punctilious in caring for its honour, while others are from persons of undoubted character and respectability, who in other relations of life have had an opportunity of observing the conduct of the petitioner.

Now, on the one hand, we cannot lay down an inflexible rule that when once a law-agent has been convicted of a crime his position is irretrievably lost. This must depend—as has been held by the English courts—both upon the quality of the offence committed and upon the subsequent conduct of the offender, coupled with the length of time which has elapsed since his conviction being sufficient to warrant a belief in the stability of the petitioner's good behaviour. In the present case, without in any way extenuating the gravity of the offence committed by the petitioner, it does not appear to be one of those gravest offences which leave an indelible stain.

On the other hand, I do not wish to encourage the idea that the mere lapse of time gives a right to claim re-admission. But I think that the circumstances of this petition are so favourable as to justify us in granting the prayer.

LORD ADAM—I am of the same opinion. The petitioner was convicted in 1879 of the embezzlement of funds which had been entrusted to him in his capacity of a law-agent, and was sentenced to three months' imprisonment. What followed was that his name was, on his own application, removed from the list of law-agents. That, in my opinion, constitutes no difference from his being struck off the roll, which would have been done but for his application.

But I agree that, where an unfortunate offender is struck off the roll, it does not necessarily follow that his sentence is perpetual and without the possibility of being rescinded. He may have shown by his conduct for years that he has come to see the heinousness of his offence and has returned to ways of rectitude, and can it be said that there is no restitution possible? Such a view cannot be a proper one, and if we are satisfied that his repentance is true, and that by his conduct during fifteen years he has redeemed his position, and can be safely restored to his profession of a law-agent, I can see no reason why we should not restore him. I think that the petitioner has so satisfied us. It is not only a consideration of the time which has elapsed since his offence, but of his conduct during that time, which, as shown by the certificates produced, has satisfied us. Therefore I agree with your Lordship.

LORD M'LAREN and LORD KINNEAR concurred.

The Court granted the prayer of the petition.

Counsel for the Petitioner—D. Dundas—W. Thomson. Agents—W. & J. Burness, W.S.

Counsel for the Society of Law-Agents—Macfarlane. Agents—Carment, Wedderburn, & Watson, W.S.

*Tuesday, July 9.*

## FIRST DIVISION.

## MACLEAN, PETITIONER.

*Process—Trustee—Non-Gratuitous Trustee — Resignation — Petition for Confirmation of Resignation—Trust Act* 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 1.

A member of a shipbuilding firm, who was appointed a trustee under a trust-disposition and settlement executed by one of his partners, accepted office "without prejudice to his rights as a partner." By the terms of the trust he was entitled on acceptance of office to a legacy of £50. Five months after accepting office, finding that his interest as a partner had become inconsistent with his duty as a trustee, he resigned office, and his resignation was accepted by the remaining trustees. On being offered payment of the legacy he refused to accept it. Sixteen years later, doubts having been expressed as to the validity of his resignation, the trustee presented a petition craving the Court "to hold the reasons stated in the petition as sufficient to entitle the petitioner, as at 5th November 1879, to resign the office of trustee . . . and to approve of said resignation accordingly, and to authorise and confirm the same as at said date."

The Court *refused* the petition as incompetent

*Opinions* that, where a non-gratuitous trustee has resigned his office in consequence of a conflict having arisen between his personal interests and his duties as trustee, his resignation may be sustained as valid at common law, although he has not obtained authority to resign from the Court.

By trust-disposition and settlement, executed in December 1878, Robert Curle, shipbuilder, Glasgow, senior partner of the firm of Barclay, Curle, & Co., assigned and disponed his whole estates, heritable and moveable, to trustees for the purposes expressed in the trust-deed. By the second purpose he directed his trustees "to pay to each of the gentlemen hereinbefore named as trustees, who may accept office and act as trustees, the sum of £50 sterling, payable at the first term of Whitsunday or Martinmas after my decease."

The truster died on 8th June 1879, and was survived by his widow and by three children—Mrs Miller, Mrs Lamont, and Robert Barclay Curle.

On the 18th June 1879 the first meeting of the trustees appointed in the trust-settlement took place, when two of their number—Mr James Hamilton and Sir Andrew Maclean—accepted office conditionally, the minute of the meeting bearing that "it was understood that Messrs James Hamilton and Andrew Maclean so accepted under reservation of and without prejudice to their rights as surviving partners of Barclay, Curle, & Company."

