as a preparation for trial. There may be room for some modification of this rule where, as in the present case, after the completion of preparation, a trial is put off for a considerable period, and at the taxation of this account the Auditor felt some difficuty in regard to this. In disposing of the matter, the Auditor had in view that to some extent both the consultation fees and the trial fees charged in this account should affect the amount of the fees for consultation (assuming an additional consultation to be necessary and allowable) and trial to be hereafter paid, and that only a portion of the fees paid at this stage of the cause should be regarded as not available for the actual trial. Having regard to the doubt whether a second consultation fee is allowable to any extent as against an unsuccessful party, it appeared to the Auditor to be his best course not to attempt to apportion the fees, but to allow full fees for the first day of trial without any deduction, and to disallow wholly the expense of the preparatory consultation. He has accordingly sustained the trial fees to counsel to the extent of £21 and £15, 15s., with corresponding allowances to the lawyers' clerks and agents' fees—in all, £39, 5s. 1d. The expense of the consultation disallowed is, £17, 19s. 8d. It is for the Court to determine whether the allowance made is sufficiently liberal or not.

"6. *Agent's fees for attending consultation, and for attendances in Court,* . £2 3 4

"As to the charge for attending consultation, being 13s. 4d., the Auditor refers to his remarks under the preceding head.

"The other charges for attending in Court on 8th, 9th, 10th April, and writing Glasgow agents as to position of prior cases (amounting to £1, 10s.), were certainly not expenses caused by the defender's motion for postponement on 12th April, but were incurred in consequence of the protraction of the prior cases, and are ordinary expenses of process."

Counsel were heard on the report.

A. Moncreiff, for pusuer, insisted principally on the 4th and 5th objections.

Gifford in reply.

Lord President—The only difficult questions are the 4th and 5th. As to the 5th—the consultation fee sent to counsel—I must say I think that ought to be allowed as part of the expenses which are rendered unavailable. Because, without taking into view the long time that may elapse between the time set down for trial, and the time when the case will actually be tried, there is a probability that the same counsel will not be employed, and no doubt this fee must just be repeated. Even suppose the same counsel are employed, I am not prepared to say that the subsequent fee should not be the same, for it is impossible that any counsel can carry in his mind the details of a case, even though it is well known to him at the time. It is almost inconsistent with counsel's proper performance of his duty to his client that he should carry the case in his mind, for he could not then do his duty to his other clients. Therefore the entire consultation fee is lost and unavailing, The 13s. 4d. follows as a matter of course. As to the agent's fee (4) for preparing for trial, there is more difficulty. If the case be entirely documentary, and the documents have to be adjusted and set in order for the trial, there will not be much to do in the second trial; but, on the other hand, if there is a good deal of parole evidence, and the agent is expected to act intelligently and usefully at consultation before the second trial, he will have to read over his precognitions and get up the details again which must to some extent, have gone out of his mind. If I were a counsel preparing for a second trial, I should be disappointed if I were to find the agent in such a state of mind as he would be in if he did not look at his case again. This is a case with which we must deal roughly. My notion is, that if the agent gets for preparing for the second trial one-half of the fee he is entitled to for preparing for the first, that will fairly represent his additional trouble, and the result here will be to allow the fourth charge to the extent of one-half, as being to that extent unavailable for the second trial. We shall therefore sustain the 4th objection to the extent of one-half, sustain the 5th entirely, and the 6th to the extent of 13s. 4d.

The other Judges concurred.

Agents for Pursuer—Wilson, Burn, & Gloag, W.S.

Agents for Defender—M'Ewen & Carment, W.S.

Wednesday, December 4.

ANSTRUTHER *v.* POLLOK, GILMOUR & CO., AND THE TRUSTEES OF PORT-GLASGOW HARBOUR.

Conjoined Actions — Supplementary Actions — Defences—Expenses. A party was called as defender in a supplementary action. He lodged no defences. The original and supplementary actions were conjoined. A record was made up and proof ordered. The party then proposed to lodge defences. The Lord Ordinary refused the motion. On reclaiming note, the Court remitted to receive the defences, and found the party liable in the expenses incurred by the pursuer in consequence of defences not being timeously lodged.

The pursuer is proprietor of subjects in Port-Glasgow, situated on the shore. Under his titles he claims right to form a harbour or basin on the shore opposite his property. The defenders, Pollok, Gilmour, & Co., having obtained a disposition to shore-ground, including the ground over which the pursuer claims a right to form a harbour or basin, recently erected a wall enclosing the shore-ground. The pursuer thereupon, in May 1866, brought an action against Pollok, Gilmour, & Co. —(1) to have it declared that he had the right of making a harbour or basin as above; and (2) to have Pollok, Gilmour, & Co. ordained to remove so much of the wall as is built *ex adverso* of the pursuer's property. Pollok, Gilmour, & Co. having pleaded *inter alia* that the Port-Glasgow Harbour Trustees ought to have been called as parties, these trustees were called in a supplementary action. The trustees not having lodged defences, the original action and the supplementary action were conjoined on 4th December 1866. Thereafter, a record was made up between the pursuer and Pollok, Gilmour, & Co., and a proof was ordered to be taken before the Lord Ordinary on the 19th (subsequently postponed till the 26th) November 1867. On the 20th, the Port-Glasgow Harbour Trustees craved the Lord Ordinary for leave to lodge defences, adopting the statements and pleas for Pollok, Gilmour, & Co. The motion was refused.

