

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.

“*Note.*—The respondents, in virtue of a right granted to them by Mr Carrick Buchanan, proprietor of the lands of Finlayston, on the south bank of the river Clyde, have recently erected certain timber-ponds on the foreshore between high and low water mark *ex adverso* of these lands, and to the eastward of Port-Glasgow. The present application, at the instance of the Trustees of the Clyde Navigation, was instituted for the purpose of preventing the erection of these ponds, and is now insisted in to the effect of having the respondents ordained to remove them. The complainers have stated their readiness, however, to allow the ponds to remain if the respondents will grant an obligation in terms the same as those granted by other persons occupying similar timber-ponds in the neighbourhood, undertaking to remove the ponds whenever required to do so by the complainers. The respondents have declined to grant this obligation, but are willing to give an undertaking to remove the ponds if their existence at any time should be injurious to the navigation of the river, or if the complainers should at any time require the ground for operations under their statutes.

“The ground in question lies some distance to the eastward of the line across the river which forms, under section 75th of the Consolidation Act of 1858, the western boundary of the river under the charge of the complainers for the purposes of navigation in virtue of their Acts. The river at that part is upwards of a mile in breadth. The timber-ponds, beginning at high-water mark, are a considerable way within low-water mark, and at a distance of upwards of 1000 feet from the navigable channel of the river. It is not alleged by the complainers that they have any intention of executing operations on the ground under their Acts of Parliament, nor do they say that the occupation of the ground as timber-ponds has any injurious effect on the river for the purposes of navigation, or is calculated to have any such effect. A good many similar ponds have been in existence for a number of years without being productive of any such injury, and indeed the complainers’ willingness to have allowed the ponds in question to be erected, provided only their previous sanction had been obtained, sufficiently shews that it was not on account of any dreaded injury to the navigation that the present action was instituted, but rather for the purpose of maintaining, I assume quite properly, what the complainers believe to be their right of absolutely preventing such erections unless made with their sanction.

“The complainers are willing that before answer as to the legal rights of parties, the respondents should be allowed a proof of their averments, because, if Mr Buchanan, from whom the respondents derive their right, has the property of the foreshore, it might be ultimately held that an action like the present might not be maintainable against him, or others deriving right from him, unless it could be averred that the operations complained of were injurious, while an averment to that effect might not be necessary as against parties who had not a title from the owner of the foreshore. The respondents maintain that a proof is not necessary to enable the Court to dispose of the legal question which the action raises, and I have ultimately come to adopt this view.

“There can be no doubt that the complainers

are entitled, in virtue of the Statutes under which they act, to prevent any operation on the bed of the river below high-water mark, which will be productive of injury to the navigation, and that under their Acts they are entitled to execute such operations as are in their judgment required for the deepening and improvement of the navigable channel, until throughout its length a depth of 17 feet has been attained. The respondents admit this, and concede that their ponds must at once be removed if their existence should be an interference with these rights, or should become so from any change of circumstances. The question between the parties is whether the complainers have the higher right, which they claim, of preventing any occupation of the foreshore even where such occupation is harmless as regards the navigation of the river.

“In support of the action the complainers refer to the Clyde Navigation Consolidation Act, 1858, sections 75, 76, and 77, and the 97th and following sections, which authorise the levying of rates and duties on goods and vessels. By section 75 the limits of the river are defined as including ‘the whole channel or waterway of the said river forming the harbour,’ as far down the river as the line from Newark Castle there mentioned; and by section 76 the undertaking of the Trustees is stated to consist of the ‘deepening, straightening, enlarging, widening, or confining, dredging, scouring, improving, and cleansing the river and harbour, until a depth of at least 17 feet neap tides has been attained in every part thereof,’ and of the other works there enumerated including the erection of banks, walls, and works, for maintaining the channel of the river within proper bounds, and the digging and cutting the banks and other works which, in the opinion of the Trustees, are necessary ‘for improving the navigation of the river,’ or ‘for improving the navigable channel of the river.’ The complainers maintain that these provisions give them the entire control of the river below high-water mark, without any limitation. The right contended for is thus very extensive, and seriously affects the riparian proprietors. I am humbly of opinion that the complainers’ rights under their Statutes are not of the unlimited nature maintained by them, but are limited by the purposes of their trust, viz., the making and maintaining of a suitable navigable channel, of the depth specified in the Statute, throughout the river’s course. I think that whatever operations are in their opinion required to effect this purpose the complainers are entitled to execute, and whatever obstructions are put in the way of the execution of this purpose they are entitled to have removed; but the Statutes do not, I think, give them the further and unlimited powers for which they contend. They have no property in the foreshore. Subject to the use of the shore in so far as required for navigation, the right of property remains either in the Crown for other public purposes, or in the riparian proprietor if he has acquired the right by express grant, or by such a grant as will confer a right if followed by possession, where such possession has actually taken place. If the complainers should require to occupy part of the shore permanently by their works, they must acquire the right by purchase from the proprietor, whose right of property is not only not taken away, but is expressly recognised by section 77th of the Statute. But it is said that the right

