

The  
**Scottish Law Reporter.**

WINTER SESSION, 1875-76.

**AUTUMN CIRCUIT.**

GLASGOW.

(Before Lord Ardmillan.)

October 13, 1875.

LORD ADVOCATE *v.* ALEXANDER WATSON.

*Crime—Cruel and unnatural treatment of an infant child by its parent—Libel—Relevancy.*

A panel was charged with the crime of "cruel and unnatural treatment of an infant child by its parent, to the danger of its health and life." The narrative set forth that the panel having "obtained possession of said child, of which you are or were the reputed father, and which was then about four hours old or thereby, you did, then and there, wickedly, cruelly, and unnaturally, and regardless of consequences, and of whether it should live or die, carry it away from its said mother, clothed in nothing but a shawl or petticoat, and expose it to the cold morning air, and remove it without any additional covering, and without any precautions taken for its safety, to some other place in said united parishes, or in the said county, to the prosecutor unknown, to the great danger of its health and life, and did so deal with and dispose of it that its said mother has not been able to recover it, and that it has not since been seen or heard of, notwithstanding the most diligent search and inquiries, and that the prosecutor is unable to say or discover whether it is alive or dead." Objection to relevancy of the libel *sustained*, on the grounds, (1) that the narrative was inconsistent with the major proposition, in so far as the former libelled "parent," while in the latter the words "reputed father" were used; (2) That there was no averment that the panel carried the child away a sufficient distance to amount to cruelty or incur danger; and (3) That it was not libelled that actual injury was received.

Counsel for the Crown—Muirhead. A.-D.  
Counsel for the Panel—Macdonald.

VOL. XIII.

**COURT OF SESSION.**

Friday, October 15.

— [Lord Young.

**FIRST DIVISION.**

TURBINE AND OTHERS *v.* THE KIRK-SESSION OF LEUCHARS.

*Trust—Administration—Legacy—Poor.*

A legacy of £500 was left to the Kirk-session of a parish, the interest to be applied for relief of poor in the parish; and it was declared "that the minister and elders, constituting the Kirk-session of the parish for the time being, should be perpetual patrons of the said sum, and should have the sole power of naming the individuals."—*Held* That the directions of the trust were sufficiently complied with by distribution of the fund by the minister, without special nomination of the recipients at meetings of session.

This was an action at the instance of certain poor persons in the parish of Leuchars, against the minister and Kirk-session of that parish, in the following circumstances:—The late Alexr. Kettle Young left a sum of £500 to the Kirk-session of Leuchars, with directions to them to apply the interest for "relief of such persons, natives of the parish, and particularly of the village of Leuchars, as the said Kirk-session shall consider proper objects of such aid, but who have never received any aid from the Poor funds,—to be paid at such times, in such small sums as shall be considered to be most useful to the said poor persons, declaring that the minister and elders constituting the Kirk-session of the parish of Leuchars for the time being shall be perpetual patrons of the said sum, and shall have the sole power of naming the said individuals."

The pursuers, who were poor persons in the parish falling under the description in the be-

N. D. I.

quest, alleged that for some years past the defenders had not duly executed the purposes of the trust, in that no nomination had been made by the Kirk-session of persons entitled to receive relief from Young's bequest, nor, so far as the pursuers knew, had the interest of the fund been applied to any charitable purpose whatever, or, at all events, had not been applied in terms of the bequest. The main conclusions of the summons were for declarator that for the last nine years the trust had not been administered in terms of the trust's settlement, and that in future, the Kirk-session were themselves to nominate the recipients of the charity.

The defenders admitted that the custom had been for the minister to distribute the fund year by year without calling a special meeting of the Kirk-session for the purpose of making express nomination.

The Lord Ordinary pronounced the following interlocutor:—"Sustains the defences, and assolvoes the defenders from the conclusions of the summons, and decerns: Finds the pursuers liable in expenses, and remits, &c.

