that the case was taken in the presence of two magistrates named. There as here the conviction bore that "the magistrate," in the singular, pronounced the conviction, and only the signature of one magistrate was appended without anything to indicate that he signed for anyone but himself. My own opinion is that these defects are fatal to the conviction, and I should have so held had there been no decision in the books upon the matter. I cannot consider it as a matter of form. I think a conviction is in substance bad when the record bears that two magistrates tried the case, and there is nothing whatever on the face of the conviction from which it appears that one of the magistrates concurred in the conviction and sentence. But even if I had difficulty in the matter I would follow what has been already decided. I adopt the words of Lord Ivory when, treating this not as a matter of form but of substance, he says—"The proceedings in question were conducted before two magistrates and only one signs the conviction. He does not do that as preses of the Court but in his individual capacity, and there is nothing to show that the other magistrate concurred with him in that sentence or in his opinion of the guilt of the complainer. On this ground the sentence must be quashed."

I notice that Lord Deas, who differed, said he was not sorry that the decision should be as it was, "because the result will be to establish a more correct practice." To allow this conviction to which exactly the same objections apply would be once more to disturb the correct practice, and that I should not be disposed to do even if I felt any difficulty in forming my own judgment.

I am therefore of opinion that this conviction must be quashed.

Lord Young—I am of opinion that there are no grounds for setting aside this conviction. It is stated—and there is no reason to doubt the statement—that Bailie James Scott was the presiding magistrate, and that Bailie Donald was present merely for the purpose of becoming familiar with the procedure in the Court. The conviction bears that "the Magistrate," in respect of the evidence adduced, found the complainer guilty, and the Magistrate by whom the conviction bears to have been made signs it. It was not disputed that in this Police Court one magistrate is a quorum, and one magistrate is none the less a quorum, or the less competent to act for himself, because there is another magistrate sitting alongside of him. A quorum of the Inner House in the Court of Session consists of three judges. If four judges are sitting, and if one leaves, the three remaining judges are at liberty to pronounce judgment. It is the same in an inferior court. A contrary rule would be against good sense. There is no allegation or presumption that the two magistrates sitting on the bench differed in opinion. In the conviction only one magistrate is referred to as having acted. In the conviction no mention is made of the presence of another magistrate. So that the ground of suspension comes to be that the Clerk of Court in recording the earlier proceedings erroneously and superfluously put in the name of another judge who was sitting on the bench. This mistake of the Clerk of Court does not seem to me to be a ground for setting aside the conviction. In my judgment there is no ground whatever for setting aside this conviction, which bears to be by Bailie Scott, and which is signed by him and by him alone.

Lord Kyllachy—I concur with your Lordship. I think the case is ruled by the decision in the case of *Williamson*—a decision which I do not see any ground to disturb. I do not see my way to go behind the record and to have a proof or other inquiry as to whether Bailie Donald was on the bench merely as a spectator. Accepting the record, the facts are, as it seems to me, identical with those in the case of *Williamson*.

The Court sustained the bill of suspension.

Counsel for the Complainer—A. S. D. Thomson — Munro. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Respondent—T. B. Morison. Agents — Macpherson & Mackay, S.S.C.

COURT OF TEINDS.

Friday, October 26, 1901.

OLIVER *v.* HERITORS OF MARYHILL.

Teinds—New Parish Disjoined and Erected under Acts of 1707 *and* 1844 *— Manse and Glebe—Claim by Minister for Manse and Glebe in Disjoined and Erected Parish —Liability of Heritors—Withdrawal of Conclusion for Allowance in Lieu of Manse and Glebe in Summons of Disjunction and Erection of Parish—Act* 1707, *cap.* 9—*New Parishes* (*Scotland*) *Act* 1844 (7 *and* 8 *Vict. cap.* 44).

