

taken on commission. The prejudice which may arise from proceeding at a time when the pursuer cannot go into the witness-box will fall upon himself rather than upon his opponent.

LORD STORMONTH DARLING—I concur.

LORD ADAM and LORD M'LAREN were absent.

The Court granted the pursuer's motion.

Counsel for the Pursuer—Munro. Agents—Steedman, Ramage, & Bruce, W.S.

Counsel for the Defender—W. Æ. Mackintosh. Agent—Arch. Menzies. S.S.C.

Tuesday, March 14.

FIRST DIVISION.

MITCHELL, PETITIONER.

Parent and Child—Custody of Illegitimate Child—Mother's Right to Custody—Child Brought up by Another Person at that Person's Expense—Right of Mother's Nominee to Custody—Custody of Children Act 1891 (54 and 55 Vict. c. 3), secs. 1 and 3.

A petition by a mother for the custody of her illegitimate female child was opposed by the person in whose custody the child was at the date of the petition, and who had practically seen to and paid the expense of the upbringing of the child. The Court, having regard to the welfare of the child and the whole circumstances, *refused* to make an order for the delivery of the child to the mother or to persons nominated by the mother.

The Custody of Children Act (54 and 55 Vict. c. 3), section 1, enacts—"Where the parent of a child applies to the High Court or the Court of Session for a writ or order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may in its discretion decline to issue the writ or make the order." Section 3—"Where a parent has (a) abandoned or deserted his child; or (b) allowed his child to be brought up by another person at that person's expense, or by the guardians of a poor law union, for such a length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties, the Court shall not make an order for the delivery of the child to the parent unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child."

This was a petition at the instance of Mrs Margaret M'Donald or Mitchell, wife of and residing with John Mitchell, labourer, 4 Niddry Street, Edinburgh, with the consent and concurrence of her husband, praying for the custody of her illegitimate child.

The petitioner averred that on 2nd June 1897, while in the service of Henry T. Blair, Avontoun House, Linlithgow, she gave birth to an illegitimate female child, Elizabeth Aitken; that on 2nd July 1897 she placed the child in the custody of Mr and Mrs Cunningham, Maddiston, Polmont, where it remained till July 1904; that in the beginning of July 1904 it was sent at the request of Miss Elizabeth Wright (Mr Blair's housekeeper) to Avontoun House to reside with her during the holidays; that on the termination of the holidays Mr Cunningham requested Miss Wright to allow the child to return to him, but she declined to do so; that since then the petitioner had made repeated applications to Miss Wright for the custody of her child, but she refused to give it up.

The petitioner further averred that on 23rd August 1904 she was married to her present husband; that she had now a house of her own and was anxious to get the custody of her child, and that her husband was also desirous of having the child brought up in their home.

In these circumstances she prayed the Court to find her "entitled to the custody of the said child" and "to ordain the said Miss Elizabeth Wright to deliver up the said child to the petitioner, or to those having her authority, . . . to remain in the custody of the petitioner."

Miss Wright lodged answers, in which she made, *inter alia*, the following averments:—"The petitioner is a cousin of the respondent, and when petitioner found herself with child she appealed to the respondent for assistance. The respondent, out of compassion and sympathy for the petitioner, made all the arrangements for the birth of said child, paid for the medical and nursing attendance, and provided all the necessary clothing. She further arranged with the petitioner that the said child should be brought up and maintained under her care and at her expense. The respondent further employed her law-agents to take proceedings against the alleged father of the child, which they did, and obtained decree for alimony against him. He has been paying occasionally from 5s. to 8s. a month under said decree. The respondent paid her law-agents their charges in connection with said proceedings. In accordance with the foresaid arrangement as to the custody and maintenance of said child, the respondent placed the child when a month old in the custody of the said Mrs James Cunningham, paying her £1 a month from July 1897 to July 1904, in all £84. The respondent has also expended about £5 a year on the child's clothing. The petitioner has paid nothing towards said child's maintenance. The respondent frequently saw the child at Mrs Cunningham's and each year had her for a short holiday with herself at Avontoun House. . . . On 31st March and 11th April 1902 the petitioner and respondent entered into a minute of agreement, which is produced and referred to. By said agreement the petitioner, *inter alia*, agreed to allow the child to remain under the custody and