and obligation to maintain the channel or waterway of the river for the purpose of navigation gives the right to object to any temporary occupation of any part of the shore within high-water mark. I am disposed to hold that the word 'waterway' occurring in the Statute is not to be construed as limited to the navigable channel, as the respondents maintain, but includes every part of the river at high water, and certainly every part used practically for navigation. But the purpose for which the complainers' rights in the channel and waterway are conferred is that of navigation only: and it appears to me their right to interfere with operations on the foreshore is limited by what is necessary and proper for that purpose. The intention of the Legislature evidently was, that the complainers should make and maintain a navigable channel of 17 feet deep and of such breadth as they should think fit, the breadth of course varying at different parts of the river, and the provisions of the Statute conferring powers on the Trustees must be read with reference to this intention, and so as fully to give effect to it. I am of opinion that, reading the Statute in this way, and assuming that the river up to high-water mark is subject to the control of the complainers in so far as necessary to enable them to carry out the intention of the Statute, the result is that the complainers have a title to object to any operation which interferes with any purpose they have in view for the improvement of the navigation of the river, but have no title to complain of operations which they cannot say will have that effect.

"The complainers allege in this instance that the timber-ponds in question 'may become injurious to the said river and the navigation thereof.' I do not read this averment as meaning that the complainers have any reason to think that the timber-ponds, at so great a distance as they are from any part of the river used for the purpose of navigation, will really affect the navigation of the river in any way. If the engineer of the Clyde Trust, or the Trustees themselves, entertain that view, it must be much more definitely expressed. If the case of the complainers really were that the respondent's operations will have an injurious effect on the uses of the river for the purposes of navigation, it is not maintained that their title could be objected to.

"In the view now stated it does not appear to me that a proof is necessary for the decision of the case. The respondent's operations are really those of Mr Buchanan, the riparian proprietor, for they have been executed under authority granted by him. Whether in a question between him and the Crown these operations are lawful, it is not, I think, necessary here to inquire. The Crown, at least, has acquiesced, and the respondents are entitled to the benefit of this. The fact that the Crown might have a title to object will not give the complainers such a title. If the complainers would have no title to complain of operations by the admitted owner of the foreshore, it appears to me that, equally, they have no title to complain of the respondents' operations, which are permitted by the true owner on his property—*Mackenzie v. Gilchrist*, 20th January 1829, 7 S. 297; *Mackenzie v. Houston*, August 1831, 5 W. and S. 422. If the powers of the complainers be limited by the purposes of the trust under which they act, as I have now stated, they have no title to complain of

operations on the property of others which they cannot say interfere with the purposes of their trust.

"If a valuable use of the foreshore can be made by the proprietor without injury to the navigation or any other public right, I do not think the complainers are entitled to prevent such use by requiring that their sanction shall be previously obtained."

The Trustees of the Clyde Navigation reclaimed, and after hearing counsel the Court adhered to the Lord Ordinary's interlocutor, adding a reservation of the rights of the Clyde Trustees to require the removal of the timber ponds and the restoration of the foreshore when required for the purposes of their Act, and a provision to prevent the running of prescription against the Clyde Trustees by reason of the possession of the ponds by the Greenock Harbour Trustees.

Counsel for the Clyde Trustees—Solicitor-General (Watson), Balfour, and Asher. Agents—Webster & Will, S.S.C.

Counsel for Greenock Harbour Trustees—Dean of Faculty (Clark), Q.C., and Macdonald. Agent—W. Archibald, S.S.C.

Friday, July 9.

FIRST DIVISION.

[Lord Craighill, Ordinary.

FINDLAY *v.* MACKENZIE.

Succession—Mortis Causa Deed—Construction—Survivorship.

A testator, in his disposition and settlement, on the narrative that he was desirous to settle his affairs in event of his death, and considering that he had already fully provided for his daughter, and that he was desirous to provide for his wife "in the event of her surviving me" over and above the provisions already conceived in her favour, "therefore" he disposed to his wife, and "her heirs and assignees whomsoever," his whole means and estate. The previous provisions to his wife were only in liferent. *Held* that the disposition to the wife in the settlement was dependent on her survivorship.

This was an action at the instance of William Findlay against James Mackenzie of Glentore, for reduction of a will in favour of the defender, executed by the deceased John Todd of Glenduffhill on 8th October 1872, on the ground that it had been obtained by the defender by fraud and circumvention when the said John Todd was weak and facile in mind. The pursuer was one of the next of kin of Mr Todd, and the defender was his son-in-law.

Preliminary defences were lodged to the effect that if the deed of 1872 was reduced the succession of Mr Todd would be regulated by a prior disposition and deed of settlement of date 27th April 1866, found in Mr Todd's repositories after his death, and that thus the pursuer had no title to sue.

The following is the important part of the deed of 1866:—"I, John Todd, Esquire, of Glenduffhill, near Shettleston, being desirous to settle my