sion on the issue proposed by the pursuer the Court suggested that the cause should be tried on the record without issues. The pursuer's counsel consented, but the defenders' counsel stated that before consenting he desired the opinion of the Court on the question whether, if the case were tried on the record, copies of the record ought to be laid before the jury. If so, he could not consent.

The Court of Session Act 1868, section 27, provides, with regard to jury trials in causes originating in the Court of Session, that "if the parties consent, and the Lord Ordinary approves, it shall be competent to direct the cause to be tried by jury without adjusting any . . . issue, and such cause shall be tried, as nearly as may be, in the same manner in which causes are tried in which issues have been adjusted according to the present law and practice."

The Act of Sederunt, 10th March 1870, provides (section 1, sub-section 5) that "it shall be competent to try any cause by jury on the record without issues if it shall appear to the Lord Ordinary expedient that such cause shall be so tried."

The Court *were of opinion* that copies of the record should not be laid before the jury, the Lord Justice-Clerk *observing* that "the proper course is for the Judge to put before the jury the points that arise on the record. It is quite improper that the jury should have the record itself in their hands."

The defenders' counsel then agreed that the cause should be tried on the record.

Counsel for Pursuer—Rhind—Gunn. Agent—Robert Stewart, S.S.C.

Counsel for Defenders — Comrie Thomson. Agents—Millar, Robson, & Innes, S.S.C.

Tuesday, November 18.

OUTER HOUSE.

[Lord Kinnear.

BAIN *v.* GRANT.

*Glebe—Prescription—*Ultra vires.

In 1756 a presbytery resolved to convey to a heritor, at a stipulated rent or feu-duty, the ground forming a glebe which lay in a situation inconvenient for the minister of the parish. No deed of conveyance was ever executed. In 1884 the minister of the parish and the presbytery sought to vindicate the glebe from the heir of the heritor, who pleaded prescriptive right. *Held* (assuming the validity of the plea if there had been a deed of conveyance) that a mere resolution of the presbytery to grant a title was not a good ground on which to found prescription.

The parishes of Duthil and Rothiemurchus were about the year 1630 united into one parish.

At a meeting of the Presbytery of Abernethy, held at Rothiemurchus on the 6th July 1756, a joint petition was presented by Captain Patrick Grant, younger of Rothiemurchus, and Mr Patrick Grant, minister at Duthil. The petition stated that there was a glebe belonging to the minister of Duthil, situated so as to be "in the bosom of the Mains of Rothiemurchus," and that the situation was distant from the manse, and very inconvenient for both parties. They prayed the presbytery to make over and dispone the said glebe to Captain Grant, his heirs and successors in perpetuity, he being willing to pay the minister of Duthil and his successors in office a yearly rent or feu-duty of twenty pounds Scots.

The presbytery thereafter appointed two persons to inspect the glebe, and to present a report to the next meeting of presbytery, giving an estimate of the value and yearly rent of the same. At the next meeting of presbytery, held at Aviemore on 3rd August 1756, the report was presented, which after describing the glebe as to the south of Gualin Claoigh, to the west of the kirk-yard, to the north of Lochan Coinich, to the east of the Crasks of Liandell and Polnageddis, to the north betwixt it and the Spey, and stating that the reporters "having perambulated amid the said glebe, commonly known by the name of Croft-na-h'eglaish or Church Croft, did seriously consider of the extent and boundaries thereof, and we judge and compute it to be about an 'acker and and an half acker' of arable ground, which conform to the best of our skill we esteem worth six pounds Scots per acker, amounting in whole value to sum of nine pounds money aforesaid."

The presbytery thereafter having considered the report and petition, and for various reasons stated in the minute, such as the fact that the glebe was "a small spot of ground situate in the very bosom of Rothiemurchus, his mains," the inconvenience both to the owner of Rothiemurchus and to the minister of Duthil caused by the position of the glebe, the support which the Rothiemurchus family had given to religion and the minister, and the rent which the laird of Rothiemurchus promised to pay, which was greater than the minister of Duthil had before secured, unanimously agreed that the moderator should sign a deed in name of the presbytery, "disponing, transferring, and making over the said glebe to Captain Patrick Grant of Rothiemurchus, his heirs and successors or assignees in perpetuity;" and they also agreed "that writs be at this day extracted to the above effect." No such deed was executed, or at all events, at the date of the action now reported, none was known to have been ever executed, as no deed transferring the glebe to the proprietor of Rothiemurchus was at the date of this action to be found.