control of the respondent. In July last the respondent resolved to remove the child from the custody of the Cunninghams and take her to live with herself at Avontoun House, where she can bestow more care and attention upon the child. She accordingly did so, and the child has resided with her since then and is at present with the respondent at Avontoun House."

She further averred—"The respondent is attached to the child, and the child is happy and contented with the respondent. The respondent is in a position to give the child a comfortable home and a good education, and has the intention of doing so. The petitioner is not in a position to attend to the child. It is believed that she is employed in the daytime in a boot factory and that she is unable to employ any person to look after the child in her absence. The respondent refers to and founds upon the Custody of Children Act 1891, particularly sections 1 and 3 thereof, and maintains that in the interest of the child the petition ought to be dismissed."

On 21st January 1905 the Court remitted to the Sheriff of the Lothians and Peebles (MACONCHIE) to inquire into the facts and circumstances set forth in the petition, and to report.

On 17th February 1905 Sheriff MACONCHIE reported as follows:—"The petitioner Margaret M'Donald or Mitchell (aged 34) is a cousin of the respondent Miss Elizabeth Wright, who has been for upwards of twenty years housekeeper to Mr Henry T. Blair of Avontoun House, Linlithgowshire.

"In 1897 the petitioner, who was then unmarried, had been for about eight years a domestic servant at Avontoun. On 2nd June of that year she gave birth to the illegitimate child Elizabeth Aitken. On the day of the birth the respondent went to a law-agent in Linlithgow and arranged for proceedings being taken against George Aitken the putative father, with a view to obtaining decree of aliment against him, and on 2nd July 1897 decree was granted against him, ordaining him, *inter alia*, to pay aliment for twelve years at the rate of £6, 10s. per annum paid quarterly.

"Immediately after the birth the respondent and a Mrs Roy, daughter of James Cunningham, Maddiston, Polmont Station, retired mineral worker, and now sergeant in the Salvation Army, went with the consent of the petitioner to see Cunningham, and arranged that he and his wife should receive the child into their house and bring it up, they being paid a sum monthly for its maintenance. About a month afterwards the arrangement was carried out, the child being taken to the Cunninghams by Miss Wright and Mrs Roy.

"The petitioner remained in service at Avontoun till November 1901, and during that time she used frequently to go to see the child.

"When she left Avontoun she went to live with a man Thomas Mackay, who shortly afterwards went as a soldier to the war in South Africa. . . .

"In January 1902 after Mackay had gone away the petitioner went to Cunningham's

house and demanded that her child should be delivered to her. Cunningham refused to give her up, and the petitioner went away. Since then and until this petition was about to be raised, she has not tried to see the child, has paid nothing towards its upkeep, and has not shown in any way that she takes any interest in it.

"On 28th February 1902 the petitioner wrote to Messrs P. & P. Miller, solicitors, Linlithgow, who act for the respondent, saying that she would allow the child to remain with the Cunninghams, and that she was sure that Miss Wright would see 'that the child is taken care of, also that it is fed and clothed.'

"In April 1902 the petitioner entered into a formal agreement with the respondent under which the former bound herself, *inter alia*, to allow the child 'to remain as hitherto under the custody of Miss Wright, either at Avontoun or elsewhere in the discretion of Miss Wright.'

"In July 1904 the respondent took the child to stay with her at Avontoun during the school holidays, and subsequently refused to allow the Cunninghams to take her back to their house. The child is still at Avontoun, and there is in process a letter from Mr Blair to Mr Miller in which he states that he quite approves of her remaining an inmate of his house, and that he will 'always be very willing to give Miss Wright any pecuniary aid she may require for the purpose of supplying the child with suitable clothing, &c.'

