the stoppage of the work caused him loss, he claims compensation from the defenders.

Now if the Court in recalling the interdict had decided that in point of law the pursuer Jack was entitled to build the gable as he was doing, one-half or nearly one half on the defender's grounds, and if in respect of this legal right they had recalled the interdict as wrongful, I do not doubt that this would have been conclusive between the parties, and that the pursuer would have been entitled to an issue of damages. But this is not at all the nature of the case. The Court did not find that Jack had right to erect the gable to the extent of one-half or to any extent on the defenders' ground, and that was not the reason why the interdict was recalled. On the contrary, if your Lordships concur with the Lord Ordinary and affirm his judgment in the other actions, as I think we should now do, then the Court is now to hold that Mr Jack had no right to build the gable as he did, and although the defenders were too late in their application for interdict, and were ultimately found not entitled to summary interdict, yet they were right in the main substance of their contention, and the pursuer's proceedings were wrongful throughout. The interdict was only recalled on a point of form. It was not the proper remedy. It was inapplicable to the circumstances of the case. But in the declarator, which was the proper form and the proper remedy, Mr Jack has entirely failed, and been found in the wrong from the beginning. Mr Jack cannot possibly claim damages for being interdicted from doing that which it is now found he had no right to do at all, even although on a mere point of form or on a rule of process the interdict was recalled. To give him damages in such a case would be to reward him for wrong-doing, for he was the wrong-doer all the time, although the other party made a mistake in their selection of a remedy. Suppose that the Court had ordered the gable to be removed, as it might have done as an illegal erection, the pursuer could never have got damages, because the defenders made an abortive attempt for a time to prevent its being put up. The case is not really different, although the Court, instead of ordering the gable to be taken down, have imposed equitable conditions on which they have allowed it to stand.

Now, on this short ground, and not on the different and, I think, somewhat narrow ground taken by the Lord Ordinary (in whose view, as to the necessity of giving details as to malice and explaining in what it consisted, I cannot concur), I think the action should be dismissed, and in this case I think the defenders are entitled to their expenses.

The other Judges concurred.

The Court adhered.

Counsel for Begg and Others—Solicitor-General (Watson)—Jameson. Agent—Hugh Auld, W.S.

Counsel for Jack—Campbell Smith—Rhind. Agent—J. B. W. Lee, S.S.C.

Friday, October 29.

FIRST DIVISION.

[Sheriff of Selkirk.

MABON *v.* CAIRNS.

Process—Additional Proof—A.S. 1839, *cap.* 9, § 83.

Held that a Sheriff has no power to order additional proof in a cause in which the proof has been closed on both sides and an interlocutor pronounced thereon by the Sheriff-Substitute, unless weighty reasons be shown for so doing, and that the additional proof so led can receive no effect.

Circumstances *held* not to import such weighty reasons.

This was an appeal from the judgment of the Sheriff of Selkirk in an action of filiation. In a proof before the Sheriff-Substitute (RUSSELL), the pursuer, Helen Mabon, deponed that the defender had had connection with her on three different occasions. On two of these occasions, she deponed that her son, aged eleven, had seen them together, and that on a third occasion her sister was actually present when the act was committed. The son was called as a witness, and deponed to having seen his mother and the defender together in somewhat suspicious circumstances on two occasions, but the sister was not called as a witness, and no explanation of her absence was given.

The Sheriff-Substitute, by interlocutor of 18th February 1875, assoilized the defender. The pursuer thereafter presented a petition in terms of A. S. 1839, cap. 9, § 83, for leave to examine the pursuer's sister, and the Sheriff (PATTISON) pronounced the following interlocutor:—

"*Edinburgh, 8th April.*—The Sheriff having considered the petition for the pursuer, No. 5 of process, with the answers thereto, No. 7, Record, Proof and whole Process, upon payment by the pursuer of the expenses occasioned by the said petition, as the same shall be taxed by the Auditor of Court, Allows the pursuer to adduce the witness Elizabeth Welsh, mentioned in the said petition, as a witness for the pursuer in reference to the matter also therein mentioned; and remits to the Sheriff-Substitute to name an early diet for taking this evidence: and appoints the same, when taken, along with the process, to be transmitted to the Sheriff.

"*Note.*—The Sheriff has, but with much hesitation, pronounced the above interlocutor. The tendency of all courts is not to exclude evidence unless a very stringent rule of court forbids its admission. As the petition No. 5 was presented before the judgment on the proof was pronounced, it does not fall literally within the clause of the Act of Sederunt referred to by the defender. At the same time the Sheriff is sensible of the danger of anything which has a tendency to encourage carelessness or inattention in the leading of proof. But as the request in this instance is only for the examination of one witness, limited to certain matters of fact, and as there seems to have been some miscarriage whereby that was not adduced at the proper time, occasioned by the state of the pursuer's health, he thinks it is safer for the ends of justice to admit the evidence."

The pursuer's sister was accordingly examined and corroborated the pursuer's evidence as to the occasion on which it was said that she was present when the defender had intercourse with the pursuer.

