the intention of the Act. The case fell rather to be governed by the rule applied to the case of mortifications by private persons than to the case of a glebe of large agricultural value.

Argued for the heritors—The case of mortifications did not apply: because the question arose not in regard to something left for the benefit of the minister, but not forming part of the benefice, but in regard to the proper glebe of the parish. Now it was not denied that, if the proper glebe of the parish was of great agricultural value, the Court would take that into consideration in fixing an augmentation. Why should great value arising from feu duties not also be taken into consideration? The principle in both cases was the same.

Authorities cited — *Stewart* v. *Lord Glenlyon*, May 20, 1835, 13 S. 787; *Minister of Old Deer* v. *The Heritors*, Nov. 23, 1808, F. C.; *Free Church Minister of Wilton* v. *The Duke of Buccleuch*, Nov. 21, 1827; Shaw's Teind Cases, p. 137.

At advising—

Lord President—In this parish the present stipend is seventeen chalders, and the augmentation asked is five chalders. The heritors oppose this, and in particular upon the ground that the glebe is of unusual value. If the value of the glebe arose entirely from land as such—from the agricultural value of the land—then if that value was of very large amount, there is no doubt that we should be bound by the cases in which it has been decided that the value of the glebe in such circumstances is to be taken into account in considering the question of augmentation. But here the unusual value pleaded arises from the glebe having been feued in terms of the Statute 29 and 30 Vict. c. 71. The petition for authority to feu was presented to the Court in 1867, and what the minister had to satisfy the Court of was that the ground was of a character proper for the proposed feuing; that no reasonable objection against feuing was urged by the adjoining proprietors; and also that benefit would accrue to him and to his successors in office. We must have been satisfied upon these points when we granted the petition.

The glebe is eleven and a-half acres in extent, and the minister has feued two and three-quarter acres, which brings a return to the benefice of about £45 a-year. The proposal of the heritors is that we should count this £45 as part of the stipend, or to take it into account, and so to diminish the amount of augmentation. The question raised is one of considerable importance, whether the case is to be determined by the rule laid down in the case of *Stewart*, or that laid down in the case of mortifications by private founders, which are not taken into account.

Now the Statute under which the authority to feu was granted was enacted for the purpose of benefitting the minister and his successors in office, and if we adopted the heritors' contention the practical result would be contrary to this intention, and would benefit, not the minister and his successors, but the heritors and titular. So I am of opinion that in granting an augmentation we should not take into consideration the feu-duties which the minister derives from the glebe.

Lords Deas, Ardmillan, Mure, and Craighill concurred.

The Court granted an augmentation of four chalders.

Counsel for the Minister—Balfour. Agent—J. B. Mackintosh, S.S.C.

Counsel for the Heritors — Solicitor-General (Watson)—Asher. Agents—M'Ewan & Carment, S.S.C.

COURT OF SESSION,

Tuesday, October 26.

SECOND DIVISION.

[Lord Craighill,

BEGG AND OTHERS *v.* JACK.

JACK *v.* BEGG AND OTHERS.

Property—Party Wall—Mutual Gable.

A, without the consent of B, his next neighbour, removed the mutual wall between their respective properties, and erected upon its site a mutual gable. *Held* (1) that without contract, express or implied, A had no right to do so, but that the Court were entitled to say upon what equitable conditions, looking to the circumstances of the case, the gable so erected might be allowed to remain, and (2) that B was not entitled to insist upon its removal.

Wrongous Interdict—Malice and Want of Probable Cause—Proof.

Observed that although in questions of contract or of property, a party deprived of his legal rights by wrongous interdict may in general be entitled to damages without proof of malice or want of probable cause, the case is different where the interdict has merely been recalled on a point of form, or as not the proper remedy.

