The penalty under the Act of William is a sum not exceeding £2, with costs of conviction, and under the Act of Victoria, a sum not exceeding £5, without allowance of costs.

W. A. Brown (with him Watson) for the suspenders, argued—The conviction is bad, and should be quashed, because, while the suspenders were charged with contravening the Act of Victoria, and were convicted of that contravention, which is evident from the sentence, a penalty of £2 being all that the Act of William authorises, while, in point of fact, a penalty of £3 is imposed, the warrant upon which the suspenders were cited was not preceded, as required by the statute, by an oath of credulity. Until the amendment made in the complaint (incompetent in itself under the Summary Procedure Act, under whose provisions the complaint is brought, for that Act only authorises such amendments as do not change the character of the offence), there was no relevant or sufficient charge under the Act of Victoria. It is said that the warrant upon which the complainers were cited was preceded by an oath of credulity, but that could only be an oath applicable to the Act of William, for until the complaint was amended, and after the oath was emitted, there was no charge at all under the Act of Victoria, and it has been decided that an oath is necessary to ground a charge of contravention of the latter Act. The suspenders, therefore, had been convicted under a statute which requires the contravention of it to be charged upon oath, while in reality there was no oath that was referable to the particular statutory offence. *Trainer* v. *Johnston*, Jan. 5, 1863, 4 Irv. 264.

Shand (with him Clark), in answer, alleged, in point of fact, that the amendment of the complaint had been made of consent, and maintained that the sentence could not now be challenged on any consequence arising out of it. *Trainer* v. *Johnston* certainly decided that a contravention of the Act of Victoria required to be charged upon oath, but the parties being convened, and no objection being taken, there was no such intrinsic value in the statutory provision as to the oath of credulity as to require the sentence to be quashed, the parties themselves having waived all objections.

At advising—

Lord Justice-General—We cannot consider, in deciding this case, the allegation that no objection was taken, or that it was waived, and that the amendment of the libel was made of consent, as on the face of the record we find that the objection was taken and repelled. The only thing we have to consider is, whether, on its own merits, the objection is well founded. In a prosecution under the statute of William libelled on, it is provided that the procedure shall begin on oath. That a charge shall be made on the oath of a credible witness, is the foundation of the jurisdiction of the justices. And the proceedings of the justices under the Act of Victoria in like manner require to be preceded by an oath. Now what is the state of the facts here. There was a complaint libelling upon both those statutes, with a minor setting forth a charge of an offence under the Act of William only, and it concludes that the appellants are liable in the penalty warranted by the Act of Victoria; while the prayer concludes that the appellants be convicted of the aforesaid contravention, and to adjudge them to suffer the penalties provided by the said Acts, or any of them. But it was proposed at the first calling of the case in September last to amend the complaint, so that the case might be brought under the Act of Victoria, and that the punishment contained in the prayer of the petition might competently be concluded for. Previous to the amendment being made, there was no allegation contained in the minor specifying what is required in a charge under the Act of Victoria. The allegation that was allowed to be made by way of amendment was that the appellants "did obtain game by unlawfully going on the complainer's lands in search or pursuit of game with guns, and did unlawfully take game thereon." All that had been alleged before was that the appellants were, without leave of the proprietor, found trespassing upon the complainer's lands in search or pursuit of game. That inferred a penalty not exceeding £2, but when the amendment was made, the complaint warranted a penalty of £5, as allowed by the Act of Victoria. Then there is an oath, and that was emitted under the Act of William the IV., and referred to the original complaint. It set forth [*reads*]. But there is no oath to the effect that the appellants had obtained game by unlawfully going on said fields in search or pursuit of game with guns, and did unlawfully take game thereon; and, therefore, so far as the charge is made under the Act of Victoria, the conviction following thereon is a bad conviction, because it proceeds on a charge not made on oath.

The other judges concurred.

The sentence was accordingly quashed, with expenses.

Agents for Suspenders—Morton, Whitehead, & Greig, W.S.; and James Dickie, Solicitor, Irvine.

