position and in circumstances so pregnant with unfavourable inferences—that if there had been on his part the slightest prevarication, the slightest evasion, the slightest attempt to withhold or disguise the real truth, then I should have felt compelled to disregard his protestations of innocence, and to draw the inferences which in such cases conduct like his generally warrants.

But where innocence is possible, presumptions and inferences, however strongly founded, must yield to fact. Now, on the whole, though with very great difficulty, I prefer the evidence of the defender and appellant, and I do not believe the story and the statement of the pursuer. I think the pursuer has been shown to be entirely unworthy of credit, and I don't think the candour and truthfulness of the defender has been successfully impugned. Of his folly and imprudence there cannot be two opinions, but that is a different matter from finding proved against him actual guilt.

I abstain from entering into any details. According to her own account the pursuer at her very first meeting with the defender acted as only the most degraded prostitute could, and her subsequent evidence only deepens the distrust with which the statements of such a person must be received.

Very great care and attention has been bestowed upon the case, and deservedly so, by both the Sheriffs, and I myself have seldom felt more anxiety in deciding any case. But I prefer—and the repernsal and the reconsideration of the whole proof only confirm me in preferring—the judgment of the Sheriff-Substitute, and I cannot help adding that where the whole question absolutely depends, as it does here, upon the relative credibility of the two principal or the two only witnesses, I attach the greatest weight and importance to the opinion of the judge who saw and examined those witnesses, who observed their respective demeanour and bearing, who had the means of detecting those slight and sometimes apparently trifling and evanescent indications of truth and sincerity which so seldom can be forged or successfully imitated, but which it is impossible to convey in a bare record of the verbal testimony. So much weight do I give to this circumstance that in doubtful cases where the evidence seems to hang *inequilibrio* it almost always with me turns the balance, and this whether the evidence was taken before a Lord Ordinary or a Sheriff, or whether, as sometimes happens, we have to consider upon the facts the verdict of a jury.

On the whole, therefore, I think that the pursuer has failed to prove her case, and upon this alone I would base my judgment.

The Court recalled the interlocutor of the Sheriff-Depute, and assoilzied the defender from the conclusions of the summons.

Counsel for the Pursuer and Respondent—Solicitor-General (Watson) and Macdonald. Agents—Wright & Johnston, L.A.

Counsel for the Defender and Appellant—Dean of Faculty (Clark), Q.C., and Balfour. Agents—J. W. & J. Mackenzie, W.S.

Friday, July 9.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

THE CALEDONIAN RAILWAY COMPANY *v.* WATT AND OTHERS.

Superior and Vassal—Irritancy of Feu—Personal Claim—Bankrupt—Trustee.

The trustee on the bankrupt estate of the proprietor of a heritable property which had been injured by the construction of a railway did not oppose the superior's obtaining decree of irritancy *ob non solutum canonem*, and further gratuitously assigned to the superior all claims for compensation competent to the bankrupt against the Railway Company for damage done to the said property. *Held* (1) that such claims for compensation, being personal to the bankrupt, were not carried to the superior by the decree of irritancy; and (2) that it was *ultra vires* of the trustee gratuitously to assign the said claims.

This was a note of suspension and interdict brought by the Caledonian Railway Company against Thomas Watt and others, to stop proceedings in an arbitration instituted to settle certain claims made by Mr Watt against the Railway Company.

The following narrative is taken from the Note of the Lord Ordinary:—

"The respondent Thomas Watt claims compensation to the amount of £7500, in terms of the Railway and Lands Clauses Consolidation Acts, 1845, in respect that the property now belonging to him, which is described in the Closed Record, has been injuriously affected by the construction of the Dundee and Perth Railway, under the provisions of 'The Dundee and Perth Railway Act, 1845.' Having, on 26th December 1873, given notice of his claim to the complainers, who are now in right of the Dundee and Perth Railway Company, and having afterwards nominated an arbiter for the purpose of determining the amount of compensation to which he is entitled, the present Note of Suspension and Interdict has been presented for the purpose of obtaining suspension and interdict of all proceedings under the arbitration so instituted.