"In August 1904 the petitioner married her present husband and is now living with him at No. 4 Niddry Street, Edinburgh.

"So far the facts are not in dispute, but there are two subjects on which, though perhaps they are not of great importance to the decision of the case, it is proper that I should say a few words, as averments with regard to them are made on record, and evidence relating to them was led. 1. Who has paid for the maintenance of the child from its birth to the present time? The evidence with regard to this matter is very contradictory, but after giving it my best consideration, it is I think proved (1) That the respondent provided out of her own means at least the greater part of the baby clothes at the time of the birth. (2) That she so paid the whole expense of the action of filiation. (3) That whenever Aitken has failed to pay the whole sum due by him under the decree (and such occasions have been very frequent), the respondent has made up the sum to 10s. monthly. The Cunninghams were to receive £1 per month, and I incline to the opinion that she also paid part of the 10s. a-month which the petitioner says she paid up to November 1901. As, however, there are no receipts of any kind produced, it is impossible to be certain on this point. (4) That in July 1903 the respondent paid to Cunningham a sum of £9 (being so far as I can make out the arrears then due to him), and I see no reason to disbelieve her when she says that all that sum came out of her own pocket with the exception of a few small sums which were

handed to her by Mr Miller as coming from Aitken. (5) Miss Wright says that she paid to Cunningham on another occasion a lump sum of £14. This Cunningham denies, and in the absence of receipts I cannot arrive at any conclusion on the matter. (6) That since November 1901 the petitioner has paid nothing for the child. It is right, however, to say that she and the Cunninghams swear that when she visited them in January 1902 she offered some payment, but that she was told by Cunningham that he did not wish to receive any further payments either from her or anyone else. On the other hand, as I have said, it is admitted that the Cunninghams accepted a payment of £9 from Miss Wright in July 1903. 2. With regard to the agreement entered into in 1902, the document speaks for itself, and I would only add that Mr Miller, solicitor, swears that he explained its whole terms to the petitioner, and that it was sent to her for signature, so that if the document is of any importance at all it cannot be said that the petitioner signed it without full knowledge of what it contained or acting under any undue influence.

"I saw and spoke to the child in private. In appearance she struck me as looking very delicate, being white and thin, with particularly thin hands. She answered all my questions readily, and altogether she struck me as being decidedly above the average for her years in intelligence. She readily admitted that she had been well treated when living with the Cunninghams, but there can be no doubt that (if her views are of any importance) she is strongly attached to the respondent (whom she calls 'Auntie'), and is very anxious to live with her. She evidently is afraid of going to live with her mother, of whom she says, with truth, that she knows nothing. A certificate from Dr James Hunter, M.D., is produced. It is not stated to be on soul and conscience, but it is admittedly genuine, and in an inquiry of this kind I think that I am entitled to receive it, and it is now in process. His opinion does not seem to be based on any prolonged and intimate acquaintance with the child's constitution, but so far as I could gather there is no other doctor to whom she is better known to whom I could apply for an opinion. It is right to add that the Cunninghams said that until the child was about three years old she was delicate, but that since she began to go to school she has not been absent at all on the ground of ill-health, but from what I saw myself (and I am strengthened in my opinion by Dr Hunter's certificate) I think that plenty of fresh air and good nourishment are necessary for her health. These things there can be no doubt she would get at Avontoun.

"With regard to the home to which the petitioner says that she is anxious to take the child, I have to report that up to the middle of the first week in February the petitioner was working in a boot factory; for the few days between that date and the inquiry she had ceased to go out to work. She gave no explanation as to why it was necessary for her to work since her mar-

riage until February, and as to why it is unnecessary for her to do so now. She states that she is not pregnant. Her husband is a mason's labourer and earns 23s. a-week when he is working. He does not seem to be a regular worker, and he is known to the inspectors of the Society for the Prevention of Cruelty to Children as a man who is addicted to loafing about the street during working hours. The petitioner was respectably dressed when she attended the inquiry, and there is no evidence suggesting that her present character is bad or even doubtful.