The summons of disjunction and erection of a new parish brought in 1850 under the Act of 1707, cap. 9, and the New Parishes (Scotland) Act 1844, contained, *inter alia*, a conclusion for the modification of an "additional allowance" over and above a competent stipend to the minister "for and in place of a manse, offices, glebe, and grass ground." Subsequently the pursuers put in a minute asking leave to withdraw this conclusion of the summons, in respect that the Crown as titular of the teinds objected to the conclusion in question. The conclusion in question was accordingly withdrawn, and the final judgment and decreet in the process of disjunction and erection of the parish contained no decerniture for a manse or glebe or any allowance in lieu thereof. Funds

were afterwards raised by voluntary subscription and a dwelling-house was built and dedicated under a trust to the use of the minister of the parish.

Held that, having regard to the footing upon which the parish was erected, the present incumbent of the parish had no claim against the heritors of the parish for a manse and garden or glebe and minister's grass.

A petition was presented to the Presbytery of Glasgow by the Rev. John Oliver, minister of the parish of Maryhill, praying the Presbytery, after the usual preliminary procedure, to design and set apart a piece of ground for a manse, offices, and garden to the petitioner as minister of the parish of Maryhill, and his successors in office, and to appoint the necessary plans, specifications, and estimates to be procured, and to authorise the necessary contract to be entered into for the building of the manse, and to design and set apart a glebe and grass glebe for a horse and two cows for the petitioner as minister of the parish of Maryhill, and his successors in office, and to remit to the Clerk of Court or other proper person to prepare a scheme of division of the expense of providing a manse, garden, offices, glebe, and minister's grass among the whole heritors of the parish.

The Presbytery of Glasgow on December 5th 1900 pronounced the following deliverance:—"That the Presbytery having heard parties, Grant the prayer of the petition, and find that the minister of Maryhill, as the minister of a *quoad omnia* parish, and being a burghal landward parish, is legally entitled to a manse, offices, glebe, and grass-ground."

The heritors of the parish of Maryhill, and William Borland, writer, Glasgow, their clerk, brought a petition in the Sheriff Court of the county of Lanark at Glasgow setting forth the aforesaid petition presented to the Presbytery of Glasgow by John Oliver, minister of the parish of Maryhill, and the aforeaid deliverance pronounced by the Presbytery. The petitioners stated that they desired to appeal the said deliverance in terms of the Ecclesiastical Buildings and Glebes (Scotland) Act (31 and 32 Vict. cap. 96), sections 3 and 4, and prayed the Sheriff to stay the proceedings before the said Presbytery, and to dispose of the said petition by recalling said deliverance and dismissing the said petition.

The reasons of appeal lodged by the heritors contained, *inter alia*, the following statements:—"By decree of disjunction and erection, dated 10th July 1850, the parish of Maryhill was formed out of the Barony Parish of Glasgow.

"The church of Maryhill was erected by voluntary subscriptions in or about the year 1824, and is and has all along been vested in trustees for behoof of the minister and congregation thereof.

"Before the division of the Barony Parish of Glasgow the heritors thereof had provided a glebe, and by Statute 42 Geo. III. c .86, passed on the 22nd June 1802, parliamentary authority was obtained to feu the glebe. Since the passing of said Act the minister of the Barony Church has been in receipt of the rents and feu-duties payable therefrom amounting to upwards of £400 per annum. On 17th April 1770 the heritors of the Barony Parish granted to the minister £25 per annum in the name of manse rent, and on 27th September 1804 the allowance was increased to £30, which was accepted by the minister in lieu of a manse, and has since been paid. Having provided one manse and glebe the heritors have fulfilled their obligation, and they are not bound to provide another or others. There are two ministers and two churches in the Barony Parish of Glasgow, but no more than one manse was ever provided or claimed, and the obligation on the heritors in that respect has not been increased by the disjunction and erection of the parish of Maryhill. The Acts of Parliament quoted by the minister only apply to then existing parishes.

"The summons of disjunction and erection contained a conclusion that the Court should modify such additional allowance over and above a competent stipend to the minister for and in place of a manse, offices, glebe, and grass-ground as to the Court shall seem just, but this conclusion was abandoned by arrangement, the pursuers undertaking to provide a manse and glebe otherwise.

