propose to take from this enclosed land are required by the owners of the property, I must confess that the proof is not just so full or so explicit as one would have desired; but there is proof to a certain extent to support the Sheriff-Substitute's finding, and I have heard nothing to induce me to differ from the finding of the Sheriff-Substitute on that point.

I am therefore of opinion with your Lordship that the interlocutor ought to be in substance affirmed, but recalled in point of form in order to give decree of interdict in terms of the first conclusion.

LORD PEARSON — This case as argued for the respondents raises a question of very wide importance, on the construction of section 80 of the General Turnpike Act. But I agree with your Lordships that the respondents are entitled to succeed upon the facts, even on the assumption that that question of law was well decided in the case of *Lyell's Trustees*.

I need not advert to the proof, as your Lordship has already pointed out how it supports, as I think it does, the case for the pursuers. The only difficulty I have felt is this. The first finding, if we affirm the Sheriff-Substitute's interlocutor, is that these lands are enclosed lands within the meaning of section 80. To a certain extent therefore we are affirming the view which was taken in the case of *Lyell's Trustees* as to the meaning of the word "land" in section 80; and I only desire to add that I concur in that finding in deference to the authority of that case, and that so far as my opinion goes I am anxious that nothing we do should be regarded as adding to the weight of that decision. But assuming the law to be as there laid down, I think the pursuers are clearly right on the facts, and that we need not consider whether they could succeed on the other ground. Therefore I concur with what your Lordships propose.

LORD YOUNG and LORD MONCREIFF were absent.

The Court pronounced this interlocutor:—

"Recal the interlocutor appealed against: Find in fact (1) that the bed, channels, and banks of the river North Esk *ex adverso* of the lands of Morphie and Stone of Morphie, belonging to Francis Barclay Grahame, and so far as within the area of the salmon fishings belonging to him and the trustees of the late Barron Grahame of Morphie, are enclosed lands within the meaning of section 80 of 1 and 2 Will. IV. cap. 43; (2) that the defenders are not entitled to remove therefrom any boulders, stones, gravel, or other material, except such material as is not required for the private use of the said Francis Barclay Grahame and the said trustees as proprietors thereof foresaid; and (3) that the whole boulders, stones, gravel, and other material now lying in the said bed and channels and upon the said banks are required for the private use of the said proprietors: Find in law that the defenders are not entitled to remove the same: Therefore interdict and prohibit the defenders, and each of them, and all others acting for them or under their instructions, from lifting, removing, and taking or carting away boulders, stones, gravel, or other material from the bed, channels, and banks of the River North Esk *ex adverso* of the lands of Morphie and Stone of Morphie, belonging to the said Francis Barclay Grahame, and so far as within the area of the salmon-fishings in North Esk belonging to him and to the pursuers, and decern: Find the pursuers entitled to expenses in this and the Inferior Court," &c.

Counsel for the Pursuers — Solicitor-General (Dickson, Q.C.)—Fleming. Agents —Morton, Smart, & Macdonald, W.S.

Counsel for the Defenders—Campbell, Q.C. — Dove Wilson. Agents — St Clair Swanson & Manson, W.S.

Friday, February 23.

FIRST DIVISION.

[Lord Low, Ordinary.

WALLACE *v.* WHITELAW.

Process — Partnership — Petition for Dissolution—Distribution of Business Act 1857 (20 *and* 21 *Vict. cap.* 56), *sec.* 4—*Partnership Act* 1890 (53 *and* 54 *Vict. c.* 39), *sec.* 35.

Section 4 of the Distribution of Business Act 1857 provides that "all summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same, shall be brought before the Junior Lord Ordinary officiating in the Outer House," and particularly the petitions and applications therein mentioned, including those for the appointment of a judicial factor.

Section 35 of the Partnership Act 1890 provides that "on application by a partner the Court may decree a dissolution of the partnership in any of the following cases," &c.

Held that a petition for dissolution of partnership and appointment of a judicial factor, presented under section 35 of the Partnership Act 1890, cannot be competently presented to any other than the Junior Lord Ordinary.

Observed, that in cases under that section which involve inquiry into disputed matters of fact, an action of declarator is the appropriate form of application.

Process—Reclaiming-Note—Competency of where Want of Jurisdiction is Pleaded.

