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*.

Charles Hamilton Reilly, labourer, Glasgow, died on 16th September 1892 leaving a widow and three children—Charles Hamilton Reilly, born on 22nd May 1892, William Sheridan Tottingham Reilly, born 12th July 1884, and Amelia Reilly born 23rd March 1892. The children lived with their mother till her death on 14th November 1894. On 21st November, after her death, they were placed by their maternal grandmother, Mrs Barry, in one of the Orphan Homes of Scotland, Bridge of Weir, Renfrewshire, under the management of Mr William Quarrier.

On 24th November 1894 Peter Reilly, the children's uncle, wrote to Mr Barry (the children's maternal grandfather) and Mr Quarrier requesting that delivery of the children should be made to him, and offering to submit a satisfactory scheme for their maintenance. Mr Barry replied—"With reference to the children therein mentioned, I have had nothing to do with any arrangement regarding them. I may mention that I discountenanced their mother (my daughter) for having married a Roman Catholic, and except on very rare occasions I have never exchanged words with her." . . . Mr Quarrier replied refusing to give up the children.

On 22nd January 1895 a petition was presented to the Court by Peter Reilly, uncle of the children, to "ordain the said William Quarrier forthwith, and at such time and place as your Lordships may fix, to deliver up the said children to the petitioner or any other person having his authority." . . .

The petitioner averred—"The deceased Charles Hamilton Reilly, the children's father, lived and died as a practising member of the Roman Catholic Church, and was buried in a Roman Catholic cemetery with the rites of said Church. He was attached to his religion, and desired and intended that his children should be brought up in it. He caused them all to be baptised by a Roman Catholic priest, and to be instructed in the tenets of said church. The two elder children regularly attended St Mary's Roman Catholic School, Abercromby Street, Glasgow. Mrs Reilly, though not a Roman Catholic, respected her husband's wishes in regard to the children's religious upbringing, and continued, after his death, to send them to the same school, where religious instruction was regularly given them. In fact, Mrs Reilly and the children attended St Mary's Roman Catholic Church, Abercromby Street, Glasgow, before and after the father's death. The eldest child made his first communion on 30th November 1893. Mr Quarrier's Homes, above referred to, though described by him as unsectarian, are institutions of a distinctly Protestant character. The children are educated as Protestants, and attend Protestant religious services. They are not allowed to be instructed in the doctrines of the Roman Catholic Church or to attend the services, or observe the religious practices of that church."

The petitioner maintained that Mr Quarrier ought not to be allowed to override the wishes of the parents in regard to the religious instruction of the children, and undertook to place them in Smyllum Orphanage, Lanark, a Roman Catholic establishment.

The petition was served upon Mr Barry and Mr Quarrier. Answers were lodged only by Mr Quarrier.

The respondent averred that Charles Hamilton Reilly, the father of the children, though he belonged to a Roman Catholic family, never went to chapel, and was in the habit of declaring that he believed in neither Catholicism or Protestanism; that he was married by a Protestant clergyman, and attended services in a Protestant mission; that neither the father nor mother were present at the baptism of their children, and that these had been sent to a Roman Catholic School only on the understanding that books and other things would be supplied free, and that except for two years they had attended Protestant and Board schools. That on his death their father had committed the children to the charge of their mother, who was a Protestant, and who before her death charged her mother to bring up her children as Protestants. He averred further that the Homes and the instruction therein was wholly unsectarian. He stated that the children had been handed over to him by their maternal grandparents, who, as nearest cognates, alone had any right to their custody.

The respondent maintained that "in the circumstances it is submitted that it is not for the interests of the children that they should be handed over to the petitioner, and that the wishes of their parents in regard to the religious instruction of the children being in no way disregarded by the education and upbringing they receive in the Homes, which are not foreign to, but, on the contrary, consistent with such training as they received during the whole, except two years, of their lives in the Protestant and Board schools they attended."

Argued for the petitioner—The petitioner was the nearest male agnate, and had therefore a good title to the custody of the children—*Morrison* v. *Quarrier*, June 9, 1894, 21 R. 889, at p. 892. Mr Quarrier had no lawful title, and the case was thus distinguished from *Morrison* v. *Quarrier*. The admitted facts showed the father was a Roman Catholic, and intended his children to be brought up in that faith. The Lord President, in the second case of *Morrison* v. *Quarrier*, July 19, 1894, 21 R. 1071, pointed out the importance of the religion of the father, and the strong presumption to be drawn therefrom as to his intentions for the children.