"The Dundee and Perth Railway was completed and opened for traffic in 1847. Part of that railway was constructed upon an embankment formed on the bed of the Tay between two points on the north shore. In this embankment there were constructed openings or arches so as to admit of the water ebbing and flowing every tide within that part of the Tay situated to the north of the railway embankment. The property now belonging to the respondent Thomas Watt is situated on the north shore of the Tay so cut off by the railway embankment. In 1847 that property belonged to John Calman, shipbuilder in Dundee, who had acquired it under a feu-contract from the respondent's predecessor at the yearly feu-duty of £150. By this feu-contract John Calman was taken bound to erect houses or embankments, or slips or other buildings of a permanent nature, equal in value to at least £1000, as a security for the feu-duty. The respondent Thomas Watt avers that Calman converted the subjects, which had a frontage to

the Tay of 400 feet, into a shipbuilding yard, and expended in constructing permanent works and buildings on the property at least the sum of £1000, which he was required by his feu-contract to expend in order to secure the feu-duty. The respondent Thomas Watt also avers that the construction of the Dundee and Perth Railway in the Tay *ex adverso* of the said subjects altogether destroyed them as a shipbuilding yard, and otherwise affected them very injuriously.

"The estates of John Calman were sequestrated under the Bankrupt Acts on 10th April 1843. The trustee in the sequestration never entered into possession of the subjects, or made up a title thereto.

"The granter of the feu-contract to John Calman conveyed by his disposition and settlement the ground so feued to Calman, under exception of that feu-right to Archibald Watt and his wife in liferent, and to the respondent Thomas Watt, and his sister, now deceased, in fee. These parties took infeftment, and the feu-duties not having been paid after Whitsunday 1843, they obtained decree of declarator of irritancy of the said feu-right *ob non solutum canonem* on 8th November 1853, against William Myles, the trustee in Calman's sequestration, and (Calman having died in 1847 or 1848) also against Calman's heir-at-law. Thereafter, on 12th December 1853, the respondent Thomas Watt completed his title to the subjects. On 19th April 1873 the respondent obtained, without any price being paid for the same, an assignation from the said William Myles, as trustee, with concurrence of the commissioners in Calman's sequestration, whereby there were assigned and conveyed to the respondent all claims for compensation competent or due to or exigible by the said William Myles as trustee on Calman's sequestrated estate, against the complainers, as now owners of the Dundee and Perth Railway, in consequence of the construction of that railway upon the bed of the Tay *ex adverso* of Calman's feu."

The complainers pleaded *inter alia* that the respondent had set forth no sufficient title to insist in the claim.

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh, 13th January* 1875.—The Lord Ordinary having heard counsel and considered the closed record and process, sustains the complainers' plea, that the respondent Thomas Watt has not set forth in his answers any sufficient title to insist in the claim for compensation against the complainers set forth in the closed record; Therefore sustains the reasons of suspension, suspends, prohibits, interdicts, and discharges in terms of the note of suspension and interdict, declares the interdict formerly granted perpetual, and decerns: Finds the complainers entitled to expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor to tax and to report."