These were two actions relating to the same subject-matter. The first was an action of declarator at the instance of Dr Begg and others, trustees in behoof of the Deacon's Courts of the congregation of Newington Free Church, against Andrew Jack, a builder in West Newington Place. The pursuers were possessed of a property which was separated upon the north from a property belonging to the defender by a wall which the pursuers averred was described in their titles as a party or mutual wall, and had been considered as such by the proprietors on both sides for more than forty years. They denied that it was a gable wall, or that it had ever been used as such by them. They averred that the defender, who in 1872 had acquired a right to the adjoining property, applied to them for permission to build the south gable of a house which he was about to erect on the said property, as a mutual gable on the site of a portion of this old wall, and that the application led to a correspondence between the parties. Shortly afterwards, however, the defender asserted a right to remove the old wall and erect his mutual gable independently of the pursuers, and accordingly he built a gable wall of the height of three storeys. The pursuers obtained interdict against him in the Sheriff-courts which was recalled upon appeal to the Court of Session, on the ground that considering how far the operation complained of had been carried interdict was not the proper remedy. The pursuers further averred that in consequence of this

encroachment and the building erected by the defender, they had suffered considerable loss and damage. This present action was accordingly brought, and the first conclusion of the summons was for declarator that they were proprietors of the subjects. The other conclusions were as follows:—"(*Second*), and it ought and should be found and declared by decree foresaid, that the wall which formerly separated the subjects above described from the property lying immediately to the north thereof, presently belonging to the defender, was mutual property, and that the defender had no right to deal with the same as his exclusive property, and that he was not entitled to remove the same, or to make other erections on the site thereof, without the consent of the pursuers; and further (*Third*), the said defender ought and should be decerned and ordained by decree foresaid to restore the said wall, so far as the same has been removed by him, to its original height and condition; or otherwise (*Fourth*), the defender ought and should be decerned and ordained to remove the gable wall built by him on the site of the said old wall, so far as it is of greater height than said old wall, and to the south of what was the centre line of the said old wall; or (*Fifth*), in the event of the defender not being decerned and ordained to restore said wall to its original condition, in terms of one or either of the two immediately preceding conclusions hereof, he ought and should be decerned and ordained by decree foresaid to make payment to the pursuers of the sum of £500, in name of damages."

The defender, on the other hand, maintained that the wall in question had been used as a mutual gable by the pursuers themselves. Moreover, that the gable wall, which the pursuers now sought to have removed, was built by him in their full knowledge that he was doing so, and that during the course of its erection it was regularly inspected by a professional gentleman acting upon their behalf. He accordingly pleaded that they were now barred from insisting in the present action.

A proof was allowed to the parties of their respective averments, and it appeared that the pursuers had not used the wall as a mutual gable, but that a school which they had built along the said wall had been built entirely on their own property.

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

"*Edinburgh*, 18*th December* 1874.—The Lord Ordinary having heard parties' procurators on the closed record, proof, and productions, and considered the debate and whole process: Finds (1) that the pursuers are proved by their titles to be proprietors of the subjects in Causewayside, described in the first conclusion of the summons, and therefore decerns and declares in terms of that conclusion: Finds (2) that the wall which formerly separated said subjects from the property lying immediately to the north thereof, presently belonging to the defender, was mutual property, and being such, that the defender was not entitled to deal with the same as his exclusive property, and in particular to remove the said wall, or to make other erections on the site thereof, without the express or implied consent of the pursuers, and to this extent and effect decerns and declares in terms of the second conclusion of the summons. *Quoad ultra* finds, as matters of fact—(1) that in February 1873 the defender began to clear out the foundations of the tenement which has since been erected by him, and the south gable of which stretches across the site of the boundary wall referred to in the second conclusion of the summons. (2) That the intention of the defender, when he began his operations, was to erect the said gable upon ground which was his own property, including therein the northern half of the site of the said wall. (3) That after operations were begun, the defender became desirous to change his plan, so as to include in the site of the foundation of the said gable the whole site of the said wall; and accordingly he, on 24th February 1873, addressed to the pursuers the letter which is No. 54 of process, wherein, on condition that he was 'allowed to occupy the piece of ground whereon is built the present boundary wall, and that he was relieved of all responsibility of protecting, shoring up, and repairing any damage to the schoolhouse there, which may be required on account of operations,' he offered 'to build a mutual wall four stories high, with all necessary vents and wall presses, according to plan which will be submitted, and to make no charge for same to said Decons' Court'. (4.) That the offer thus made was not accepted by the pursuers as given; the pursuers requiring that in addition to the things conceded by the defender, he, as expressed in the letter of their agent, Mr John Auld, W.S., dated 26th February 1873, No. 13 of process, should 'take on himself all responsibility of protecting or shoring the schoolhouse or other buildings, and repairing all damage that may be done by his operations, and paying the whole expense of writings, &c., necessary to carry the arrangement out, and make it effectual. (5) That this counter-proposal was not accepted by the defender, but a part of the said wall, though shored up by the defender, having on 2d March 1873 fallen down partly in consequence of natural decay, and partly in consequence of the attempt to underfoot the northern half of said wall on which the defender had for some days previously been engaged, the defender removed the remains of the said wall the whole length of his intended gable; and upon the site of that portion thereof, extending in breadth to twenty inches or thereby, and on other ground seven inches broad, forming part of his property contiguous to the wall, he proceeded to erect, and erected, the said gable as it now stands. (6) That from the time when the defender began to build upon the pursuer's half of the site of the said wall, and in particular from the time when the gable had been raised higher than what had been the height of the said wall, the pursuers warned the defender that he was encroaching upon their property, and that if he so persevered without coming to terms with them, measures would be taken for the vindication of their rights. (7.) That the terms upon which the defender's consent to the erection of the said gable would be given never were arranged between the parties, the pursuers, on the one hand, insisting for more than had been offered by the defender in said letter of 24th February 1873, No. 54 of pro., and the defender, on the other hand, not only refusing to concede these terms, but withdrawing the offer originally made that the gable when erected should become

