The Parish Council of Edinburgh have appealed. The proprietors of the land who are now receiving a rent of £532, 15s., not unnaturally make common cause with the Magistrates of Leith, as the result of the Committee's judgment is to let them go scot free in the matter of local taxation.

I do not think that it is necessary for me to do more than refer to your Lordships' judgment in the *Glasgow General Parks* case, and to say that the present case shows to what an extravagant result the decision on which the Committee have based their determination is capable, and logically capable, of being pushed.

I propose therefore to your Lordships that the valuation of £600, at which the subjects stood for the year 1910, be reverted to.

LORD SALVESEN—I concur.

LORD CULLEN—The subjects in question in this case, known as the Leith Public Park and Golf Course, are let by the proprietor of the land to the respondents the Leith Corporation under the lease mentioned in the case, which is for forty years with a break at 1927. They are expressly let only for the purpose of a public park and golf course in terms of the Public Parks (Scotland) Act 1878, and are used as much by the inhabitants of Leith. The respondents have laid out a golf course, and they levy charges from players, but no charge is made for admission to the park. The regulation and control of the subjects is in the hands of the respondents, who maintain them and attend to the general management of them.

As the lease is for a period exceeding twenty-one years, the respondents have been entered in the roll as proprietors. The "public" are entered as the "occupiers." The annual value is entered at the merely nominal sum of £1, by way of expressing the view of the assessor and the Valuation Committee that for the purposes of the valuation roll the subjects fall to be regarded as having no annual value.

We are not empowered to alter the entry in the "occupiers" column. It appears to me, however, that the occupiers of the subjects are none of the individual inhabitants who, less or more, and from time to time, use the parks without occupying, nor all of them together, but the respondents, who are the tenants and who occupy the subjects in order to discharge their functions of controlling and managing them so that they may be duly available for use by such of the inhabitants as choose to use them.

As regards the valuation, I am clearly of opinion that the entry of the subjects at a nominal or no value is wrong. The subjects are let by the owner to the Corporation at a large rent. Had the duration of the lease not exceeded twenty-one years, the rent payable under it would have fallen to be entered in the roll as the annual value in terms of section 6 of the Act of 1854. As, however, the lease is for forty years, the respondents are, under that section, deemed to be proprietors, and the yearly rent or value falls to be ascertained irrespective of the amount of rent payable under the lease. On this footing the figure of £600 proposed by the appellants was not challenged by the respondents in their argument before us. I am therefore of opinion that the determination of the Valuation Committee should be altered, and that the subjects should be entered in the roll at the annual value of £600.

The Court were of opinion that the determination of the Valuation Committee was wrong, and that the subject should be entered in the roll at £600.

Counsel for the Complainers—Dean of Faculty (Dickson, K.C.)—Kemp. Agents—R. Addison Smith & Co., W.S.

Counsel for the Respondents—Morison, K.C.—Lippe. Agents—R. H. Miller & Co., W.S.

COURT OF SESSION.

Saturday, February 3.

SECOND DIVISION.

[Lord Hunter, Ordinary.

MACNABS *v.* MACNAB.

Process—Partnership—Petition for Dissolution — Competency — Expediency — Necessity for Inquiry into Disputed Matters of Fact — Court of Session (Scotland) Act (Distribution of Business Act) 1857 (20 *and* 21 *Vict. cap.* 56), *sec.* 4—*Partnership Act* 1890 (53 *and* 54 *Vict. cap.* 39), *sec.* 35.

The Partnership Act 1890, sec. 35, enacts that "on application" by a partner the Court may decree a dissolution when a partner has been guilty of such conduct as in the opinion of the Court is calculated to prejudicially affect the carrying on of the business.

Two of three partners presented a petition to the Junior Lord Ordinary for dissolution of partnership under the foregoing section and averred continued inattention to business and habits of intoxication on the part of the third partner. The latter denied the petitioners' averments.

Held (*approving* and *applying* dicta *per* L. P. Kinross and Lord M'Laren in *Wallace* v. *Whitelaw*, February 23, 1900, 2 F. 675, 37 S.L.R. 483) that inquiry into disputed matters of fact being necessary, procedure by petition was inexpedient and inappropriate, and that an action of declarator must be brought.

