appellants are said to have committed the offence charged against them, and they may, for all that appears, have caught the fish in that manner. There is nothing in the case submitted to us to show that the salmon were not caught in a perfectly legal way. I do not think that that idea is excluded in this case by the wording of the conviction. I am of opinion that the conviction appealed against is bad insomuch as it does not show that any crime has been committed, and must be quashed.

LORD M'LAREN—I concur, and would only wish to add this—following a suggestion from your Lordship in the chair—that I should not wish it to be understood that the conviction is bad on the ground of the irrelevancy of the complaint. If the complaint had been in general terms that the prisoners had taken the fish in some manner to the prosecutor unknown, probably that would have been an irrelevant complaint. But I do not think that where a complaint bears, as this one does, that the fish were taken with light and leister, or in some other manner to the prosecutor unknown, that the complaint is irrelevant. But the objection here is to the conviction, in which the Sheriff has simply found in terms of the complaint, and I think it is bad and must be quashed.

LORD YOUNG—I am of the same opinion. We have decided that a suspension of a criminal charge on such grounds as the present suspension is asked for is not excluded by such a clause as we have here. This is not a review of the conviction obtained against the appellants here, but a process in which we are asked to quash a conviction on the ground that it is illegal on the face of it. We have not to consider the relevancy of the complaint presented to the Sheriff except in so far as it is imported into the conviction. If the conviction had been right on the face of it, as thus: That the Sheriff-Substitute convicted the accused of fishing in close time for salmon in another way than by rod and line—I would not have been disposed to interfere with the conviction. Clause 6 of the statute under which the appellants were tried, "The Tweed Fisheries Amendment Act 1859," specifies the close time during which it shall be illegal to fish for salmon —"It shall not be lawful for any person to fish for or take, or aid or assist in fishing for or taking, any salmon in or from the river at any time between the fourteenth day of September in any year, and the fifteenth day of February in the year following, except by means of the rod and line with the artificial fly only." And clause 8 provides—"Every person who during the annual close times or weekly close times fishes for or takes, or aids or assists in fishing for or taking, any salmon in or from the river, excepting as aforesaid, shall for every such offence be liable to a penalty not exceeding ten pounds." Well, it would have occurred to me if I had had to try the case that a relevant complaint would have been a simple statement that the accused had fished for salmon otherwise than by rod and line in close time. But the conviction as it stands contains the words "or in some other way to the prosecutor unknown," and that is not right, for the unknown way of fishing used by the appellants may have been by rod and line, which way of fishing is not illegal. I have no reason to doubt that the men did catch the fish in some other way than by rod and line, and it is a pity that justice should be defeated by what is almost a technicality, but which has enough appearance of substance to make it a valid objection to the conviction.

Conviction quashed.

Counsel for Appellants—Rhind—Gunn. Agent—James Junner, S.S.C.

Counsel for Respondent—Darling. Agent—Party.

COURT OF SESSION.

Friday, March 20.*

SECOND DIVISION.

GERRY *v.* CAITHNESS FLAGSTONE COMPANY.

Arbiter—Contract of Copartnery—Question between Partner and Company whose Partner has Opposing Interest—Reference Clause not Excluding Action.

A partnership contract provided that any disputes or differences arising among the partners as to the true extent and meaning of the contract, or the partners' rights under it, or the execution or implement thereof, or the management or winding-up of the business should be referred to an arbiter named therein. One of the partners, G, was owner of a quarry which the company leased from him, and to lease and work which, and other quarries belonging to the individual partners, was one of the objects of the copartnership. G agreed by separate letter, in respect of difficulties which arose in working his quarry, to grant the company certain contingent abatements on the rents and lordships due to him under the contract. A dispute having arisen as to whether the company were entitled to certain sums claimed by them as deductions under this letter—*held* that the question was one between G as a landlord, and the company, including G as a partner, and therefore that the action was not excluded by the clause of reference.

This was an action for, *inter alia*, £172, 9s. 2d., as rent and arrears of rent, raised by James Gerry, proprietor of Upper Langlands flagstone quarry in Caithness against the Caithness Flagstone Quarrying Company. The partners of the Caithness Flagstone Company were six pavement merchants in Thurso. They entered into that copartnery in order to work on joint account certain quarries, of which some belonged to the individual members of the firm, and some to Sir J. G. T. Sinclair. James Gerry, the pursuer, one of the partners, was owner of one of the quarries (Upper Langlands). With regard to it and two other quarries, of which the individual partners were part owners, the respective owners bound themselves to grant to the company leases thereof, and exclusive right to

* Decided January 20.

quarry for flagstones, slates, &c., therein, on the same terms and conditions as were contained in a memorandum of lease of other quarries between Sir J. G. T. Sinclair and D. J. Craig.

