

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 burghess 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;

and further, to ordain the respondents, the said Messrs Montgomerie & Company, Limited, to restore the surface of the said piece of ground to the same condition in which it was prior to the operations complained of."

The pursuer averred that he was a burghess of the burgh of Haddington, and resided there; that the piece of land in question formed part of the common good of the burgh; that it had been from time immemorial appropriated to the use and enjoyment of the burghesses or inhabitants of Haddington for the purposes of recreation, and of drying and bleaching clothes; that Montgomerie & Company had taken possession of and ploughed up the land, and that the Town Council of Haddington refused to move in the matter.

Montgomerie & Company lodged defences, in which they stated that the land in question belonged to them. The Town Council of Haddington lodged a minute to the effect "that the said Council had, at a meeting of said Council, held at Haddington on the 14th of July 1898, resolved that, under reservation of all the Town Council's rights of title to the ground in question, and to the ownership thereof, the operations complained of are not disadvantageous to the public interest, and that in the meantime the said Council propose to take no further steps in these proceedings."

The pursuer pleaded—"(1) The said piece of ground being part of the common good of the royal burgh of Haddington, appropriated from time immemorial to the use and enjoyment of the burghesses and inhabitants of the said burgh, as set forth in the pleadings for the complainer, and the respondents having illegally and unwarrantably taken possession of the said piece of ground on the pretence that it is their property, and interfered therewith so as to destroy and prevent the said use and enjoyment thereof formerly had by the burghesses and inhabitants, the complainer, as a burghess of the said burgh, is entitled to obtain interdict as craved. (2) The said piece of ground, being the property and in the possession of the burghesses and inhabitants of the royal burgh of Haddington, and the respondents, the said Messrs Montgomerie & Company, Limited, having illegally and without any right or title entered upon possession thereof on the pretence that it belonged to them, and encroached on and interfered therewith, interdict should be granted as craved with expenses."

The defenders pleaded, *inter alia*—"(1) No title to sue. (5) The present note of suspension and interdict being an incompetent, or at least an inappropriate form of action for trying the questions raised by the complainer's record as amended, the note should be refused with expenses."

On 18th July 1899 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Repels the first and fifth pleas-in-law for the respondents, and allows the parties a proof of their respective aver-

ments, and to each a conjunct probation: Appoints the same to proceed on a day to be afterwards fixed."

*Opinion.*—"The complainer sues this action as a burghess of the burgh of Haddington. It relates to a piece of ground about which the complainer avers that it belongs to the burgh, is about an acre in extent, and 'has been from time immemorial reserved and appropriated to the use and enjoyment of the burghesses and inhabitants for the purposes of recreation, walking, and exercise, for the bleaching and drying of clothes, and for the general use and enjoyment of the burghesses and inhabitants.'

"The complainer avers that the respondents Montgomerie & Company, Limited, were proceeding to take possession of this piece of land, and to excavate and remove the soil, sand, and other materials therefrom, and that they asserted right to keep the land as their own property. It is further alleged that the Magistrates of Haddington were taking no steps to prevent the illegal proceedings of the respondents, and it appears from a minute lodged by the Magistrates that at a meeting of the Council held immediately after this action was brought, it was 'resolved that, under reservation of all the Town Council's rights of title to the ground in question, and to the ownership thereof, the operations complained of are not disadvantageous to the public interest, and that in the meantime the said Council propose to take no further steps in these proceedings.' The respondents, Montgomerie & Company, Limited, aver that the land belongs to them; and besides, that their actings had been wholly beneficial to the burgh.

"The complainer had raised this action against Montgomerie & Company, and also against the Magistrates for their interest, and prays that the respondents Montgomerie & Company should be interdicted from interfering with the piece of land, and should be ordained to restore it to its condition before their interference.

"Lord Stormonth Darling in the Bill Chamber, by interlocutor dated 26th July 1898, sustained the respondents' plea that the complainer had no title to sue, and refused the note. When he pronounced that interlocutor the words above quoted were not contained in the statement of facts. Had they been I am disposed to think, from expressions in his opinion, that his Lordship might have passed the note. The complainer reclaimed, and was allowed to add these words, or words precisely equivalent, and the Court, on 23rd November 1898, on considering the amended pleadings, recalled the interlocutor, and remitted to the Lord Ordinary on the Bills to pass the note. The Lord Ordinary on the Bills accordingly passed the note. A record has since been made up, in which the respondents have renewed their plea, which disputes the complainer's title to sue.

"The interlocutor in the Inner House does not amount to a judgment sustaining the complainer's title, but it points in that direction, and after hearing the cause de-

bated in the procedure roll, I have formed the opinion that it should be sustained, and that the complainer should be allowed a proof.