The Court of Session (Scotland) Act (Distribution of Business Act) 1857 (20 and 21 Vict. cap. 56), sec. 4, enacts—"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, who shall deal therewith and dispose thereof as to him shall seem just. . . ."

The Partnership Act 1890 (53 and 54 Vict. cap. 39) enacts—Section 35—"On application by a partner the Court may decree a dissolution of the partnership in any of the following cases: . . . (*c*) When a partner, other than the partner suing, has been guilty of such conduct as in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business. . . . (*f*) Whenever in any case circumstances have arisen which in the opinion of the Court render it just and equitable that the partnership be dissolved."

Archibald Macnab and James Baird Macnab, two of the partners of the firm of Archibald Macnab & Sons, presented a petition to the Junior Lord Ordinary for dissolution of the partnership, under the Partnership Act 1890, section 35, on the grounds that Peter Macnab, the third partner, had been guilty of such conduct as was calculated to affect prejudicially the carrying on of the business, and that circumstances had arisen which rendered it just and equitable that the partnership should be dissolved.

The petitioners made specific and detailed averments of intemperate habits, failure to attend to business, and violence in language and conduct towards the petitioners on the part of the third partner, Peter Macnab.

Answers were lodged for Peter Macnab, in which he denied the averments of the petitioners and maintained that the petition was incompetent.

On 24th January 1912 the Lord Ordinary (HUNTER) dismissed the petition.

Opinion.—"The petition in this case is brought at the instance of two out of three of the partners of a business for dissolution of the partnership under the provisions of the Partnership Act of 1890, section 35, on two grounds—first, that the respondent, who is the third partner, has been guilty of such conduct as, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business; and second, that in the whole circumstances of the case it is just and equitable that the partnership should be dissolved. The averments in the petition with regard to the conduct of the respondent are apparently directed to three points—first, his continued inattention to business, second, his habits of intoxication, and third, violence used by him towards the other partners, *i.e.*, the petitioners.

"The respondent maintains that the application being in the form of a petition to the Junior Lord Ordinary is incompetent, and that the proper remedy for the petitioners in such circumstances as set forth would have been by action of declarator.

"The Act of 1890 does not prescribe any form of procedure by which application may be made to the Court in a case coming within the provisions of that statute. In the case of *Wallace* v. *Whitelaw*, 1900, 2 F. 675, to which I have been referred, the Lord President (page 678), said '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.'

"The question in this case is whether summary application is the proper procedure or not. No instance of such an application having been made to dissolve a partnership without any application for the appointment of a judicial factor—and there is none in this case—was cited at the bar. Although I was to some extent impressed by Mr Christie's argument in favour of entertaining the present application, I do not see my way to disregard what was said in the case of *Wallace* v. *Whitelaw*, to which I have just referred. There is no doubt that the circumstances in that case were different from the circumstances in the present, and that the question there decided was that the petition was incompetent as it had not been presented to the Junior Lord Ordinary; but from the opinions delivered in the Inner House it is manifest that the Judges there considered what, under the Act of 1890, was the appropriate form of procedure to be adopted, and in particular considered whether it was proper to proceed by way of summary application or to bring a formal declarator. For instance, the Lord President says, '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.' Lord M'Laren at the end of his judgment says, '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 proof is to be taken.' The remarks so made by these two Judges in that case appear to me to be directly applicable to the circumstances of the present case. The averments here made are not of that character that they can be instantly verified, but must of necessity involve, so far as I can at present see, a somewhat protracted inquiry into the conduct of the respondent extending over a considerable period of time. Looking to that circumstance therefore, in view of the opinions to which I have just referred, I do not see that I can do other than dismiss this petition as incompetent."

