'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

with them terminated on 31st October 1898. On the termination of the defender's services with the pursuers, the defender was bound to evacuate the possession of said dwelling-house occupied by him as a servant of the pursuers, but he has refused to do so. The pursuers on 17th November 1898, while maintaining the sufficiency (which they heard the defender was likely to question) of the acceptance of Mr Gibson's resignation as terminating his employment with the company, dismissed him from the service of the company for misconduct. (Cond. 4) The defender's possession or occupation of the said dwelling-house is precarious, without any right or title, and without the consent of the pursuers. The defender has been required by the pursuers to remove therefrom, but he refuses or at least delays to do so, and this application has accordingly been rendered necessary."

The pursuers pleaded—"(1) The defender having no right or title to possess the subjects libelled on presently occupied by him, the pursuers are entitled to have him ejected therefrom as craved. (2) The defender's service with the pursuers having terminated, decree should be pronounced as craved, with expenses."

The defender averred that he was managing director of the pursuers' firm, and chairman of the company, and denied that he had resigned his situation or had been legally dismissed. He pleaded, *inter alia* —"(1) The pursuers' statements are irrelevant, and insufficient to support the conclusions of the petition."

From the productions in the case it appeared that the defender held the position of chairman of the board of directors, and of managing director of the company.

On 19th January 1899 the Sheriff-Substitute (MACONOCHIE) pronounced the following interlocutor:—"Having considered the record and productions in the cause, sustains the first plea-in-law for the defender; dismisses the action."

"*Note.*—A decree of summary ejection of a person from his house is a serious matter, and is not one which, in my opinion, the Court should grant unless the pursuer has stated his case on record very clearly, and unless it is plain that the defender falls within one of the classes to which the process has been held to apply. The process is undoubtedly available against an employee whose occupancy of the house is incidental to his employment; if such a one refuses to vacate the house at the termination of his employment he is liable to be summarily ejected. The pursuers here, who are a limited company, ask the Court 'summarily to eject' George Gibson, 'manager for the pursuers,' from the house at Wellington Place occupied by him, and of which they are tenants. They aver that the defender 'was employed by the pursuers, and part of the emoluments for his services was the free use of the dwelling-house' in question. It will be observed that the pursuers do not say what the employment of the defender by them was, how it was constituted, for what services the house formed part of the emoluments, or how any contract there was was terminable. It appears, however, from the productions, and it was admitted by the pursuers at the debate, that the position which the defender held was that of a director of the company, and that he further held the positions of chairman of the board of directors and of managing director of the company. The designation of the defender in the petition is thus clearly a misnomer, and I think it is very doubtful whether the chairman of the directors and managing director can properly be termed an employee of the company. In any case, however, the nature of his position should have been set forth in the condescendence. The prayer of the petition is, however, rested on the ground that the defender was a servant of the company; and accordingly the pursuers go on to say (Cond. 3) 'The defender resigned his situation with the pursuers, and his resignation was accepted on 20th October 1898. On the termination of the defender's services with the pursuers, the defender was bound to evacuate the possession of said dwelling-house occupied by him as a servant of the pursuers;' and they further state that not only was his resignation accepted, but that on 17th November 1898 they 'dismissed him from the service of the company for misconduct.' Now, they do not state what 'situation' he resigned, whether that of ordinary director, chairman of the board, or managing director, nor in which capacity he occupied the house. Again, they do not say from which of these positions they dismissed the defender, assuming that they had power to dismiss him at all. These are all things which should have been stated, and yet they have been carefully omitted from the petition. There are evidently difficult legal questions raised in the case, and I do not think that the averments on record are relevant to entitle the pursuers to so drastic a decree as that of summary ejection."

The pursuers appealed to the Sheriff (RUTHERFURD), who on 3rd February 1899 adhered.

"*Note.* — The Sheriff agrees with the Sheriff-Substitute in thinking that the pursuers' averments are not sufficient to support the prayer of the petition. The pursuers no doubt allege that the defender is a precarious possessor of the dwelling-house referred to on record, 'without any right or title, and without the consent of the pursuers;' but questions of difficulty have arisen between the parties, both as to the defender's alleged resignation of office as managing director, and as to the pursuers' power to dismiss him in the manner in which they did, and it does not appear to the Sheriff that he can be regarded as being in possession of the house like a mere squatter, without any title at all, or that the questions which have arisen between him and the pursuers can be properly or conveniently disposed of in a process for summary ejection — *Robb* v. *Brearton*, 1895, 22 R. 885."

