

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.

Friday, November 18.

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

that water into the common sewer in order that it may not again reach the stream. They then substitute for the water thus pumped out a certain proportion of water which they get from the Loch Katrine supply for Glasgow, and which they send down the stream in place of the water extracted. Now, if they substitute a certain amount of Loch Katrine water for a certain amount of the water of the stream which they have soiled, it may be that there is no harm done, but I do not think that that consideration at all settles the question whether as matter of legal right they are entitled to do so. The right of the lower heritor is to have the water of the stream sent down to him undiminished in quantity and undeteriorated in quality, subject only to this, that it may be used by the upper proprietors for primary purposes. Now, I do not think that it can be required of any lower heritor to litigate with an upper proprietor as to whether or not he is damaged by the abstraction of a certain amount of water which belongs to the stream, if there is substituted for that water a certain quantity of water which comes from somewhere else. I think the right of the lower heritor is to have the stream transmitted down to him 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 answer to his objection that water is being abstracted for the upper proprietor to say—"Oh, I am putting in some other water which I think is just as good as or even better than the water I am abstracting." I feel bound to say that it appears to me according to the decisions in the past that an upper proprietor has no such right, and if he has no such right, he cannot defend himself against an action which calls on him to carry out what is his duty at common law, viz., to restore to the stream any water which he takes out of it except what is used up for primary purposes, and that he cannot remove water for any other purpose without restoring that water in its entirety and in as pure a state as that it was in when taken from the stream. Therefore I cannot concur with the fourth finding of the Lord Ordinary. . . .

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

*The Court recalled the Lord Ordinary's interlocutor, found, *inter alia*, (4) "that the pursuer has right to the whole water of the said stream as it flows out of Hogganfield Loch, and that the defenders by withdrawing the same for other than primary purposes have materially diminished the volume of water flowing from the said loch through the lands of the pursuer," and remitted to the Lord Ordinary for further procedure.

Counsel for the Pursuer—H. Johnston—Guthrie—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Defenders—Comrie Thomson—Ure. Agent—R. Ainslie Brown, S.S.C.

*Interlocutor signed November 26, 1892.

Friday, November 18.

SECOND DIVISION.

[Sheriff of Dumfries.

COSTLEY v. LITTLE.

Parent and Child — Paternity — Proof — Corroboration.

In an action of affiliation and aliment, it was proved that there was opportunity for the connection alleged by the pursuer. The defender denied the connection. He also denied that he had written any letter to the pursuer. The pursuer produced a letter expressed in familiar terms, and proved that she received it from the defender. *Held* that the letter was sufficient corroboration of the pursuer's evidence to entitle her to decree against the defender.

Margaret Costley, residing in Stranraer, brought this action of affiliation and aliment against William Little, yearlman, Auchmantle, Wigtownshire, for inlying expenses and aliment for an illegitimate female child, of which the pursuer alleged the defender was the father.

The child was born upon 25th October 1891, and it was proved that the defender had opportunity of having connection with the pursuer during the months of January, February, and March of that year. The pursuer averred that at that time the defender was courting the pursuer with a view to marriage, and that in January 1891 he wrote a letter to her in these terms—"My dear Maggy I wood like to see you But i cant see you i am send you this card i hope you will like this and when i see you I will kiss you time. Be kind and Good to Wm. Little My Dear."

The evidence as to the letter was as follows. The defender deposed—"I never carried on any correspondence with the pursuer. I never wrote any letters to her, never the scrape of a pen. I never sent her any Christmas cards. (Shown above)—Did you ever send that letter to the pursuer?—No. (At this stage the defender was asked to give a specimen of his handwriting, which is produced and marked as relative hereto.) *Examination continued*—I never told the pursuer afterwards that I had sent that letter to her, but she said she had got a letter. I just happened to say I sent the letter, but I didn't."

The pursuer deposed—"I remember receiving a letter from the defender. I am shown the letter already produced. That is the letter I received. That letter mentions at the bottom the name 'William Little.' The defender afterwards told me that he had sent me this letter. He asked me to let him see the letter, and I said I had it burned. He used language implying that he had sent that letter to me."

Upon 9th July 1892 the Sheriff-Substitute (WATSON) found that the defender was the father of the pursuer's child, and gave decree accordingly.

**Note*.—The pursuer has produced a love letter which she says she received from the