Captain Grant, however, entered into possession of the glebe, and he and his successors in the lands of Rothiemurchus continued to pay the annual feu-duty or rent of twenty pounds Scots to the minister of Duthil.

On 19th October 1883 the Rev. James Bain, the present minister of the parish of Duthil and Rothiemurchus, with consent of the Presbytery of Abernethy, raised an action against Sir John Peter Grant of Rothiemurchus. In this action the pursuer sought declarator "that All and Whole the lands and others sometime called by the name of and known as Croft-na-h'eglaish or Church Croft, extending to 12 acres or thereby, and which is bounded and extends and lies as follows,—viz., to the south of Gualin Claoigh, or ridge of land forming the south side of the churchyard to the west of

the kirkyard, to the north of Lochan Coinich, to the east of the Crasks of Liandell and Polnageddis, and to the north betwixt it (Liandell) and Spey, as the said croft is delineated and coloured blue on the Ordnance Survey map herewith produced, extending the said croft from Liandell northwards along the eastern bank of the river Spey 400 yards or thereby, thence eastwards from the bank of the river in a straight line to the north-west corner of the churchyard 150 yards or thereby (which straight line forms a continuation of the northern boundary of the churchyard), from the south-east corner of the churchyard to Lochan Coinich 60 yards or thereby, then southwards from the southern extremity of Lochan Coinich to Liandell 190 yards or thereby, and westwards along Liandell to the river Spey, or in whatever manner the said Croft-na-h'eglaish or Church Croft may be bounded or described, or whatever may be the extent thereof—constitutes, forms, and is the glebe of the ancient parish of Rothiemurchus, now part of the present parish of Duthil, and is thus the glebe or part of the glebe of the said parish of Duthil, and that the pursuer and his successors in the office of minister of the said parish of Duthil are entitled to the absolute, unlimited, uncontrolled, and peaceful use, possession, and enjoyment of the said lands and others, as the glebe of the said parish of Duthil in all time coming in liferent successively, in the same manner and to the same effect as glebes are possessed and enjoyed by the parochial clergy of the Church of Scotland, and with all rights and parts and pertinents effeiring to the said glebe: And further, it ought and should be found and declared by decree of our said Lords that the defender, the said Sir John Peter Grant, has not now, and that he and his authors and predecessors never had, any right, title, or interest in or to the said lands and others before described." There was also a conclusion to have the defender ordained to remove from the lands.

The pursuer stated that the united parish of Duthil and Rothiemurchus was formerly composed of two parishes — viz., Rothiemurchus and Duthil, that each of these had a glebe, and that when the two parishes were united in 1630 these two glebes became the glebe of the new parish. The whole of the ancient parish of Rothiemurchus lay within the lands of the defender, and had formerly been worked by the minister of Duthil; but, as shown by the aforementioned minutes of presbytery, an arrangement was come to in 1756 by which the proprietor of Rothiemurchus paid twenty pounds Scots yearly to the minister of Duthil in lieu of his glebe. The defender, Sir John Peter Grant, was duly infeft in the kirk lands of Rothiemurchus on 18th December 1874. It was averred that these lands did not include the aforesaid glebe.

The pursuer also averred that the twenty pounds Scots yearly had been paid as rent for the lands, and that the defender had no right or title to the property of the glebe. He averred that the boundaries as set forth in the old titles contained 12 acres, and that though it was stated in some of them that the glebe was 1½ acres, that referred to the portion under cultivation, according to an ancient Highland custom in computing acreage to take into account only the ground under cultivation.