"The heritors were not made parties to said action. On the contrary, the summons states that the Crown and trustees of the church were the only parties interested, and the only persons called as defenders were the Officers of State representing the Crown as patron and titular of the Barony Parish, the minister and Kirk-Session of the said parish, and the Moderator and remanent members of the Presbytery of Glasgow. Had the heritors been liable to provide manse and glebe and grass-ground after disjunction they should have been called for their interest.

"In implement of the arrangement referred to, the pursuers of the action of disjunction and erection proceeded to raise funds to provide a manse and glebe. They took a lease of a building site and garden ground from Sir Archibald Islay Campbell of Succoth, Bart., and raised funds by voluntary subscriptions, with which they built a manse and offices and laid out the ground, &c. The house was ready for occupation at Whitsunday 1852, and has since been occupied and possessed by the minister of the parish as the manse and glebe thereof. The title to the house was originally taken in the form of a lease for twenty-four years from Whitsunday 1852, and this lease was renounced on 27th March 1856, and a feu-contract taken in favour of the minister, elders, and deacons of the parish and their successors in office in trust for behoof of the congregation of the parish church of the parish of Maryhill. The house and garden were provided and accepted by the minister as the manse and glebe of the parish, and have been occupied and possessed by him as such from that date till now. The repair and upkeep of the manse and offices were undertaken by

the said trustees, and the present minister is in virtue of his office one of the trustees, and has acted as such since his induction. It is not competent for the minister now to attempt to upset the arrangement so made. . . .

"The statutes founded on by the minister with reference to glebe and grass-ground are repealed.

"The heritors are under no obligation by the common law of Scotland to provide either glebe or grass-ground, and there is now no statute law on the subject. . . .

The heritors submitted that the Court should find and declare—"(1) That the heritors of a new parish erected in the year 1850 are under no obligation to provide a manse and glebe and grass-ground for the minister of the parish. (2) That the heritors of the parish of Maryhill having in their capacity of heritors of the Barony Parish of Glasgow prior to the date of the disjunction and erection of the parish of Maryhill, provided a manse and glebe for the minister of the Barony Parish, their obligation in respect of these matters has been fulfilled, and they are not bound to provide a second manse and glebe and grass-ground for said parish or any portion thereof (3) That the minister of Maryhill is in possession and enjoyment of a competent and legal manse, and in respect thereof has no claim upon the heritors. (4) That the claim of the minister to a manse and glebe and grass-ground has already been considered and judicially determined, and the decision so given is final. (5) That under the terms of the decree of disjunction and erection the minister is not entitled to a manse and glebe; and (6) That the heritors are under no obligation to provide a glebe and grass-ground for the minister of Maryhill."

The answers for the minister to the reasons of appeal contained, *inter alia*, the following statements:—"The petitioner, as minister of the parish of Maryhill, which is a landward parish, is by law entitled to a competent and sufficient manse, including offices and garden, to a glebe of arable land, and over and above the arable glebe to a grass glebe for a horse and two cows out of the church lands near to the manse.

"By the Act 1663, cap. 21, it is declared 'that where competent manses are not already built, the heritors of the parish, at the sight of the bishop of the diocese, or such ministers as he shall appoint, with two or three of the most knowing and discreet men of the parish, build competent manses to the minister,' and the jurisdiction thus conferred upon the bishops is now conferred on and exercised by the presbyteries. Reference is made to the Acts 1563, c. 72; 1572, c. 48; 1587, c. 129; 1592, c. 118; 1593, c. 165; 1594, c. 202; 1606, c. 7; 1661, c. 9 and 15; 1644, c. 31; 1649, c. 45; and 1663, c. 21. Said statutes have never been limited in their application to parishes existing at their date. They apply to all erections of parishes *quoad omnia*.