Argued for the respondent—There should in any view be an inquiry into the facts of the case, and a curator appointed to the children. This was a peculiar case, for the persons entitled to the custody of the children, viz., their grandparents, the nearest cognates, had placed them with the respondent, and did not complain of their treatment. No ground had been

stated for the proposed change, except the religious education of the children, and there was no case where this had been held a sufficient consideration without other strong reasons existing.

At advising—

LORD M'LAREN—We have had several cases of this description recently, in which application has been made by a relative for the custody of children, and answers have been put in by relatives of recognised title to appear, and with a recognised legal interest in the welfare of the children. In such cases we have thought it necessary to inquire into the conflicting statements, generally by the appointment of a *curator* to the children, with instructions to inquire and to report. The present case is peculiar in this respect, that while on the one hand it is not disputed by the petitioner that the children are well cared for in Mr Quarrier's Homes, on the other hand no relative has come forward to question the statements which he makes. These statements are very distinct—that the father of the children was a Roman Catholic, that the children were baptised into the Roman Catholic faith, and that after their father's death their mother so far recognised her husband's opinions that she sent the children to a Roman Catholic school. That is not admitted in terms, but the statements are only disputed by the manager of the Homes in which the children are placed, and who is necessarily dependent for his information on the statements made to him by others. I think that if none of the relatives come forward to dispute the statements of the petitioner as to the father's religious profession and his wishes regarding the upbringing of his children, the Court is in a position to exercise its discretion, and to grant the prayer of the petition in respect of the petitioner's statement, security being first given for the proper education and upbringing of the children.

LORD ADAM—In this case no question arises as to the material interests of the children. They are at present being well cared for in Mr Quarrier's Home, but there is no reason to think that they will not be equally so in the orphanage where the petitioner proposes to place them, and binds himself to find caution that he will do so.

I agree with your Lordship that this is a peculiar case, because on the one side there comes forward the nearest male agnate of the children, and on the other side he is opposed only by Mr Quarrier, in whose custody they are, but there is no competing relative to oppose the petition.

I repeat what I said in a recent case, viz., that the nearest male agnate has a right to intervene, though he has no power of control over the children. Accordingly the petitioner has a right to intervene, and to say that he thinks it is not right to bring up the children as Protestants, since they are in point of fact Roman Catholic children. I have no doubt that their father was a Roman Catholic—he may not have been a good one, but that is nothing to us. We have this fact endorsed by the letter which has been read to us from Mr Barry, in which he states that he was displeased with his daughter for marrying a Roman Catholic. Moreover, these children were baptised as Roman Catholics, and that is undisputed, the only answer being that their parents were not present at the ceremony, but no suggestion being made that this was done without their authority or wishes. On the death of their father the children were under the care of their Protestant mother, who sent them to a Roman Catholic school for a period of about two years, until shortly before her death, thus presumably carrying out their father's wishes with her own approval. Now, all these facts which I have narrated are practically undisputed, and the only answer made is that the father was not a good Catholic, and neglected his children. But, as I have already indicated, it is not our duty, and I could not consent to any inquiry whether there was more or less laxity on his part in the performance of his religious or other duties as a Catholic, which is entirely foreign to the present question.

I therefore agree that the prayer of the petition should be granted.

LORD KINNEAR—I am of the same opinion. The petitioner's right is *prima facie* good, and he is not opposed by any relative of the children or other person with a title to direct the manner of their education. The only relative who might have come forward with a good title is the maternal grandfather. The petition has been served upon him, and he does not oppose it; and the explanation which has been given at the bar only throws us back upon his letter, which shows, firstly, that he was quite indifferent to the fate of the children; and, secondly, that their father was undoubtedly a Roman Catholic.

Therefore, concurring with the remarks of Lord Adam, that we cannot consider averments as to the laxity of the father's religious views, I am of opinion that we have sufficient grounds for granting the prayer of the petition, subject to security being given for the proper upbringing of the children.

The LORD PRESIDENT concurred.

The Court ordered the petitioner to submit a scheme for the education of the children, and the following scheme was subsequently lodged by the petitioner, who undertook to carry it out if approved—"That the said three children shall be brought up at the Smyllum Orphanage, Lanark, where they will be boarded and educated, and receive an industrial training. They will remain in the said Orphanage until they respectively attain the age of sixteen years or thereby, when they will be apprenticed to the trade at which they have been working, or placed in suitable situations."