The contract contained this reference clause—"In the event of any disputes or differences arising among the partners, or between the surviving or solvent partners and the heirs, representatives, or creditors of the deceasing or insolvent partners as to the true intent and meaning of the foregoing contract, and of these presents, or their rights under the same, or in regard to the execution or implement thereof, or the management or winding-up of the said business, or with reference to questions and duties specially submitted to him under the said contract, or as to any other matter or thing relating to the copartnery affairs, all such questions, disputes, and differences are hereby referred to the amicable decision and decree-arbitral of Alexander Henderson, Esq. of Stemster, whom failing," &c.

In 1881 Gerry's quarry (Upper Langlands) began to be worked. That quarry proved difficult to work in consequence, *inter alia*, of the company having to open up a new face of rock. Gerry agreed by separate holograph letter as follows:—"That in the event of your being unable, either by contract or day's wages, to quarry the sawing and H edged flags from this stretch, at a rate not exceeding 1s. per square yard off any excess above the said figure, I shall pay you the same." And further, "that in the event of your being unable to raise during the year ending at Whitsunday 1882 the minimum quantity of flags for lordship, I will not ask for that year lordship on a greater quantity than you have been able to raise."

The quarry continued to be worked by the company till 1884, when in consequence of disputes as to the deductions allowable under the letter just quoted, and as to surface damage to other lands, this action was brought. The defenders had after the disputes arose, and before the action was raised, offered to refer the disputed points to the arbiter, but the pursuer declined to do so, on the ground that the points did not fall within the arbitration clause.

The defenders did not dispute that rent was due, and the question was what deductions were claimable by them. They claimed £147, 18s. 5d. as a deduction to which they were entitled under the letter quoted above, on the ground that the cost of working the slates in the quarry had been to that extent in excess of 1s. a yard. Further, they alleged that the lordships on slabs raised in the first year's working was only £39, 7s. 5d. instead of £139, 17s. 11d., the minimum lordship exigible under the contract of copartnery.

To this claim for deductions the pursuer replied that the defenders' own inefficient working had caused both the extra expense and the deficiency of output.

The defenders pleaded—"(1/1) The action is incompetent in respect that the questions raised fall to be determined under the arbitration clause in the contract of copartnery, and this action ought therefore to be dismissed, with expenses; or otherwise, the questions in dispute should be referred to the arbiter, and decree given in terms of his decision."

The Sheriff-Substitute (HARPER) allowed a proof before answer.

The defenders appealed.

At advising—

LORD YOUNG—This is an action for rent by the proprietor of a quarry, and the rent is admittedly due, but there are certain deductions claimed which give rise to the dispute presented by the parties on this record. The defenders found upon a holograph letter of guarantee and obligation by the landlord to them, dated 18th April 1881, and say that they are entitled to deduct from the rent the excess of cost of working over 1s. per square yard, which amounts to £147, 18s. 5d., and they further say that whereas lordship is claimed upon the minimum output specified in the lease, by that same letter the landlord undertakes not to ask for lordship for the first year's working on a greater quantity than the tenants have been able to raise—the lordship on the quantity which they did in fact raise in the first year being admittedly not £139, 17s. 11d. but £39, 7s. 5d.

Now, with regard to the first ground of deduction—I mean the sum of £147, 18s. 5d.—the landlord's answer is this: In point of fact your working expenses did come to £147, 18s. 5d. in excess of what they would have been at 1s. per square yard, but that is owing to your not having worked properly, or as economically as you might. And with respect to the second he says—True, £39 is the lordship due on the quantity actually raised, but by due and proper working you might have raised more.

These questions were brought under the notice of the arbiter mentioned in the contract of copartnery, when the balance-sheet for the year and the vouchers relative thereto were laid before him; and he invited the landlord to address himself to them to show that the £147, 18s. 5d. is due to the cause he mentions, and that the £39, although the lordship on the quantity actually raised, was an insufficient lordship by reason of the way the company conducted the working. The landlord declined that invitation, saying that the questions were not within the reference clause, and the arbiter thereupon approved of the balance-sheet which contained these items. The landlord disregarded that decision, and raised this action for his full rent, without deduction of those items I have referred to, being £147, 18s. 5d., and the difference between £139, 17s. 11d. and £39, 7s. 5d.

What is put forward in defence is this: The company say that the matters upon which the pursuer's right to these sums depends are within the reference clause of the contract of copartnery, and have been decided by the arbiter in the exercise of his jurisdiction. It is urged upon us, on the other hand, that they are not within the reference clause, and that therefore the arbiter had no right to determine them.

