

Counsel for the Appellants—Lord Advocate (Balfour, Q.C.)—C. S. Dickson. Agents—Grahames, Currey, & Spens, for Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—Sir Horace Davey, Q.C.—Munro—Wilson. Agents—Andrew Beveridge, for G. Monro Thomson, W.S.

Thursday, August 3.

(Before the Lord Chancellor (Herschell), and Lords Watson and Macnaghten.)

BROOK v. KELLY.

(*Ante*, vol. xxx. p. 472, and 20 R. 470.)

Church, Voluntary—Code of Statutes, Construction of—Canon's Stipend.

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 (aff. the decision of the Second Division)* to be irrelevant.

This case is reported *ante*, p. 472, and 20 R. 470.

The Rev. Alfred Brook appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, in this action the pursuer, who is the appellant at your Lordships' bar, and who is a canon residentiary of the Cathedral Church of St Andrew, Inverness, seeks to have it found and declared that the defenders, the respondents, who are the Board of Management of that Cathedral, "are 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." The summons concludes for "payment to the pursuer of the sum of £150 sterling annually, or such other sum as may be shown in the course of the process to follow hereon to be available for the fitting support of the pursuer as a canon of the said Cathedral."

My Lords, on the 2nd of January 1892 the appellant was appointed to the office and dignity of a canon of the Cathedral Church by Bishop Kelly, and obtained no doubt under that appointment all the rights to which any canon of that Cathedral

Church was as such entitled, whatever those might be. The Cathedral Church of Inverness and the canons residentiary are of course not bodies having any legal status. The rights of the officials of that church must be determined on the ordinary principles of law in the same way as of members of any other voluntary association. The appellant places his reliance upon the 13th statute of the code of statutes of the Cathedral Church of St Andrew, which appear to have been approved and accepted by the synod of the united dioceses, held in the Cathedral in October 1869, and consented to by the chapter, and ratified by the Bishops in November 1869. The 4th of those statutes provides 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." The 13th statute is in these terms—"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." The appellant places his reliance upon the concluding words which I have just read—"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, my Lords, the appellant claimed that the Board of Management should allot to him an annual stipend out of the funds in their hands. They declined to do so; they denied that there was any obligation upon them in point of law to do so, and thereupon the present action was brought. The averments upon which the appellant relies are these—In condescendences 5 and 6, after alleging his intimation of a request to the Board of Management to be provided with a fitting support for him in terms of section 13, he avers that on the 4th of April he received an extract from the minutes of a meeting of the Board held on the 1st of April, which bore that they "declined to make any provision for the pursuer." The 6th condescendence adds the fact that two other canons are being paid respectively £200 and £150, and avers

that "the defenders have funds amply sufficient to provide fitting support for the pursuer," and further, that "even if" they "had not funds over and above the £350 paid to the other canons (which is denied) they are bound to apportion the same among the three canons."

The action having been determined in the Court below on the question of relevancy, of course no regard can be had to disputed averments, but it is important to notice that the appellant does not aver that there are any funds in the hands of the Board of Management specifically dedicated or set apart for the fitting support of the provost and canons. There is only the general averment that they "have funds amply sufficient to provide fitting support for the pursuer"—that is to say, that out of the general moneys which are in their hands to be administered, there is enough to make a certain payment to the appellant which would be sufficient for his support.

The appellant can of course only maintain this action on one of two grounds; either by showing that under contract the Board of Management are subject to an obligation to make him the payment he seeks, or by showing that the Board of Management are trustees holding in trust a fund of which he is in part a beneficiary, and therefore entitled to insist that they shall apply so much as they hold in trust for him as such beneficiary to that purpose. My Lords, it seems clear that no contract has been entered into, under which as a matter of contract the Board of Management are bound to pay him the stipend for which he asks or any sum of money whatsoever; indeed, the arguments mainly turned upon the contention that the Board of Management do hold their funds upon a trust in respect of which he is a beneficiary. Now, it is to be observed that the Board of Management is entrusted in the fullest and most general terms with the management and administration of the funds of the Cathedral, subject only to this, that if any person confers gifts or endowments upon the Cathedral for any particular object, those funds are to be held for that object or those objects. Apart from that, the management and administration of the whole of the funds is entrusted to the Board of Management, giving them so far the fullest and most ample discretion as to the use of those funds, the limit being, of course, that they can only apply them to Cathedral purposes.

My Lords, if the statute had stopped there, I do not think it would have been possible seriously to raise the argument which your Lordships have heard on behalf of the appellant. But reliance is placed upon the words which follow in the 13th statute, namely—"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, my Lords, I confess it seems to me that one important object in view in the insertion of those words was to impress upon the Board of Management that it was their duty to obtain as far as they could, funds which would pay for the

maintenance of divine service and for the fitting support of the provost and canons. It cannot, of course, for a moment be questioned that an obligation of that kind was a discretionary obligation, at most a moral obligation, which imposed no sort of legal duty which anyone could enforce upon the Board of Management.

My Lords, it may well be that within those words there was also included an indication that the Board of Management were to have regard to the fact that in administering the fund, due provision should be made for the maintenance of divine service and fitting support provided for the provost and canons of the Cathedral. But it appears to me that having these objects in view, the mode in which they were to administer the funds in their hands so far as they were not specifically dedicated, was entirely left to their discretion, and that there is nothing in this statute which would give to any person a legal right to complain of that administration, so long as that administration was in good faith and the funds were applied to no other than Cathedral purposes.