After this scheme had been lodged, but before the interlocutor disposing of the petition had been signed, a minute was lodged by Mr William Barry,

the maternal grandfather of the children, craving the Court to allow him to adopt the answers of the respondent Mr Quarrier, "or otherwise to order the re-delivery of the children to him as their nearest male cognate, and the person to whose care they were entrusted by their deceased mother, with instructions for their Protestant upbringing."

The minuter averred that when the petition had been served upon him, in order to avoid the expense of litigation, he had, instead of lodging answers, demanded redelivery of the children from the respondent Mr Quarrier, with whom they had been placed for their better support and maintenance, that Mr Quarrier had refused redelivery on the ground that the question of custody was before the Court, and that the minuter had now learnt that his non-appearance had been taken to infer acquiescence in the prayer of the petition.

Argued for minuter—This, being a question of *status*, was one which the Court would not refuse to hear even at this late stage—*Whyte* v. *Whyte*, January 31, 1891, 18 R. 469. The opinions expressed by the Court favourable to the petitioner had been based on the fact that no relative had come forward to oppose the petition. But the answers lodged by the respondent, if they had come from the minuter, would have furnished good grounds for refusing it—*M'Grath*, L.R. 1893, 1 Ch. 143. The petitioner's right was only that of any stranger, while the minuter, as the person liable to aliment the children, was entitled to their custody.

Argued for petitioner—The minuter was too late in coming forward. Moreover, he had contributed nothing new to the facts which the Court had before it when the petition was previously disposed of.

At advising—

LORD PRESIDENT—The case of these children was before the Court very recently, and we considered it just and right that they should be brought up in an institution where they would receive instruction in the religion of their father. On the statements before us, we then came to the conclusion that the children were Roman Catholics; that their father had been a Roman Catholic, and that nothing had been stated rebutting the presumption that he intended them to be brought up in that faith. This compearer—Mr Barry—was cognisant of the proceedings about the children, and it is well to observe what was the sequence of events. Mrs Reilly died on 14th November 1894, and somebody took the children and placed them in the care of Mr Quarrier. On 24th November—10 days after Mrs Reilly's death—Mr M'Lachlan, Mr Peter Reilly's agent, wrote to Mr Barry requesting delivery of the children. Now, to that letter Mr Barry replied in effect that he washed his hands of the children, having discountenanced their mother for marrying a Roman Catholic against his wishes. He now, however, comes forward, and says that his daughter had on her deathbed, that is to say, sometime about 14th November, expressed as her dying wish, that the children should be brought up by him as Protestants. He gives no explanation of his subsequent conduct, supposing him to have been given this sacred charge, or of the letter in which he repudiates having anything to do with the children. Now, these facts about this letter were before the Court previously; we knew that the petition had been served upon Mr Barry, and that no answers had been lodged by him. But now that Mr Quarrier has been beaten, Mr Barry comes, or is put forward, to contest the question again. It is important to observe the terms of his intervention. He knows, or ought to know, a great deal about the children, and yet, instead of giving us any additional information, and explaining his own previous conduct, which greatly requires explanation, he is content, in the most languid manner, to say that he did not wish to incur the expenses of a lawsuit at that time, but wishes now to adopt Mr Quarrier's answers.

Now, we have to consider the welfare of the children, to see whether this intervention is a *bona fide* one, and to take the course which will be for the children's interest, with due regard to the religion to which they belong. The minuter gives us no additional information about the children at all, but is content to adopt the statements of a complete stranger, which must necessarily have been obtained second-hand. I am satisfied that this intervention is not *bona fide*. As the minuter, Mr Barry, has contributed nothing, we are safe to conclude that we were before in possession of all the facts, and, accordingly, I do not think there is any reason for not proceeding to carry out our previous decision. The scheme proposed seems a very proper one, the institution seems to be a desirable one for children of the Roman Catholic religion in this condition of life, and caution is to be given that the children are to remain in it till they are sixteen years old. I am therefore for approving of the scheme.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"Having resumed consideration of the petition of Peter Reilly, the nearest male agnate of the children mentioned in the petition, and the answers thereto by William Quarrier, together with the proposed scheme for the petitioner, and the minute of William Sheridan Tottingham Barry, the nearest male cognate of the said children, and heard counsel for the parties, approve of the said scheme, and the petitioner having found caution to the satisfaction of the Clerk of Court that the undertaking contained therein and in the petition will be carried out, Find the petitioner entitled to the custody of the said children: Decern and ordain the respondent William Quarrier

forthwith to deliver up the said children, viz., Charles Hamilton Reilly, William Sheridan Tottingham Reilly, and Amelia Reilly to the petitioner or any other party having his authority and decree: Find the respondent William Quarrier liable to the petitioner in expenses to 13th May 1895, the date of his intimating his withdrawal from the action: Find the minuter William Sheridan Tottingham Barry liable to the petitioner in the expenses of the discussion on the 1st and 4th June: Find the said respondent and the minuter liable conjunctly and severally to the petitioner in the expenses of the discussion upon expenses," &c.