mutual property, without contribution by the pursuers on account of the cost. (8) That notwithstanding the variance of views by which an agreement was prevented, both the pursuers and the defender desired and expected that in the end an agreement would be concluded; the defender carrying forward the erection of said gable, and the pursuers refraining from the adoption of measures by which its erection should be stopped in consequence of the feeling so entertained till the gable was all but completed; and (9) That ultimately, and on or about the 10th of May 1873, the defender was interdicted on a warrant granted by the Sheriff of Midlothian, at the instance of the pursuers, from proceeding further with the erection of said gable; but this interdict, on an appeal, was recalled in the Court of Session, on or about the 10th of January 1874, and immediately thereafter operations were resumed, and the wall was completed, as it now stands, without further opposition; Finds, in point of law, the facts of the case being as above set forth, (1) That the pursuers are not entitled to insist that the said gable shall be taken down, if reasonably indemnified for the use that has been taken of their ground; (2) That the defender is bound to make reasonable indemnification to the pursuers for the ground belonging to them upon which in part his said gable has been erected; and (3) That the defender having originally offered to build the said gable as a mutual gable without charging any portion of the cost against the pursuers, the adoption of this as the condition on which the said gable is to be left as erected will not be unfair to him, and will be full satisfaction or indemnification to the pursuers for the use which has been taken without agreement with them of a portion of their ground for its erection, and appoints the cause to be enrolled, that parties may be heard as to the application of these last findings to the remaining conclusions of the summons; reserving meantime all questions of expenses.

"*Note.*—The first and second conclusions of this action had ceased before the proof was closed to be matters of controversy. The other conclusions, however, were keenly contested; and the Lord Ordinary has adopted, and has expressed in his findings, results which were presented neither by the pursuers nor by the defender. On the one hand, the pursuers, in their argument upon the proof, sought that decree in terms of the first and second conclusions of the summons should at once be pronounced, and that the action *quoad ultra* should be left undisposed of for the present, that it might by-and-bye be conjoined with an action of damage for interdict, alleged to have been wrongously obtained by the pursuers when the erection of the gable referred to was all but completed. This course the Lord Ordinary has not adopted, because in his opinion the conclusions of the present action ought to be exhausted, if that can reasonably be accomplished, without reference to these proceedings in another suit. On the other hand, the defender urged that though his conduct in using the pursuers' ground in the erection of his gable was not strictly legal, the gable must be allowed to stand, and become his property, should the value of the ground belonging to the pursuers on which in part it has been erected, be paid to the pursuers; this value, according to the estimate of one of the pursuers' witnesses, who is the only witness by whom evidence on the subject is given, being only £15. This view of the course to be followed the Lord Ordinary has also set aside. If anything is plain in this case, it seems to be that the defender, by using the ground belonging to the pursuers in the way he did, cannot make it his own, or compel the pursuers to sell it to him. They are entitled to retain what is theirs, and the only question of practical importance which has to be decided is, what, in the circumstances, are the terms on which the property should remain with them, and the gable which was erected by the defender partly upon that property be permitted to remain? The Lord Ordinary says this because, if the facts are as have been found, the pursuers, as he thinks, are precluded from insisting that the gable shall be taken down, and a *fac simile* of the old boundary wall erected, provided that all which they can reasonably ask for the use which has been taken of the ground shall be rendered. The pursuers saw the gable in the course of erection, and though they gave warnings, yet these appear to have been given rather for the purpose of bringing the defender to their terms, than to prevent its erection. They, in truth, were not anxious that the gable should not be built; and accordingly it was only when the building was all but finished that the interdict which has given occasion to the counter action was sought.