The pursuers appealed, and argued—It

was relevantly averred on record that the defender had resigned his office, and that he had been dismissed. Although he could not be removed as a director, yet he could be dismissed as manager of the company, and it was in that capacity that he had been dismissed. He had the use of the house as part of his emoluments as manager, and his title to the house at once came to an end when he was dismissed from the service of the company. The right of occupancy of a house as incidental to service was a different thing from a tenancy. It was a precarious title, and summary ejection was competent—*Scott* v. *M'Murdo*, Feb. 4, 1869, 6 S.L.R. 301, opinion of Lord Deas, 302; *Whyte* v. *School Board of Haddington*, July 9, 1874, 1 R. 1124; Dove Wilson's Sheriff Court Practice (4th ed.) 485.

Argued for defender—If the averments on record and the facts brought out in the productions were taken into account, it was plain that summary ejection was not a competent process in the present case. There must be a definite and specific allegation of a vicious or precarious title before an action of summary ejection could be held relevant—*Hally* v. *Lang*, June 26, 1867, 5 Macph. 951; *Scottish Property Investment and Building Society* v. *Horne*, May 31, 1881, 8 R. 737; *Robb* v. *Brearton*, July 11, 1895, 22 R. 885. There was no such allegation here. The pursuers could not dismiss the defender, who was the managing director of the company, and possessed the house as such. Directors were not entitled to remove a managing director before the expiry of his period of office—*Imperial Hydropathic Hotel Co., Blackport* v. *Hampson*, 1882, L.R., 23 Ch. D. 1. In view of the disputed legal questions raised in the action, summary ejection was neither a proper nor a competent remedy.

LORD JUSTICE-CLERK—I am of opinion that the interlocutor of the Sheriffs should be adhered to. It does not appear to me that the pursuer has put forward any argument showing that he has a right to a different judgment. Indeed, what has been said has rather tended to confirm my belief that the decision arrived at is sound.

LORD YOUNG and LORD TRAYNER concurred.

LORD MONCREIFF—I am of the same opinion. I think that the process of summary ejection only applies where the title is precarious—either where the person proceeded against never had a title at all, or where he having had a title, it has been brought to an end by a competent Court or in some competent manner.

The Court dismissed the appeal, of new dismissed the action, and decerned.

Counsel for the Pursuers—Ure, Q.C.—Cook. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Defender — Cooper. Agents—Millar, Robson, & M'Lean, W.S.

Wednesday, March 8.

FIRST DIVISION.

[Lord Pearson, Ordinary.

HANDYSIDE AND ANOTHER (HADDEN'S TRUSTEES) *v.* HADDEN AND OTHERS.

Insurance—Policy of Insurance on Life of Son—Proof of Policy being Property of Father.

A life insurance policy payable to his heirs, executors, administrators, and assigns was taken out by a young man eighteen years of age. It passed at once into the keeping of his father, who retained possession of it, and in whose repositories it was found on his death twenty-five years afterwards. The premiums on the policy were paid by the father down to the date of his death, and in his will the father described it as "the policy of insurance belonging to me on the life of my son," and directed the trustees to pay the premiums on it until the son's death.

In a competition between the representatives of the son and the testamentary trustees of the father, *held* (*aff.* judgment of Lord Pearson) that the policy was the property of the father.

Contract — Approbate and Reprobate — Trustee—Power to Compromise.

An insurance policy on the life of his son, and payable to his son's representatives, remained in possession of a father, who paid all the premiums thereon down to his death, and directed his testamentary trustees thereafter to pay the premiums until the son's death. After the testator's death the trustees took an assignation from the son of his interest in the policy, binding themselves at the same time to pay the proceeds of the policy at maturity, less the total amount of premiums paid thereon, to the son's daughter.

In a competition between her and the father's testamentary trustees, who had uplifted the proceeds of the policy and who claimed that these were part of the residue of the father's estate—*held* that the assignation was binding on the trustees, in respect (1) that it was a probative writ, (2) that the transaction with the son was *prima facie* reasonable, inasmuch as he alone could give the trustees an active title to the policy and give security for the repayment of the premiums, and (3) that the trustees had not challenged the deed on record.

Insurance—Void Policy—14 Geo. III. c. 48, sec. 1.

If the insurance company do not choose to plead the Statute 14 Geo. III. c. 48, the question who is is entitled to the proceeds of policy may be determined as if the statute did not exist.

This was an action of multiplepoinding raised by David Handyside and another,