For these reasons, my Lords, I think that the judgment of the Court below ought to be affirmed. I should perhaps add that I cannot regard any sums which have heretofore been paid to the other canons residentiary, as indicating that there are funds in the hands of the Board of Management specially dedicated to the support of the canons, or as giving the appellant any right to claim a portion of the salaries which have been paid to the other canons. I think in order to do that, it would be necessary for him to show a fund vested in the trustees for the use of all the canons of the Cathedral, so that the distribution of those funds amongst a portion of those canons would be a violation of the trust. And, my Lords, certainly the argument of the appellant goes, and I think must go, a long way. I do not see how under the words of statute it is possible to make any distinction between the position of a fourth, fifth, or sixth canon, and the position of the first three canons who might be appointed. They all become canons residentiary; there is no limitation of number in the statute; and although three is the number contemplated as the minimum, I do not see that the rights of the fourth, fifth, or sixth would be any worse or more limited than the rights of the first, second, and third. The contention must therefore go this length, that however many canons residentiary the bishop appoints, all who fill that office would be in the same position, as well entitled to make the same claim, and to assert their right to a portion of the funds in the hands of the Board of Management. I think, my Lords, that this goes far to show that the contention of the appellant cannot be well founded and that the judgment ought to stand, and so I move your Lordships.

LORD WATSON—My Lords, in this case two points are clear—first, that there is no contract between the reverend appellant and the Board of Management, and in the

second place, that it is not averred there are funds held by the Board which have been specially dedicated by the donors to the support of the canons residentiary. In these circumstances, it must be assumed that any funds which the pursuer alleges to be in the hands of the Board are funds collected by them for Cathedral purposes in terms of the 13th section of the statutes. Now, in my opinion, that clause gives the Board an unlimited discretion with respect to the administration of these funds. So long as they are used for Cathedral purposes, it is for the Board and for the Board alone to determine at what time, in what way, or for what particular purpose they shall be applied. The statute gives canons residentiary no beneficial interest in these funds save what the Board may choose to accord to them. On these grounds I am of opinion that the judgment of the Second Division is right.

LORD MACNAGHTEN—My Lords, I concur. I agree entirely with the opinion of Lord Rutherford Clark. I do not think that the appellant has any right to insist on having provision made for him out of the funds in the hands of the Board of Management not appropriated by the subscribers to any specific purposes. It seems to me that the Board of Management have an absolute and unfettered discretion as to the administration of the funds in their hands within the limits prescribed by the statute for the Cathedral Church. The appellant's only right—if it can be called a right—is a right to be recognised as one of a class for whom the Board of Management may, if they think fit, in their discretion make provision.

The House affirmed the decision of the Second Division and dismissed the appeal with costs.

Counsel for the Appellant—Lord Advocate (Balfour, Q.C.)—Watt. Agents—A. Beveridge, for David A. Ross, S.S.C.

Counsel for the Respondents—Solicitor-General for Scotland (Asher, Q.C.)—Pitman. Agents—Grahames, Currey, & Spens, for J. & F. Anderson, W.S.

COURT OF SESSION.

Tuesday, February 28.

OUTER HOUSE.

[Lord Kincairney.

ROBB AND OTHERS (MITCHELL'S TRUSTEES) v. CABLES AND OTHERS.

Succession—Testament—Construction of "Children"—Illegitimate Child.

By his trust-disposition and settlement A. M. made a bequest of heritage to his son D. M. in liferent, "and to his lawful children at my death equally," whom failing to his married daughter Mrs L. in liferent, "and to the whole

children procreated or that may yet be procreated of her body."

At the date of the settlement Mrs L. had an illegitimate child, G. C., who lived with the testator, and for whom he made a special provision by legacy, designating her as his "granddaughter."

D. M. having died without issue, and subsequently Mrs L. having died leaving no issue but G. C., a competition arose between G. C., claiming under the destination to the "whole children" of Mrs L., and the widow of D. M., claiming under her settlement.

Held that the word "children" must be construed here in its ordinary meaning as applying to legitimate children only, the testator not having clearly indicated an intention to include G. C. in the bequest to the children of Mrs L.

This was a multiplepointing raised by David Robb and others, testamentary trustees of Alexander Mitchell, shipmaster, Dundee, to determine which of several claimants was entitled to his heritable estate.

The circumstances are sufficiently stated in the opinion of Lord Kincairney.

"Opinion.—I am of opinion that the claim of Grace Cables to the heritable property of the truster must be repelled.

"Alexander Mitchell, the truster, was a shipowner in Dundee. He died on 21st December 1872, leaving a trust-disposition and settlement prepared by his agent and executed only three weeks before his death. He was survived by his widow and by two children, David Mitchell and Mrs Loeffler, and by the children of a son William who predeceased him. He was survived also by a granddaughter Grace Cables, an illegitimate daughter of Mrs Loeffler, who was, when the truster died, about four or five years old, and who, as has been stated from the bar, lived with the truster at the date of his trust-deed. The trustees state that he was survived also by a legitimate son of Mrs Loeffler called George, who died in 1874 at the age of five, but the other parties do not admit that Mrs Loeffler had any child but Grace Cables, and no claim has been lodged by any representative of George Loeffler. The whole estate was inconsiderable, consisting almost entirely of two flats in a tenement in Dundee, in which, or in one of which, Mr Mitchell seems to have resided.

"The trust-deed is short, but I think it has not been drawn skilfully, and perhaps it was drawn hastily, having been executed so shortly before the truster's death. Its provisions are, shortly, these—The liferent of his whole estate is provided to his widow. Then the trustees are directed to deliver to Grace Cables, whom he designates 'my granddaughter,' or to someone for her behoof should she be in pupillarity or minority, the furniture in his bedroom, and to pay her a legacy of £50 'should there be cash to that amount remaining.' By the fourth purpose the truster directs payment of his moveable estate to David Mitchell and Mrs Loeffler equally, and failing either without issue to the survivor—an inopera-