Agents for Respondents—Webster & Sprott, S.S.C., and Campbell & Smith, S.S.C., and J. & A. Peddie, W.S.

Tuesday, November 5.

SECOND DIVISION.

MORRISON *v.* JEFFERIES AND OTHERS.

Written Contract—Extra Work—Triennial Prescription. Held that the plea of the triennial prescription did not apply to extra work executed under a written contract providing for such work.

This is an action at the instance of Alexander Morrison, contractor, Bellevue Terrace, Edinburgh, against Dr Jefferies, Dalkeith, and others, trustees of the Queen's Theatre and Opera House, Edinburgh, concluding for the balance of a sum of money alleged to be due to him for the mason work done by him on the theatre, under a written contract between, May 1854 and May 1856. The pursuer made the following statements in support of his claim :—

"In terms of, and upon the conditions of the said specifications, the pursuer, in or about the end of 1853 or beginning of 1854, give to Mr Bryce, on behalf of the defenders and the said John Brown, as trustees and committee foresaid, an offer, addressed to the latter, for the whole mason work, stating the difference of price between Sterlie Burn and Kenmuir Quarries for the hewn works of principal fronts. There was no time fixed by the specifications for the contractor for the mason work commencing or completing his operations, but the pursuer understood, and made up, and gave in his estimate and offer as aforesaid, on the footing that he was to be at liberty, and not to be prevented by the defenders and the said John Brown, or any of them, or any one for whom they were responsible, from commencing and carrying on continuously, and finishing and completing the mason work of the said building mentioned in the said specifications.

"The estimate and offer so made up and given in was retained by the said David Bryce, and he, in or about the end of 1853 or beginning of 1854, told the pursuer that he was to get the works, and would be told when to commence the same. The pursuer's said estimate and offer were thus accepted by the defenders and the said John Brown; and the pursuer was thus employed by them to commence, carry on, and finish and complete the mason work of the said building. And it was contracted and agreed between the pursuer and the then trustees or committee aforesaid, that the mason work which the pursuer was so employed to commence, carry on, and finish and complete, should be forthwith, or as soon as possible thereafter, commenced and carried on continuously, and be completed to the entire satisfaction of the said trustees or committee, or Mr Bryce, or Mr Hog.

"Shortly previous to 18th May 1854, the pursuer was told by Mr Bryce to prepare to commence the said works, and on or about 18th May 1854 the pursuer got access to the said site, and it was on or about 24th May 1854 that he commenced the said works. The pursuer's works were, however, after being so commenced, carried on continuously (with the exception of the period from 2d to 26th June 1854, during which he was not allowed by the defenders and the said John Brown, as the then trustees or committee, who communicated with the pursuer through the defender Thomas Scott, their clerk or secretary, and whose letter to the pursuer is produced, to proceed, in consequence of their having been served with an interdict), and finished and completed on or about 24th May 1856. The works, under the pursuer's contract, and extra works connected therewith, were completed under his said employment by the defenders, and in every respect to the entire satisfaction and under the instructions of Mr Hog. Mr Bryce was also entirely satisfied with the works completed by the pursuer in every respect. There was in the specifications to which the pursuer's offer referred, a provision as to the entry and signature in a book of all additions to, or deductions from, the works embraced in the specifications, but no book was provided by the defenders or any person for this purpose, and none such was kept, although there were both deductions from, and additions to, said works, and all such were executed by the pursuer under the instructions of Mr Hog or of some of the defenders, and to the entire satisfaction of Mr Hog. Neither the defenders nor Mr Bryce nor Mr Hog ever gave the pursuer any written orders; and from first to last, both as regarded original and extra work, the pursuer proceeded with the works he contracted to execute, and those he was verbally ordered to do, and was in part paid for, as after mentioned, by the defenders, in the full knowledge of the defenders and Mr Bryce and Mr Hog, and without objection on that score of the want of written orders or signed entries in any book therefor, under the instructions and to the entire satisfaction of Mr Hog. The provision in the specifications as to the entry and signature in a book was never acted on, but departed from and abandoned by the defenders and Mr Brown, as the pursuers' employers."

The defender maintained a number of pleas which the Lord Ordinary (BARCAPLE) repelled, holding that averments had not been made relevant to support them, and they pleaded the triennial prescription. His Lordship also repelled the latter plea, on the ground that it was not disputed that the extra work in question was performed under a written contract which provided for extra work being done, and that in such a case the triennial prescription did not apply.

The defenders reclaimed.

SOLICITOR-GENERAL and MAIDMENT for them.

THOMS in answer.

The Court adhered.

Agents for Pursuer—Lindsay & Paterson, W.S.

Agent for Defenders—J. Neilson, S.S.C.

Wednesday, November 6.

FIRST DIVISION.

MARQUIS OF AILSA *v.* PATERSON AND RONALD.

Property—River—Salmon-Fishing—1696, *c.* 33—*Prescription—Mill-dam.* In an action between A, proprietor of salmon-fishings and one bank of a river, and B, proprietor of opposite bank, *Held* that B had a prescriptive right to a dam-dyke across the river, but with a sufficient slap for the passage of salmon. Nature and dimensions of slap adjusted in accordance with report by engineer to whom remit made by Court.