

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 reopening 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 reopening 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