"*Note.*—The pursuers state no case to warrant the interference of the Court. Having regard to the character and amount of the charity in question, I think the Kirk-Session acted reasonably and within their power when they left the distribution to the discretion of the minister. Having confidence, no doubt well-founded, in his integrity and judgment to fulfil the intention of the charitable giver, I think they could not have taken a wiser course. The minister no doubt gave such an account of his proceedings from time to time as satisfied the Session, and any more formal accounting would, with reference to such a fund, and the purpose for which it was given, have been out of place. Accounts open to public inspection are certainly not required, and an accounting in this Court, at the instance of the pursuers or others like them, would put the little fund in a fair way of being extinguished altogether, by a rapid distribution of it in a manner not contemplated by the charitable donor. There is, in truth, nothing for it but to trust the Kirk-session, as the giver did, implicitly; and unless the members shall concur in deliberate misapplication, which is not reasonably to be apprehended, there is no real danger. The practical local checks against any serious abuse are quite sufficient, and I can give no countenance to a resort to this Court with such a case as the pursuers present. I see no reason to doubt that the defenders have been acting properly according to the purpose and intention of the charity."

The pursuers reclaimed.

The pursuers pleaded *inter alia*—" (2) The administration and management by the defenders of the charitable bequest mentioned in the condescence having been at variance with the wish and intention of the said Alexander Kettle Young, said management and administration were and are illegal and *ultra vires* of the defenders, and the pursuers are entitled to decree in terms of the second conclusion of the summons."

The defenders pleaded *inter alia*—" (2) The defenders are entitled by the terms of the bequest to distribute the said charity among poor persons of the class mentioned, at such times and in such small sums as shall be considered most

useful, without any express nomination to the fund at meetings of Session.

Authorities cited—*Liddle v. Kirk-Session of Bathgate*, 14th July 1854, 16 D., 1075; *Petrie v. Meek*, 4th March 1859, 21 D., 614.

At advising—

LORD PRESIDENT—There cannot be the least doubt of what is the object of this charity. It is for the relief of certain persons in the parish of Leuchars—namely, poor persons who have never been on the poor's roll or received parochial relief; and out of that class the Kirk-session are to select those persons whom they consider proper objects of relief. There cannot be a doubt that the Kirk-session have the power and the sole power of selection; and the question is, whether the Kirk-session can legally devolve that duty upon the minister. On that matter I entirely agree with the Lord Ordinary. I do not think it is indispensable that the Kirk-session should have a formal meeting and make a formal minute about every shilling or half-crown spent in this way, or that they should all concur in making such expenditure. I think it would be quite competent, for instance, in the case of a larger parish, for them to divide the parish among them, each taking a district, or, if that were considered more expedient, it would be competent to do the work through a committee. The minister here is just the committee of the Kirk-session, and is in my opinion by far the most suitable person. It would be much to be regretted if the pursuers were to be successful. There is a very small fund, and if anything like the proceedings contemplated by the pursuers were to be held requisite, I think it very likely that the Kirk-session might not be willing to undertake the duty at all. This fund is for a very useful and important purpose—viz., to keep poor persons who are in temporary want off the poor's roll, and is a sort of supplement to the church collections. I agree with the Lord Ordinary.

The other Judges concurred.

The Court adhered.

Counsel for pursuer—Dean of Faculty (Clark), Q.C.—J. P. B. Robertson. Agents—Lindsay, Paterson, & Hall, W.S.

Counsel for Defender—J. Guthrie Smith—A. E. Henderson. Agents—Mitchell & Baxter, W.S.

Friday, October 15.

[Lord Curriehill,

## SECOND DIVISION.

FORREST v. DUNLOP.

*Process—Decree of Absolvitor by Default—Res Judicata—Court of Session Act, 1868 (81 § 32 Vict. cap. 100) § 26.*

A decree of absolvitor by default was pronounced in terms of § 26 of the Court of Session Act, 1868, on failure of the pursuer to deliver two printer's proofs within the time therein specified—*Held* that the subsistence of that decree rendered a subse-