proceedings for settling the claim that the respondents were not prejudiced in their defence by the want or delay of such notice.

The Sheriff has found that it was not proved that the respondents had not been prejudiced in their defence by reason of the want or delay in giving notice, and he held that the proceedings were not maintainable by reason of the provisions of section 2, sub-section (1) of the Act, to which I have already referred, and has assoilzied the respondents.

The question of law which is put to us by the Sheriff is, whether the onus of proving that the respondents were not prejudiced in their defence by want of due notice rests upon the appellant.

If we answer this question in the affirmative then the judgment will stand, because in that case it was the duty of the appellant to prove that the respondents had not been prejudiced. If we answer it in the negative then it was the duty of the respondents to prove that they had been injured, and the judgment will not stand.

From the way in which this question is put to us I gather that nothing appeared in the proceedings from which the Sheriff could draw an inference one way or the other as to whether the respondents had been prejudiced or not, otherwise, no doubt, he would have found affirmatively one way or another. The appellant does not appear to have led any evidence that the respondents were prejudiced, because if he had led such evidence, however slight, if it was not met or contradicted by the respondents, the Sheriff would have been entitled, and would, I presume, have drawn the inference, that they had not been prejudiced. So, also, it would appear that the respondents had not led any evidence on the point, as otherwise, no doubt, the Sheriff would have dealt with it affirmatively.

This, I should think, was an uncommon case, and not likely to be of frequent occurrence.

On the construction of the Act I am of opinion that, in the first instance, the onus lies upon the appellant to prove that the respondents were not prejudiced in their defence. The appellant, by failing to give timeous notice, has barred himself from maintaining proceedings under the Act, and he can only surmount the bar by proving either that the respondents were not prejudiced in their defence, or that the want of such notice was occasioned by mistake or other reasonable cause. But while I think that the onus lies, in the first instance, on the appellant, I do not think that the Act contemplated separate or preliminary proceedings with the view of determining whether the employer had been prejudiced or not. That fact is to be found in the proceedings, and I can understand that facts and circumstances appearing in the course of the inquiry may sufficiently show that the employer had not been prejudiced. The claimant is put to prove a negative, and I should think that very slight evidence would be sufficient to shift the onus on the employer, who certainly is in a position to prove the prejudice, if any, which he may have suffered.

I think we should answer the question put to us in the affirmative, and adhere to the Sheriff's judgment.

LORD M'LAREN—In a case where notice has not been given as required by the statute, if the pursuer or claimant offers no argument and leads no evidence to show that the employer has not suffered prejudice, I am unable to see how the arbitrator could come to any other conclusion than that to which the Sheriff-Substitute of Lanarkshire has come in the present case. For if neither argument nor evidence were offered, to proceed further in the case would be to nullify the statutory requirements as to notice. It is plain that the initial proceeding lies with the party claiming, but I wish to emphasise the view—which, I understand, is also held by your Lordship—that this is not necessarily a separate issue of fact. The requirement of the statute is that the arbitrator must be satisfied that the employer was not prejudiced, and the arbitrator may be thus satisfied from the argument alone on admitted facts, without the necessity of separate proof, or he may reach the conclusion by a consideration of fact and argument together. It is easy to figure cases in which the conclusion is clear from the beginning that the employer has not been prejudiced by want of notice, as, for example, where a large number of persons have been injured and claims have already been instituted by one or more of them. The mere statement of such a point may be sufficient to displace the onus, to the effect that the employer, if he desires to take advantage of the want of notice, would have to satisfy the Sheriff that he had been prejudiced.

LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Answer the question in the case in the affirmative: Adhere to the deliverance of the arbitrator, and decern: Find the appellant liable in expenses, and remit," &c.

Counsel for the Appellant — Glegg. Agents—Macpherson & Mackay, W.S.

Counsel for the Respondent—Campbell, Q.C.—J. Wilson. Agents—

Saturday, November 18.

FIRST DIVISION.

ROBERTSON, PETITIONER.

Nobile Officium — Change of Surname — Chartered Accountant.

Petition by Chartered Accountant holding certain official positions to which he had been appointed by the Court, for authority to assume a new surname in exercising these offices, and to ordain the petition and the Court's

deliverance thereon to be recorded in the Books of Sederunt, *refused* as unnecessary.