Counsel for the Petitioner — Comrie Thomson—W. Campbell. Agent—William B. Glen, S.S.C.

Counsel for the Respondent—Ure—Clyde. Agents—Dove & Lockhart, S.S.C.

Counsel for the Minuter—A. Jamieson—Lee. Agents—Dove & Lockhart, S.S.C.

Thursday, July 11.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

GIBSON *v.* CADDALL'S TRUSTEES.

Trust—Litigation by Trustees—Expenses—Liability of Trustees.

Trustees who were fiars of a heritable estate, the fences of which the liferenter was bound to keep up, finding said fences in disrepair, entered upon the lands without his consent and cut them down. The liferenter thereupon raised an action against them in the Sheriff Court for £100 as damages. The Sheriff found that, although the trustees had acted illegally, they had done so in *bona fide* and in the interests of the estate, assessed the damages at £5, and found the trustees liable in one-half of the expenses. *Held* that the trustees were not personally liable for these expenses, but were entitled to recoup themselves out of the trust funds.

Trust—Fee and Liferent—"Annual Income"—Whether Duplicand of Feu-Duty to be Regarded as Annual Income.

Trustees were bound under an agreement to pay to the liferenter of the trust-estate "the whole free annual income." *Held* (*rev.* judgment of Lord Wellwood) that this did not include a duplicand of feu-duty, which was payable only once in nineteen years.

Case of *Lamont-Campbell* v. *Carter-Campbell*, January 19, 1895, 22 R. 260, *distinguished.*

Butter's Church, Glenapp, Ayrshire, with manse and offices, was erected in 1850 upon lands disponed to trustees by the late Mrs Isabella Butter or Caddall, who also left funds in their hands, for, *inter alia*, the building of said church and manse, the income of the balance to be paid annually as stipend to the incumbent for the time being. In 1857 the Rev. Henry Gibson was appointed incumbent, and in 1858 Mrs Caddall's trustees conveyed to him for his incumbency the lands belonging to them, reserving the growing timber and the plantations on said lands, and bound themselves and their successors in office to pay him as stipend the interest of £2700 yearly. In 1869 a sinking fund, which had been instituted in 1850 to meet the expense of keeping in repair, amounted to £500, and the trustees, thinking that sum sufficient for the purposes of the fund, entered into an agreement with Mr Gibson to give him, in addition to the income from the said £2700, the balance of the free income of the estate, he undertaking to keep up the manse, offices, and fencing.

In 1877 certain questions arose between Mr Gibson and the trustees as to the proper repair of the glebe fences, and the trustees, being of opinion that they had not been properly cut, without Mr Gibson's consent sent a hedger on to the lands, who cut them down. Thereupon Mr Gibson raised an action in the Sheriff Court at Ayr against the trustees, to have them interdicted from cutting the hedges, and ordained to pay him £100 damages for their unwarranted interference. The Sheriff-Substitute, after a proof, granted interdict, gave decree for £5 in name of damages, and found the trustees jointly and severally liable in expenses, subject to modification. This interlocutor was affirmed by the Sheriff, who modified the expenses due to the pursuer to one-half, and in his note added that, from the evidence before him, he had no doubt whatever that the defenders had acted throughout in perfect good faith for the benefit of the property, the fee of which they held in trust, but that they were wrong in law in proceeding to do that which, although right and proper in itself, should not have been done without consent or order of law. The trustees paid the damages and expenses in which they were found liable out of the sinking fund.

In 1885 Caddall's trustees entered into a new arrangement with Mr Gibson, by which it was agreed (1) that the arrangement of 1869 should be cancelled; (2) that certain sums should be expended upon the church, manse, offices, fences, &c., out of the sinking fund; (3) that in future the upkeep of these should be under the exclusive control and management of the trustees; (4) that the sinking fund should by degrees be brought up again to the sum at which it then stood; and (5) that as soon as that was done the incumbent should "as hitherto enjoy the whole free annual income from said trust-estate, including said sinking fund."

Butter's Church had been erected into a parish church *quoad sacra* in 1873, and a sum of £2500 had been paid by the then Caddall trustees to the Endowment Committee of the Church of Scotland to secure an annual stipend to the minister. A deed