds available for his support. If the pursuer proves his averments, and the defenders fail to prove theirs, it will fall to the Board to fix the pursuer’s remuneration. As to this they undoubtedly have a large discretion, with which the Court will not interfere except on the gravest grounds.”

The defenders reclaimed, and argued—The action should be dismissed as irrelevant. There was nothing on record to infer any legal right in favour of the pursuer against the Board of Management, unless, as a consequence of his appointment by the Bishop, he had a legal right to participate in the funds. But, in the first place, the pursuer was not a residentiary canon at all. A residentiary canon was a canon resident in the Cathedral, conducting daily service from day to day. The appointment of Canon Brook did not bear that he was appointed a residentiary canon, and in fact he was not one, but a supernumerary diocesan. He only got the title of canon by courtesy. Even if he was appointed a canon residentiary by the Bishop, that appointment *per se* gave him no right to any part of the funds in the hands of the defenders. The articles vested the control of the funds in the defenders. The discretionary power as to the application of the funds was to lie with them. They knew nothing about this appointment, and never sanctioned it. The Bishop might appoint a residentiary canon, but if that canon wanted a salary, the appointment had to be ratified and the salary fixed by the Board of Management. The Court could not interfere with the discretion of the Board—*Thomson v. United Incorporations of Mary’s Chapel*, March 9, 1838, 16 S. 842.

Argued for the pursuer and respondent—The pursuer was competently appointed by the Bishop. His appointment was that of a canon residentiary, and he had a stall in the Cathedral as such. His appointment being competent, he was entitled under the articles to fitting support from the Board of Management if there were funds in their hands from which to provide this fitting support. The deed under which the Board of Management was appointed imposed on them the payment of the canons residentiary from the funds in their hands. Proof should be allowed to show that there were sufficient funds from which the pursuer’s stipend could be paid. The Court were entitled to construe the code of statutes—*Flethers of Glasgow v. Scotland*, January 31, 1826, 4 S. 405. [LORD YOUNG—That was an incorporation, while this is a purely voluntary religious charity. That makes an enormous difference.]

At advising—

LORD JUSTICE-CLERK—This case raises a question undoubtedly of some difficulty. Under the code of statutes of the Cathedral Church of St Andrew, Inverness, the clergy of the Cathedral are to be appointed by the Bishop, and it is provided in the statutes that they are to consist of a provost and of three or more canons residentiary, who constitute the Chapter, and the clergy of the Chapter are to hold their offices *ad vitam aut culpam*. Now, in this case the pursuer of the action, who held an incumbency within the diocese of the Bishop at Tain, was induced to come to Inverness to take up an office in the Cathedral there of the nature of a chaplaincy of the diocese, the duties of which consisted in his attending the churches where there was a temporary absence or a temporary vacancy, and performing the services and conducting the work of the particular place for the time being. The Bishop also appointed him a canon of the Cathedral. Apparently under the statutes the Bishop had no power except to appoint canons residentiary, and the pursuer in this case does not appear to have been specifically appointed a canon residentiary, but I am inclined to think in the whole circumstances of it that the appointment of canon by the Bishop was the appointment of a canon under clause 4, and therefore was the appointment of a canon residentiary. All went well for some time. But some difficulty arose, and the Bishop thought it better to remove the pursuer from his position as a chaplain who performed those duties that I have described. I do not know what the circumstances were which occasioned the Bishop to do so, and there will be no need to enter into them. No doubt the Bishop had the power to act as he did if he thought proper. In these circumstances the pursuer lost the stipend or salary which attached to the office of chaplain, but he remained, and contends that he remained, a canon *ad vitam aut culpam* in the Cathedral, and he made a demand on those who have charge of the funds of the Cathedral Church to make him an adequate provision in the way of stipend or salary in respect that he was a canon of the Cathedral. That they declined to make; and the question which is before us is, whether they are bound to make such provision? Now, the statute regarding temporalities is the statute No. 13, and that statute, after declaring that the temporal affairs of the Cathedral are to be vested in a Board of Management, states that the Board is entrusted with the "management and administration of the funds of the Cathedral." And then, as regards questions of stipend or salary, the statute departs from the language of institution—I think rather unfortunately—and proceeds to state—"With the Board of Management will rest the due provision for the maintenance of divine service and for the fitting support of the provost and canons of the Cathedral." Now, that, expressed in that form, is a little ambiguous and doubtful, and I have a great difficulty in coming to a conclusion in my own mind what is the