A petition for dissolution of partnership and appointment of a judicial factor was presented under section 35

of the Partnership Act 1890. The petition was presented to a Lord Ordinary, not being the Junior Lord Ordinary, and the procedure was therefore incompetent. No objection was taken by the respondent, and the Lord Ordinary before answer remitted to a man of skill to report. The respondent moved for leave to reclaim against this interlocutor, but leave was refused, and thereafter he reclaimed without leave. The respondent then stated objections to the competency of the petition. The petitioner maintained that the reclaiming-note was incompetent, on the ground that the interlocutor reclaimed against was not one disposing of the merits, and that the question of the competency of the petition could not be raised. The Court *dismissed* the petition, being of opinion that the statutory restrictions as to reclaiming did not apply where the whole procedure was attacked as *ab initio* incompetent.

Mr William Wallace, coalmaster, Glasgow, presented a petition craving the Court "to find and declare that the partnership between the petitioner and the said Thomas Whitelaw, constituted by the said contract of copartnery, dated 5th March 1889, is dissolved, and to decree a dissolution thereof; and further, whether it shall be so found, declared, and decreed or not, to nominate and appoint such person as your Lordships may think fit to be judicial factor on the estate of the said partnership."

The petition was presented to Lord Low, Ordinary, and not to the Junior Lord Ordinary. The petitioner averred that further contributions of capital were urgently required for the firm's business, that the respondent was unwilling to contribute, that the business could not be carried on without further capital, and that the partnership must consequently be dissolved, that the partners were unable to agree as to the value of some of the assets of the business, and that accordingly it could not be wound up after dissolution by the parties themselves.

Answers were lodged by the respondent, in which he submitted that the prayer of the petition should be refused in respect that the petitioner's averments were irrelevant, and, so far as material, unfounded in fact.

The Lord Ordinary (Low) on 17th August 1899 pronounced the following interlocutor:—"Before answer, remits to John M. Macleod, Chartered Accountant, Glasgow, to inquire into the circumstances set forth in the said petition and answers, and to report thereon, and in particular to report whether any, and if so, what amount of additional capital was necessary as at Whitsunday 1899, and is now necessary, for carrying on the business of John M'Andrew & Company, designed in the petition, with power to Mr Macleod to call for exhibition and production of all the books, papers, and others of the said business or copartnership, or relating thereto, which he may consider necessary to enable him to report thereon, and to hear the explanations of parties."

The respondent moved for leave to reclaim, and the Lord Ordinary officiating on Bills (Lord Kyllachy) on 22nd August refused the motion.

The respondent reclaimed, and argued—(1) The reclaiming-note was competent. It could not be excluded by the provisions of the Distribution of Business Act, for the petitioner cannot have intended to bring his petition under that Act, or he would have presented it to the Junior Lord Ordinary. Accordingly, the provisions could not be invoked to make this reclaiming-note incompetent. If, on the other hand, the Court of Session Act of 1868 applied, then clearly the reclaiming-note was competent as being presented within six days against an interlocutor which settled a method of proof—*Quin* v. *Gardner & Sons*, June 22, 1888, 15 R. 776. But if the Court of Session Act did not apply, then there was no statutory provision excluding review, and at common law all interlocutors pronounced after discussion in the Outer House might be reclaimed against—*Macqueen* v. *Tod*, May 18, 1899, 1 F. 859. If the petition was incompetent the reclaimer was not barred from having it dismissed by the fact that he had raised no objection before the Lord Ordinary. That did not imply an agreement on his part to assent to an incompetent proceeding and to accept the decision of the Lord Ordinary as though he were an arbiter—*Gordon* v. *Bruce & Company*, May 12, 1897, 24 R. 844. (2) Procedure by summary petition was not the proper method of raising a question like this. The very words of the petitioner's prayer showed that an action of declarator was the appropriate method. But if the question could be raised by way of summary petition it must be in the manner prescribed by the Distribution of Business Act, *i.e.*, by petition to the Junior Lord Ordinary, and accordingly this petition having been presented to another Lord Ordinary was incompetent.

Argued for the respondent—(1) In substance this was to be treated as a petition under the distribution of Business Act, and therefore review was incompetent. It was certainly in form a summary petition, and the reclaimer had consented to its being treated as such. There was no provision under any Act by which a reclaiming-note against an interlocutor such as this was competent without leave. (2) The petition had been competently presented in the Outer House. There was a continuous practice of presenting such petitions there, and nothing had been said against their competency—*Thomson*, June 2, 1893, 1 S.L.T. No. 73, Lindley on Partnership, 809. Under the common law prior to the Partnership Act the Court did in effect decree dissolution though a partnership was a going concern, when it appointed a judicial factor—*Macpherson* v. *Richmond*, February 16th 1869, 41 S.J. 228. Accordingly, when it was found in the Partnership Act that "the Court" had jurisdiction to perform certain acts, it would be natural to expect that the old common law practice would be carried forward—*Dickie* v. *Mitchell*,

June 12th 1874, 1 R. 1030. Accordingly the question was clearly one which could be raised in the Outer House. The objection came too late.