Agents for Respondent—Tods, Murray, & Jamieson, W.S.

Tuesday, December 24.

(Full Bench).

KENNEDY *v.* CADENHEAD.

Procurator-Fiscal—Jurisdiction—Nuisances Removal Act. Held, under the Nuisances Removal Act, 19 and 20 Vict., cap. 103—(1) that the concurrence of the Procurator-Fiscal was not required although the complaint prayed for penalties, and, in default of payment, for imprisonment; (2) that the Magistrates of Aberdeen had jurisdiction; and (3) that the Act applied to wholesale dealers, and was not confined to meat "exposed for sale."

This was an appeal certified from the Aberdeen Circuit against a conviction under the Nuisances Removal Act, 19 and 20 Vict., cap. 103. The appellant was James John Kennedy, wholesale merchant in Aberdeen, and the conviction appealed against was obtained before one of the Magistrates of Aberdeen upon a complaint charging the appellant with having had in his possession twelve porkhams which were in a condition unfit for human food, and which had been destroyed as such by the Inspector of Nuisances. Fourteen objections to the conviction were stated in the Circuit Court, but of these only the following were now argued:—

"(1) The complaint, which prayed for penalties and in default of payment thereof for imprisonment, was at the instance of the respondent, as prosecutor appointed by the local authority, with his own concurrence as Procurator-Fiscal of Court; whereas the Act contemplated that the prosecutor should be a different person from the Procurator-Fiscal of Court.

"(2) The Magistrates of Aberdeen had no jurisdiction in such a case, the Act conferring jurisdiction upon the Sheriff, not on the Magistrates.

"(3) There was no offence under the Act charged. The appellant was a wholesale dealer, while the Act was confined to retail dealers, or at least to 'the exposure of diseased meat for sale.'

"(4) The execution of citation was inept, in respect it was dated 3d July, while the complaint itself was dated 30th July.

"(5) The Magistrate committed an irregularity in failing to record and pronounce upon the objection taken to his jurisdiction."

The first of these objections was argued at some length some weeks ago, and was then repelled on the ground that in this case the concurrence of the Procurator-Fiscal was not necessary at all. Of the remaining objections, the fourth and fifth were not seriously pressed, and the case came mainly to turn on the second and third objections.

CLARK and KEIR for appellant.

SHAND and BIRNIE for respondent.

At advising,

LORD JUSTICE-GENERAL—The statutes under which the complaint under appeal is laid must, so far as regards the ends they were intended to serve, be construed liberally; but, in so far as penal, the construction must be strict, putting aside the other points mentioned by Mr Keir, as to which it is unnecessary to say more. The first point to be disposed of is—Whether the Magistrate had jurisdiction as here assumed by him. The complaint is laid under the 18th section of the Nuisances Removal Act, 1856, Part I. Section 10 of that Act confers equal power on the Magistrates as on the Sheriffs and Justices; and section 44, which was referred to, does not confer any jurisdiction on the Sheriff more than on the Magistrate, although, by an omission, the form of proceeding thereby authorised is limited to the Sheriff, and does not include Magistrates and Justices. To remedy the restriction thus made, section 447 of the General Police Act made the provisions and procedure in regard to proceedings before, and to appeals from, any order or judgment of the Sheriff apply to proceedings before, and any judgment of any Magistrate or Justice of the Peace. Who has jurisdiction if the Magistrate has not? There are no sections or section confirming jurisdiction which applies to a Sheriff that does not to a Magistrate or Justice, and I am of opinion that jurisdiction was intended to be, and is, equally conferred on all three different classes of judges alike. The next point is as to the relevancy of the complaint as laid. It is laid under section 18, and it is said that the complaint is not within the meaning of the Act, in so far as it does not allege that the hams were exposed for sale. There are some delicate questions which might be raised in regard to the meaning of the Act, and I think, therefore, we ought to decide no more than is necessary for the disposal of the case. It is alleged that the goods were found, inspected, seized, &c., in respect there was probable cause for believing that the same were intended for human food, and were unfit for human food. The Inspector of Nuisance is entitled to enter premises in two events, either where there is exposure for sale, or probable cause for believing that the goods were intended for human food. There is a perfect alternative, and the Act provides that in case any such meat, &c., appear, &c., unfit for human food, the same may be seized, and if it appear to any Magistrate or Justice of the Peace that it is unfit, he may order it to be destroyed. There is a matter of fact to be established, whether exposed or probable cause for believing. Then follows a penalty incurred by the party to whom the meat belongs, or in whose custody the same is found. I am of opinion, therefore, that the complaint is properly laid under the Act. I do not give any countenance to Mr Clark's contention that there must be an allegation that at the time of the goods being unfit they must have been intended for food, but think the complaint sufficient.

