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-

fender's acquaintance in 1878 in Glasgow. He then told her that he had been living there for about two years previously. He was supposed to be a medical student. He was then about twenty-one years of age. For about eight or nine months after the marriage they lived in her father's house in Glasgow, and afterwards went into lodgings, where the child of the marriage was born in February 1882. From the time of the marriage the defender conducted himself in a very loose way. He was dissipated in his habits. He always came home drunk. He was not studying or following any occupation. They were supported by the pursuer's father and mother, and by occasional remittances from the defender's own friends. "He told me that his mother was alive and his father dead. He said his father had lived in England; he said what is on the marriage certificate. I understood my husband had been born in England, and had come to Scotland about two years before I made his acquaintance, nominally as a medical student, but he did not do anything either before or after his marriage. He did not say how he intended to live, or where he intended to go. He said that at some future time he would prosecute his studies. He said he was to stop in Glasgow with me; that he did not intend to return to England. He gave no reason for that, except that he was not on friendly terms with his mother, and did not want to go back to her. His statement to me was that he meant to remain in Scotland with me. After my marriage, and until we separated, in point of fact he did remain in Scotland. His conduct grew rather worse. He was exceedingly dissipated, and I began to have difficulty in getting sufficient food and clothing. His conduct got worse after the child was born. He frequently spoke roughly to me. On one occasion only he struck me. That was in Houston Street, after the child was born."

In consequence of this conduct on the defender's part, the pursuer, by her mother's advice, left him on 16th April 1882 and went to stay with her uncle in Rochdale, and had not seen the defender since. Before she left him she had reason to suspect that he was not faithful to her. He used to stay out all night. She wrote twice to him after she left him, in the first and second weeks thereafter, and he replied. She sent these letters through his mother in Devizes. That was all the communication she had with him. In the end of 1883 or beginning of 1884 some information came to her from where her husband was with reference to his conduct. Examined by the Court she said—"Defender never had any house in Scotland. He never had anything to do in Scotland that I know of. He was going to be a doctor. I understood he was going to practise in Scotland. He said that. He got money from his mother, but he was not on particularly good terms with her. He had no other relations that helped him. He had other relations—two aunts in Devizes. He had no relations in Scotland that I know of."

Elizabeth Stuart Hosie knew the defender, as he used to come about her house to visit lodgers of hers. She was one of the witnesses of the marriage at the registrar's office, and made a deposition before the Sheriff-Substitute when the warrant for its registration was granted. She also visited the parties after their marriage. She said—"He did not attend classes that I knew of. Latterly he got dissipated. I knew he was an Englishman."

William Aitken Davidson, law-agent in Glasgow, deponed that in 1876 the defender called at his office with a letter of introduction to him from a Dr Godfrey, who used to be in Glasgow, and who stated in the letter that defender was a young friend who had come to Glasgow, to whom witness might pay some attention. Defender's career since that time was that he ceased to have any definite purpose as to his life, and lived in Glasgow as a loafer. Examined by the Court this witness said—"He spoke to me on the subject; he said his intention was to remain where he was—to prosecute his studies, and qualify himself. (Q) Did he say to you, in so many words, that he was desirous of settling and prosecuting his profession when he qualified himself in Glasgow?—(A) Well, he talked of being in Scotland, I understood in Glasgow. He had no friends in Scotland that I am aware of. His friends were in England. His mother was in England. He never gave me to understand that he was studying to qualify himself for practice in the place where he had friends. (Q) Did he ever say anything to you on the subject to enable you to give any reliable light on the subject?—(A) I cannot go back on my memory and say he did; but the impression left—because I had many meetings with him in supplying money—was that he had no intention of going back to his mother, for his impression was, as he said, that he had been a very bad boy, and did not intend to go back. You see he was married here. (Q) But, apart from the marriage, what kept him here was that he felt he could not very well go back with credit?—(A) That is so. (Q) I suppose I may take it as your evidence that he never stated distinctly to you any decided intention, one way or other, as regards his place of settlement?—(A) No; he never did say distinctly, except in this general way, that he meant to practise in Scotland once he had passed."

It was proved by witnesses from England that the defender was then living at South Shore, Victoria Docks, Essex, with a woman said to be of bad character, not the pursuer, as man and wife, under the name of Mr and Mrs Roberts. He was working as a labourer at the docks.

The Lord Ordinary (LEE) found it not proved that either at the date of the marriage or at the date of the citation the defender was domiciled in Scotland, and therefore, in respect of no jurisdiction, dismissed the action.

"*Opinion.*—The only question of any difficulty in this case is, whether this Court has jurisdiction to entertain the action. Now, the jurisdiction depends on domicile, and it has been settled that that domicile must be a real domicile, such as would regulate the succession. I say nothing whatever against the importance of the matrimonial domicile, because I think that is in many cases a conclusive test of the real domicile in in such cases. But there must be proof of the husband's domicile in order to sustain jurisdiction.