"Until the disjunction and erection of Maryhill as a separate parish, the church, erected by voluntary contributions in 1824, was used as a chapel of ease in connection with the Church of Scotland. In 1848 the managers raised a process of disjunction and erection, founded on the Act 1707, anent the plantation of kirks, and 7 and 8 Vict. c. 44, and the parish of Maryhill was disjoined from the Barony Parish, conform to decree of disjunction and erection dated 10th July 1850. In consequence of said erection the heritors of Maryhill became bound to support, repair, and rebuild the church, to furnish a churchyard, to provide the minister with a manse, glebe, and grass glebe. The heritors fulfilled none of the obligations incumbent on them.

"Owing to the failure of the heritors to discharge their duty to the parish, the kirk-session entered into negotiation with Sir Islay Campbell for ground for a house for the minister, and a house was built for him at a cost of £960. Of this sum £260 was raised by subscription, and members of the kirk-session granted bills for the remainder. The minister paid a rent of £35 for the house, and it was arranged that on the extinction of the debt upon the house the minister should be allowed to occupy it rent free if he cared to do so, and if he remained unprovided with a manse. The said house was never accepted by the minister of Maryhill as a manse. . . . Said house is not a manse authorised by law, and there is no provision or security as to its maintenance or repair or rebuilding. . . .

"No manse, offices and garden, glebe, or minister's grass ever having been possessed or enjoyed by the petitioner or his predecessors, the minister is now desirous of having a suitable manse, offices, and garden designed and built, or otherwise provided and set apart for the use of himself and his successors in office, ministers of the said parish."

The minister further stated that he was desirous that the arable glebe and grass glebe to which he was by law entitled should be designed and set apart to him and his successors in office, ministers of the said parish. Reference was made to the Acts 1563, c. 72; 1572, c. 48; 1592, c. 118; 1593, c. 165; 1606, c. 7; 1644, c. 31; 1649, c. 45; and 1663, c. 21.

It was further stated for the minister that "the house used by the minister of Maryhill was not built until after the erection of the parish in 1850. The church is not and never has been vested in trustees.

"The statute 42 George III., cap. 86, is referred to, beyond which no admission is made. The statements made as to what said statute provided, and what the Barony heritors have done, are irrelevant. Moreover, it is denied that by providing a manse for the minister of Barony Parish the obligations of the heritors of the *quoad omnia* parish of Maryhill have been fulfilled. Since the erection of the parish of Maryhill in 1850 the heritors thereof have not been called upon to pay any part of the building or upkeep of the ecclesiastical fabrics of the Barony Parish. Their obligation to do so was extinguished by the disjunction and erection of Maryhill.

"The statements in the reasons of appeal

in regard to the summons of disjunction and erection of Maryhill are denied under reference to the process. . . . It is explained that the manse did not exist at the date of the summons. Furthermore, it would have been *ultra vires* of the Court of Teinds to designate a manse, glebe, and minister's grass, this being the duty of the presbytery, and the withdrawal of the conclusion in regard to the manse, glebe, and grass was not based on any such ground as the heritors now allege, but because the Crown, as titular of the teinds, objected to decree being given for such allowance out of the teinds instead of being imposed as a burden on the heritors of the parish. The pursuers withdrew the said conclusion before issue was joined between the pursuers and the Crown on the only point contested, but they gave up no right or claim competent to the minister against the heritors at common law and under the said statutes. It was understood by the parties interested, namely, the minister, kirk-session, and parishioners, that the heritors would make the usual and necessary arrangements in regard to a manse, glebe, and grass, but they failed to do so. The averment made by the heritors about an arrangement on the part of the pursuers is irrelevant through want of specification.

"Moreover, the heritors were called into said process by the order of the Court, procedure being sisted until this order was obtempered. The minister and kirk-session were not parties to the case. Said summons was duly intimated and advertised. It is denied that any arrangement of the nature indicated, but not specifically set forth, was ever made, and if made, which is denied, it is averred that it was never carried out. In any event, it did not affect the minister's rights against the heritors, and no minister or kirk-session can by any arrangement prejudice the rights by law established in favour of the cure.