The petitioners reclaimed, and argued—Procedure by petition was certainly not incompetent—Lindley, Partnership (7th ed.) 868-9—and the language of the statute under which the application was brought suggested procedure by petition rather than by action. "Application" was the word used, and in the Court of Session Act (Distribution of Business Act) 1857 (20 and 21 Vict. cap. 56) "application" seemed to be used to describe proceedings of the nature

of petitions as distinguished from "causes" or "actions." There was practice both before and after the Partnership Act 1890 (53 and 54 Vict. cap. 39) in favour of procedure by petition — *Macpherson and Others*, February 16, 1869, 41 Sc.J. 288, 6 S.L.R. 348; *Eadie, &c.* v. *MacBean's Curator Bonis*, February 19, 1885, 12 R. 660, 22 S.L.R. 422; *Russell* v. *Russell*, November 14, 1874, 2 R. 93, 12 S.L.R. 64; *Thomson*, June 2, 1893, 1 S.L.T. 59. In *Logan* v. *Cunningham*, September 30, 1903, 11 S.L.T. 327, the petition was thrown out because presented in the Bill Chamber. It was certainly expedient that in the present case the procedure should be that most conducive to expedition, for if the averments in the petition were true, then the business was suffering serious detriment, which should be brought to an end as soon as possible. Further, where, as here, the Court was asked to decree a dissolution, in the exercise of its discretion, on equitable grounds, then procedure by petition was more appropriate than by action of declarator, which was suitable rather to cases where a partner claimed a right to a dissolution in terms of a contract. The fact that a proof would be necessary did not matter. Such proof was allowed under, *e.g.*, petitions for custody. The opinions in *Wallace* v. *Whitelaw*, February 23, 1900, 2 F. 675, 37 S.L.R. 483, were *obiter*, and the case raised no such question as was involved here. In any case these opinions recognised the competency of procedure by petition in suitable cases. This was a suitable case.

Counsel for the respondent were not called on.

LORD JUSTICE-CLERK — The question raised in this case is whether application by petition is or is not the proper procedure. There is no question of competency indeed, because I have no doubt that the petition is competent, and if there was nothing pointing to the inexpediency of procedure by petition, I should be prepared to hold that the case might proceed in its present form. But I have formed a very strong opinion that that form of procedure is not expedient here, and my opinion is based on the reasons which were expressed in the case of *Wallace* v. *Whitelaw*, 1900, 2 F. 675, and which are directly applicable to the present case. In that case the Lord President, with reference to a petition which was founded, as is the present one, on section 35 of the Partnership Act, observed—"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." And Lord M'Laren put the matter quite as strongly—"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."

Now I think that if these dicta are to be given effect to at all, this is as strong a case for their application as I could conceive. It was quite evident that unless the petitioners' averments had remained undisputed there was an absolute necessity for a proof, and one of considerable difficulty and anxiety. Therefore on the whole matter I have come to the conclusion that we cannot sanction procedure by petition in this case, and I would move your Lordships to sustain the Lord Ordinary's interlocutor.

LORD DUNDAS—I am of the same opinion. I am not for interfering with the view of the Lord Ordinary, which seems to me sensible and suitable. The question is not so much what is competent as what is appropriate and expedient. The pith of the reclaimers' argument was the alleged greater despatch under this form of procedure and a plea of urgency. I am not sure that there need be much difference in regard to despatch between procedure by petition and a properly conducted ordinary action, which may if necessary be expedited, on cause shown, by the Lord Ordinary. I think that in a matter of this sort the Court ought to consider, in determining the procedure, not only the averments of the petitioner and the questions raised thereby but also the averments of the respondent. Taking such general view as one can of the sort of inquiry that may be necessary here, I think the petitioners ought to bring an ordinary action. I agree with, and do not repeat, what was said by the Lord President and Lord M'Laren in the case of *Wallace* v. *Whitelaw*, to which reference has been made.

LORD GUTHRIE—I agree. I think that the Lord Ordinary's interlocutor is right, but in the last sentence of his opinion he seems to put the ground of dismissal on competency. Now, as your Lordships have said, the question really is not one of competency at all, but simply whether in this case procedure by petition is appropriate. In my opinion the suitable procedure in the special circumstances of this case is not by petition but by ordinary action. There are here specific averments of fact by the petitioner, but these are met merely by a general denial in the answers, whereas I cannot doubt that in a record, with articulate condescendence and answers, the respondent would require to make a much more specific statement of his case,

and the question would then go to proof in proper shape.

The Court adhered.

Counsel for Petitioners—J. R. Christie. Agent—Robert H. Christie, S.S.C.

Counsel for Respondent—Morison, K.C.—Macdonald. Agent—A. Stuart Watt, W.S.

Saturday, March 11, 1911.

FIRST DIVISION.

[Lord Cullen, Ordinary.

