shall noways infer a revocation of my said trust-disposition and deed of settlement . . . but that the same shall stand in full force with these additions and alterations thereto."

In a multiplepoinding raised by Alexander Stuart's trustees with a view to the distribution of his estate, a claim was lodged by the trustees for behoof of Peter Stuart's children to be ranked and preferred to the tenth share of residue destined to Mrs Wyness. A claim was also lodged by the residuary legatees, who pleaded that the share of residue which would have been taken by Mrs Wyness, if she had survived the testator, fell by her predecease to be divided among the residuary legatees.

On 25th June 1898 the Lord Ordinary (KYLLACHY) ranked and preferred the claimants, Stuart's trustees, for behoof of Peter Stuart's children, to the tenth part of the residue originally destined by the truster to Mrs Wyness.

Opinion.—[*After setting forth the provisions of the settlement and codicil, his Lordship proceeded*]—"The children of Peter Stuart say that this revocation makes no difference, the conditional institution in their favour being unrecalled and taking effect. The other residuary legatees, on the other hand, say that the revocation of the primary bequest operates as a revocation of the conditional institution attached to it, and that if the truster had meant otherwise the codicil was unnecessary. They say also that the language of the conditional institution is unfavourable to the theory of its independence (*first*) because of the use of the word 'devolve,' and (*second*) because the conditional institutes take only what the original legatee would have taken if she had lived, and the legacy being revoked, the original legatee, if she had lived, would have taken nothing.

"It appears to me that in all such questions the point to be ascertained is the intention of the testator; and, looking to the scheme of this settlement, the presumptions applicable to a conditional institution, and the fair meaning of the language used, the just conclusion, I think, is that the testator intended no more by his codicil than to express (necessarily or unnecessarily) the lapse of Mrs Wyness' interest under his settlement.

"I am not much moved by the criticism of the language of the conditional institution. The word 'devolve' is certainly not used in its strict sense. If it were, it would denote the transmission of a vested right, and of course there was no vested right here. On the other hand, the suggested limitation to what Mrs Wyness would have taken if she had lived appears to me to be no more than a definition of the *amount* of the interest which the conditional institutes were to take. The point might have had more force if the bequest had been revoked during Mrs Wyness' life.

"Further, I cannot hold that a conditional institution is of the nature of a derivative right. It is really an independent right taking effect contingently, but operating when it does operate as an independent gift. A bequest to A, and if A shall predecease a certain event to B, is not, I apprehend, revoked by a revocation of the gift to A. At least, it is not so unless the intention is otherwise clear; and here I think the intention of the truster may fairly be inferred to be that Peter Stuart's children, and not his legatees generally, were to benefit by any lapse of interests conferred on the members of brothers, as distinguished from sister's families.

"I am therefore of opinion that Peter Stuart's children take Mrs Wyness' one tenth share." . . .

The residuary legatees reclaimed, and argued — The revocation in the codicil applied to the conditional institute as well as to the person to whom the share was originally destined—*Boulcott* v. *Boulcott*, 1853, 2 Drewry, 25.

Counsel for Stuart's trustees were not called upon.

LORD PRESIDENT—In framing his codicil the testator says that his trust-disposition shall stand in full force with these conditions and alterations. Now, it appears from the terms of the clause founded on that he merely takes occasion to revise his settlement—to bring it up to date, so to speak. That is to say, he says, "As my niece has predeceased me, I recall the bequest of one just and lawful tenth part conveyed to her." That I think is the fair reading. I think it is simply a recall for the purpose of simplicity and clearness of this lapsed bequest.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Claimants Stuart and others (the residuary legatees)—Guthrie, Q.C.—Hunter. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Claimants Stuart's Trustees — Campbell, Q.C. — Cook. Agent — Horatius Stuart, S.S.C.

Wednesday, March 8.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

RIACH *v.* WALLACE.

Process—Summons — Amendment — Error in Christian Name of Pursuer.

Where by a clerical error a pursuer was named in the summons "James" instead of "Francis," there being no dubiety as to his identity—*held* (*rev.* judgment of Lord Ordinary) that the pursuer should be allowed to amend his summons by deleting "James" and substituting "Francis."