proper interpretation to put upon it as regards the question whether any obligation is imposed on the Board of Management in every case in which a canon is appointed by the Bishop to provide a fitting support for him out of the funds. The one view is, that the Board of Management having the administration of the funds, if any gentleman is to be appointed a canon, he must get that matter of stipend settled between him and them before he undertakes the duties of the office, and that they have discretion, if their funds are not of sufficient amount at the time, to refuse to provide him with a stipend. I understand the arrangement is that a certain sum is set apart out of the funds—which are entirely voluntary funds—for the purpose of meeting stipends or salaries of the canons residentiary, and the case put in defence here is that the Board of Management are unable at present both to provide adequately for two canons already appointed before this gentleman was made a canon and to make the provision for him which he demands. The other view is that the Bishop having the power to appoint canons, as a matter of right a canon when appointed can insist on this Board of Management providing a proper stipend or salary for him, and that if the sum set apart for the canons is not sufficient to provide adequately for them, all those who have already had a stipend allocated to them must suffer accordingly by a certain sum being taken from them in order to make up a salary for the canon last appointed. I consider it to be a difficult question, but giving it the best consideration I can, I have come to the conclusion that the Board of Management are not bound, merely because the Bishop has appointed a canon, to find a stipend or salary for him. I do not go at all into the question of whether if the Board of Management were to misuse their office as a Board of Management, and to decline to consider the matter, and for purposes of their own—either objecting to the Bishop's appointments or having some difference with the Bishop—were to refuse to do their duty at all, the Court might not interfere. That is a totally different question. But assuming as I do—and as I think I am entitled to do in this case, for there is nothing to the contrary—that the Board of Management are exercising discretion honestly and fairly in this matter, and have come to the conclusion that they are not able to make the provision demanded, I have, though with some difficulty, come to the conclusion that they are within their right and duty under section 13 of the code of statutes in doing so, and that accordingly the pursuer has not a good case to present when he demands that they shall be compelled to grant him stipend or salary in respect of his being a canon of the Cathedral.

LORD YOUNG—This action contains two conclusions. One is to declare the existence and import of a civil contract and the other is to enforce implement of it by decree for £150 a year in favour of the pursuer. I am

of opinion—and I confess without any doubt—that no civil contract is at all relevantly alleged here. I have represented the action as I have done, I think, accurately as an action to declare the existence and import of a civil contract, and to enforce it by a decree for money. In no other view could we entertain it. We should have no jurisdiction to entertain an action regarding the government and management of this Cathedral or whatever it is. It does not signify whether it is a cathedral or a Methodist meeting-house—we have nothing to do with the management of it. I do not mean that any body of citizens of this country who voluntarily set up a church, or any other institution, and appoint a board of management, and provide them with funds, cannot call them to account. That is a civil action and a civil remedy. They must deal faithfully and according to law and justice with the funds committed to their hands for a particular purpose, and they may be called to account in a civil court if they misappropriate funds or apply them in a way for which they were not committed to them. And again, contracts may be made with such a board of management or with an individual manager for any of the purposes for which they were appointed by the subscribers to the fund which they were to administer, and in the “maintenance of divine service.” In this place there might be contract—ordinary civil contract—which is generally made in an ordinary way. The building is to be kept in repair, it is to be kept clean, it is to be lighted. That is all provided for I see, and that is by ordinary civil contract, and those who contract to give their services in repairing the building—joiners and masons—or in cleaning or giving attendance, may make their particular contracts, or if they did not it would be *quantum meruit* in matters on which we should have no difficulty in fixing, if the parties did not agree, what is a fair price for these services that have been given. And so also with the clergy—those who are to go there and conduct the services and preach. They may make such contracts as they see fit, and when they make any contracts they will be civil contracts, and may be enforced here against those with whom they make them. But unless they intend to submit themselves to the bounty of those who bring them there—if they mean to have a fixed sum or a proportion of the sums which may be subscribed year by year—they may make their contract to that effect, and that will be a civil contract and will be enforceable against the makers. But I can find nothing of that kind alleged with reference to this particular minister. He was appointed by the Bishop to be a supernumerary or diocesan chaplain, but he had no contract for any salary as such, he was paid what they could afford. His services have been dispensed with, and it is totally incompetent to inquire, and we are not invited to inquire, into whether it was useful that he should be continued or not. But at the same time he was nominated a canon by the Bishop. Now that nomina-

tion of a canon by the Bishop is not a contract in law—it is not a contract at all—I mean standing *per se*. It might be brought into the position of a contract otherwise, and that is sought to be done here by referring to a particular head—the thirteenth—of the code of statutes of this Church regarding the temporalities. The temporalities are very moderate, because though no doubt they are a very pious people who have set up and support this Church, the contributions are not very handsome and do not at all admit of very generous treatment of the clergy. I think we were informed that the provost takes nothing. He is content to go without anything, and not to diminish the funds by anything to him. But there are two canons, who I suppose are the ordinary clergy of the Church, with whatever dignity that name carries, and they have the position of being members of the Chapter, and these two are paid very moderately indeed. One is paid more than the other. I do not know why, because in the absence of contract and in the estimation of law, one canon would be as good as another. But it is in the discretion and judgment of the Board of Management what provision they are to make for the maintenance of divine service in the Cathedral; with them is to rest “the due provision for the maintenance of divine service, and for the fitting support of the provost and canons of the Cathedral.” These are the declared purposes to which the funds subscribed—these very moderate small subscriptions—are applicable. Are they applying them to any other? Any of the contributors to the fund might complain, or I think any interested party might complain, if they were applying the funds to any other purpose. But it is not for us to judge or control them, or for anybody we can see to instruct or control them as to what number of canons they will place, with the funds in their hands, or as to what they will give to each. The purposes are limited to which they can apply the funds. Are they to divide the funds among the various objects of those purposes according to their own judgment or subject to the control and correction of the Court of Session? That is a duty which I should most respectfully decline to undertake. To ascertain year by year what is the amount of subscriptions in the hands of this Board of Management, and to instruct them as to the number of canons which they should pay, and what they should pay to each, or what they should do with the money that should have gone to the provost had he not been well provided otherwise and too generous towards those who required the money more than himself to take anything—that is not a matter of the law of Scotland at all. If the canons are not satisfied with their stipend, or if the Bishop were to wish three canons appointed with equal salaries each, in place of two with salaries of £200 and £150, I think the duty of judging there is committed to the Board of Management as the administrators of these funds. If the Board said,