"The terms to which the pursuers are entitled, and which may be imposed on the defender, have been to the Lord Ordinary the cause of some anxiety; but he in the end has come to think, in the first place, that the result at which he has arrived has legal warrant in the facts of the case; and that, in the second place, what has been given as amends is full indemnification to the pursuers, and not unreasonable satisfaction to be rendered by the defender as to the first of these points. If the Lord Ordinary is right in holding that though this ground is the property of the pursuers, and was built on without agreement with them, they in the circumstances are not entitled to insist that the gable shall be removed, it follows almost as a necessary consequence that it must be in the power of the Court to fix the terms on which it shall be permitted to stand. Regarding the second point, a few words of explanation are all that are required. The value of the gable has not been proved; but it is perfectly certain that the acquisition without payment of a mutual right in that gable is worth all the inconvenience and the loss and damage of every kind which the pursuers have suffered or can suffer through its erection, the only doubt which the Lord Ordinary felt is whether the indemnification given is not a greater burden than should be imposed on the defender. But when it is considered that the defender originally offered what has now been found due, and that he, by persevering in the course upon which he entered despite repeated warnings from the pursuers, has obtained all the advantages which he could have secured if the offer he made at the outset had been accepted, or had not been withdrawn, most will be disposed to conclude that the terms are not unreasonable, being such as are naturally suggested as well as recommended by the real facts of the case, as these have been established in the proof.'

Parties were afterwards heard before the Lord Ordinary on the application of the finding in this judgment, and he then pronounced the following interlocutor:—

"*Edinburgh, 24th March* 1875.—The Lord Ordinary having heard parties' procurators as to the application of the findings set forth in the interlocutor of 18th December 1874, to the third, fourth, and fifth conclusions of the summons, being the conclusions which are still undisposed of, and having considered the debate and whole process: *Primo*, In respect of the findings relative to matters of fact contained in the said interlocutor, and in particular of the sixth, seventh, and eighth of these findings: Refuses the pursuers' motion for decree in terms either of the third conclusion or alternatively of the fourth conclusion of the summons, and assoilzies the defender from both of these conclusions, and decerns: *Secundo*, On the pursuers' motion, decerns against the defender for payment to the pursuers of the sum of £15 sterling, as damages to the pursuers in the premises, in terms of the fifth conclusion of the summons: *Tertio*, Finds no expenses due to or by either the pursuers or the defender, and decerns."

The defender reclaimed.

Argued for him—Even assuming that the defender erected the mutual gable without the consent of the pursuers, he was only exercising his legal rights in so doing.

The other action was one of damages raised by Jack against Dr Begg and his co-trustees, and arose out of their unsuccessful attempt to interdict him from erecting the gable wall as stated above. Jack claimed £360 in name of damages. To this action it was pleaded by Dr Begg and his co-trustees that as their proceedings in the interdict were not malicious or without probable cause, no damages were due. In this action the Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 24th March* 1875. — The Lord Ordinary having heard parties' procurators on the closed record, and on the issue proposed by the pursuer, No. 11 of process, and having considered the debate and whole process, Finds that there is no issuable matter on record: Therefore sustains the first of the defenders' pleas in law, dismisses the action, and decerns: Finds the pursuer liable in expenses, of which allows an account to be given in, and remits that account when lodged to the auditor for his taxation and report."

"*Note.*—In the present action damages are sued for as reparation for loss said to have been sustained by the pursuer through the granting of an interdict by the Sheriff of Midlothian on the application of the defenders. The pursuer contends that he is bound neither to aver nor to prove malice; while the defenders, on the other hand, maintain, in the first place, that if an issue shall be granted, malice must be inserted; and in the second place, that even were the pursuer willing to take an issue so expressed, no issue could be adjusted, inasmuch as malice has not been relevantly averred on the record. The Lord Ordinary has adopted, and by the preceding interlocutor has given effect to, this last view of the case.