On 7th October 1898 there was signeted a summons by James Riach, 20 M'Lean

Street, Plantation, Govan, against James W. Wallace, Practitioner in Medicine, 71 South Cumberland Street, Glasgow, in an action for the reduction of "a pretended decree or interlocutor bearing to have been pronounced in the Sheriff Court of Lanarkshire at Glasgow upon the 8th day of September 1898, in an action purporting to have been brought under The Debts Recovery (Scotland) Act 1867, by the present defender against the present pursuer, for recovery of the sum of £20, 17s. 6d. sterling."

The pursuer averred that in or about August 1898 the defender raised an action in the Debts Recovery Court at Glasgow against him for £20, 17s. 6d.; that the sum sued for was not due by him to the defender; that he instructed his wife to procure a qualified law-agent to appear for him at the diet of compearance and defend the action; that she, instead of instructing a law-agent, appeared in Court herself and made a statement to the Sheriff; that she had no authority to appear for him, and was not entitled to do so under section 4 of the Debts Recovery Act, and the Sheriff had no right to allow her to appear and act; that notwithstanding a decree had been pronounced against him bearing to be a decree *in foro* instead of a decree in absence; that although it bore to be a decree *in foro*, the defender wrongly and maliciously, and contrary to the provisions of sections 9 and 11 of the Act, whereby such decrees were only to be extracted after eight days from their date, and contrary to the uniform practice of the Lanarkshire Sheriff Court, caused the decree to be extracted on 9th September and at once lodged an arrestment, proceeding on said extract in the hands of the pursuer's employers, and thereafter continued to use arrestments against the pursuer, and that the defender refused to withdraw them.

The pursuer pleaded—"(1) The pursuer is entitled to have the said pretended decree reduced in respect it bears to be a decree *in foro*, and yet was pronounced wrongfully and unwarrantably on the motion of the present defender, when the pursuer was neither present nor represented in Court. (2) The defender having wrongfully and maliciously craved and obtained extract of the said pretended decree before extract could have been properly granted in terms of the statute, and contrary to the uniform practice of the Sheriff Court at Glasgow, and having wrongfully and maliciously used arrestments thereupon, is liable in damages and expenses."

The defender lodged preliminary defences and a statement of facts, in which he, *inter alia*, admitted that on 8th September 1898 the Sheriff-Substitute gave decree in an action at defender's instance for £20, 17s. 6d. against Francis Riach, 20 M'Lean Street, Plantation, Govan, at which diet a woman appeared representing herself to be the wife of Francis Riach. He averred that she did so with the consent of Francis Riach, and that the latter knew on the same day that she had done so, but he did not repudiate her conduct. The defender further denied that the decree in the debts recovery action at defender's instance against Francis Riach was not extractable until eight days from its date, and admitted that he refused to withdraw the arrestments used by him.

The defender pleaded, *inter alia*—"(1) No title to sue. (2) The defender not having taken decree against the pursuer, nor having used arrestments against him, should be assoilzied. (7) The pursuer is barred from insisting in the present action in respect that he committed to his wife the charge of attending to the defence of the action wherein was pronounced the decree brought under reduction, and that she defended the same."

After the Lord Ordinary (KINCAIRNEY) had on 15th November closed the record on the summons, preliminary defences and answers, and appointed the cause to be sent to the procedure roll, the pursuer lodged a minute asking to be allowed to amend the summons by deleting the word "James" in the name of the pursuer and substituting "Francis." To this the defender objected and the Lord Ordinary on 25th January refused the motion of the pursuer and reserved the question of expenses.

The pursuer reclaimed, and argued—The law-agent in this case had sent instructions to counsel to raise an action in the name of "Francis" Riach. Counsel by a slip had substituted "James" for "Francis" in the draft summons. When the record came to be adjusted, the Lord Ordinary had been moved on behalf of the pursuer to substitute the correct name, but the defender objected and desired the motion to be made formally by a minute. When the minute of amendment was lodged the Lord Ordinary refused the motion. The amendment should be allowed. The mistake was purely a clerical one. The name in the decree sought to be reduced was "Francis," and he was the only person residing at 20 M'Lean Street. From the defences it was quite clear that the defender was well aware of the identity of the pursuer.

Argued for defender — The Lord Ordinary's judgment was right, whether pronounced on a point of law or a matter of discretion. If the original summons were looked at, it was plain that the alteration of the name would be the introduction of a new pursuer. The proper course where a mistake had been made was to commence the action *de novo* under the correct name—*Macallum*, November 2, 1883, 11 R. 60; *Anderson* v. *Harlowe*, December 12, 1871, 10 Macph. 217.