At the time of the truster's death the capital of the firm exceeded £250,000, and the value of his share was estimated at over £100,000. By the tenth clause of the contract of copartnery it was provided that, on the death of one of the partners, his co-partners might within three months exercise the option of winding up the concern or paying out the share of the deceaser.

Owing to the depreciation of the shipping trade, the surviving partners did not see their way to paying out Mr Curle's trustees, and as they were unwilling to wind up the business, negotiations were entered into with a view to the partners taking over the business portion of the firm's assets, and paying a slump sum to the trustees for Mr Curle's interest in these. A meeting was held on 11th September 1879, at which Sir Andrew Maclean was present, and offered some explanations as to the balance sheets of the firm, but took no further part in the business. At a meeting on 5th November 1879, Sir Andrew Maclean and Mr Hamilton resigned their offices as trustees, and this resignation was accepted by the remaining trustees.

The negotiations as to the acquisition of the business assets of the firm were concluded on 2nd March 1880, and the trustees were paid off. On 11th March Sir Andrew Maclean was sent a cheque for his legacy of £50, but declined to accept it.

On 20th May 1895 Sir Andrew Maclean presented a petition craving the Court "to hold the reasons stated in the petition as sufficient to entitle the petitioner, as at 5th November 1879, to resign the office of trustee . . . to approve of said resignation accordingly, and to authorise and confirm the same as at said date. . . ."

The petitioner averred that a direct conflict of interests between Mr Curle's trustees and the surviving partners of the firm, of whom he was one, had arisen on 11th September 1879, when the negotiations as to the transference of the business assets and the paying out of the trustees began; that he had accordingly resigned his office, and had not since intervened in any way in the affairs of the trust; that he had only accepted office conditionally, and was not expressly prohibited from resigning by the terms of the trust.

He stated that the only parties interested in the application were the renouncing trustees, and Mrs Miller, Mrs Lamont, and Robert Curle, the beneficiaries under the trust, together with the children of the two former; that Mrs Miller and Mrs Lamont consented to the application, while Mr Curle would have done so *qua* beneficiary if he had not also been a trustee; and that the trustees desired to remain neutral.

On 22nd May 1895 the Court appointed Mr Scott Moncrieff Penney, advocate, *curator ad litem* to the minor and pupil children of Mrs Miller and Mrs Lamont.

On 5th June 1895 Mr Penney lodged a minute, in which he stated that, while the granting of the petition would apparently preclude his wards from making any claims against the petitioner for not discharging his duties as trustee since 1879, yet, on the other hand, it might be desirable for their interest that no doubt should be thrown on the actings of the trustees during these years. Accordingly the curator, while unable to concur in the petition, did not think it his duty to oppose it should the Court hold it competent to grant it.

Argued for the petitioner—This trustee was practically a gratuitous one, having never accepted his legacy, and therefore did not fall under section 1 of the Trusts Act of 1867 (30 and 31 Vict. cap. 97). He had only done his duty in resigning; it was competent for the Court to confirm his resignation, which was a valid one—*Hill* v. *Mitchell*, December 9, 1846, 9 D. 239.

At advising—

LORD ADAM—This is a petition at the instance of Sir Andrew Maclean, with consent of two ladies, who, I understand, are beneficiaries; and the prayer of the petition is that we should "hold the reasons stated in the petition as sufficient to entitle the petitioner, as at 5th November 1879, to resign the office of trustee, to approve of said resignation accordingly, and to authorise and confirm the same as at said date." Now, the petitioner, Sir Andrew, then Mr Maclean, was appointed one of the trustees under Mr Curle's settlement, and by that settlement the truster directed his trustees "to pay to each of the gentlemen hereinbefore named as trustees, who may accept office and act as trustees, the sum of £50 sterling, payable at the first term of Whitsunday or Martinmas after my decease." He accepted office along with the other trustees, and the minute of acceptance was qualified in this way:—"It was understood that Messrs James Hamilton and Andrew Maclean so accepted under reservation of and without prejudice to their rights as surviving partners of Barclay, Curle, & Company." The reason of that reservation was that, although they accepted office, they might come to have an interest as partners of Barclay, Curle, & Company, adverse to that of the beneficiaries and the trustees. And very soon, I understand, that state of affairs did arise; and a question came to be at issue between the trustees and the firm of Barclay, Curle, & Company, of which the petitioner was a partner, as to what sum should be paid by Barclay, Curle, & Company to the trustees in respect of the late Mr Curle's share in the company, so that Mr Maclean's duty as a trustee and his interest as a partner of the company came into direct antagonism. Upon this occurring Mr Maclean resigned his office of trustee, and his resignation was accepted by the remaining trustees, and ever since that date, as I understand, he has taken no share at all in the management of the trust. It is in these circumstances that we are asked to concur in the resignation. Now, from what I have said, it appears that Mr Maclean—that was the view put to us from the bar—was a non-gratuitous trustee, and therefore could not take advantage of the powers of resignation given by the Trust

