opened the bag and took out some papers. I recollect my sister showing me a letter which she had received from my brother George along with the bag of papers. As far as I recollect, George said in the letter that I was to have half of my mother's estate, which was to be divided between me and Mrs Moir. [Shown No. 1]—I cannot read the letter as I am too shortsighted, but I recollect parts of it. No. 1 being read to me, I depone that I think that must be the letter; that was my recollection of what was in it. I remember that when the bag was opened my sister said something about my mother's will, and about the 'Cop.' She did so with reference to one of the papers taken from that bag. I took sufficient notice of the piece of paper to be able to identify it when I saw it again. It was a longish piece of paper. Mrs Moir left the papers with me, including this paper. . . . When my sister left the papers, including the will, in my house after mother's death, I took them up off the table where she left them and put them into a drawer. About a month or six weeks afterwards I was preparing my house for lodgers, and I emptied the drawer in which I had put the papers. Among the papers in this drawer I recognised the paper which my sister had showed me when she spoke of my mother's will, and I saw that it was signed by my mother, but I did not look at it particularly. I crumpled it up along with the other papers and took it away and burned it."

Mr Jaffrey, actuary, Aberdeen Savings Bank, deponed that Mrs Moir and Mrs Williamson came to the bank to draw out their mother's money, and showed to him her will; that "The document was of an informal nature, and was not folded after the ordinary legal fashion. My impression is that it was a holograph will signed by Mrs Calder, and that its terms coincided with the statement of George Low Calder in the second paragraph of letter No. 1—that is to say, that it left everything to Charlotte Calder. I am satisfied that it bore out everything in the said letter."

There was, however, a conflict of evidence on this point, Mrs Moir denying that the will had ever been shown to Mr Jaffrey, while Mrs Williamson stated that she had no recollection of it.

Argued for the pursuer — Admittedly there were no adminicles, and as a rule adminicles were considered necessary, but in cases such as this where the will was informal and it was unlikely that a draft existed, and further, where the *casus amissionis* was the wilful destruction of the document by an interested party, the Court had held that the terms of the deed might be sufficiently instructed by parole evidence—*Leckie* v. *Leckie*, July 12, 1884, 11 R. 1088; *Lillies* v. *Lillie*, December 4, 1832, 11 S. 160; *Sugden* v. *Lord St Leonards*, March 13 [1876], L.R. 1 Prob. Div. 154. In the case of *Rannie* v. *Ogg*, June 12, 1891, 18 R. 903, opinions were expressed apparently adverse to the pursuer's view, but that was the case of a deed granted by the defender, and destroyed by him undelivered. Moreover, the case of *Leckie* v. *Leckie, supra*, was not cited to the Court. The pursuer had proved the essential part of the will, viz., that everything had been left to Charlotte, and it was unnecessary for him to prove all the words.

The Court instructed the pursuer to amend his summons by deleting the words "and I appoint her to be my executrix," and thereafter pronounced the following interlocutor:—

"Open up the record: Allow the summons to be amended by deleting the words 'and I appoint her to be my executrix,' occurring on the 8th and 9th lines of page 4 thereof; and the same having been done of new close the record, and find and declare in terms of the conclusion of the summons as amended, and decern."

Counsel for Petitioner — Dove Wilson. Agent—Arthur H. Paterson, W.S.

Friday, November 17.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

SHEARER *v.* MILLER & SONS.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 2 (1) — *Notice of Accident — Prejudice to Employer—Onus of Proof.*

In a case stated under the Workmen's Compensation Act 1897 it appeared that the workman had not given notice of his claim till seventeen days after he had met with the accident, and that he left his employment on the day on which it occurred. The Sheriff found "that it was not proved (*a*) that the want of or delay in giving notice was occasioned by mistake or other reasonable cause; and (*b*) that the respondents had not been prejudiced in their defence by reason of the want of or delay in giving notice."

Held that the onus of proving that the employer had not been prejudiced lay in the first instance upon the workman, that it did not appear from the Sheriff's findings that this onus had been discharged, and that accordingly the workman's claim to compensation was barred.

Observations as to the evidence required to discharge this onus.

