

Saturday, December 1.

SECOND DIVISION.

[Lord Adam, Ordinary.]

FORBES AND OTHERS, PETITIONERS.

Trust—Petition for Appointment of Judicial Factor under sec. 10 of Trusts (Scotland) Act 1867—Nobile officium—Remit to Prepare Scheme.

A petition was presented to the junior Lord Ordinary under the 10th section of the Trusts (Scotland) Act 1867, by the trustees of a charitable bequest in a certain parish for leave to resign, and for appointment of a judicial factor in their stead to manage the trust. The petitioners, who were some of the heritors, together with the minister and kirk-session, were opposed by other heritors. The Lord Ordinary refused the prayer of the petition as incompetent under the Act, but on a reclaiming-note being presented, the Court before answer made a remit to have a scheme prepared and reported to them for carrying out the objects of the trust.

This was a petition presented to the junior Lord Ordinary (ADAM) by William Forbes of Callander and others, designing themselves "all heritors of the parish of Dalry," and by the minister and elders of Dalry, under the following circumstances:—As far back as 1639 Robert Johnston, of London, by will bequeathed £3000 to "sound, good, godly and pious works" in Scotland, naming certain persons to carry out his wishes. A portion of this fund was by the last surviving trustee devoted to the purpose of erecting a free Grammar School and maintaining poor scholars in Dalry parish. Certain persons were also nominated by him to frame orders and laws, but as they never acted, the management fell into the hands of the kirk-session and of the heritors, who had since 1688 managed the fund. In 1875 an action of declarator was raised against the trustees, the nature and result of which sufficiently appears from the interlocutor of the Second Division, pronounced on 30th July 1876, finding "that the heritors and kirk-session of Dalry, acting as trustees under the will of Mr Johnston, are not entitled to delegate to the Parochial Board the right to nominate poor children who are to have the benefit of the endowment fund; that the nomination of such poor children must remain with the heritors and kirk-session as trustees; and that on such nomination the School Board, while the agreement labelled on exists, are bound to have the poor children so nominated instructed in the higher as well as in the elementary branches of education," &c. The whole income of the fund amounted to £62, 15s. 6d. The petitioners in these circumstances thought it unadvisable, and personally were unwilling, to continue to administer so small a fund, and they therefore applied to the Court under the Trusts (Scotland) Act 1867, sec. 10, for appointment of a judicial factor, and for power to them to resign in a body and get their discharge.

Answers were lodged by a number of persons, inhabitants of Dalry village, and interested in the bequest. They asserted that the trust funds had not been fully employed as directed in the above-mentioned interlocutor: that only a few heritors

were petitioners, there being 150 heritors or more in the parish; that any such change as that of placing the fund under the control of a judicial factor should have been made when the action of declarator was depending; and that the proper mode of effecting a change would have been an application to the Inner House praying the Court to exercise its *nobile officium*.

The Lord Ordinary (ADAM) on the 14th November 1877 refused the prayer of the petition as incompetent, and added the following note to his interlocutor:—

"*Note.*—This petition is presented at the instance of William Forbes of Callander and certain other persons designing themselves heritors of the parish of Dalry, and of the Reverend Samuel Blair, minister of Dalry, and certain other persons designing themselves the minister and elders of the parish. It is presented under the 10th section of the Trusts (Scotland) Act 1867, by the petitioners (as being the sole trustees of the trust), for the appointment of a judicial factor, and thereafter for authority to resign.

"The trustees of the trust upon which the petitioners desire to have a judicial factor appointed are the 'heritors and kirk-session of Dalry.' But this petition is not presented in name of the heritors and kirk-session of Dalry. It is not presented in virtue of any resolution of a meeting of the heritors and kirk-session resolving to resign the trust, or authorising the petitioners to present the application. Moreover, it would appear that all the heritors are not parties to it. It is averred by the respondents, and not disputed by the petitioners, that there are numerous other persons entered in the valuation roll as proprietors of land in the parish, although it may be of small value, and these the Lord Ordinary thinks are heritors of the parish.

"In these circumstances, the Lord Ordinary thinks that the petitioners have no title to apply for the appointment of a judicial factor under the 10th section of the Trusts Act, on the ground that they are the sole trustees of the trust.

"If the petitioners desire individually to resign the office of trustee, they may be entitled to do so, but they are not entitled to do so under the section of the Act.

"It does not appear to the Lord Ordinary that the trust ought to be administered by a judicial factor. He thinks it would be better administered by the heritors and kirk-session of the parish."

The petitioners reclaimed, when the prayer of the petition was amended to the effect of asking the Court for a remit to prepare a new scheme, and to adjust and settle it for the future management and administration of the mortification. The Court thereupon pronounced the following interlocutor:—

"The Lords allow the amendment No. 23 of process to be received and added to the record, and having heard counsel on the reclaiming note for William Forbes and others against Lord Adam's interlocutor of 14th November 1877, before answer remit to Mr Alexander Nicolson, Sheriff-Substitute of Kirkcudbrightshire, &c., to frame and report to the Court a scheme for the future administration of the fund in question, having in

view the terms of the original bequest and the proceedings in this and the former process; and also to suggest for the consideration of the Court the names of any persons, official or otherwise, who in his opinion might fitly be named as trustees for the administration of the fund."