"In this case the question is, whether the husband Watts acquired a domicile in Scotland? It is quite plain that he was originally a domiciled Englishman. It is equally plain that he came to Scotland for a special and limited pur-

pose, namely, to study at a university with the view of qualifying himself for the medical profession. Now, that is not the kind of residence that will effect a change of domicile. It is said, however, that before his marriage, and during the course of his studies, or rather during the time when he ought to have been pursuing his studies, he intimated to Mr Davidson, to whom he had come with a letter of introduction, that he did not intend to return to England. I may say I place perfect reliance upon what Mr Davidson says, but I cannot say I find in Mr Davidson's evidence anything more than this, that the young man indicated to him an intention not to go back to England. He was, I think, as Mr Davidson put it, conscious that he had been a bad boy, and that he could not show face at home. But, at the outside, that is nothing but an intimation of intention. Did he ever in fact settle in Scotland so as to acquire a domicile here? I quite agree that it is not necessary in all cases that a man should have a house of his own, either rented or purchased. A man may acquire a domicile in Scotland or in any other country by living in a hotel. I think it is so put in one of the cases in the House of Lords. But the question always is, can you show that, in addition to an intention, there was ever any fact of settlement? Now, here I must say I do not think there is any proof sufficient to show that this young man's intention, supposing it to have been deliberately and seriously expressed, was ever carried out so as to change his domicile. I think it doubtful if he seriously expressed an intention. But assuming that he had, is there evidence sufficient to show that in effect he ever did settle in Scotland to the effect of changing his domicile. He never had anything but lodgings, and generally for short periods, and we see that, within a couple of years of the time when his wife left on account of his bad conduct, he did return to England, without any proof of his ever having, either as a man separated from his wife, or as a man living with his wife, done anything to acquire a settlement in any way in Scotland. I have great reluctance in coming to the conclusion I have indicated, because I think the pursuer's is a hard case. But I am unable to arrive at the conclusion that there is a domicile such as would enable me to sustain jurisdiction.

"I may add that it is quite necessary in these cases not to sustain the jurisdiction except upon some sufficient ground, because it affects the pursuer's own interests, and possibly the *status* of the children that may yet be born of her, if she was trusting to a decree pronounced without jurisdiction; besides, it would affect the pursuer's position if she was to enter into another marriage. I therefore do not feel at liberty to consider as sufficient what is insufficient.

"Reference was made to a case which was formerly before me, in which I sustained jurisdiction against a person who was originally an Englishman, but who was *de facto* resident in some foreign part—I think in South America. I refer to the case of *Allan*. But in that case there was this material difference—and it was that on which my judgment was rested—that the husband, before going to South America to take up his employment, had come to Glasgow, and taken up a house there, and there settled his wife and children, so that they might be under the protection of a brother, and there the wife and children remained during the husband's residence abroad—he himself evidently intending to return to Scotland to the place where his family were settled. These things made a very different case from the case we have here.

"I must find it not proved that the defender has any domicile in Scotland, and dismiss the action.

"THOMSON—Perhaps your Lordship will put a finding into the interlocutor in regard to adultery.

"LORD LEE—It would scarcely be right. Holding that there is no jurisdiction, I cannot enter into the merits. I am willing to give you my opinion that the defender's connection with another woman is proved.

"THOMSON—If you indicate that it will be enough.

LORD LEE—I did so when I said that the only difficulty was as to jurisdiction."

The pursuer reclaimed, and argued—There was no proof of an English domicile of the defender. Granting that he had an English domicile of origin, it had been lost by acquisition of a Scottish one, which was evinced by his marrying and making his home there, as far as the evidence went, *animo remanendi*. But even without that the Court had jurisdiction on the head of matrimonial domicile, as decided in *Jack* v. *Jack*, February 7, 1862, 24 D. 467, and which was still the law of Scotland, the subsequent case of *Pitt* v. *Pitt* in the House of Lords, 4 Macq. 627, containing only *obiter dicta* to a contrary effect. Besides, the rule of *Jack* was approved by the Lord President in *Stavert* v. *Stavert*, February 3, 1882, 9 R. 519.

The defender did not appear.

At advising—

LORD YOUNG—I have read the evidence in this case with some care, and attended to the arguments which were presented to us against the interlocutor of the Lord Ordinary, who has declined to grant decree of divorce on the ground that the Court has no jurisdiction in the case. His Lordship has intimated, as I understand, that but for the objection on the ground of jurisdiction, he would have found the adultery established, and granted decree of divorce accordingly.

The facts of the case, so far as disclosed, are, that the defender, a young man of the name of Watts, appeared in Glasgow in 1876. Where he came from does not appear. The first evidence we have about him is that he did appear in 1876 in Glasgow. One witness says he brought him a letter of introduction, but where it came from we do not know. There is hearsay evidence, which I daresay is reliable enough, that he was a medical student, and there is also some evidence that he was irregular in his habits. At anyrate in 1878 he got acquainted with a young woman in Glasgow, the pursuer, and married her, and they lived together for some time in her father's house, and then for some time in lodgings, and a child was born. But his habits got worse, and he behaved cruelly to his wife, so that on the advice of friends she left him and went to stay with her uncle in England, and did not return to him. In the following year the man dis-

appeared from Glasgow, and the next we hear of him is that he is living with a woman, who is said to be a bad woman, somewhere in Essex, and the adultery on which the action is founded is said to have been committed there, and in the opinion of the Lord Ordinary is established.