"The house in which the petitioner and her husband live is on the top storey of a common stair and consists of one room measuring about 13 feet by 9 feet. That size of room is, it should be stated, certified as satisfying the requirements of the sanitary authorities as a dwelling-place for three persons. The Cunninghams, who are respectable enough looking people, swear that the room is clean looking and well furnished, and Cunningham says that once or twice he got his tea there comfortably. On the other hand, Mr Turnbull, who is a very experienced inspector of the above-named society, deponed that the room is very poorly furnished, with only one bed in it, and that it is in his opinion unsuitable as a place in which to bring up a child; that the stair is dark and that the neighbours are not of a desirable class (the petitioner also admitted that the stair is "pretty rowdy"). He would not go so far as to say that if he had found a child living there with its own father and mother, he would have thought it his duty at once to bring the case under the notice of the society. Mr Picken, the other inspector who was examined, and who knows the petitioner's husband well, while agreeing with Mr Turnbull in his evidence generally, went somewhat further, stating that he found the bedding dirty, and that had he found a child living there even with its own father and mother he would have reported the case with a view to its removal from the parents' custody. This matter seemed to me so important that after reading over my notes I asked Mr Turnbull to come to me privately with a view to supplementing his evidence on the point. He then told me (being still under oath) that the inhabitants of the stair are a very drunken and low lot, and that his society has had a great number of cases of child neglect under consideration from the house. The stair itself is very long, dark, and ill-ventilated, and it has a bad reputation for assaults, indecent and otherwise, on young girls taking place there. There is little furniture in the house, only one bed, and generally the room is dirty. The father's reputation is not good so far as sobriety is concerned. Beyond that the witness could not speak to his character.

"The last matter on which I think it necessary to say anything is with regard to the averment that James Cunningham is the true *dominus litis*. I do not think that that is proved, though it is evident that he is doing all in his power to assist the peti-

tioner. I am by no means certain that there is not some understanding between him and the petitioner to the effect that in the event of the petitioner obtaining the custody of her child it will be handed over by her to his charge. Cunningham prevaricated and would not give a distinct answer to a question to that effect put by me, and the impression left on my mind was that there was some such understanding. The petitioner, however, swore quite distinctly that it was her intention to retain the child in her own custody, and I venture to think that the case must be decided on that footing.

"I think it right to add that the petitioner never said a word to suggest that it was from any feeling of maternal affection to the child that she was suing for its custody. She gave no explanation of why she had deserted the child in 1901, and she would say nothing as to what measures she was prepared to take for having the child attended to if she were in the future compelled to go out to work."

Argued for the petitioner—The agreement entered into by the petitioner and Miss Wright was not binding on the petitioner, as a parent's right to the custody of his or her child was inalienable—*Kerrigan v. Hall*, October 22, 1901, 4 F. 10, 39 S.L.R. 8. There was nothing objectionable in the petitioner's character—the chief objection in the reporter's opinion was the nature of the locality where the petitioner resided, but the petitioner was prepared if necessary to remove to a better district. A mother was entitled to the custody of her illegitimate child and also to give directions in regard thereto. Accordingly the petitioner now made an alternative motion, viz., that if the Court were not prepared to give the custody to her, it should be given to the Cunninghams. The respondent had taken the child away from the Cunninghams without the petitioner's authority. A parent was not bound to give reasons why the custody of his or her child should be given to his or her nominee. It was enough to say that he or she desired it. [The LORD PRESIDENT—The remit to the reporter was not made on the basis of what is now proposed; the inquiry ordered was on the footing that the petitioner should have the custody, not on the footing that the Cunninghams should have it. What the petitioner now asks the Court to do is to give the custody of her child to a nominee of her own who might give it back to her within a week.] Under section 3 of the Custody of Children Act 1891 the Court had no power to deprive a mother of the custody of her child unless she had abandoned or deserted it, or had allowed it to be brought up by another person at that person's expense. That had not happened here.