The Sheriff recalled the interlocutor of the Sheriff-Substitute, and found the defender liable.

The defender appealed.

Authorities cited—*Corrie* v. *Adair*, Feb. 24, 1866, 22 D. 897; *Drain* v. *Scott*, Nov. 25, 1864, 9 Macph. 114.

At advising—

LORD PRESIDENT—In this case the proof was completed on 1st February, and on the 18th of the same month the Sheriff-Substitute pronounced an interlocutor finding that it was not proved that the defender was the father of the child libelled. As the case then stood it was not altogether free from difficulty. I do not sympathise with the view stated by the Sheriff-Substitute in his note "there is something singularly painful in the thought that a son of such tender years should be brought as a witness to his mother's shame." I cannot see that because the witness is the illegitimate child of his mother that his evidence should be rejected. Nor do I think that the evidence of a child of that age is less reliable than of a person of maturer years. His being brought to speak to his mother's shame does not affect the question. Although the case was therefore a narrow one, on the evidence I am disposed to agree with the Sheriff-Substitute. Against his judgment an appeal was taken to the Sheriff, when the case assumed a different aspect. There was a petition presented to the Sheriff for the examination of an additional witness, and the Sheriff entertained that application favourably. Now, the circumstances under which that witness was examined were very peculiar. The witness was a sister of the pursuer, and was called upon to speak to one of the occasions on which the parties were said to have had intercourse together. She was an important witness, and it was impossible that the pursuer or her agent should not have been aware that her evidence was material. They must also have known what she was able to prove. Yet they did not examine her, and closed their proof without her evidence. To admit such a witness now is a very serious proceeding. If it falls under the Act of Sederunt of 1839, which requires very weighty reasons for such a course, I am of opinion that the Sheriff was wrong in granting the application. On the other hand, if it does not fall under the Act of Sederunt, then the Sheriff must have done so in the course of his ordinary discretion, and in this case he was entirely wrong. When the pursuer spoke of a witness as being present on one of the occasions referred to, and that witness is not called, the impression is irresistible that the witness was not disposed to undertake to confirm the pursuer. The probability is that the witness was not prepared to confirm the pursuer's statement originally, but was prevailed upon to do so. Therefore I take the case as it stood before the Sheriff-Substitute, and I am for reversing the Sheriff's interlocutor and returning to that of the Sheriff-Substitute.

LORD DEAS concurred.

LORD ARDMILLAN—In this action of filiation the Sheriff-Substitute has decided for the defender, and assoilzied. The Sheriff-Principal has decided for the pursuer, and decerned for aliment. The question was, however, not presented to the Sheriff-Principal under the same circumstances and on the same proof as to the Sheriff-Substitute, since an additional witness, Elizabeth Welsh, half-sister of the pursuer, was examined after the Sheriff-Substitute had pronounced his decision.

I have, not without some difficulty, arrived at the conclusion that the judgment of the Sheriff-Substitute, on the proof before him, was well-founded. I have hesitated a little on this point, because the pursuer's evidence is distinct, if true, and is not absolutely without corroboration. But I do not feel justified in differing from the opinion which has now been given by your Lordship, and the opinion of the Sheriff-Substitute, who saw and examined the witnesses, is also important, and entitled to some weight. The boy James Laidlaw was only eleven years of age when examined, and must have been little more than ten at the time of the occasion to which he speaks. He is the son of the pursuer, and his testimony—not given on oath, and not bearing directly on the question involved—seems scarcely sufficient to afford the necessary corroboration to the pursuer—a single witness of worse than doubtful character.

But, it is said that the evidence of Elizabeth Welsh, taken on the 19th of April (the Sheriff-Substitute's judgment having been on the 18th of February 1875), affords additional and sufficient confirmation of the pursuer. I am of opinion that, under the circumstances, and having regard to the previous examination of witnesses, the judgment of the Sheriff-Principal of 8th April 1875, allowing the pursuer to adduce the witness Elizabeth Welsh, was not well-founded. I think it was wrong, under the circumstances, to admit that additional witness. It is not correct to speak of it as merely a question of competency. To some extent it is a question of judicial discretion. I do not say that the Sheriff could not have competently allowed the witness to be examined if in the circumstances justice required her examination. But it was not so. No "weighty reason," such as was required by the Act of Sederunt, explaining why the witness had not been previously adduced, was stated to the Sheriff, or has now been stated to this Court. Both the pursuer and the defender were examined as witnesses for the pursuer, and both of them then mentioned the fact that the pursuer's sister was present at the carting-in of the rakings in the field. The fact of the witness's presence was therefore known, and certainly any evidence she could give as to what occurred when she was present in that field must have been known to be more or less important. If it was important, she should have been adduced. No excuse was made for not calling her. Mrs Welsh, mother of the pursuer and of the witness, was examined, and no circumstance explaining the witness's absence, or accounting for the failure to adduce her, was stated. The pursuer's procurator must have known the nature of this witness's testimony. But he did not think fit to examine her, and he closed his proof without adducing her; and some time afterwards he proposes to adduce this sister

of the pursuer who had not been examined before the Sheriff-Substitute.

