

all dug out he cannot get them. Thus if by the decree of declarator the respondent has got no right to the claim for damages, where is it, and to whom has it gone? If it did really exist it undoubtedly belonged to the trustee on the sequestrated estate. But the trustee has conveyed the claim by assignation to the respondent. The Lord Ordinary says that he was not entitled to do so, and I agree with him, for this was a valuable right belonging to the estate, which the trustee had no right to assign.

It was suggested that the superior in a case of this sort has a claim for his feu-duty. That may be so, for the security of this feu-duty may be very much diminished. So I am not prepared to say that for an injury of that sort a claim would not be competent to the superior as well as to the vassal. But there is no such claim here. I am therefore of opinion that the Lord Ordinary's interlocutor should be adhered to.

The other Judges concurred.

The Court adhered.

Counsel for the Complainers—Solicitor-General (Watson) and Johnstone. Agents—Hope, Mackay, & Mann, W.S.

Counsel for the Respondents—Dean of Faculty (Clark) and Balfour. Agents—H. & A. Inglis, W.S.

Saturday, July 3.

FIRST DIVISION.

[Lord Craighill, Ordinary.]

TOUGH v. TOUGH.

Proof before Answer—Executor.

Where an executor-dative failed to furnish particulars of the executry estate, and opposed the confirmation of the deceased's widow as executrix, the latter held entitled to a proof before answer.

This action was brought by the widow of the late John Tough, ropemaker in Greenock, against his brother William Tough, who had been confirmed as executor-dative of the deceased *qua* one of his next of kin. The widow raised an action of count reckoning and payment against the executor on the ground that he had understated the amount of the executry estate, and the Lord Ordinary allowed a proof before answer.

The defender reclaimed.

At advising—

LORD PRESIDENT—The defender's position in this case is a peculiar one. He has been decerned executor-dative on the estate of his deceased brother *qua* one of his next of kin, and the statement furnished by him of the funds in his hands shows the amount of that estate to be £1,025, 16s. 10d. He admits that the deceased's widow, the pursuer of this action, is entitled to the half of this sum, but opposed her confirmation as executrix, and has not explained his motive for doing so. He is one of several next of kin, and has thus excluded the widow; he has not shown how the inventory of the estate is made up, which the pursuer alleges is incorrect and understated in amount. Further, he takes refuge in the plea that the pursuer may

take out confirmation *ad omitta*, and it is also worthy of remark that the debt to the estate is due by the firm of which the defender is a partner. In all these points, then, the defender stands in an unfavourable view. The proof allowed by the Lord Ordinary is under special reservation; and I do not think that the authorities alluded to for the defender apply to the present case. If the pursuer's averments are proved the defender must be held to be keeping back part of the estate, and for his own benefit. The Lord Ordinary has taken the right course.

LORD DEAS—The fact that this proof has been allowed before answer takes away the difficulty. I should require better ground before coming to the conclusion that this defender is entitled to say that the only remedy open to the widow is to confirm executrix *ad omitta*.

LORDS ARDMILLAN and MURE concurred.

Refuse reclaiming note.

Pursuer's Counsel—Trayner. Agent—Adam Shiell, S.S.C.

Defender's Counsel—J. C. Smith. Agents—John Wright and Johnston, L.A.

Thursday, July 8.

SECOND DIVISION.

TRUSTEES OF THE CLYDE NAVIGATION v.
TRUSTEES OF THE PORT AND HARBOUR
OF GREENOCK.

Interdict — River - Trust — Foreshore — Navigable Channel—Timber Ponds—Obstacle to Navigation.

Held that certain statutory trustees on forming a Board for improving the navigation of a river were not entitled to interdict parties having due title from the riparian proprietor from erecting timber ponds on the foreshore, provided and so long as such erections did not interfere with the navigable channel of the river, and with the necessary operations of the Board for its improvement, or with any public right.

This case came up by reclaiming note against an interdict pronounced by Lord Shand in a process of suspension and interdict brought to stop the erection by the respondents of certain timber-ponds on the foreshore of the Clyde, in the neighbourhood of Port-Glasgow.

The interlocutor was as follows:—

“Edinburgh, 19th January 1875.—Having heard counsel, and considered the cause, Finds—in the absence of any averment that the ground occupied by the timber-ponds in question is required for the execution of operations under the Clyde Navigation Acts, or that the occupation of the ground as timber-ponds in any way injuriously affects the navigation of the river, or works maintained by the complainers for the purposes of navigation—that the complainers have no title to insist in the action, therefore refuses the note of suspension and interdict, and decerns: Finds the respondents entitled to expenses; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor to tax and to report.