At advising—

LORD JUSTICE-CLERK—This is a matter in the discretion of the Court. That the error here is merely a clerical one is absolutely certain, because the defender all through his answers and statements of fact refers to the pursuer under the name of "Francis." It so happens that by a mistake on the part of the counsel, who drew the summons (not, I may notice, the present counsel for the pursuer) the name of

'James" was substituted for the name of "Francis." If this proposal to alter the name had the effect of introducing a new party to the case or of making good an arrestment founded on a decree, I would be of opinion that the change should not be allowed. But this is not a case of diligence and there is no suggestion that any harm will or can happen to anyone from our allowing this slip of the pen to be corrected. The motion to amend should never have been resisted and I am of opinion that the defender should be found liable in the expenses of the reclaiming-note.

LORD YOUNG—I am of the same opinion. We were informed that the clerical error was discussed before the case came to the procedure roll, and that the pursuer's counsel explained how it had occurred and asked leave to amend by changing the "James" into "Francis." If the case had been before me as Lord Ordinary, I should have suggested that in such circumstances the name should be changed. We are told that the defender objected, saying that there was no reason why the record should not be closed and the amendment made by formal minute. The record was therefore closed, and thereafter the minute was put in conform to the suggestion made. So that the whole expense incurred since 15th November, when the record was closed and the case sent to the procedure roll, has been occasioned by the defender's resistance to this reasonable and proper motion.

In these circumstances I think that the present interlocutor of the Lord Ordinary is erroneous and ought to be recalled and the amendment allowed, and the defender found liable in expenses since the date of closing the record.

LORD TRAYNER—I also am of opinion that the Lord Ordinary's interlocutor should be recalled, and that the pursuer should be allowed to amend his summons. There is here no introduction of a new pursuer; the wrong name has merely been substituted by a clerical error, and there is no dubiety as to who is the person pursuing the action. The defender has no cause to complain, for it is quite evident from his defences that he knew the correct name of the pursuer.

I am of opinion, however, that the pursuer ought to be allowed expenses only from the date of the interlocutor reclaimed against.

LORD MONCREIFF—I am also of opinion that the pursuer should be allowed to amend. His identity is clearly established by the decree which the defender obtained against him in the Debts Recovery Court.

I agree with your Lordship in the chair and Lord Trayner that the pursuer should get expenses from the date of the reclaiming-note.

The Court pronounced this interlocutor:—

"Recal the interlocutor reclaimed against: Allow the pursuer to amend the summons in terms of his minute: Find the pursuer entitled to the expenses of the reclaiming-note."

Counsel for the Pursuer—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defender—W. Thomson. Agents—Macrae, Flett, & Rennie, W.S.

Wednesday, March 8.

SECOND DIVISION.

[Sheriff of the Lothians.

JAMES GIBSON & SON, LIMITED *v.* GIBSON.

Removing—Summary Ejection—Dwelling-house Occupied as Part of Emoluments—Manager—Managing Director—Dismissal.

A limited liability company of millers raised against a person designed as "formerly manager for the pursuers" an action to have him summarily ejected from a dwelling-house which they averred that he occupied as part of the emoluments for his service. They averred that the defender had resigned his "situation," and that his resignation had been accepted by them, and further that having heard that the sufficiency of the acceptance might be questioned, they had dismissed him from the service of the company.

From the productions it appeared that the defender held the position of chairman of the board of directors, and of managing director of the company. The defender denied that he had resigned or had been legally dismissed.

Held that the pursuers' averments were not relevant to entitle them to so drastic a decree as that of summary ejection.

James Gibson & Son, Limited, incorporated under the Companies Acts 1862-1890, and having their registered office at Brunstane Mills, Musselburgh, raised in the Sheriff Court of the Lothians at Edinburgh an action against George Gibson, designed as "formerly manager for the pursuers, and residing at Wellington Place, Brunstane, Musselburgh, in which they prayed the Court summarily to eject the defender from the dwelling-house at Wellington Place foresaid.

The pursuers averred—"(Cond. 1) The pursuers are tenants of the subjects known as the Brunstane Mills, Musselburgh, with the houses and land attached thereto, situated in the parish of Duddingston and county of Edinburgh. (Cond. 2) The defender George Gibson was employed by the pursuers, and part of the emoluments for his services was the free use of the dwelling-house at Wellington Place aforesaid, now occupied by him, being part of the said subjects. (Cond. 3) The defender resigned his situation with the pursuers, and his resignation was accepted by the pursuers on 20th October 1898. His services