After the above narrative the Lord Ordinary proceeds:—

"The claim to compensation for any injury done to Calman's feu subjects by the construction of the Dundee and Perth Railway vested in the party then interested in these lands in or prior to 1847. The party so interested was William Myles, the trustee on Calman's sequestrated estate. By the Bankruptcy (Scotland) Act, 1856, section 82, the trustee is bound to 'manage, realise, and recover the estate belonging to the bankrupt, wherever situated, and convert the same into money,' according to the directions of the creditors, and if no such directions are given, with the advice of the commissioners. By the 115th section of that statute it is declared competent to the trustee, with concurrence of a majority of the creditors, and of the heritable creditors, if any, and of the Accountant in Bankruptcy, 'to sell the heritable estate by private bargain on such terms and conditions regarding price and otherwise as the trustee, with concurrence of those parties, may fix;' and by the 136th section it is provided that, 'If on the lapse of twelve months from the date of the deliverance actually awarding sequestration it shall appear to the trustee and commissioners expedient to sell the heritable or moveable estates not disposed of, and any interest which the creditors have in the outstanding debts and consigned dividends, they shall fix a day for holding a meeting of the creditors, to take the same into consideration; and the trustee, besides advertising the same in the *Gazette*, shall, fourteen days before the day appointed send by post to each creditor claiming on the estate a notice of the time and place of the meeting, with the valuation of the estates, and of the outstanding and the consigned dividends; and if three-fourths in value of the creditors assembled at the meeting shall decide in favour of a sale, in whole or in lots, the trustee shall cause the estates, debts, and dividends to be sold by auction, after notice thereof, published at least one month previous to the sale, once in the *Gazette*, and in such other newspapers as the creditors at the meeting shall appoint.'

"Mr Myles, as trustee on Calman's sequestrated estate, did not comply with any of the statutory directions, but entirely disregarded them, and granted, with concurrence of the commissioners on the estate, the above mentioned assignation of 19th April 1873 in favour of the respondent. That assignation is a gratuitous deed. The obligation thereby imposed upon the respondent Thomas Watt, as a condition of the assignation, that he should free and relieve the sequestrated estate of any claims for feu-duties or otherwise competent to him against the same in any manner of way, does not make the deed onerous, because the superior having taken decree of irritancy *ob non solutum canonem* had no claim for payment of any feu-duties in arrear. It is not averred, and it does not appear, that he had any other claims against the sequestrated estate. If there was any claim for compensation (which is now said to amount to £7500) competent to the trustee against the Dundee and Perth Railway Company, or against the complainers as now in right of that company, it was the duty of the trustee to recover the same for behoof of the creditors in the sequestration, and he was not entitled gratuitously to assign such claim. He was not even entitled to sell the same except in the way and manner pointed out in the 136th section of the Bankruptcy Act. A private onerous sale by the trustee and commissioners of a debt forming part of the sequestrated estate has been held illegal and ineffectual (*Crichton* v. *Bell and Gillon*, 11 Shaw, 781; *Robertson* v. *Adam*, 19 D., 502).

"The Lord Ordinary is therefore of opinion that the assignation by the trustee on Calman's sequestrated estate does not confer any title upon the

respondent under which he can insist in his claim of £7500 for compensation against the complainers. He is also of opinion that the respondent Thomas Watt did not acquire any such title in respect of the decree of declarator *ob non solutum canonem* obtained in 1853, or of the title in his favour following thereon."

The respondents reclaimed.

Argued for them—The superior by his decree of irritancy got an estate of much less value than he would have got if the works of the railway company had not been carried out, and anything defective in the superior's title was made good by the assignation. But it was not necessary for the respondent to rely on the assignation although that was good. The trustee did not take possession of the subjects, but surrendered them, and suffered decree of irritancy to go out. By that decree not only the right of property passed, but all rights pertaining thereto. But, further, the trustee had perfect right to grant the assignation. He could only have insisted in the claim on condition of incurring liability for the feu-duty. He did not incur that liability, and it was not suggested that he did wrong in refusing to do so, so he was not injuring the bankrupt estate by assigning the claim. All that the trustee did was to help the respondents' title in point of form.

Argued for the complainers—If a superior looses the security for his feu-duty he is entitled to compensation. But if the estate passed to him by the decree of irritancy is sufficient to give security for the feu-duty, then no compensation is exigible. In this case it was not denied that the damaged estate was sufficient security for the feu-duty. The next question was as to the trustee's right to grant the assignation. The claim under consideration was personal to the bankrupt, and the trustee could not by mere renunciation vest that claim in any third party. Nor could the trustee assign the claim gratuitously, for it was a valueable right belonging to the estate which the trustee had to administer.