“The complainer’s averments come to this, that the respondents appropriated a piece of ground which belongs to the Magistrates, and has been devoted immemorially to public uses and the public right, which the Magistrates have resolved not to vindicate, being of opinion that the interests of the burgh and its inhabitants are not prejudicially affected. But I take it that a burghess is not bound by that opinion, but is entitled to vindicate what he alleges to be a public right—that is to say, a right in that section of the public consisting of burghesses in Haddington, in which right he is participant. What he avers is that the respondents were appropriating the land, and depriving the public of the use of it. Had the Magistrates themselves been treating the land in such a way as would deprive the public of the use of it, a burghess would have a title to interdict them, as illustrated in many cases, such as *Sanderson v. Lees*, Nov. 25, 1859, 22 D. 24; *Graham v. Magistrates of Kirkcaldy*, 6 R. 1066, and 9 R. (H.L.) 91; and *Murray v. Magistrates of Forfar*, June 20, 1893, 20 R. 908, and others. *Crawford v. Magistrates of Paisley*, March 10, 1870, 8 Macph. 693, in reference to the town steeple, was decided on a similar principle although the circumstances were different.

“In these cases the action was directed against the magistrates, and here it is said the action should have been directed against the Magistrates, and not against the other defenders. But it is not clear how that could have been, because it does not appear that the Magistrates did anything themselves or authorised what the respondents did. They only abstained from interfering. If a burghess would have a right to prevent illegal interference by the magistrates, it appears to me that *multo magis*, he would have a title to prevent illegal interference by a third party.

“The respondents, it is true, defend themselves by asserting a right of property, but it seems impossible to hold that that mere assertion of such a right can destroy the complainer’s title. The respondents plead that they cannot be required to defend their title of property against an individual burghess, because, they say, a judgment in their favour would not be *res judicata* if their title were challenged by any other burghess. It is not necessary that I should express an opinion on that point. But the argument does not remove the difficulty of holding that a complainer’s title can be destroyed by the respondents’ assertion of right.

“It is said that the case resolves into a question of property, and not a question as to the use of property, and I think that when the case was first brought in the Bill Chamber that may perhaps have been so, but it is not so on this record. A question as to right of property may be incidentally involved, but the main question is as to interference with public use.

“In another class of cases a member of the public, or of a section of the public, has been held entitled to sue an alleged wrongdoer directly without calling the magistrates, who had, or might have had, right as such, to interfere for the protection of the interests of the public, such, e.g., as *Stewart v. Greenock Harbour Trustees*, June 1, 1864, 2 Macph. 1155; *Adamson v. Edinburgh Street Tramway Company*, March 5, 1872, 10 Macph. 533; and *Ogston v. Aberdeen District Tramway Company*, December 14, 1896, 24 R. (H.L.) 8. It appears to me that these cases apply. It is said that they regarded the interests of the public and were popular actions, like an action of declarator of right-of-way, and that no hardship or injustice was involved, because, it was said, a judgment would bind the public, whereas in this case a judgment in favour of the respondents would bind no one but the complainer. I do not need to determine any of the debateable points involved in this argument. I do not see sufficient grounds for holding that, even assuming that difference between these cases, the application of them to this question of title is thereby affected. I do not say that the complainer stated a good title when the action was brought in the Bill Chamber, but think that any defect in his title was cured by the amendment made in the Inner House.”

Montgomerie & Company reclaimed, and argued — It should be noted that the pursuer is not suing as one of a minority in the Town Council but as an individual burghess and on an independent title. Again, this was not an *actio popularis*, as in cases of right-of-way and the other cases cited by the Lord Ordinary. Therefore the judgment in the action would not be *res judicata* against the Town Council if they should afterwards choose to take up the matter. The defenders were therefore not bound to defend an action at the instance of the pursuer, as success in it would not establish their title. The pursuer was not without a remedy. He could bring an action against the Town Council to have them decerned either to move in the matter or to grant him the use of their name for an action. So, a bankrupt could not sue, but could compel the trustee to give him the use of his name—*Henderson v. Robb*, January 13, 1889, 16 R. 341; and in like manner a beneficiary could obtain the use of the trustee’s name—*Sprot v. Paul*, July 5, 1828, 6 S. 1083; *Spence v. Gibson*, December 13, 1832, 11 S. 212. So far as there was authority on the point of the title to sue an action like this by an individual, apart from cases of right-of-way, it was in the reclaimers’ favour—*Home v. Young*, December 18, 1846, 9 D. 286; *Cameron v. Ainslie*, January 21, 1848, 10 D. 446; *Mackay’s Practice*, i. 280, where an unreported case is quoted. Interdict was here incompetent, because what it was proposed to interdict had already been done.