The defender alleged that in the year 1756 the glebe of Rothiemurchus had been disponed and conveyed in property to him, as shown by the minutes of presbytery, although the conveyance itself had gone amissing. Since that date the said glebe had been possessed as part of the estate of Rothiemurchus, and under the titles thereof, or otherwise and alternatively under the said title obtained from the minister and presbytery. He also stated—"The area of ground described in the summons and shown on the Ordnance plan produced is not and never was the glebe of the said parish. It consists to a large extent of ground reclaimed from the river Spey about forty years ago, when the former course of the said river was embanked and its course diverted considerably westward. The said area of ground now claimed has been from time immemorial, or at all events for the prescriptive period, possessed by the defender and his authors under their infeftments as part of the estate of Rothiemurchus, by which the said area of ground is on all sides surrounded. The said alleged area of ground is about sixteen miles from the pursuer's manse."

The pursuer pleaded—"The defender Sir John Peter Grant having no right to the lands described in the summons, and the same being the glebe of the said ancient parish of Rothiemurchus, the pursuer is entitled to decree of declarator and removing as concluded for."

The defender pleaded—"(2) The area and ground claimed being the property of the defender, and having been possessed by him and his authors for the prescriptive period, the defender should be assoilzied."

After proof the Lord Ordinary found—That prior to 1756 the lands in the parish of Rothiemurchus, some time called and known as Croft-na-h'eglaish or Church Croft, extending to one acre Scots and one-half or thereby of arable ground, formed the glebe of the said parish; that on 3d August 1756 the presbytery agreed to transfer that glebe to Captain Patrick Grant, then of Rothiemurchus, his heirs, successors, or assignees in perpetuity, for an annual payment of twenty pounds Scots as a yearly rent or feu-duty; that that agreement was *ultra vires* of the presbytery, and was and is invalid and ineffectual; that the pursuers were not precluded by that agreement, or by possession following thereon, from asserting the right of the minister of that parish to that glebe, and that the defender had failed to instruct a sufficient title to support his plea of prescription. He therefore repelled the second plea-in-law for the defender, and before answer remitted to Mr George J. Walker, land valuator, Aberdeen, to inspect the ground and report as to the boundaries of the glebe, having regard to the description of the same contained in the minutes of the Presbytery of Abernethy of 3d August 1756, and also to the foregoing finding as to the extent of the superficial area.

"*Opinion.*—It is proved by the minutes of presbytery that prior to 1756 the minister of Rothiemurchus possessed a glebe in the situation alleged by the pursuers, and the defender is not in a position to maintain that the minutes are inadmissible in evidence against him, because he alleges that he and his predecessors have possessed the ground in question under a conveyance granted by the presbytery in conformity with the

agreement set forth in their minutes; and he produces and refers to the minutes as evidence of the terms of that conveyance which is said to be missing.

"It cannot be disputed that the agreement to transfer the glebe in perpetuity to the laird of Rothiemurchus was *ultra vires* of the presbytery. It would appear that the cure was vacant at the date when the presbytery resolved to make the transfer. But had it been otherwise the consent and concurrence of the minister would not have served to validate the transaction, which was plainly illegal, as an alienation of part of the benefice.

"The question therefore comes to be, whether the defender has acquired by prescription a right of property in the glebe. There can be no doubt that the title of a heritor to ground which was formerly glebe may be supported by prescription, and it is admitted that the proprietors of Rothiemurchus have been in undisturbed possession since the transaction of 1756.

"But the defender has produced no title to support a plea of prescription. It is said that glebe land being allodial a personal title is sufficient, and in the case of *Liston* v. *Smith*, Hume 475, there is authority for holding that a charter would be sufficient although not followed by infeftment. If the defender could have referred his possession to a conveyance from the minister or the presbytery there might have been a question whether such a title might not have been supported by the decision in *Liston* v. *Smith*. But he produces no title whatever except the agreement to grant a perpetual right which is embodied in the minutes of presbytery. The only ground of possession, therefore, is not a personal title to land, but an illegal and ineffectual agreement to grant a title. It is said that possession for the prescriptive period bars the objection that the title proceeded *a non domino* or *a non habente potestatem*. But this is true only where possession has been held by a title complete in itself, because it is in that case alone that the Statute 1617, c. 12, bars inquiry as to the right by which such title has been constituted. The principle is stated by Lord Moncreiff in the well-known case of the *Lord Advocate* v. *Graham*, 7 D. 183, where he says:—'I hold that it is the purpose of prescription to exclude all inquiry as to whether titles habile in their form, upon which prescriptive possession has followed, were in their original nature and constitution good or bad, and specially the inquiry whether the author from whom they have proceeded had power to grant them or not.' But it is indispensable that the title should be habile in form; and the defender has been unable to satisfy that condition.