Thereupon the Port-Glasgow Harbour Trustees presented two reclaiming notes, viz.—(1) a reclaiming note against the interlocutor refusing to allow them to lodge defences; and (2) a reponing note against the original interlocutor of conjunction.

CLARK and LEE for reclaimers.

GIFFORD and BLACK in reply,

The Court (1) remitted to the Lord Ordinary to receive the defences tendered, and to find the Port-Glasgow Harbour Trustees liable to the pursuer in payment of the whole expenses incurred or to be incurred by the pursuer in so far as incurred in consequence of the trustees not having appeared timeously; and (2) refused the reponing note against the interlocutor of conjunction.

Agent for Pursuer—W. H. Muir, S.S.C.

Agents for Defenders and Reclaimers—Hamilton & Kinnear, W.S.

Wednesday, December 4.

MILLER *v.* BUILDING COMMITTEE OF U. P. CHURCH, LOCHGELLY.

Interdict — Building Contract—Arbiter. Circumstances in which the Court *refused* interdict against the proprietors of a house, in course of erection by a contractor, taking down and rebuilding the house.

In June 1861 John Miller, builder, Cowdenbeath, and David Lamond, mason at Lochgelly, contracted with the managers of the U. P. Church, Lochgelly, to execute the mason work of a manse for the U. P. Church there. The manse was to be built according to plans and specifications prepared by Mr John Melvin, architect in Alloa. The walls were to be ready for the roof by the 1st of October. Payments for the work as it advanced were to be made on certificate by Mr Melvin, to whose satisfaction the work was to be carried on. Any additions to, alterations on, or deductions from the work contracted for, which the managers might require, were to be made by the contractor, the amount and value of such additions, alterations, and deductions being referred to Mr Melvin, who was made sole arbiter in any dispute regarding the works. The work was commenced after some delay, and about 12th December the walls were ready for the roof. Cracks then began to appear in the walls, and disputes arose in consequence between the parties. The contractors contended that the cracks were not owing to insufficient workmanship, but were due to the ground on which the walls were built having fallen in, being situated immediately above old coal workings. The managers, on the other hand, asked Mr Melvin to inspect the building, and obtained from him an order on the contractors to take down and rebuild the portions of the building which were giving way. The contractors denied that the matter fell within the reference. Finally, on 29th August, Mr Melvin, in respect of the contractors having failed to commence the operations enjoined in the previous order, authorised the managers to employ some other party to execute the alterations and complete the work. The managers accordingly employed another builder to take down and rebuild the walls. One of the contractors, Lamond, had by this time left the country. Miller now presented this note of suspension and interdict, asking to have the respondents, and persons acting under their order, interdicted from acting under the arbiter's award, and from taking down or interfering in any way with the building; and also asking to have them interdicted from using or interfering with the building materials, scaffolding, and tools belonging to the complainer. The Lord Ordinary on the Bills refused the note, holding that the complainer had taken a wrong remedy. If he was unjustly treated he should raise his action for the price, or for damages.

The complainer reclaimed.

A. R. CLARK and RHIND for him.

GIFFORD and W. A. O. PATERSON in reply.

LORD PRESIDENT—The complainer contracted with the respondents to build a house for them, and after he had so far completed his contract that the walls were built and ready for the roof, it turned out that the wall would not stand for some reason or other. One party said that that was owing to bad building, the other blamed the bad foundation, and stated he had been desired to build on a piece of excavated ground not sufficient to sustain the building. It is impossible to decide that here, but in the meantime the respondents say they are not going to wait till that is decided, but will build up their walls, and leave the contractor to his action of damages; and accordingly they took down and built up the walls again. When this was going on, and before the old work was entirely pulled down, this application was made, and the question is, ought the Lord Ordinary to have passed the note or refused it? I must say I think the respondents would have been more correct in their conduct, and safer for their own interest, if they had not proceeded to do what they did, but waited for a judicial warrant. The proper course in such a case is to go to the Judge Ordinary of the bounds, and ask him to inspect the work himself, or by some person of skill, and apply the necessary remedy to protect the interests of all parties. But they did not do that, and the question is, whether this failure on their part makes this proceeding on the part of the contractor a competent proceeding? He asks that we should interdict the proprietor of the ground and building from taking down the walls, and from interfering in any way with the progress of the contract. Without pronouncing absolutely whether that is competent, I think with the Lord Ordinary, that it is not reasonable in the circumstances. On Miller's own showing he can't go on with his contract, for, he says himself, that even with good workmanship he can't build a wall that will stand. In these circumstances, he cannot execute his contract, and is not in a favourable position to hinder the owners from trying their hand. Therefore, I think the Lord Ordinary was right.

The other Judges concurred.

Reclaiming note refused, but without additional expenses.

Agents for Complainer—D. Crawford and J. Y. Guthrie, S.S.C.

Agents for Respondents—J. & A. Peddie, W.S.

Wednesday, December 4.

SMITH'S TRUSTEES *v.* SCAIFE AND OTHERS.

Trust—Vesting—Residue—Interest on Shares—Majority. A testator died in 1853. His trustees were directed to pay and make over the free residue of his estate to five persons named, equally, as they respectively attained the age of