Now, so far as I am able to find in the evidence, the only proof of his being in England at all is this evidence about his having taken up with a bad woman in Essex. The Lord Ordinary seems to have assumed that he was an Englishman by birth. But we have no evidence of his birth. The only part of the proof bearing on it is where his wife says—"I understood my husband had been born in England, and had come to Scotland about two years before I made his acquaintance." I cannot receive this as evidence that the defender is an Englishman. There is one other passage, and the only other bearing on this subject, in the evidence of Elizabeth Stewart Hosie, who says he came about her house—"I knew he was an Englishman." There is really no other evidence. Now, I cannot take this as evidence that he was an Englishman or was born in England. There is no evidence of any witness who saw him there prior to his marriage, nor is there any evidence of his birth at all. I think a case might be stated and proved here which would exclude the jurisdiction of the Court, but none such is here stated or proved—that is to say, that he was a domiciled Englishman whose home was in England. There is no evidence that his home is in England, or that he ever had one there. One witness says his mother lives in Devizes, but that fact will not exclude the jurisdiction of the Court, for we do not know if she had a home for him there. All the evidence about him is connected with Glasgow, and that is the place where he met his wife, and married her, and lived with her. The action was served on him personally, and he has not appeared to dispute the jurisdiction of the Court, as was competent for him to do if he preferred to have the question of divorce tried elsewhere, and had grounds for that contention. On the contrary, he has assented to the jurisdiction, because I see that Mr Craigie appeared for him at the proof, though no defences were lodged, and cross-examined witness, not on the question of jurisdiction but on that of adultery.

Now, in these circumstances I am not disposed to raise any question of jurisdiction. If it was incumbent on the Court to raise this question which the parties do not raise for themselves, it would of course be necessary to direct a further exhaustive inquiry as to the birth and home of the defender. But the summons having been personally served on him, and he having appeared and consented to the jurisdiction, and taking the evidence as it stands, all we know of him is that he was in Glasgow for some years, that he married there, that his wife is there, his child there. I do not think it is fitting for the Court to raise the question if the one of the parties interested to do so does not.

I should propose, therefore, that we do not enter on the question of domicile, but should recal the Lord Ordinary's interlocutor and grant decree of divorce.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Lord Justice-Clerk was absent.

The Court recalled the Lord Ordinary's interlocutor and granted decree of divorce, finding the pursuer entitled to the custody of the child.

Counsel for Pursuer — Comrie Thomson. Agents—Smith & Mason, S.S.C.

Friday, March 20.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

LORD ADVOCATE *v.* DUKE OF ATHOLE.

Teinds—Tack of Teinds—Inhibition—Tacit Relocation.

In 1791 the titular granted a tack of teinds of the lands of B., which included the lands of P. and D., for 19 years. On the expiry of the tack in 1810 the tacksman continued to possess the teinds on tacit relocation till 1839. In that year an inhibition was used by the titular, which was admittedly invalid. Nothing followed upon this inhibition until 1860, when, on a demand from the titular, the tacksman made payment of the surplus teinds of P. from 1841 to 1861. No surplus teind was paid for the lands of D. after the date of the tack. In 1884 the titular raised an action against the tacksman for payment of (1) £30, 4s., the amount of the surplus teinds of P. from 1861 to 1881; and (2) £227, 19s., the amount of the surplus teinds of D. from 1844 to 1881, on the ground that the defender by making payment in 1860 of the teinds of P. had recognised the inhibition as valid, and as putting an end to tacit relocation. The defender answered that the payment had been made in ignorance of the invalidity of the inhibition. *Held* that the payment in 1860 was inconsistent with the continuance of tacit relocation as regarded the teinds of P., and decree granted for £30, 4s. the admitted amount of the surplus teind, but (*diss.* Lord Shand, *rev.* Lord M'Laren) that nothing had been done to put an end to the possession of the teinds of D. upon tacit relocation, and that the defender should be assoilzied from the demand for arrears of teinds from these lands.

Question—Whether the rule established in the case of *Burt* v. *Home*, 5 R. 445 (*Calton* case), with regard to a locality, that unvalued teinds are to be estimated at one-fifth of the rental, is applicable to the case of a titular suing for arrears?

This was an action at the instance of the Crown as titular of the teinds of the lands of Pitdornie and Dalcroy, in the parish of Dull and county of Perth, against the Duke of Athole, the proprietor of these lands, for payment of (1) the sum of £30, 4s., being the amount of the surplus teind of the lands of Pitdornie from 1861 to 1881; and (2) the sum of £227, 19s., being the amount of the surplus teind of the lands of Dalcroy from 1844 to 1881.

By a tack of teinds, for 19 years from the term of Lammas 1791, the Crown let to the then Duke