At advising—

LORD PRESIDENT—The first question is whether section 4 of the Distribution of Business Act 1857 applies to this petition, and I consider that it does. That section declares that "all summary petitions and applications to the Lords of Council and Session which are not incident to actions or cases actually depending at the time of presenting the same, shall be brought before the Junior Lord Ordinary officiating in the Outer House," and in particular the petitions and applications therein mentioned, including petitions and applications for the appointment of judicial factors. This petition is summary in form; it prays to have it found that the partnership to which it relates is dissolved, and asks for decree of dissolution, and it also prays for the appointment of a judicial factor on the estate of the partnership, with certain specified powers. The petition is no doubt in part founded on section 35 of the Partnership Act 1890, which authorises the Court to decree a dissolution of partnership in certain cases, "on application by a partner." As this section applies to Scotland as well as to England, the term "application" may be held to include any competent proceeding for attaining that object in Scotland, and prior to 1890 this Court repeatedly entertained petitions presented to the Junior Lord Ordinary for dissolution of partnerships and the appointment of judicial factors. I do not say that in all, or probably in most, cases under section 35 of the Act of 1890, such a petition would be the appropriate, or even a competent, proceeding; on the contrary, it appears to me that an action of declarator would be the proper form wherever the parties are at variance with respect to matters requiring investigation or inquiry; but having regard to the practice which has prevailed both prior and subsequent to the passing of the Act of 1890, I do not think it should now be held that the procedure by summary petition in suitable cases is incompetent, provided that the petition is presented to the Junior Lord Ordinary. There is, however, no authority for presenting such a petition to any other Lord Ordinary, and as this petition was presented to a Lord Ordinary who was not the Junior Lord Ordinary, I consider that it is incompetent. No objection on this ground appears to have been stated by the respondent, but when it is pleaded by the petitioner that we cannot recal an interlocutor of which we disapprove because of restriction against reclaiming contained in the Act of 1857, or in any other Act, it appears to me that we are not only entitled but bound to consider the competency of the proceeding *ab initio*, and as the present petition seems to me to be incompetent for the reason which I have just stated I think we should recal the whole interlocutors which have been pronounced in it and dismiss it as incompetent.

LORD M'LAREN—I am of the same opinion. As your Lordship has observed, while the Partnership Act provides that decree of dissolution of a partnership may be pronounced in an application to "the Court," which includes the Court of Session, nothing is said as to the procedure to be adopted, and it is not, in my opinion, to be assumed that in every case it is competent to apply for a dissolution of partnership by petition to the Junior Lord Ordinary. When the facts on which dissolution is sought are capable of instant verification, as for example, where a partner has been sequestrated, or when the deed of partnership limits the duration of the partnership to the period of the partners' lives and there is evidence of the death of one of the partners, when in fact the evidence pointing to the remedy of dissolution is indisputable, I should say it was convenient and not incompetent to combine a prayer to this effect with a petition for the appointment of a judicial factor to wind up the business of the copartnery. But if the partnership is in existence and its business is prosperous, and there is no apparent cause for a dissolution except a desire on the part of one of the partners to get rid of a copartner, to say that a dissolution of partnership could be obtained by means of a summary petition, and on the report of an accountant from whose conclusions there is practically no appeal, would be to sanction a procedure so monstrous that I do not think a parallel to it could be found in any legal system that I know of. We know that the Distribution of Business Act allows no appeal at any stage of the case from interlocutors regulating the mode of inquiry, and the whole of this code of procedure is adapted to the administrative as distinguished from the contentious business of the Court. While I do not wish to say anything tending to exclude the summary jurisdiction of the Lord Ordinary in a plain case, I may say that where there is a dispute between the parties to a contract of copartnery as to the necessity for dissolution, it is according to all the traditions of our practice that it should be decided in an ordinary action where there is an opportunity of appealing on the relevancy or as to the form in which a proof is to be taken.

LORD KINNEAR—I am of the same opinion. I also agree with Lord M'Laren that it does not follow from what has been said, or from what we propose to do, that every proceeding for obtaining a decree of dissolution of partnership can be conveniently or competently carried out by way of a summary petition. As his Lordship pointed out, there may be circumstances which would make that an inconvenient if not an incompetent process. However, without considering the merits of the present case we must treat it as what it purports to be, to wit, a summary petition presented in the Outer House, and treating it as such, I agree with your Lordship that it is incompetent, inasmuch as it falls within the provisions of the Distribution of Business Act, and ought accordingly to

have been presented to the Junior Lord Ordinary.