Argued for the respondents—It was decided that an individual burghess had a

right of action against the magistrates to prevent them alienating lands forming part of the common good, and against the individual in whose favour they proposed to alienate—*Sanderson v. Lees*, November 25, 1859, 22 D. 24; *Graham v. Magistrates of Kirkcaldy*, June 9, 1879, 6 R. 1066, and July 26, 1882, 9 R. (H.L.) 91; *Murray v. Magistrates of Forfar*, June 20, 1893, 20 R. 908. This was practically the same form of action. *Sanderson v. Lees* was particularly in point, as the action there was directed both against the magistrates and the party to whom they proposed to alienate. If this form of action was not competent, a burgess, had no remedy if the majority of the Town Council chose to alienate all the common good. An action to compel the magistrates to give the pursuer the use of their name had never been tried and would be incompetent.

At advising—

LORD KINNEAR—I think the Lord Ordinary has disposed of this case quite rightly. The first question is, whether the complainant, who alleges that he is an inhabitant and burgess of the royal burgh of Haddington, has a title to sue this action of interdict to protect a piece of ground, which he alleges is a part of the common good of the burgh, from the encroachments of the respondents. The averment on which he rests his case is that “The said piece of ground has all along formed part of the common good of the burgh. It has been from time immemorial reserved and appropriated to the use and enjoyment of the burgesses and inhabitants for the purposes of recreation, walking and exercise, for the bleaching and drying of clothes, and for the general use and enjoyment of the burgesses and inhabitants. Recently the respondents proceeded illegally and unwarrantably to take possession of and to plough up the surface of the said piece of ground.” It is said that on these averments the title to sue is in the Magistrates alone, and not in a single inhabitant of the burgh. If the averments are true—and for the present purpose we must assume in the meantime that they are—the doctrine of law which is applicable to the circumstances is not open to question since the decision in *Sanderson v. Lees*. The law is, that when a piece of land forming part of the common good of a burgh has been appropriated from time immemorial to such purposes as are alleged in the passage I have read, this possession by the inhabitants is a quality of the right in which the magistrates are vested for the benefit of the community, and any member of the community is entitled to protect it against encroachment even by the magistrates themselves. Accordingly it was held in *Sanderson v. Lees* that an action of suspension and interdict must be sustained which had been brought by a single inhabitant of Musselburgh against the Magistrates and against a certain William Brown, residing at Linkfield, to prevent the Magistrates from feuing a part of the Links and to prevent Brown from building

upon the ground proposed to be feued. That case is said to be distinguished from the present in two respects, but neither of the points of distinction appears to me to make any difference. In the first place, it is said that in this case the process is not directed against the Magistrates but only against the individual respondent. I have no doubt that it was necessary to call the Magistrates, but they are called for their interest, and the complainant could not ask for an operative decree of interdict against them, because according to his case they are not actively interfering with the rights of the community. They are not themselves encroaching as the Magistrates of Musselburgh encroached by attempting to feu out a part of the Links. His complaint against them is simply that they are standing by idle and are not protecting the community, as they ought to do, against the encroachments of the respondents. But if it be clear that a burgess is entitled to sue for interdict against an encroacher, who puts forward an express grant of the magistrates in his defence, I am unable to see why his title to sue should not be equally good if instead of having the active support of the magistrates in his favour the encroacher can only found upon their tacit acquiescence. The foundation of the title in both cases is that the burgesses are not bound to submit to the discretion of their magistrates, but may protect their immemorial right of common enjoyment for themselves, even although the magistrates may think it better in the public interest that the property should be diverted to other purposes. The burgess must therefore have an equally good title to sue for interdict whether the magistrates have abstained from interfering because of their active participation in the wrong, or because of their deliberate opinion that it is not worth while to incur the cost of litigation, or again because of mere negligence and disregard of duty.