"The heritors are called upon to specify the statutes by which the statutes founded on by the petitioner are repealed."

The other statements made in the reasons of appeal were denied, in so far as they conflicted with the minister's statements.

The minister pleaded, *inter alia:*—"(2) The statements of the heritors are irrelevant and insufficient to support any part of the prayer with which the reasons of appeal conclude. (3) The minister of Maryhill being entitled as the minister of a *quoad omnia* parish to a manse, glebe, and minister's grass, and the heritors having declined to design and provide the same, they ought to be ordained to provide and design a manse, glebe, and grass glebe. (5) The Presbytery of the bounds having decided that a manse, glebe, and minister's grass ought to be provided and designed for the minister of Maryhill, and the reasons of appeal being irrelevant and insufficient, the said proceedings ought not to be stayed. (6) The declarator sought ought to be refused, with expenses, in respect that No. (1) is contrary to common and statute law, and that the remaining heads of the prayer are irrelevant and unfounded."

The summons of disjunction and erection of the parish of Maryhill in 1850 as originally drawn concluded, *inter alia*, that "the said Lords . . . ought and should modify such additional allowance, over and above a competent stipend to the said minister, for and in place of a manse, offices, glebe, and grass ground as to our said Lords shall seem just."

On March 6, 1850, a minute was put in by the pursuers in the action of disjunction and erection in these terms—"Inglis, for the said pursuers, begged leave to state to the Court that the Crown, as titular of the teinds and patron of the Barony Parish of Glasgow, having intimated an objection to the inclusion of the summons for modification of 'an additional allowance' to the minister of the proposed new parish of Maryhill, 'over and above a competent stipend to the said minister for and in place of a manse, offices, glebe and grass ground,' . . . the pursuers had agreed, if permitted by the Court, to withdraw the said conclusion, and he therefore respectfully moved their Lordships for permission to withdraw the same accordingly."

The libel was accordingly restricted in terms of the said minute of 6th March 1850. The final judgment and decreet of the Lords of Council and Session on July 10, 1850, "*Separated and disjoined* the whole lands and others libelled, forming the district of Maryhill described in the summons from the Barony Parish of Glasgow, and *Erected* the same into a separate parish, to be called in all time coming the parish of Maryhill: reserving always the existing management of the poor and poor's funds, and the rights of the existing session clerk of the said Barony Parish in virtue of the provision to that effect contained in the said Act [New Parishes Act 1844, sec. 6]: *Found and declared* the said church at Maryhill to be the parish church of the said parish of Maryhill:" . . . and modified, decerned, and ordained a constant stipend for the said kirk and parish of Maryhill to be yearly paid to the minister by the titulars and tacksmen of the teinds, heritors and possessors of the lands disjoined, out of the teinds of the same. The final judgment and decreet contained no decerniture as to a manse or glebe, or any allowance in lieu thereof.

On June 28, 1901, the Sheriff-Substitute allowed the parties a proof before answer.

The petitioner the Reverend John Oliver appealed from this interlocutor to the Lord Ordinary in Teind Causes.

The arguments of the parties sufficiently appear from the foregoing reasons of appeal for the heritors and the answers thereto for the minister in the Sheriff Court process and from the opinion of the Lord Ordinary (Low).

LORD LOW—It seems to me to be beyond dispute that in erecting a new parish under the Acts 1707 and 1844 the Court has jurisdiction to deal with the question of manse and glebe. That is a jurisdiction which the Court has repeatedly exercised, and which it is necessary that it should possess in

order that it may carry out the powers conferred by the statutes.

Whether or not lands are to be disjoined and erected is entirely within the discretion of the Court, and in order that the Court may exercise that discretion it is necessary that it should know not only the circumstances of the parish from which the lands are to be disjoined, but what the equipment of the new parish is to be and how it is to be provided. It is accordingly the practice for those who are promoting the erection of a new parish to come to the Court prepared with a complete scheme which is detailed in the summons, and to which the Court is asked to give effect. If therefore the proposal is that the heritors should provide a manse and glebe, that ought to be, and is in practice, stated in the summons.