Argued for the respondent—The respondent had not taken the child away illegally. Under the agreement made with the petitioner in 1902 she had right to the custody of the child. Moreover, she was entitled in virtue of the agreement to decline to give it up to the Cunninghams. The Sheriff's report showed that it would not

be for the welfare of the child to remove her from the respondent's custody. The home offered by the petitioner was in a very poor locality, and consisted of one room. Moreover, the locality was morally objectionable. The respondent's home was in the country. The respondent was also in a position to look after the child, whereas the petitioner was not, as she worked in a boot factory and would be away all day at her work. The respondent was much attached to the child, who was also attached to her. The reporter had so stated. Looking to the child's future prospects it was greatly to her advantage to be left with the respondent, who was in a position and was also willing to provide for her future, whereas her prospects if given back to the petitioner were dismal in the extreme. The prayer of the petition craved the Court to give the custody to the petitioner. The alternative motion which the petitioner now made (viz., that it should be given to the Cunninghams) was an afterthought. At the inquiry she swore that it was her intention to keep the child herself. It was for the best interests of the child that she should be allowed to remain with the respondent. The welfare of the child was the main consideration both at common law and under the statute of 1891—*Sutherland v. Taylor*, December 22, 1887, 15 R. 224, 25 S.L.R. 189; *Mackenzie v. Keiller*, July 6, 1892, 19 R. 963, 29 S.L.R. 829; *Campbell v. Croall*, July 6, 1895, 22 R. 869, 32 S.L.R. 655; Custody of Children Act 1891 (54 and 55 Vict. cap. 3), secs. 1 and 3.

LORD PRESIDENT—This is a petition at the instance of Mrs Margaret Mitchell, the mother of an illegitimate female child, which is presented in order to obtain custody of the child, who is now and has been for some time residing with Elizabeth Wright at Avontoun House, Linlithgow. Miss Wright is a cousin of the petitioner.

Your Lordships remitted to the Sheriff of the Lothians to inquire into the facts and circumstances set forth in the petition and answers, and we have now before us a very full and careful report by the Sheriff.

It appears from the report that the petitioner gave birth to this illegitimate child while in service at Avontoun House in the year 1897. The respondent, who was then housekeeper at Avontoun House, came to the assistance of the petitioner, and made arrangements for the upbringing of the child. She also arranged for proceedings being taken against the father of the child, and a decree for aliment was obtained against him, which he has somewhat intermittently implemented.

The petitioner was not in a position to look after the child herself when it was born, nor at that time was the respondent able to do so, because she was housekeeper in a gentleman's house and could make no provision for taking in a child of tender years. Accordingly the respondent arranged that the child should be boarded with a Mr and Mrs Cunningham. The child remained with them till July 1904, and they were paid for her maintenance. The payments were made *pro tanto* out of

such funds as were received from the child's father, and the balance was supplemented by the respondent. About a year ago the respondent saw her way, with the consent of her master, to take the child into residence with herself, and the child has since remained with the respondent at Avontoun House.

The petitioner, after a somewhat troubled career, is now married to a man in humble circumstances but of respectable character. He is not in steady employment, nor does he seem likely to be able to provide a settled home for the child, and counsel for the petitioner eventually admitted that it was out of the question to send the child to the present home of her mother and step-father.

The respondent objects to giving up the child, and the Sheriff has no difficulty in assuring us that the child would much rather remain where she is.

The petition is presented on the ground that the petitioner, as the mother of the child, has the right to her custody. She at first proposed to take the child into her own custody, and swore at the inquiry before the Sheriff that such was her intention. But counsel for the petitioner has so far damaged her attitude that he now admits that it is impossible to ask for an order for custody by the petitioner, and he asks for an order to retransfer the child to the Cunninghams.