"It is quite true that the defenders, in applying for and in keeping up the interdict complained of, are alleged on record (Cond. Art. 4) to have acted 'wrongously, maliciously, and without probable cause.' But the Lord Ordinary thinks that the bare use of such epithets is not enough. There must also, in his opinion, be something which affords at least a colourable reason for their application. Here, however, what is required has not been afforded, the averments of the pursuer presenting nothing which can be regarded even as a pretext for characterising either the obtaining or the maintaining of the interdict granted by the Sheriff as a malicious proceeding. The plea of irrelevancy, therefore, has been sustained, and the action, as a consequence, dismissed."

The pursuer (Jack) reclaimed.

Argued for him—No averment of malice was necessary. The mere recall of an interdict was sufficient to prove that it was wrongous, and if the successful party could prove that he suffered injury he was entitled to damages.

Argued for the defenders—When founding upon a judicial proceeding it was necessary to the relevancy of the action to aver malice; it was not enough to allege in general terms that the act complained of was maliciously done.

Authorities—*Abel* v. *Edmunds*, July 10, 1863, 1 Macph. 1061; *Millar* v. *Hunter*, March 23, 1865, 3 Macph. 740; *Snare* v. *Duff and Others*, Dec. 10, 1850, 13 D. 286; *Bailey* v. *Hume and Adamson*, Dec. 8, 1853, 16 D. 151; *Moir* v. *Hunter*, Nov. 16, 1832, 11 Shaw 32; *Reid* v. *Bruce*, July 11, 1855, 17 D. 1100.

At advising—

Lord Gifford—In these two cases, the one an action of declarator at the instance of the Rev. Dr Begg and others against Mr Jack, and the other an action of damages for wrongous interdicting at the instance of Mr Jack, I concur in the results at which the Lord Ordinary has arrived; and in the action of declarator in substance I agree with the Lord Ordinary in the grounds upon which he has proceeded. The circumstances of the cases are very special, and it appears to me that the mode in which the Lord Ordinary has disposed of them is not only reasonable and equitable, but in entire accordance with the strict rules of law.

Although last in date, the leading action is the action of declarator, for it directly raises the questions between the parties as to their respective legal rights, the determination of which is essential before any question of wrongous interdicting can be entered upon, and in truth the decision of the questions raised in the declarator will virtually decide the questions of law raised in the action of damages. For example, if it were held that the defender Jack even yet is bound to take down his gable, he could never be held entitled to damages for having been interdicted for a time in building it.

It is clear from the titles, and is no longer disputed by the defender Jack, that the old wall between his property and that of the pursuers, and upon the site of which the defender has now erected the gable of his tenement, was a mutual or party wall between him and the pursuer, and

could only be dealt with as such. The defender admitted that the pursuers were entitled to decree in terms of their first declaratory conclusion, and in terms of the first branch of their second declaratory conclusion.

But the defender maintained, and this contention lies at the foundation of the whole case, that he was entitled at his own hand, without the warrant and authority of any court, and without the consent and against the remonstrances of the pursuers, to convert the mutual division wall, which formed a mutual fence between the lands of the parties, into a mutual gable four storeys high, that is, that he was entitled by himself, and against the will of the pursuers, to build the gable of his new tenement to the extent of one-half upon the property of his neighbour.

Now, I am unable to assent to the proposition thus broadly and generally laid down. It is quite true that where adjoining lots of ground are feued or sold for the purpose of building a continuous street, the owner of any one of the lots, in building his tenement, constructs its gables one-half upon the adjoining lots, so as to be mutual gables, and then when these gables are taken advantage of, or used by the neighbouring proprietors, they become bound to pay to the first builder half the value of the mutual gables so used by them. It is also true that very often or in general the builder of the first tenement builds the mutual gable partly upon his neighbour's ground without the express consent of that neighbour, or as it is expressed by the Lord President in *Lamont* v. *Cumming*, 11th June 1875, "behind the back of the adjoining proprietor," who takes for granted that the mutual gable will be all right, and the want of express consent will not preclude the builder of the mutual gable from claiming half its value from his neighbour who comes to use it. But all this proceeds upon a tacit or implied contract inferred either from a feuing plan according to which the line of street is to be built, or from the special circumstances of each case. Where there is no room for such implied contract and implied consent, the rule does not hold, and the builder of a tenement must build it, gable and all, entirely upon his own ground, unless he gets the consent of his neighbour.