This was a stated case under the Workmen's Compensation Act 1897, in which the appellant John Shearer claimed damages in respect of injuries sustained by him while in the employment of the respondents George Miller & Sons, coalmasters, Glasgow. The following was the case as stated by the Sheriff-Substitute (GUTHRIE):—"This is an arbitration under The Workmen's Compensation Act 1897, brought before the Sheriff of Lanarkshire at Glasgow, at the instance of the appellant

against the respondents, in which the Sheriff is asked to ordain the respondents to pay to the appellant the sum of 17s. 6d. per week, beginning the first weekly payment on the 17th of March 1899, with interest from the date of citation till payment, and to find the respondents liable in expenses.

"The appellant avers that on the 24th of February 1899, while he was in the employment of the respondents as a miner, he was taking down a piece of coal, and was for that purpose striking a wedge with a hammer; that in doing so his left hand was wrenched or twisted to such an extent that he had been unable to work since said date, and that his wages at the date of said accident were 35s. per week.

"The case was heard and proof led before me on this date (June 14, 1899), when the following facts were established:—(1) That on the 24th February 1899 the appellant, while in the employment of the respondents in their No. 4 Swinehill Pit, Larkhall, was engaged in cleaning out a coal face by means of a wedge and hammer, and that in driving in the said wedge he severely strained his left wrist, whereby he has since been unfit for work. (2) That the appellant forthwith left the pit, and was attended by Dr Rogerson daily for four weeks, and thereafter less frequently until the date of the hearing. (3) That the first notice of the appellant's claim for compensation was sent to the respondents on 13th March 1899. (4) That the appellant, who was residing with his brother-in-law, was told by Dr Rogerson within a day or two after the accident that the injury was serious, and that his recovery would be tedious. (5) That the appellant's wages amounted to 22s. 8d. per week. (6) That it was not proved (*a*) That the want of or delay in giving notice was occasioned by mistake or other reasonable cause; and (*b*) that the respondents had not been prejudiced in their defence by reason of the want of or delay in giving notice.

"I accordingly held that the proceedings were not maintainable by reason of the provisions of section 2, sub-section 1, of The Workmen's Compensation Act 1897, and I assoilzied the respondents and found the appellant liable in expenses.

"The question of law for the opinion of the Court is—Does the onus of proving that the respondents were not prejudiced in their defence by want of due notice rest upon the appellant?"

By section 2 (1) of the Workmen's Compensation Act 1897 it is provided—"Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the time of death: Provided always that the want of, or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause."

Argued for appellant—There had been no evidence on either side as to prejudice. The Sheriff had proceeded on the view that there was an onus resting on the appellant of proving that the employers had not been prejudiced, but the case of *M'Lean* v. *Carse & Holmes*, May 30, 1899, 1 F. 878, showed that the existence of prejudice must be proved and not assumed.

Argued for respondents—The appellant was bound to place before the arbiter materials to enable him to decide the question. The arbiter had found that it was not proved that the employers had not suffered prejudice, and in effect his finding was that the appellant's delay had been unreasonable and unnecessary. It was only if the arbiter found in the course of the proceedings that the employer had in fact not been prejudiced that the proviso in the statute would apply. In *M'Lean* v. *Carse & Holmes*, *supra*, there had been no proof, and it was clear that if the claimant were allowed a proof he might be able to show that the employers had not suffered prejudice. Here, on the other hand, the Sheriff having before him the averments of the parties had allowed a proof, and as the result of it had decided that the appellant had failed to show that no prejudice had been suffered. To the objection that the respondents' argument placed the workman in the position of having to prove a negative, the answer was that this was precisely what was required in express words by the statute. An example of the Court imposing the onus of proving a negative was to be found in *M'Clure, Naismith, and Others* v. *Stewart*, July 22, 1887, 15 R. (H.L.) 1.

At advising—

LORD ADAM—This is a case stated under the Workmen's Compensation Act.

The appellant, who was a miner in the employment of the respondents, met with an accident on the 24th February 1899. The first notice of the appellant's claim was sent to the respondents on 13th March 1899.

Section 2, sub-section (1), of the Act provides that proceedings for the recovery of compensation under the Act shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof. But it is provided that the want of such notice shall not be a bar to the maintenance of such proceedings if it be found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want of such notice, or that such want was occasioned by mistake or other reasonable cause.

The Sheriff has found that it is not proved that such want of or delay in giving notice was occasioned by mistake or other reasonable cause. That being so, the appellant cannot recover unless it is found in the

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