Counsel for Petitioners—Lord Advocate (Watson)—M'Laren. Agents—J. & J. Milligan, W.S.

Counsel for Respondent—Fraser—Rhind. Agents—Rhind & Lindsay, W.S.

Friday, December 7.

SECOND DIVISION.

[Lord Young, Ordinary.]

TRANENT COAL COMPANY *v.* POLSON AND ROBERTSON.

Arbitration—Decree-Arbitral—Reduction—Undue Influence—Legal Corruption of Arbitrer.

Averments which were held relevant to found an action of reduction of a decree-arbitral on the ground of legal corruption on the part of the arbitrer, within the meaning of the Act of Regulations 1695, and of undue influence exercised upon him by one of the parties, but the proof of which fell short of what was requisite to success in such an action.

This was an action raised by the Tranent Coal Company against John Polson and James Robertson, both of Tranent, concluding for the reduction of a minute of reference which had been entered into between the pursuers and defenders in a previous litigation between them, and of a decree-arbitral pronounced thereon by Robert Clark, manager of the Arniston Coal Company (Limited), on 27th October 1876.

The present defenders had sometime previously raised against the Tranent Coal Company an action of declarator, interdict, count and reckoning and payment, arising out of various transactions in connection with the working of the coal in certain lands which had previously belonged to a Mr Tennant, but which had been sold by him to Dr Robertson, one of the defenders. Ultimately, by joint-minute, to which the authority of the Court was interposed, a reference in that action was agreed to. Under the reference, amongst other procedure, a proof was taken, and one of the pursuers' witnesses, named Adams, having become, as they alleged, confused and excited, they applied subsequently to the arbitrer to see him personally and alone, and also to receive some corroborative evidence of what he really desired to say. These requests the arbitrer refused. In September 1876 a draft award was issued, against which the pursuers gave in a representation. This was also met by a refusal on the part of the arbitrer to grant the requests made.

The statement in the pursuer's condescendence as to legal corruption and influence was in these terms (cond. xxi.):—"The pursuers believe and aver that from within a short time after the arbitrer accepted of the reference down to

the close, the said James R. M. Robertson used means to influence the arbitrer, and did unduly influence him against the pursuers and in favour of the defenders in reference to the subject-matter of the arbitration. More particularly, in or about the month of June 1875 the said James R. M. Robertson made a journey from Renfrew to the arbitrer's residence at Arniston, where he resided with the arbitrer over night, and the sole purpose of his visit was with reference to the matters involved in the arbitration, which matters he discussed with the arbitrer, and impressed his views upon the arbitrer, who improperly listened to him and allowed him to make the arbitration the matter of prolonged conversation, all outwith the presence of and unknown to the pursuers. The pursuers do not impute wilful fault to the arbitrer, who is not a man accustomed to the *quasi* legal business of an arbitration, but they believe and aver that in point of fact, although it may be unconsciously, from the date of that meeting the arbitrer was biassed by the representation then made by the said James R. M. Robertson, who is the son of one of the defenders, and factor for both. More particularly, they believe and aver that upon that occasion the said James R. M. Robertson took the opportunity of endeavouring to indoctrinate the mind of the arbitrer with his false explanations in regard to the true nature, meaning, and purpose of his foresaid letter of 8th October 1872, addressed to the said Thomas Adams (cond. xxii.). Notwithstanding of the foresaid representation lodged by the pursuers on 4th October 1876, the arbitrer suddenly, and without any intermediate communication between him and the pursuers, or anyone on their behalf, of this date (October 23, 1876) signed the decree. The pursuers believe and aver that this was done at the instigation of the defenders between the two dates 4th October and 23d October, with a view to prevent the pursuers being heard before the arbitrer upon the points in question."

The defenders said the visit was paid by Robertson to the arbitrer on totally different business, and generally denied the pursuer's averments.

The other grounds of reduction sufficiently appear from the pleas-in-law and the opinions of the Court.

The pursuers pleaded—“(1) The whole of the proceedings complained of having been unfair and illegal, and the conduct of the defenders and of the arbitrer having been unjust and illegal and corrupt, the decree-arbitral, and all that preceded and followed it, ought to be set aside. (2) The decree-arbitral sought to be reduced, with all that preceded and followed it, ought also to be set aside, in respect—1st, That the claim for compensation for damages for coals taken from below the farmhouse and steading of Easter Windygowl was made in pursuance of an illegal and unwarrantable scheme on the part of the defenders to concuss the pursuers in the negotiations between them and the defenders with the view to the defenders getting possession of the colliery. 2d, That the letter by Mr J. R. M. Robertson to Thomas Adams, of 8th October 1872, was either authority to the pursuers to work the coal in the reserved area, or it was a snare to induce the pursuers to do so, with the view to the defenders thereupon pleading that the lease had been contravened and damages incurred. 3d,