Acts. Accordingly he comes to us and asks us to approve of his resignation, and to authorise and confirm the resignation accordingly. The petitioner's counsel informed us that he had no authority to present to us as a precedent for the petition, and I see many reasons why we should not grant the prayer of the petition. We are asked to approve of a resignation that took place in the year 1879. There is nobody here to oppose the petitioner, and there may have been many acts of the trustees between 1879 and the present date which might be called in question. I think that it would be an extremely dangerous course to approve of the petition, and that we should dismiss it as incompetent.

But while I have that opinion, I wish to express my own opinion that Sir Andrew Maclean's resignation may have been a valid resignation. There is authority to be found for that view in the case of *Hill* v. *Mitchell and Others*, 9 D. 239. The question there arose in a suspension. The resignation by one trustee had been accepted by the remaining trustees, and it was said that the resignation by the trustee was invalid, because it had not been approved of by the Court. But the Court said in that case that there were many cases where a resignation might be valid, and that where the interests of the resigning trustee were entirely opposed to the interests of the trust, such a resignation, although it had not been approved of by the Court, might be quite valid. Lord Jeffrey said:—"I think clearly that after having accepted and committed themselves to the office they are not entitled, on a mere change of inclination, for their own convenience, just *ad libitum*, to throw up the office; therefore I doubt whether they can without previous warrant of the Court retire from their office, even though there should be grounds for doing so that might have satisfied a court of law had the Court been previously applied to. The subsequent proof is not so safe as the preceding warrant that ought to be obtained. But though I consider this the most expedient course, I am willing at the same time to find that, if in the whole circumstances of the case the reasons of the resignation are capable of being clearly and satisfactorily established after that resignation has been made, it ought to be sustained, and the acts of the remaining trustees upheld. In that view of the law, and looking to the satisfactory reasons for the resignation here, I would be inclined to sanction what was done independently of the concurrence of the beneficiaries."

It will be found that the other judges took the same view. In that case they decided the first question really raised between the parties; and accordingly in the case before us, if any of the acts of the trustees had been challenged, we would have been in a position to decide the question. But that is not the present case, and not being in the same position, I am of opinion that we should not decide that the resignation was valid. I therefore move that we should refuse the petition.

Lord M'Laren—We are not asked in this application to pronounce a declaratory finding as to the effect of the petitioner's resignation fifteen years ago, nor could we consistently with the settled rules of procedure pronounce a declaratory finding in a summary petition. There are other methods of obtaining such a conclusion, but we are asked to confirm that resignation, in other words, to find that it is as good as if it had been made under the authority of the Court at the time when it was tendered. I am of opinion that to give such confirmation would be beyond the powers of the Court. It is easy to see that in certain cases this might lead to injustice or might be inoperative; if, for example, questions were raised as to the liability of the resigning trustee for acts subsequent to his resignation, our confirmation could not displace the liability which had already arisen, while, on the other hand, if there were no liability, it would be superfluous.

While agreeing with Lord Adam that we are unable to grant the prayer of the petition, I do not wish to indicate any opinion unfavourable to the validity of the resignation which was made. It appears that the trustees had not adverted to the fact that the power to resign conferred by the Trust Acts excluded the case where trustees are entitled to a legacy on condition of undertaking the duties of the trust. Why this exception was made in the unqualified terms used in the statute is not apparent, since it cannot be supposed that an honorary bequest of £50 would have any bearing on the acceptance of the trust by gentlemen in the position of the petitioner, and in point of fact he returned the legacy when it was offered him. While the case therefore is relegated to common law, it must be remembered that it never was the result of common law that a trustee by acceptance of a trust is bound to cling to it for life. He might resign with the consent of all the parties (as was done in the case of *Hill* v. *Mitchell*) on the grounds of ill-health or absence from the country, and it has never been decided that these are the only grounds of resignation. Clearly if there is a conflict of duties, such that it would be a breach of duty on his part to act as trustee, the trustee must be entitled to resign. It would increase the already very onerous responsibilities of trustees were we to hold that they must continue to act as trustees for some purposes of the trust and not for others, leaving the trustee to find out for himself as each contingency arose whether he was or was not entitled to act. Such a conclusion would be preposterous, and would lead to unworkable results. When, therefore, a trustee, having originally found it consistent with his duty to take up a trust, finds that he is disabled from acting by personal conflicting interests, as in the present case, he must necessarily withdraw absolutely from the management. Of course this would not apply to cases where a truster having foreseen such