DUKE OF ARGYLL *v.* RIDDELL.

Superior and Vassal—Casualty—Composition—Relief.

A vassal who held the *plenum dominium* of certain lands under a charter of 1849, with a destination in favour of himself and his heirs and assignees whomsoever, in 1851 executed an entail conveying the lands to himself and the heirs-male of his body, whom failing to his younger brother and the heirs-male of his body, whom failing the heirs-female of the body of his grandfather; other substitutions followed, and then this clause, "the eldest heir-female and the descendants of her body always excluding heirs-portioners." The deed of entail of 1851 contained a double manner of holding, and the entailer took infeftment *de me* under it, thus holding the lands base of himself as mid-superior. In 1860 the entailer propelled the fee to his only son T. by disposition in favour of him and the heirs appointed to succeed under the entail. In 1872, after the entailer's death, when the lands fell into non-entry, T. obtained from the superior a writ of confirmation of the disposition or propulsion of 1860 and paid a casualty of relief. The writ of confirmation contained the following clause of reservation:—"And it is hereby expressly declared that I" [the superior] "by granting these presents do not exclude myself or my successors from any claim which I or they may have to a full year's rent of the lands within contained whenever the heir of entail to whom the succession shall open shall happen not to be the heir of line of the person who was last entered by me or my foresaids, but on the contrary I hereby reserve such claim entire." The entailer's son T. died in 1883 without issue and was succeeded by his cousin R., the only son of the entailer's younger brother, and on his recording an extract decree of special service as heir of tailzie and provision relief was accepted from him as being also heir of line of the last entered vassal. On the death of R. without issue there was no heir-male of the body of the entailer's younger brother, and the succession opened to L., the eldest of R.'s three sisters, as heir-female of the body of the entailer's grandfather.

Held (Lord Kinnear *diss.*) that L. was liable to the superior in payment of composition of two-third parts of a year's rent, as *quoad* two-thirds of the lands she was not the heir under the former investiture of 1849.

Authorities reviewed.

The Duke of Argyll raised an action against Miss Louisa Margaretta Riddell of Sunart, in the county of Argyll, in which he sought to have it found and declared that "in consequence of the death of Sir Rodney Stuart Riddell of Sunart, Baronet, who was the last entered vassal in All and whole the lands of Sunart, . . . a casualty, being two-third parts of one year's rent or annual value of the said lands, and one-third part of the feu-duty exigible from the said lands, became due to the said Duke of Argyll, as superior of the said lands, upon the 2nd day of January 1907 (being the date of the death of the said Sir Rodney Stuart Riddell), and that the said casualty is still unpaid, and that the full rents, mails, and duties of the said lands of Sunart, after the date of the citation herein, do belong to the pursuer, the said Duke of Argyll, as superior thereof, until the said casualty and the expenses after mentioned be otherwise paid to the said Duke of Argyll: And the said Louisa Margaretta Riddell ought and should be decerned and ordained, by decree foresaid, forthwith to make payment to the pursuer the said Duke of Argyll of the sum of £3000, or such other sum, more or less, as shall be ascertained in the course of the process to follow hereon to be two-third parts of one year's rent or annual value of the said lands, and one-third part of the annual feu-duty exigible from the said lands."

The pursuer pleaded—"The defender being liable to the pursuer in payment of a casualty or composition of two-third parts of a year's rent or annual value of the said lands and others, and of one-third of the said annual feu-duty, as condescended on, decree should be pronounced as concluded for."

The defender pleaded, *inter alia*—"(3) The defender being liable only in relief duty in respect of her entry as heir of entail in the lands of Sunart, and having tendered relief duty prior to the raising of the action, is entitled to absolvitor."

The *facts* of the case as stated by Lord Johnston were these—"It is necessary, in the first place, to see how the title stands and how the question arises.

"The Riddell family have been in possession of Sunart since 1770. But at that date Sir James Riddell only acquired the *dominium utile* on a subaltern title, holding off Lochnell as mid-superior between himself and the Duke of Argyll. This subfeu he entailed in 1784. His grandson Sir James Milles Riddell acquired the mid-superiority from Lochnell in 1808, and thereafter held the entailed subjects of himself as mid-superior. In 1849 Sir James Milles Riddell obtained from the Duke of Argyll