It was hardly contended that in proper rural subjects, where the lands of the parties are divided by mutual fences, whether walls or hedges, the proprietor of one of the subjects can at any point he pleases and without his neighbour's consent, remove the mutual fence or wall, and insist upon erecting a gable one-half upon his neighbour's property. I think he has no such right, and that he cannot, without mutual consent, convert a mere garden or field division-wall into a mutual gable. For example, in villa feuing, where each villa stands entirely in its own grounds, and the lots are divided by mere mutual garden walls, I do not think that the proprietor of one villa lot is entitled, without his neighbour's consent, to remove the garden division wall and erect a gable one half upon his neighbour's ground, and that at any spot he pleases, without any regard to the plans or wishes of his neighbour. This would be carrying the rights of mutual proprietors farther than has ever been done. In like manner, where even in a street a church has been built entirely within its own ground, I do not think that adjoining proprietors, apart from contract express or implied, can insist upon building the gables of their houses one-half upon ground belonging to the church, although the church and its proprietors can never take any benefit from such gables as mutual gables. Such a right may arise from contract, or even from implication, but it certainly does not exist at common law.

Now, in the present case, and looking to the titles of the parties, and to the whole circumstances as appearing from the proof, I am of opinion that the defender Mr Jack was not entitled, without the consent of the pursuers, and against their remonstrances, to build his gable one-half upon the property of the pursuers. The mere existence of a mutual division-wall gave no such right, and the express stipulation in the title seems inconsistent therewith. The title describes the walls, including the walls in question, "to be party walls between the deceased John Henderson of Leaston his avenue and garden of his other house, and to be in all time thereafter upheld, beeted, and repaired, on his representatives and his the said William Miller and his foresaids, their joint charges and expenses." This seems to be an obligation to maintain the wall as a mutual avenue or garden wall, and to exclude the right of either proprietor changing it into a gable wall, as the present defender has claimed right to do. There is nothing in the position or character of the respective properties from which the right to erect a mutual gable on the site of this wall can be inferred.

In the next place, I think it is clear that the pursuers never consented, either expressly or by implication, to the gable in question being erected partly upon their grounds. On the contrary, I think that the correspondence and evidence shews that the pursuers all along objected and warned the defender that he was proceeding at his own risk, while at the same time they were negotiating terms of agreement or arrangement. No agreement, however, was ever come to, the parties having differed as to the responsibility for any damages which might be occasioned to the school-room. It was on the failure of these negotiations for arrangement that the pursuers, on 10th May 1873, obtained interdict against the defender, stopping him from proceeding further with the erection of the gable, but this interdict was not obtained until the gable was very nearly completed. It is plain, however, that the pursuers, although they delayed their application for judicial interdict till towards the end, never consented to the erection, but extrajudicially objected, and reserved all their rights.

The question of interdict was brought by appeal to this Court, when the First Division, on 10th January 1874, recalled the interdict and dismissed the pursuers' petition. But they did so, not upon a consideration of the rights of the parties, or upon the ground that the defender had a right to erect the gable one-half upon the pursuers' ground;—this question was never entered upon at all—but solely upon the ground that the interdict was too late;—they held that, in the circumstances, interdict was "an inappropriate remedy." The Court were of opinion that a summary petition for interdict ought to be presented

timeously, and before the erection complained of is finished, and if this is not done, from whatever cause, the parties must indicate their right in another form, and not in a summary application of a mere possessory nature. But the Court gave no decision of any kind upon the present defender's right to erect the gable in question, or upon the further question, what are the interests of parties in the gable when erected. These questions are now raised, and competently raised by the present action of declarator.