I think it is extremely inadvisable that a change of front of this magnitude should be made in the course of the hearing of a petition for custody, and in view of the Sheriff's statement I do not think it is safe to take the facts except as they are presented in the case. There is no security that an order to transfer the child to the Cunninghams might not be disregarded within a few days and the child taken away by her mother, and therefore I am not disposed to give much heed to this sudden change of front in the cause of the petitioner.

The petitioner had, however, directly raised the question of the powers of the Court under the Custody of Children Act 1891 (54 Vict. c. 3). The two sections which apply to the present case are the first and third. Section 1 enacts—[*His Lordship quoted the section*].

I do not think the facts in this case amount to abandonment or desertion. I think that the words "abandoned or deserted the child," point at the parent leaving the child to its fate. But in this case, although the petitioner did little for her child, she never really abandoned or deserted it, because she knew and approved of the steps which the respondent took for its maintenance.

But then the latter portion of section 1 raises a more delicate question. The words "has otherwise so conducted himself that the Court should refuse to recognise his right to the custody of the child," seem to point to some defect in the character of the parent which would render him unfit to bring up the child. The findings of the Sheriff do not establish any moral fault in

the petitioner's mode of life at the present time, but they come to this, that she is not in a position to give the child a home in which it can have any great advantages for its maintenance or development.

Section 3 enacts—[*His Lordship quoted the section*]. The same observations apply to sub-sec. (a) as to the first part of section 1. The petitioner's counsel, however, argued that this case was not within the terms of sub-section (b), because the child had not been brought up by or at the expense of the respondent. I am of opinion that this is too narrow a reading of the words. I do not read them as meaning that the child must reside continuously in the house of the person who brings it up. I think they apply to the person who makes the arrangements for the board, lodging, and clothing of the child. In the same way the words "at that person's expense" do not mean that every penny of expense is to be paid by the person in question. The true meaning is the common sense meaning, and I think the words apply to the person who practically sees to the bringing up of the child.

Applying that meaning to the present case I have no doubt that the respondent is the person who brought up the child at her expense. I have no doubt also that the facts of this case fortify that construction. It is evident that the mother practically washed her hands of the child and left her entirely in the care of Miss Wright. That view is strengthened by the change of attitude adopted by her counsel to-day, which suggests that the present application is really made at the instigation of the Cunninghams.

With regard to the latter part of the section, it was argued that in so far as there was at the present moment no moral stain upon the character of the petitioner, she must necessarily be a fit person to have the custody of her child. But then the words "having regard to the welfare of the child" must be kept in view. In short, all these considerations point to the fact that the question of fitness is one of circumstances and degree.

The petitioner's counsel tried to argue that to refuse the prayer of the petition was tantamount to refusing the right to a mother to settle her child where she preferred when she was not able to take it herself, but we are laying down no such rule. If the mother had come forward with the names of persons of exceptional character who were able to give the child the advantages which she at present enjoys, we should have respected her claim, but I cannot look upon her decision in favour of the Cunninghams, made somewhat late in the day, as fulfilling these conditions.

Having regard to the welfare of the child I am clearly of opinion that the case comes under the statute, and that it is for the welfare of the child to remain, as she wishes, with the respondent. I am therefore for refusing the prayer of the petition.

LORD KINNEAR—I agree, with this qualification, that I desire to reserve my opinion as to the interpretation of the second part

of section 1. But the third section, as to the construction of which I agree with your Lordship, is quite sufficient for the disposal of the case in so far as it depends upon the statute; and I am satisfied, for the reasons your Lordship has stated, that this petition should be refused.

LORD DUNDAS—The excellent and careful report of Sheriff Maconochie satisfied me that, having regard to the welfare of the child and the whole circumstances of the case, and to the language of the Statute of 1891, this is a petition which the Court ought not to grant but to refuse.

LORD ADAM and **LORD M'LAREN** were absent.

The Court refused the petition.