a conflict of interests has yet appointed a trustee. It is a common occurrence for a son or partner of the truster to be appointed for the express purpose of carrying on a business, where there must be adverse interests in his capacity as partner and trustee existing at the time of the constitution of the trust. But such a conflict cannot be held to disable him from acting, when he has been appointed specially for the purpose of carrying on the business. Here, however, the collision of interests was not apparent when the petitioner accepted office. It arose out of subsequent causes, and therefore, while the Court cannot grant the prayer of the petition, it is probable that this decision will be in no way disadvantageous to the petitioner's interests.

LORD KINNEAR—I have come to the same conclusion. I think that the case of *Hill* v. *Mitchell* is an authority for holding that, where a trustee has become disqualified either by bodily or mental incapacity, or by the emergence of an adverse interest, which makes it improper for him to continue in the trust, his resignation of office may be sustained, and the title of the remaining trustees to act in the trust may be upheld, although he has not made a previous application to the Court for authority to resign. Whether that principle is applicable to the position of the present petitioner, I think we are hardly in a position formally to decide, but I agree with all your Lordships who have spoken on that point, and I should be very sorry indeed to throw doubt upon the right or duty of the present petitioner to resign when he found that his own interest was directly opposed to that of the trust. But then I think we cannot decide that in this petition, consistently with the forms of procedure, which do not depend upon arbitrary rules, but on sound principle, and therefore we cannot take any other course than that suggested by Lord Adam, and dismiss the petition as incompetent. The prayer of the petition really means that we should decide that the resignation was valid. If it does not mean that, it means nothing, because it asks us to hold that the reasons stated in the petition are sufficient to entitle the petitioner to resign, and are good reasons, and to approve of the resignation accordingly. Now, if the resignation was valid and effectual, notwithstanding the petitioner did not come to us first for leave to resign, then it requires no additional authority. The real meaning of the finding therefore seems to me to be that we are asked to declare that the resignation was valid, and to do that in a summary petition, without any question between parties in litigation being raised for judgment. The interlocutor which we are asked to pronounce would either be a decision that this is a good resignation, or else it would be nothing at all. But then it would not be a decision that would bind anyone having an interest to challenge it, or that would form *res judicata* to any effect. The petitioner does not ask for authority to resign now, because the import of his prayer is that he has well and effectually resigned many years ago. I agree that that is a question which we cannot decide in this petition, however well-founded the petitioner's view may be, and therefore I concur in what is proposed.

The LORD PRESIDENT concurred.

The Court refused the petition.

Counsel for the Petitioner—W. Findlay. Agents—Wallace & Begg, W.S.

---

*Thursday, July* 10.

## FIRST DIVISION.

## REILLY *v.* QUARRIER.

*Custody of Children—Petition by Nearest Male Agnate — Religion of Deceased Father.*

Three orphan children, who were in pupillarity, were placed by their maternal grandmother in a charitable institution not Roman Catholic. Shortly afterwards the uncle of the children—their nearest male agnate—presented a petition to the Court to have them given into his custody, in order that he might place them in an orphanage where they could be brought up in the Roman Catholic faith. He alleged that their father had been a Roman Catholic, that they had been baptised by a Roman Catholic priest, and had been intended by their father to be brought up in that faith. The petition was served upon the children's maternal grandfather, who did not lodge answers, and who had previously written refusing to have anything to do with the children. Answers were lodged by the manager of the institution. It was not alleged that the material interests of the children would be affected by their remaining where they were or being removed to the Roman Catholic Orphanage. After hearing parties the Court expressed the opinion that the prayer of the petition should be granted, in respect that the statements in the petition were not disputed by any relation of the children, and that they were satisfied that the children's father had been a Roman Catholic, and had intended his children to be brought up in that faith. Before the interlocutor following upon this opinion had been signed, a minute was lodged by the grandfather of the children craving the Court to allow him to adopt the answers of the respondent, or to order re-delivery of the children into his own custody. The Court *granted* the petition of the nearest male agnate, being of opinion that the intervention of the minuter was not *bona fide*.