If I am right in the opinion I have expressed, that the defender Jack had no right to build the gable in question so as to encroach upon the property of the pursuers, and if the defender erected it at his own risk and notwithstanding the opposition and warning of the pursuers, the logical result is that the Court might order it to be taken down and set back, and there are cases when this course, severe although it be, may be necessary to do justice between the parties; but in all such cases there is an equitable power vested in the Court, in virtue of which, when the exact restoration of things to their former condition is either impossible or would be attended with unreasonable loss and expense quite disproportionate to the advantage which it would give to the successful party, the Court can award an equivalent,—in other words, they can say upon what equitable conditions the building shall be allowed to remain where it is, although it has been placed there without legal right. This equitable power has often been exercised by the Court when slight encroachments have been made by a builder upon his neighbour's property, it being unreasonable in such cases to insist on the demolition of the whole building. An example of this occurred in the case cited in argument, *Sanderson* v. *Geddies*, 1 Rettie, 1198; but there are many other and stronger instances.

Now in the present case I am of opinion with the Lord Ordinary that the pursuers "are not entitled to insist that the gable shall be taken down if reasonably indemnified for the use that has been taken of their ground"; and this brings me to the question,—What, in the whole circumstances, will be reasonable indemnification? What are the equitable conditions on which the defender's gable should be allowed to stand as it is, although he has unwarrantably encroached on the pursuer's ground?

Now, here I am of opinion that the finding of the Lord Ordinary is reasonable and proper in the circumstances. He finds that if the pursuers ever come to use the mutual gable in question, they shall be entitled to do so without making any payment to the defender. The value of the half of the mutual gable I understand to be from £60 to £80.

I reach this result on several grounds. *First*, it was the defender's own original proposal. He offered to give the pursuers the use of the gable gratis if they would waive all question as to the ground on which it was built; and although this proposal was not accepted by the pursuers, who asked an additional guarantee, and the negotiations for an agreement went on, still, as the gable was allowed to be put up and is now to stand, I think it is quite fair to keep the defender to what he himself originally offered. The additional guarantee asked by the pursuers, and which alone prevented the agreement from being completed, turned out to be of no practical moment. *Second*, I think the condition is fair and reasonable in itself, and such as, apart altogether from the defender's own proposal, might have been rightly and equitably suggested and imposed by the Court. But *Third*, The same result is reached in another way, and on a legal ground. When a man builds upon the property of his neighbour, especially when he does so not by mistake, but with his eyes open and in the face of warning, the rule applies *inaedificatum solo cedit*. The building becomes the property of the owner of the land. No doubt, in general, this owner is bound to make compensation to the builder *in quantum lucratus*, but this is a mere equitable rule applicable to a *bona fide* builder, and always subject to the control of the Court. Such compensation may be denied altogether to one who *in mala fide*, or in spite of warning, attempts to appropriate his neighbour's ground. In the present case the gable, to the extent of nearly a-half, has been built on the pursuer's land. It has been so built knowingly and against remonstrances. It confers no present benefit on the pursuers. They are not now *lucrati* in any sense; and looking to the whole history of the proceedings, I think it no more than equitable to declare that the pursuers, if they ever require to do so, may use the mutual gable which stands half on their own land without compensation. I think we can do this under the present summons, and under the conclusions for removal and damages. Even without a conclusion for damages, I think we could impose the condition now proposed, because it is the equitable condition in respect of which we abstain from ordering the gable to be set back.

This exhausts the leading case, and I have only to add that I think the Lord Ordinary has exercised a sound discretion in finding no expenses due to either party in this action.

The action of damages at the instance of Mr Jack must be considered and disposed of on its own grounds, although its merits to a large extent depend on the decision of the questions in the action of declarator. Here also I think the conclusion to which the Lord Ordinary has come is well founded, although I do not agree in the grounds upon which he has proceeded.

In the view which I take of the case, it is not necessary to consider the form of issue, or to enter on any of the questions discussed at the bar, as to whether in actions of damages for wrongous interdicting the pursuer is bound to prove malice or want of probable cause. All these questions seem to me to be superseded, for I am of opinion that when the real nature and substance of this action is looked to there is no relevant or legal ground for damage at all. I may say in passing, however, that if in *cases of contract* or implied contract, and in cases of property, a party is deprived of his legal rights by a wrongous interdict, he will in general be entitled to damages without proving either malice or want of probable cause.

In the present case damages are demanded because the pursuer in this action, Mr Jack, was prevented by the interdict from proceeding with the erection of the gable from 10th May 1873 to 10th January 1874. He maintains that the interdict was wrongful, and he says that this is proved by its having been recalled by this Court; and as

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."