LORD ADAM concurred.

The Court pronounced this interlocutor:—

"Recal the whole interlocutors pronounced in the petition: Dismiss the petition, and decern: Find the petitioner William Wallace liable to the said Thomas Whitelaw in expenses," &c.

Counsel for Petitioner—C. K. Mackenzie. Agents—J. & J. Ross, W.S.

Counsel for Respondent—Salvesen, Q.C. —Cook. Agents — Dove, Lockhart, & Smart, S.S.C.

Tuesday, February 27.

FIRST DIVISION.

GARDNER (THOMSON'S JUDICIAL FACTOR) *v.* HAMBLIN AND OTHERS.

Succession — Vesting — Vesting subject to Defeasance.

By an *inter vivos* declaration of trust executed by two unmarried sisters and their three brothers, on the narrative that certain shares had been purchased to be held in trust, it was provided that the annual dividends and profits of the shares were to be paid to the parents of the parties during their lives, and on the death of the survivor they were to be held for behoof of the two sisters jointly during their lives and for the survivor. In the event of the sisters having issue, the fee of the stock, subject to the liferents, was to belong, one half to the issue of each sister, and failing their having issue "the fee of said stock shall fall and belong to you, our brothers, equally, or the survivor of you." Each sister and brother contributed one-fifth of the purchase price of the stock. The sisters died unmarried; they were predeceased by all the brothers. *Held* (Lord Adam *diss.*, Lord Kinnear *absent*) that on the death of the second of the brothers the fee of the stock vested in the last surviving brother, subject to defeasance in the event of either of the sisters leaving issue.

Opinion contra per Lord Adam that the purposes of the trust had lapsed, and that on the death of the last sister the stock fell to be divided among the representatives of all the brothers and sisters.

Steel's Trustees v. *Steel*, December 12, 1888, 16 R. 204, *commented on.*

The following declaration of trust was, on 10th May 1854, addressed by Miss Janet Thomson and Miss Marion Thomson to their three brothers William, Peter, and Richard Thomson:—"DEAR BROTHERS,—We, Janet and Marion Thomson, residing in Forres, considering that you have purchased, partly with your own funds, 235 shares of the capital stock of the Caledonian Banking Company of Inverness, and registered in the said Company's books, Nos. 932, 933, 935, and 941, and that although you have entered and vested the said stock in our names jointly, and the survivor of us, and the executors, administrators, and assignees of us, excluding the *jus mariti* of any husband we or either of us may marry, we nevertheless hereby declare that the said stock is so vested in our names, and held by us in trust, for the following purposes:—In the first place, to apply and pay the dividends and profits arising from said stock annually to our father and mother, and the survivor of them, in liferent, during all the days of their, his, or her lifetime, but for their, his, or her liferent use allenarly. Secondly, after the death of our father and mother, to hold the dividends and profits for our own behoof, jointly, during our joint lives, and for the survivor of us while we remain unmarried, but in the event of either of us marrying, the other shall be entitled to the liferent of the whole, and in the event of both of us marrying, then we shall again be entitled to a joint liferent, and to the survivor of us, as aforesaid; subject to which liferents the fee of said stock shall fall and belong, one-half to the lawful children of me the said Janet Thomson, and the other half to the children of me the said Marion Thomson, share and share alike, but with a power of apportionment among our children respectively, as we may think proper; and failing our having children, the fee of said stock shall fall and belong to you, our brothers, equally, or the survivor of you, but it is expressly declared that the *jus mariti* and right of administration of any husband we may marry is expressly excluded, and that the liferents in our favour are purely alimentary; and it is further expressly provided and declared that neither we jointly, nor the survivor of us, shall have any right or title to sell or otherwise dispose of said stock during our lives, unless with the written consent of you, our brothers, or the survivors or survivor or the majority of you which all survive, previously obtained," &c.

The number of shares actually bought and registered in the name of the Misses Thomson was 230. The trust came into operation at the date of the declaration, and the dividends on the shares were paid to Mr and Mrs Thomson, the parents of the parties, during their lives. On the death of the survivor, Janet and Marion Thomson liferented the shares jointly, and on the death of Marion on June 8, 1891, Janet obtained a transfer of the shares into her own name, and enjoyed the liferent till her death on June 18, 1897.

Both sisters died unmarried. They left settlements dated April 15, 1899, in which they directed their executors to convey the shares to the person or persons legally entitled thereto, in accordance with the terms of the declaration of trust.

William Thomson died in August 1855 intestate. He was survived by a widow but left no children.