Authorities—*The Scottish Central Railway Company* v. *M'Alley and Others*, June 12, 1850, 12 D. 999; *Thom* v. *Bridges*, March 11, 1857, 19 D. 721; *Crichton* v. *Bell & Gillon*, 11 S. 721; *Robertson* v. *Allan*, Feb. 20, 1857, 19 D. 502; Bankruptcy (Scotland) Act, 1856, §§ 82, 115, and 136.

At advising—

Lord President—This is a suspension and interdict at the instance of the Caledonian Railway Company, to stop proceedings in an arbitration instituted for the purpose of settling certain claims which the respondent alleges against the railway company. These are claims for damage said to have been done to a property in Dundee from the construction of the Perth and Dundee Railway, which was opened in 1847. So the damage must have been sustained upwards of twenty-six years ago, but that is not a sufficient reason to interfere with the prosecution of the claim, or with the arbitration, unless there is some other ground for doing so.

It appears that no part of the property was actually taken by the Railway Company, and the claim is in respect of the property being injuriously affected by the railway. That might raise a question of some difficulty, which, however, it is not necessary to consider, as the point now before us is whether, assuming the claim for deterioration to be competent to the owner, the respondent is in the position of owner, and as such entitled to prosecute the claim. The first ground urged by the Railway Company in support of the suspension is, that the respondent has no title and sets forth none. This is the title which he sets forth.—In 1847 the property belonged to John Calman, who acquired it by a feu-contract from the respondent's grandfather at a feu-duty of £150. The granter of this feu-contract conveyed by his disposition and settlement the ground so feued to Calman, under exception of that feu-right to Archibald Watt and his wife in liferent, and to the respondent Thomas Watt and his sister, now deceased, in fee. These parties took infeftment, and the instrument of sasine is produced and founded on. There are two other instruments founded on—1st, a decree of declarator of irritancy against John Calman on 8th November 1853; and 2d, an assignation to the respondent by the trustee on Calman's sequestrated estate of any right or interest which he might have in the claims against complainers. The feu-right was constituted in 1838, and Calman's sequestration took place in 1843, before the railway was formed, or, so far as appears, before anybody had thought of it. The injury was done by the Railway between 1845 and 1847, the former being the year in which the statute was obtained, and the latter the year in which the railway was opened. So, taking 1846 as the time when the injury was done, the feu at that time remained a separate estate from the *dominium directum*. No doubt the vassal was sequestrated, but no steps were taken by the superior in consequence. The trustee in the sequestration did not take up the feu, and the superior then proceeded with declarator of irritancy *ob non solutum canonem*, and obtained decree. It is necessary to observe that previous to 1853 there was nothing in the respondent or his predecessor except the *dominium directum*. The effect of the declarator was to extinguish the feu-duty, and so to restore matters as far as possible to the same position as they were in before the feu-right was given in 1838, and the *plenum dominium* became vested in the party holding the *dominium directum*. It has been said that in consequence of the decree of declarator claims competent to the feuar or his trustee became vested in the superior. I cannot assent to that proposition, for it seems to me that the claim which opened to the bankrupt in 1846, and passed to his trustee, was a claim for compensation in respect of injury to property, not a claim to have the property restored to what it was before. It was a personal claim for damages, personal to the individual owner of the estate when the damage was done. If an owner sells a property after damage to it he does not sell the claim for damage by that transaction. He may assign the right, but the personal right to the claim and the right to the property are separate and distinct rights. One is a heritable estate, the other a personal right which may be conveyed by assignation, but the two are distinct. Thus, if the superior exercises his undoubted right, and extinguishes the real right, he does not get the personal right, but only the *dominium utile* as it exists at the date of the decree of declarator. It is in vain to say that the superior has right to get back the estate as he gave it; he can only get back what remains of it. For example, if the minerals are

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 omissa*, 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 omissa*.

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 interlocutor 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.