The second ground of distinction is that in the case of *Sanderson* the right alleged by the individual respondent was rested upon a grant from the magistrates, whereas in the present case the respondent maintains that he has a right of property in the ground in question exclusive of the Magistrates' title, and in no way derived from them; and he maintains that he cannot be compelled to litigate a question of property with anybody except the Magistrates, who are *ex hypothesi* the competing proprietors, since the complainant has no right of property in his own person. Now, the complainant's title to sue must be determined by his own case, and not by averments which the respondent may bring forward in defence; and the case stated is exactly that which was found to support a title to sue in *Sanderson v. Lees*, viz., that a certain piece of burgh property has been appropriated from time immemorial to certain uses of common enjoyment. But apart from that consideration the argument is founded upon a misapprehension. It is an entire mistake to suppose that on the complainant's case the ground in question is the property

of the Magistrates. The Magistrates are the managers of the town's estate, but the right of property is in the community. The complainer therefore is not seeking to protect a subordinate right of use in the property of another, but he claims on behalf of the community to prevent their own property from being disturbed, and that is what every burgh is entitled to do independently of the Magistrates or against their opposition. This was the ground of judgment in *Sanderson v. Lees*, and in the subsequent case of *Grahame v. Swan*. It is said, however, that it is unjust to the respondent to compel him to try a question of property in a process the judgment in which may not be *res judicata* if the same question should be raised hereafter by the Magistrates. I agree with the Lord Ordinary that it would be premature to consider how far the judgment in this case will constitute *res judicata*, since we do not know what the judgment may be. But the same question arose in *Sanderson v. Lees*, and Lord Deas makes an observation upon it which I think very useful. His Lordship says—"I am quite aware that this question arises in the form of a suspension and interdict. But I give no opinion whether this decision will or will not be *res judicata* in an action of declarator should such a proceeding be resorted to. A question of right may be raised and decided even in a process of suspension and interdict; and it will be for consideration if a declarator shall be raised whether this is not a case in which that has been done." And then his Lordship points out that all the pleas of the respondent were upon matter of right. The material point is that a burghess may raise a process of this kind even although it may involve matter of right, and that whether it will result in a final judgment on a question of property will depend on the subsequent course of the proceeding and on the ground of the ultimate decision. I agree that there is force in the observation which was made by the respondent's counsel that it may be very hard for him to be compelled to litigate a question of this kind with one unreasonable inhabitant of the town where the Magistrates who are the responsible administrators of the burgh property are clearly of opinion that it is not expedient or not worth while to litigate. But we cannot take for granted at present that the complaint is unreasonable. That is the question to be tried; and if the law is, as I think it clearly is, that the complainer is not bound by the decision of the Magistrates, he has a good title and interest to try it.

The only other point which the Lord Ordinary decides is that raised by the fifth plea-in-law, which is that a note of suspension and interdict is an inappropriate form of action in trying the questions raised by the complainer. In so far as that plea is meant to be founded on the suggestion that rights of heritable property are necessarily concerned I think that it is untenable, but it was also supported by the argument that the suspension and interdict were too late since the wrong complained of is already

completed. I think that it also is quite untenable. The encroachment complained of is a continuous encroachment, and the inhabitants, if their case is otherwise well founded in fact, are entitled to a decree which will prevent the respondents from continuing to interfere with the subjects and will enable the proper administration to restore the subjects to their true purposes, or to compel the respondents to restore the ground to the condition in which it was before the operations complained of.

LORD ADAM and LORD M'LAREN concurred.

The LORD PRESIDENT, who was present at the hearing, having in the interval been appointed a Lord of Appeal in Ordinary, gave no opinion.

The Court adhered.

Counsel for the Reclaimers—Balfour, Q.C.—Dundas, Q.C.—Kennedy—W. F. Trotter. Agent—T. S. Paterson, W.S.

Counsel for the Respondent—Sol. Gen. Dickson, Q.C.—Wilson—Guy. Agents—Patrick & James, S.S.C.

Tuesday, November 21.

## SECOND DIVISION.

[Sheriff of Lanarkshire.

M'ALPINE & SONS v. DOCHERTY.

*Proof—Separate Proof of Preliminary Defence—Discharge—Reparation.*

A workman bringing an action for damages against his employers was met by the defence that the claim had been discharged. Held (reversing judgment of Sheriff, and reverting to that of the Sheriff-Substitute) that proof of the averments relating to the discharge should be taken before the main question was remitted to proof.

James Docherty, labourer in the employment of Robert M'Alpine & Sons, railway contractors, raised an action in the Sheriff Court at Glasgow, concluding for damages against his employers, both at common law and under The Employers Liability Act 1880. The defenders, besides lodging defences to the pursuer's condescendence, put in a separate statement of facts, in which they averred—" (Stat. 1) After the accident in question, communications were entered into between the pursuer and the defenders, with a view of settling any possible claim for damages that pursuer might allege to be due to him in respect of the injuries said to have been suffered by him by said accident. (Stat. 2) The pursuer asked for and agreed to accept the sum of £3 in full satisfaction of his claim. That sum was accordingly paid to him by the defenders, and accepted by him in full of all his claims, and on receipt thereof he granted the following discharge to the defenders." . . .