"The same point arose for judgment in *Scott* v. *Ramsay*, 5 S. 340 (N.E. 367), where it was held that an agreement by the presbytery to grant a feu of a glebe was insufficient to support a prescriptive right, no such feu having in fact been granted; and the decision appears to me to rule the present case.

"It was maintained, alternatively, that the defender's title to the estate of Rothiemurchus was sufficient to support his possession. But the possession of the glebe cannot be referred to the title to the estate. It is not suggested that the title as it stood in 1756 was altered in respect of the agreement, and that the possession is referable to the agreement is manifested by the payment of the stipulated rent or feu-duty of twenty pounds Scots.

"The pursuers maintain that the glebe must be held to have extended to 12 acres. But this is inconsistent with the minute upon which they themselves found, and in which it is set forth that 'two men of skill appointed by the presbytery for the purpose having perambulated around the said glebe, commonly known by the name of Croft-na-h'eglaish or Church Croft, did seriously consider of the extent and boundaries thereof, and judged and computed it to be about an acre and an half of arable ground.' There is no room for doubt as to the meaning of this report, and the alleged custom by which it is proposed to qualify its construction is clearly inadmissible, and if it were proved would be inapplicable to such a document. The pursuer's case as to the extent of the glebe appeared to be founded mainly upon a supposed presumption that a grass glebe must have been designed of the statutory extent. But there is no such presumption. The glebe was arable; and it does not appear whether it was designed under the statutes or whether it had been enjoyed as a part of the benefice before the Reformation. But in either case it is not at all impossible that whether from deficiency of kirk lands or from some other cause the glebe may have been of less than the statutory dimensions. It is said that in that view the pursuer will be entitled to an addition to make up the deficiency. But that cannot be assumed in this action. The pursuer is the minister of a united parish, and his right to an additional designation—which may probably be found to depend upon the extent of glebe land he enjoys in all taking both parishes into account—can only be determined in a proper process for that purpose.

"The proof which has been led does not enable me to determine the boundaries, and considering the extent to which the ground has changed since 1756 this is not surprising. Assuming the pursuer's right to a glebe of one acre and a-half to be established, the most convenient course will be to obtain a report from a man of skill before disposing of the conclusions as to the boundaries."

Thereafter, on consideration of Mr Walker's report, the Lord Ordinary issued the following interlocutor—"Finds that All and Whole the lands and others sometimes called and known as Croft-na-h'eglaish or Church Croft, lying within the parcels of land forming the estate of Rothiemurchus, as follows, viz., to the south of Gualin Claoigh, to the north of Lochan Coinich, to the east of the Crasks of Liandell and Polnageddis, to the north betwixt it and Spey, and extending to one acre and a-half of Scots measure, or one acre and 891 decimal parts of an acre Imperial measure, as the same is delineated and coloured pink on the plan, constitutes, forms, and is the glebe of the ancient parish of Rothiemurchus, now part of the present united parishes of Duthil and Rothiemurchus; and to said extent and effect, finds, decerns, declares, and ordains in terms of the conclusions of the summons: *Quoad ultra* assoilzies the defender: Finds the pursuer entitled to expenses, subject to modification."

The Lord Ordinary subsequently modified the expenses by one-third in respect of the pursuer's

failure to establish a claim to a glebe of 12 acres in extent.

Counsel for Pursuer—Pearson—M'Kechnie. Agent—H. W. Cornillon, S.S.C.

Counsel for Defender—Mackintosh—Guthrie—J. P. Grant. Agents—J. Clerk Brodie & Sons, W.S.

Tuesday, November 18.

OUTER HOUSE.

[Lord Fraser.

ROBERTS *v.* CRAWFORD.