“We can afford to pay two canons, and cannot reasonably well afford to pay any more.” I think on that point it would be for them to judge, and not for the Bishop. But I see no indication of any difference of opinion except with this gentleman, who is the pursuer here, and who says, “They ought to take me in and give me proper provisions.” Now, what is a “proper provision?” He is applying to us to state what that is in this action on an alleged civil contract. I cannot in the least tell. But he says—and it was so argued to us—that a suitable provision is to be ascertained by evidence; it is a suitable apportionment having regard to the funds in the hands of these people for the time. But that is controlling the administration of the money, and that is a control which will vary, I suppose, according to the variance of the funds. Now, I must say I think that is altogether outside the question. I think it is a clear case that there is not on the face of this record, or in any of the statements or materials put before us, any ground whatever for affirming the existence, or admitting evidence to show the existence, of a civil contract which we can declare to be what is alleged here, and according to which we are to interpose and instruct this Board of Management as to their administration.

LORD RUTHERFURD CLARK—The management of the funds of this church is in the hands of the defenders. It rests with them to make due provision for the fitting support of the provost and canons. This is a matter entirely in their discretion, and unless they have undertaken to make provision for the pursuer, I think the pursuer has no case. It is not alleged that they have given any such undertaking. Further, I am of opinion that he has no claim as beneficiary under any trust; as I read the record, it is not alleged that there is any such trust under which he is beneficiary.

LORD TRAYNER—The pursuer in this case was duly appointed and instituted a canon of the Cathedral Church of St Andrew, Inverness, by the Bishop, acting under the authority of the statutes which regulate the government of the church and the administration of its funds. It is said that the pursuer is a canon, but not a canon residentiary. In the view which I take of the case it is quite immaterial whether the pursuer is called by the one name or the other, although being appointed by the Bishop (and the regularity of the appointment is not questioned), who has no power to appoint any but canons residentiary, I should think the latter designation the one to which the pursuer is entitled. By the 13th article of the statutes I have referred to, it is provided that the temporal affairs of the Cathedral shall be vested in a Board of Management, with whom “will rest the due provision for the fitting support of the provost and canons of the Cathedral.” I think the fair reading of that article is that the Board of Management, out of the funds

under their administration, shall make fitting provision for the canons of the Cathedral. There is no obligation on the Board to provide such funds, and if they have none, dedicated by donors or otherwise, set apart for the benefit of the canons, the pursuer has no claim upon them. The pursuer does not pretend to have any such claim. On the other hand, if the Board have funds in their hands so dedicated or set apart, then in my view they are bound to hold and administer such funds for behoof of the whole canons of the church, and are not entitled to pay the whole funds away to any one or more of the canons whom they may select or who may be selected by any other person or body of persons. As regards all funds held by the Board for behoof of the canons, they are merely trustees, and the canons, each and all of them, beneficiaries. In the face of the plain words of the statutes, I cannot come to the conclusion that the Board of Management can administer the funds set apart for the canons in such a way as to exclude any canon from participation therein. I think the pursuer in accepting the office of canon was entitled to take this view of the meaning of the statutes, as indeed I think he did in point of fact.

The defenders say that they have no funds in their hands for behoof of the canons; the pursuer says they have, and offers to prove this. The Lord Ordinary has allowed the pursuer an opportunity of proving his averment, and I think he was right. I do not desire to indicate, any more than the Lord Ordinary has done, that the Court would readily interfere with any discretion on the part of the Board of Management in the distribution of the funds (if they exist) among the several canons. All I mean to say is, that if the Board have money in their hands set apart for the support of the canons of the church, then the pursuer as a canon cannot be excluded from participation therein. I am of opinion that the interlocutor appealed against should be affirmed.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for the Pursuer—Comrie Thomson—Watt. Agent—D. A. Ross, S.S.C.

Counsel for the Defenders—Sol.-Gen. Asher, Q.C.—Brodie Innes—Pitman. Agents—J. & F. Anderson, W.S.