I do not go into the details of the question. They have been pointed out in the course of the argument at the bar, and in the views indicated from the bench, and I now merely express it as my opinion that these questions are not within the reference clause. I think they are not questions among partners, but between the whole body of the partners on the one side, including the pursuer, and the pursuer himself, not as a partner but as landlord, and having an adverse interest, on the other, and therefore that they are not

referred to the arbiter, and have not been decided by him.

There are other matters, namely, claims for ground occupied in the course of quarrying, and for surface damages to other subjects, about which we have had no debate, it being conceded on both sides that they would most conveniently be referred to a man of skill. I put it to Mr Robertson if we were against his contention—which I individually am, and which I understand your Lordships also to be—about the reference clause, and the decision by the arbiter, then would it not be more expedient to refer the whole questions now to a man of skill than to go on with a proof here? I understood him to say that he should then think the matter not suitable for a proof, but rather for a man of skill. I understand that to be the view of the other party also. Therefore if your Lordships should be of the same opinion as to the reference clause, and consequently as to the jurisdiction of the arbiter, the result would be that we should now remit these matters to a person or persons to be agreed upon by the parties. I should like to say at the same time that I am not at all of opinion that it is not within the competency of the Court—although it is better to go to a referee with the consent of the parties—to appoint such matters to be determined by the report of persons of skill, or by such persons upon the examination of witnesses.

Lord Craighill—I am entirely of the same opinion. There is no doubt that there is a reference clause in the contract, but when we look at the contract it seems manifest that only disputes among the partners themselves are referred under it. Gerry, as well as some of the other partners, occupy a different position from that of mere partners. Gerry stands in the place of landlord, and he is bound to fulfil the obligations undertaken by the landlord, and is entitled to exact performance of the obligations undertaken to him. That is quite a different matter from the relation in which Gerry as a partner stands to his copartners. As, however, it is plain upon the terms of the lease that only disputes amongst the partners are to be remitted to the arbiters, I concur in the judgment which your Lordship has proposed.

Lord Rutherfurd Clark—I am of the same opinion.

The Lord Justice-Clerk was absent.

The Court sustained the appeal, recalled the interlocutors of the Sheriff-Substitute appealed against, repelled the plea-in-law No. 1/1 for the defenders, and interponed authority to a joint minute for the parties referring the whole matters in dispute to a referee.

Counsel for Pursuer (Respondent) — Low — Guthrie. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Defenders (Appellants)—J. P. B. Robertson—Dickson. Agents—Smith & Mason, S.S.C.

Friday, March 20.

SECOND DIVISION.

[Lord Lee, Ordinary.

WATTS *v.* WATTS.

Husband and Wife—Divorce—Adultery—Jurisdiction.

A woman raised an action of divorce against her husband on the ground of adultery. The parties were married in Scotland, cohabited there, and a child was born. Less than two years after the marriage she left him on account of ill-treatment. Her domicile of origin was Scottish. There was no proof of the defender's domicile of origin, but some hearsay evidence that he came from England to Scotland as a student, and that his mother lived in England. It was proved that he was living in England in adultery at the date of the action. The summons was served upon him personally. He lodged no defences, but appeared by counsel at the proof and contested the question of adultery, but took no objection to the jurisdiction. The Court (*rev.* judgment of Lord Lee) *sustained* the jurisdiction and *granted* decree of divorce.

William John Weekes Watts was married to Mary Emily Bertram at Glasgow on 12th October 1880 in the office of the registrar by declaration in presence of witnesses, and the marriage was thereafter registered in the register of marriages for the district of Blackfriars there under warrant of the Sheriff-Substitute. Subsequently they went through a ceremony of marriage in an Episcopal Church. They cohabited in Glasgow until April 1882, when they separated as after mentioned, after one child had been born.

In November 1884 Mrs Watts raised the present action of divorce against her husband on the ground of adultery, committed in England. There was a conclusion for the custody of the child.

The summons was served on the defender personally at South Shore, Victoria Docks, Essex, where he was then residing.

No defences were lodged.

The Lord Ordinary on 4th February sustained an amendment to the pursuer's condescendence to the effect that the defender was "at the date of his marriage, and had been for some time prior thereto, domiciled in Scotland," and having found the libel relevant, appointed a proof.

On the day fixed for the proof the defender appeared by counsel, and the Lord Ordinary appointed him to state, by minute, by the following Monday, the defences he proposed to maintain, and adjourned the proof till the Wednesday thereafter.

The defender failed to obtemper the order to lodge defences, and proof was led, at which the defender appeared by counsel, who cross-examined some of the witnesses on the subject of the defender's alleged adultery, but offered no objection to the jurisdiction, the only question asked by him on that point being whether the defender did not say he intended to go back to England and practise there. The defender was not examined.

The pursuer deponed—She first made the de-