Process—Citation—Citation by Registered Letter—Citation Amendment (Scotland) Act 1882 (45 *and* 46 *Vict. cap.* 77), *secs.* 3 *and* 4.

The summons in a process of maills and duties had been served by registered letter according to the provisions of the Citation Amendment (Scotland) Act 1882. The letter was returned marked "Refused." The Lord Ordinary not being satisfied that the letter had been tendered at the defender's proper address and refused by him, *refused* to give decree in the undefended roll, and *appointed* service to be made of new according to the former law and practice.

The Citation Amendment (Scotland) Act 1882 (45 and 46 Vict. cap. 77), provides:—Sec. 3—"From and after the commencement of this Act, in any civil action . . . any summons or warrant of citation of a person, whether as a party or witness, or warrant of service or judicial intimation, may be executed in Scotland by an enrolled law-agent, by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served, or to his last known address, if it continues to be his legal domicile or proper place of citation, a registered letter by post, containing the copy of the summons or petition or other document required by law in the particular case to be served with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation."

Section 4, sub-sec. 5—"If delivery of the letter be not made because the address cannot be found, or because the house or place of business at the address is shut up, or because the letter-carrier is informed at the address that the person to whom the letter is addressed is not known there, or because the letter was refused, the letter shall be immediately returned through the Post-Office to the clerk of court, with the reason for the failure to deliver marked thereon, and the clerk shall make intimation to the party at whose instance the summons, warrant, or intimation was issued or obtained, and shall, where the order for service was made by a judge or magistrate, present the letter to the judge or magistrate from which the summons, warrant, or intimation was issued, and he may, if he shall think fit, order service of new, either according to the present law and practice or in the manner hereinbefore provided, and if need be substitute a new diet of appearance. Where the judge or magistrate is satisfied that the letter has been tendered at the proper address of the party or witness and refused, he may, in the case of a witness, without waiting for the diet of appearance, issue second diligence to secure his attendance, and in the case of a party hold the tender equal to a good citation."

In this action of maills and duties the summons had been served under the provisions of the Citation Amendment (Scotland) Act by registered letter. The letter had been returned with the endorsement "Refused, A. G.," and decree was sought in the undefended roll.

The Lord Ordinary issued the following interlocutor:—"The Lord Ordinary not being satisfied that the registered letter was tendered at the proper address of the defender Thomas Crawford, appoints service of the summons of new, with a copy of this interlocutor, to be made upon the said defendant, according to the law and practice in existence at the date of the passing of the Act 45 and 46 Vict. cap. 77, and allows him to enter appearance within eight days after service."

"*Note.*—I cannot grant decree in absence in this case, because, in the words of sec. 4, sub-sec. 5, of the Act 45 and 46 Vict. cap. 77, I am not satisfied that the registered letter has been tendered at the proper address of the defender and refused by him. The evidence that has been produced to me is simply a marking on the back of the registered letter in these terms, "Refused, A. G." It does not appear from the registered letter itself who the person was that made this notandum, but one may conclude that it was the post-runner. Assuming this to be the case (which in such a matter as the execution of a summons is assuming a good deal) the question still remains who it was that refused to receive the letter. Was it the defender himself, or his wife, or a servant? And in the event of it having been any other person than the defender himself, the question would necessarily arise whether such a refusal must be taken as a refusal by the defender. It is quite true that by the statute of 1540, cap. 75, a messenger-at-arms is authorised, in the event of not finding the defender personally, to leave the copy of the summons with a servant, and if the servant refuse to take it, the messenger is then authorised to affix the copy of the summons to the gate or door of the defender's house—now in modern practice by sticking the copy summons into the lockhole. But this is entirely statutory, and there is no provision in the Act of 1882 to the effect that the delivery of a registered letter to a servant would be held delivery to the defender, or that the refusal to receive the summons made by a servant is to be taken as the act of the defender. It is obvious that further legislation is needed if so wide a construction is to be given to the recent statute. And besides providing for the act of the servant being held to be that of the master, in the case, but only in the case, where the master himself could not be found, it would be necessary also to enact that the post-runner shall certify (as a messenger is obliged to do) to whom he tendered the letter, and by whom it was refused, and