Mr James Alexander Robertson, C.A., Edinburgh, presented this petition to the Court "to authorise the petitioner to assume, bear, and henceforth to use the name James Alexander Robertson-Durham in exercising the said offices of judicial factor, *curator bonis*, liquidator, and trustee; to ordain this petition and your Lordships' deliverance thereon to be recorded in the Books of Sederunt."

The petitioner stated that he had succeeded to certain entailed estates of which the deeds of entail contained provisions to the effect that the heir of entail in possession should be bound to assume the name of Durham.

He further stated that he had from time to time been appointed by the Court judicial factor on various estates, and *curator bonis* to persons under disability; that he had been elected trustee on various estates under the provisions of the Bankruptcy Acts, and that he was liquidator of two joint-stock companies—in one case by the appointment, and in the other under the supervision of the Court.

The petitioner referred to the *dicta* of the Lord President in the case of *Forlong, Petitioner*, June 15, 1880, 7 R. 910, as supporting his views as to the necessity of the petition.

LORD ADAM—I am of opinion that the petition is not necessary. Mr Robertson has a perfect right to change his name, and no one can prevent him adding to or altering it. The case of a notary is different, because a notary is an imperial officer, and a person holding a public office may require authority. So in the case of a W.S. and other persons whose names are entered on a register. But there is nothing to prevent a private individual from changing his name.

LORD M'LAREN—I am of the same opinion. It is in accordance with practice that authority may be given to use a new name when the application is by someone who has been admitted to his profession by the Court. So, where the name is entered on a roll to which the authority of the Court is given, or which is under the control of the Court, it may be necessary to present an application for authority to change the name in order that the roll may be kept in order. But that rule does not apply to a professional accountant, and I am unable to see that any real difficulty arises from the fact that this gentleman has obtained executive appointments from the Court.

LORD KINNEAR concurred.

The Court refused the petition.

Counsel for the Petitioner — Pitman. Agents—J. & J. Anderson, W.S.

Friday, November 17.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MONTGOMERIE & COMPANY *v.* WALLACE-JAMES.

Title to Sue—Inhabitant of Burgh—Encroachment on Common Good of Burgh—Interdict—Property—Burgh.

An inhabitant of a royal burgh has a title to sue an encroacher on lands which form part of the common good of the burgh, and have been from time immemorial reserved for the use and enjoyment of the inhabitants. In such a case the magistrates must be called for their interest.

W., a burgess and inhabitant of the burgh of H., brought an action of suspension and interdict against the magistrates and M. & Co. He averred that M. & Co. had encroached on a certain piece of land which formed part of the common good of the burgh, and had from time immemorial been reserved for the use and enjoyment of the inhabitants for recreation, drying clothes, and other purposes, and that the magistrates refused to take action in the matter. *Held* (*aff.* judgment of Lord Kincairney, Ordinary) that W had a good title to sue.

Sanderson v. *Lees*, Nov. 25, 1859, 22 D 24, *followed*.

Held further that a suspension and interdict, with conclusions restraining the respondents from interfering with the land in question, and ordaining them to restore it to the condition in which it was before the encroachment, was a competent form in which to try the question raised.

John George Wallace-James, Bachelor of Medicine, residing at Tyne House, Haddington, brought an action of suspension and interdict against Messrs Montgomerie & Company, 142 St Vincent Street, Glasgow, and the Provost, Magistrates, and Town Council of Haddington, for any interest they might have. The conclusions of the action were "to interdict prohibit, and discharge the respondents, the said Messrs Montgomerie & Company, Limited, and all others authorised by or acting for them, from taking possession of or encroaching on the piece of ground on the west side of the river Tyne, lying between the bowling-green and public washing-house, both belonging to the royal burgh of Haddington, on the west, and the river Tyne on the east, and extending from the Vennel leading from the East Port of Haddington to the Water of Tyne on the north, and the ford across the said river to the south of Nungate Bridge on the south, and in particular from ploughing up the surface of the said piece of ground, excavating therein, or removing soil, sand or materials therefrom, and from in any way interfering with the said piece of ground;