Now, what was the procedure in erecting the parish of Maryhill? In the summons of disjunction and erection it was asked that "a sufficient and competent additional allowance should be made in modifying the stipend of the said minister for and in place of a manse, offices, glebe, and grass ground."

If decree had been pronounced in terms of that conclusion it is plain that the heritors could never have been called upon to supply a manse and glebe. The conclusion, however, was subsequently deleted from the summons. But why? Simply because the Crown, as titular of the teinds, objected to it and threatened opposition.

The argument for the appellant is, that when the conclusion for an allowance in place of manse and glebe was withdrawn, the summons became one which did not mention manse and glebe, and that accordingly the decree which followed thereon did not in any way deal with that matter, but left it to be regulated by the general law applicable to parishes.

I cannot accept that view. The summons as originally framed clearly implied that there was to be no manse or glebe, and the withdrawal of the conclusion for an allowance simply meant that the pursuers, rather than face the opposition of the Crown, were willing that there should be neither manse and glebe nor an allowance in lieu thereof. The Court might have refused to erect a parish upon such a footing, but they had unquestionably power to do so, and in my opinion they actually did so. Further, if it was intended by withdrawing the conclusion for an allowance to lay upon the heritors a burden which could not have been laid upon them if the conclusion had remained and had been given effect to, then that should have been made clear by substituting for the conclusion which was withdrawn one for manse and glebe. If, however, that had been done the heritors might have appeared and opposed the erection, and it cannot be assumed that in that case the Court would have granted decree.

Further, it seems to be plain that at the time when the decree was pronounced it was understood by all parties interested that the heritors were not liable to provide a manse and glebe, because funds were raised by voluntary subscription and a dwelling-house for the minister erected in which the minister of the parish has ever since resided, and which is by a trust dedicated to his use. Now, after the elapse of half-a-century, and when the cost of providing a manse and glebe would, I take it, be immensely greater than it was at the time of the decree, the present incumbent comes forward and for the first time claims that the heritors have all along been, and are now, liable to supply a manse and glebe. The question therefore arises in circumstances very unfavourable for the minister, and it may be that in any view of the case the claim is barred. That is not a question, however, upon which it is necessary for me to express any opinion, because, for the reasons which I have given, it seems to me that the footing upon which the parish was erected was that the minister should have no claim for a manse and glebe or for an allowance in lieu thereof.

I shall therefore recal the interlocutor appealed against and dismiss the whole proceedings.

Counsel for the Minister—Crabb Watt—Balfour. Agent—Wm. Geddes, Solicitor.

Counsel for the Heritors—Clyde, K.C.—Cullen. Agents—Dove, Lockhart, & Smart, S.S.C.

COURT OF SESSION.

Saturday, March 8, 1902.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

WALLACE JAMES *v.* MONTGOMERIE & COMPANY.

(*Ante*, vol. xxxvii. p. 83, and 2 F. 107.)

Burgh—Property—Common—Immemorial Use by Inhabitants—Encroachment by Individual.

W, a burgess and inhabitant of the burgh of H, brought an action of suspension and interdict against the magistrates and M. & Co. with conclusions for restraining M. & Co. from interfering with certain lands which the complainer averred formed part of the lands included under the charter of the burgh, and had from time immemorial been appropriated for the use and enjoyment of the inhabitants for recreation, drying clothes, and other purposes.

This averment having been held relevant to entitle an individual burgess to sue such an action (*ante*, vol. xxxvii., p. 83) *evidence* upon which *held* (*following Sanderson* v. *Lees*, November 25, 1859, 22 D. 24; and *Grahame* v. *Magistrates of Kirkcaldy*, June 19, 1879, 6 R. 1066, 16 S.L.R. 676) that it had been sufficiently established.