Without expressing any opinion on the credibility of this witness's testimony, if the adducing her as a witness had been sustained, I have no alternative but to leave her testimony out of consideration.

So viewing the case, I think that we should adhere to the decree of absolvitor pronounced by the Sheriff-Substitute.

Lord Mure concurred.

The Court pronounced the following interlocutor:—

"Recall the interlocutor of the Sheriff of 8th April 1875; refuse the prayer of the petition for the pursuers, No. 5 of process, and appoint the evidence of the witness Elizabeth Welsh to be withdrawn from process; further recall the Sheriff's interlocutor of 15th May 1875; find it not proved that the defender (appellant) is the father of the child mentioned in the summons; therefore assoilzie the defender, and decern; find the pursuers liable in expenses, both in the inferior Court and this Court; allow accounts thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for the Pursuer—J. C. Smith. Agents M'Caul & Armstrong, S.S.C.

Counsel for the Defender—Rhind. Agent—Thos. Lawson, S.S.C.

Friday, October 29.

FIRST DIVISION.

[Lord Shand.

SPENS *v.* MONYPENNY'S TRUSTEES.

Trust—Succession—Vesting.

A testator directed his trustees to invest the residue of his estate in the purchase of lands, leaving the time of purchase to their absolute discretion. The fund being wholly or within £300 invested, a disposition was to be executed in favour of A in liferent, and B and the heirs whomsoever of his body in fee; whom failing, in favour of C and her heirs whomsoever; whom failing, to D and her heirs whomsoever; whom failing, his own nearest heirs and assignees. The trustees had partially invested as directed, but there still remained about £20,000, or one-third of the whole fund, in their hands. A having died, B raised a declarator that the trustees were bound to make payment of this balance to him as absolute fiar, and further concluded for payment. *Held* that, the fee having vested in B, he was entitled to decree of declarator and payment as concluded for.

Observations on the case of *Gordon* v. *Gordon's Trs.*, March 2, 1866, 4 Macph. 501.

By trust-disposition and settlement, dated 11th February 1869, and, with various codicils thereto, recorded 19th May 1873, Mrs Hannah Spens or Monypenny, widow of the deceased William Tankerville Monypenny, Esq. of Pitmilly, disponed to John Alexander Spens, Lawrence Dalgleish, and Nathanael James Spens, and to the deceased Nathanael Spens of Craigsanquhar, her brother, as trustees, her whole means and estate, heritable and moveable, under exception of certain heritable estate disponed by separate deeds. The trustees were directed to pay various legacies and annuities; and after other purposes were set forth, the deed further narrated—"In the sixth place, in order that the said trustees or trustee may, and I hereby direct them or him, as soon after my death as may be convenient, to make up a state exhibiting the amount of the residue and remainder of the means and estate hereby conveyed after answering the foregoing purposes of this trust. In the seventh place, in order that the said trustees or trustee may, and I hereby direct them or him, so soon after my death as may be convenient, and as they may think proper, to invest the said whole residue and remainder of my means and estate in the purchase of lands in the county of Fife, and adjacent to or near the estate of Craigsanquhar, belonging to the said Nathanael Spens, or the said portions of the estate of Ardit, if in their opinion a suitable purchase can be effected in the said locality, or if not, then in some other part of the said county, or if not, then in some other county in Scotland: Declaring that the said purchase may be made by my trustees of such lands at such prices, and from time to time as they may consider to be most eligible, according to the state of the trust funds and the opportunities which may occur of making suitable and convenient purchases, and that they shall be the sole and exclusive judges of the lands which, and the period when these should be purchased, free from the control of any of the heirs who may be interested therein. In the eighth place, in order that the said trustees or trustee may, and I hereby direct them or him, on the said residue or remainder of my means and estate, or sums, being wholly or within three hundred pounds thereof, invested in the purchase of lands as aforesaid, to execute a valid disposition thereof in favour of the said Nathanael Spens, my brother, in liferent for his liferent use only, and to the said Nathanael James Spens, and the heirs whomsoever of his body in fee, whom failing, the said Miss Jessie Hannah Elizabeth Spens, and the heirs whomsoever of her body, whom failing, the said Miss Mary Margaret Roberta Spens, and the heirs whomsoever of her body, the eldest heir-female excluding heirs-portioners, and succeeding always without division throughout the whole course of succession; whom failing, to my own nearest heirs and assignees whomsoever, under the real burden of the said annuity of £100 to William Thomas Thornton, Esq., if he shall be then alive, and under the real burden of an annuity of £500 to the said Mrs Janet or Jessie Law Spens, in the event of her being then alive. In the ninth place, in order that the said trustees or trustee may, and I hereby direct them or him to pay over the annual interest and produce of the said residue and remainder of my means and estate, previous to its being invested in the purchase of lands as aforesaid, and the rents of the said lands, after they are so purchased, which shall accrue or become payable between the first term of Whitsunday or Martinmas which shall happen six months after my death, and the date of entry under the