Counsel for the Petitioner—Dewar, K.C.
—Jas. Macdonald. Agents—Paterson & Salmon, Solicitors.

Counsel for the Respondent—A. M. Anderson. Agent—John Veitch, Solicitor.

Tuesday, March 14.

SECOND DIVISION.

NEILSON v. STEWART'S TRUSTEES.

Trust—Petition for Removal of Co-Trustees—Trust Administration—Auctor in rem suam—Expenses.

A petition by one of a body of trustees for the removal of his co-trustees and the appointment of a judicial factor on the trust estate on grounds of maladministration was opposed by the other trustees. A settlement was arrived at extra-judicially, on the terms that the other trustees should repay certain sums to the trust estate, and that the administration of the trust should be placed under the superintendence of the Accountant of Court. *Held* that the petitioning trustee was entitled to his expenses, as between agent and client, out of the trust estate, and that the other trustees were not entitled to charge the trust estate with any of the expenses incurred by them in opposing the petition.

Charles Stewart, wine and spirit merchant, Glasgow, died in November 1893, survived by his wife and two pupil children, and leaving a trust-disposition and settlement by which he conveyed his whole estate to Thomas Y. Paterson, Andrew Martin, Lewis Cook, and Mrs Stewart as trustees for certain trust purposes. All accepted office, but Mr Cook resigned in 1898, and in October 1903 Mrs Stewart died and William Neilson, the present petitioner, was assumed as a trustee. The trustees, it was declared, were to have all the powers, privileges, and immunities conferred upon gratuitous trustees by the Trusts Acts 1861 to 1891, and, without prejudice thereto, power to enter into possession of and intromit generally

with the trust estate; power to appoint factors, of their own number or otherwise, and allow them suitable remuneration; certain powers to compromise and enter into arbitrations regarding claims and questions with third parties affecting the estate; and a power of sale of all or any parts of the estate, either by public roup or private bargain.

On October 15, 1904, William Neilson presented a petition to the Court of Session praying the Court, *inter alia*, "to sequester the said trust estate, and to remove the said Thomas Y. Paterson and Andrew Martin from the office of trustees, . . . and to allow the petitioner to resign the office of trustee, and to appoint Robert Reid C.A., or such other person or persons as their Lordships might think proper, to be the judicial factor on the said estate."

The petitioner averred that there had been and still were at the date of the petition serious irregularities in the administration of the trust, and in particular, *inter alia*, that the trustees had continued and still continue to carry on the wine and spirit business which was being conducted by the testator at the time of his death, and had never made any attempt whatever to dispose thereof. The licence was first transferred to the name of the testator's widow, and upon the assumption of the petitioner as a trustee at her death it was transferred to his name. The petitioner had been advised that the said business was not a proper trust-investment. It was not authorised by the trust-deed, which, on the contrary, conferred the most ample powers of sale upon the trustees. Further, liquors for the said business had all along been supplied at a profit, at first by the firm of Oswald, Paterson, & Company, of which the said Thomas Y. Paterson was sole partner, and thereafter by T. Y. Paterson & Company, Limited, of which the said Thomas Y. Paterson was managing director and principal shareholder. The supply of the said liquor to the trust business at a profit by a trustee was also a breach of trust. Further, the trustees employed one of their own number, viz., the said Mrs Stewart, to manage the business, and paid her for doing so a salary of £2 a-week. There was so paid her in all upwards of £400. The payment of such a salary to a trustee for work done for the trust was also illegal. At any rate its legality was very doubtful.

In these circumstances the petitioner maintained that it was necessary for the protection of the trust estate that the existing trustees should be removed from office and a judicial factor appointed to administer the trust. The petitioner was desirous of resigning the office of trustee, but deemed it to be his duty, and to be necessary both for his own safety and for the security of the trust, to first place the whole matter before the Court.

The petition was opposed by Mr Paterson and Mr Martin.

Counsel were heard in the Summar Roll on 23rd November 1904, and thereafter a minute was lodged on behalf of the respon-