

Friday, November 18.

FIRST DIVISION.

FOGGO AND OTHERS, PETITIONERS.

Trust—Petition for Authority to One of Two Trustees to Wind up.

A petition was presented by one of two trustees under a settlement, and the sole beneficiaries under the same, stating that the other trustee had, without demitting office, recently left the country with the intention of taking up his permanent residence in America, and that his address was unknown to the petitioners, and craving the Court to authorise the petitioning trustee to grant conveyances of the trust property and all other deeds necessary for bringing the trust to a termination. The Court *refused* to grant the authority craved.

John Waugh died on 11th August 1884 leaving a trust-disposition and settlement whereby he conveyed his whole estate, heritable and moveable, to Robert Foggo and George Forrest, and to such other persons as might be assumed in virtue of the powers of assumption vested by statute in gratuitous trustees, and to the acceptors or acceptor, survivors and survivor of the same in trust for the purposes set forth in the deed. In the third place, he directed his trustees to hold and manage certain heritable subjects at South Back of Canongate during his wife's lifetime should she survive him, and to pay her aliment at a specified rate out of the rents thereof, and to pay the balance to his children William and Margaret equally; (fourth) to realise and convert into money the whole remainder of his estate, and to pay the residue thereof to his children William and Margaret equally; (fifth) on the death of his widow to convey the heritable subjects to and in favour of William and Margaret equally, or to sell the same and pay the full proceeds equally to William and Margeret.

After John Waugh's death Robert Foggo and George Forrest accepted the office of trustee, and entered upon the management of the estate.

John Waugh was survived by his wife, who died in March 1892, and by his two children William and Margaret.

On 4th November 1892 Robert Foggo, William Waugh, and Margaret Waugh presented this petition to the Court.

After setting forth the facts above narrated the petitioners stated—"That the estate of the deceased John Waugh consists principally of (1) the said property in South Back of Canongate, Edinburgh, in which the said Robert Foggo and George Forrest are heritably vested as trustees foresaid conform to notarial instrument in their favour recorded 2nd October 1884; and (2) the sum of £650 sterling, being the principal sum in a bond and disposition in security, . . . to which the petitioner the said Robert Foggo and George Forrest have now right

as trustees foresaid by notarial instrument in their favour recorded in said last-mentioned register 2nd October 1884. That on 12th October 1892 the petitioner William Waugh offered the sum of £600 for the said subjects in South Back of Canongate, and on 17th October 1892 the petitioner Margaret Waugh accepted, so far as her interest therein was concerned, the said offer conform to missives of sale produced, and they desired the petitioner Robert Foggo, with his co-trustee, the said George Forrest, to execute the necessary conveyance in favour of the said William Waugh, with entry at the term of Martinmas 1892, when the price should be payable. That the said George Forrest had suddenly, and without demitting office as trustee foresaid, or giving notice to any of them of his intention so to do, within this last month of October proceeded to America, intending to take up his permanent residence there, but his present address there is unknown to the petitioners. The petitioner, the said Robert Foggo, is therefore sole trustee under the foresaid trust-disposition and settlement remaining in this country, but he is unable to execute the conveyance of the said property in South Back of Canongate as desired, although it is necessary that the transaction should be settled at the term of Martinmas 1892 as originally agreed upon. Further, the bond and disposition in security already referred to as part of the trust-estate was called up by the truster . . . and afterwards exposed for sale, but unsuccessfully, by the petitioner Robert Foggo and the said George Forrest as trustees foresaid . . . The trustees thereafter entered into possession by action of maills and duties, but the petitioners have now determined to sell the subjects and wind up the whole trust.

The petitioners therefore craved the Court, after the petition had been intimated, and served edictally on George Forrest, to authorise the petitioner Robert Foggo to manage the affairs of the trust and bring the same to a termination, and to grant all deeds necessary for executing the trust and bringing it to a termination, in terms of the foresaid trust-disposition and settlement, upon such caution, if any, as the Court might direct.

Reference was made by the petitioners to the following cases:—*Miller and Others, Petitioners*, January 19, 1854, 16 D. 358; *Fraser, Petitioner*, March 4, 1837, 15 S. 692.

At advising—

LORD PRESIDENT—I am afraid we cannot grant the petition, nor is it clear that the difficulty as to the title would be removed even if we could.

LORD ADAM—I am of the same opinion.

LORD M'LAREN—I am also of the same opinion. I think there are other means by which the title could be made up—either by the removal of the absent trustee, or by declaratory adjudication on a title granted by the beneficiaries. At the expiry of six months the Trust Act will apply, and what we are really asked to do is to anticipate the statutory provision

applicable in such cases.

LORD KINNEAR—I am of the same opinion, and for the reasons your Lordship has mentioned. I think if the present trustee and beneficiaries are in a position to give a title to the purchaser then no intervention of the Court is necessary. But if the purchaser is not bound to accept such a title, then I do not think we can better it by giving any formal authority to the transaction.

The Court refused the petition.

Counsel for Petitioners—Graham Stewart.
Agents—Donaldson & Nisbet, Solicitors.

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SECOND DIVISION.

[Lord Low, Ordinary.]

STEVENSON v. HOGGANFIELD BLEACHING COMPANY.

Property—Common Property in Water—Rights of Proprietors in Stream—Substitution for Water Abstracted by Water from Foreign Source.

Held that a proprietor in a stream has a right to the whole water of the stream undiminished in quantity and undeteriorated in quality, except in so far as used by the upper proprietors for primary purposes, and that it is not a good defence for an upper proprietor to say that although he is abstracting water from the stream for other than primary purposes, he is supplying its place with water from a foreign source.

The Molendinar Burn has its source in Hogganfield Loch. Immediately after leaving the loch it flows in a westerly direction through the Hogganfield Bleach Works, and on leaving the said works it flows through the lands of Riddrie Park and Provau Mill, possessed by Duncan Stevenson.

Duncan Stevenson raised an action of declarator and interdict against the Hogganfield Bleaching and Finishing Company, *inter alia*, to have it declared “that the pursuer has good and undoubted right to the whole water of the said stream as it flows out of Hogganfield Loch, and that the defenders have no right to diminish that quantity in any way, nor to cause the said stream nor any part thereof to flow other than past, through, or over the lands of the pursuer,” and to have the defenders interdicted “from diminishing in quantity the water of the said stream, or from causing the said stream or any part thereof to flow in any way other than through, past, or over the lands of the pursuer.

A proof was led before the Lord Ordinary (Low), which showed that in 1890, in consequence of threatened action by the Public Health Local Authority of the Barony Parish, the defenders made important alterations in their works with a view of mitigating

the pollution of the stream caused by them. Prior to that date they had discharged the liquid waste matter into the stream, but they then made a connection between their works and the public sewer, and made arrangements for pumping into the sewer all the waste liquid, with the exception of the water used for washing goods and for cleaning the starching mangle. The defender's evidence showed that the following quantities of water taken from the stream were pumped into the sewer, viz., 400 gallons daily, used for boiling the cloth in the kiers, and 400 gallons twice a week used in the scouring machine. The defenders, however, led evidence to show that about 5000 gallons of water from the Loch Katrine Water-supply were used daily in their works, and that most of that water, after being so used, was sent into the burn.

On 26th April 1892 the Lord Ordinary pronounced an interlocutor finding, *inter alia*, “(4) that the amount of water from the said stream which is pumped by the defenders into the public sewer is not sufficient to prejudice in any material degree the pursuer's right to have the water of the stream transmitted to him undiminished in quantity.

“Note.— . . . The pursuer also seeks to have the defenders prohibited from pumping any part of the water of the stream into the public sewer. . . . To prohibit the operation would, I think, practically amount to stopping the works altogether, and would require strong reasons to justify it. The water pumped into the sewer is only what is used in the boiling kiers and in the boxes which contain chemical solutions. The total amount of water so used is not large, nor, in my opinion, sufficient to affect appreciably the normal flow of the stream. When the stream is very small the defenders require to use a considerable quantity of Loch Katrine water, which is put into the stream. I think that when the stream is so low as to be appreciably affected by the water which is pumped away more Loch Katrine water will be put into the stream than the amount abstracted. In view, therefore, of the whole circumstances I do not think that such an amount of water is pumped into the sewer as to encroach upon or prejudice in any material degree the pursuer's right to the stream transmitted to him undiminished in quantity.” . . .

The pursuer reclaimed.

At advising—

LORD JUSTICE-CLERK— . . . The fourth finding of the Lord Ordinary is as follows—[Here his Lordship read the finding]. Now, this raises a difficult and a very important question, possibly not as regards this particular case but as regards the general law upon the subject of flowing water. The facts which I think are not disputed amount to this, that the defenders in the course of their operations take a quantity of the water which they have used, and which has become unfit for primary purposes by that use, and they pump