LORD COWAN—I concur with your Lordship on both points, and have simply to mention that the Act of 1862 subjects the Magistrates or Justices of the Peace to review as well as the Sheriffs.

LORD DEAS—There were three points on which I certified this case to your Lordships. 1. As to jurisdiction. 2. The Fiscal's concurrence. 3. Whether the statute applied to wholesale dealers. On questions of jurisdiction I would not have certified the case, as I thought there was jurisdiction sufficient, and I concur in the mode of disposal of that question now proposed by your Lordships. The second point was disposed of last Court-day, and requires no further remarks. As to the third point, it appears to be, though I had an opinion such as has been expressed by your Lordships when the case was before me in Aberdeen, that it was proper to report the point in order to avoid similar questions being raised at other Circuit Courts, and it appeared to me that the complaint was supported on grounds somewhat startling, but I have now to express my entire concurrence in the views expressed by your Lordships. I entertain no doubt that goods of this kind, in the hands of a general dealer, are exposed for sale, and if the complaint had set forth exposure for sale, I apprehend there would have been no difficulty. If it were otherwise, questions would always arise as to who were wholesale and who were retail dealers, and would make the statute quite unworkable; and I am, therefore, of opinion that the Act applies to wholesale as well as to retail dealers. It is objected that it did not say the meat was exposed for sale. Though the question admits of argument, to me it appears that it is not necessary that the goods are for sale, or exposed for sale, the object of the statute being to prevent such unwholesome things being exposed for sale; and I have no doubt, on the face of the complaint, that it is fairly laid under the statute. I give no opinion on any point not necessary to be decided; and, therefore, I give no opinion as to how far the provisions of the Act would or would not affect parties where they are neither wholesale or retail dealers. It is a question of importance, if there may not be a seizure and still the statutory penalty not enforceable; but there is no room for that question here.

LORD ARDMILLAN—I concur, and have nothing to add, except that I think a great deal of what has been said applies to the merits of the case rather than relevancy. Can it be said that I am entitled to keep unwholesome food? and it may be given to my servants, and are they not entitled to complain? and is not the Inspector entitled to seize such food? In the same way the question may readily arise with the manager of the dietary arrangements in any large establishment.

Lord Neaves—I also concur. The Act is framed with precision, and this complaint is framed with propriety. Exposure is not necessary under the statute. There is an alternative. The intention of using would be of course simultaneous with its being unfit for food; and it might be a good defence if he had given orders to destroy or put away the goods, and had ceased to intend them for human food.

Lord Jerviswoode—I concur.

The suspension was therefore refused, with expenses.

Agent for Appellant—James Webster, S.S.C.
Agent for Repondent—W. Saunders, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, December 24.

(Before a full Bench.)

LIST *v.* PIRRIE.

(*Ante* iii., 83.)

Bill of Advocation—Justice of Peace—Prevention of Cruelty to Animals Act—Summary Procedure Act—Appeal—Jurisdiction—Competency. A party convicted by justices of peace under the Prevention of Cruelty to Animals Act appealed to Quarter Sessions. The competency of this appeal was sustained, but farther consideration of appeal was superseded, pending appeal by prosecutor to High Court of Justiciary against judgment sustaining competency. Bill of advocation by prosecutor *refused* as incompetent.

This was a bill of advocation, presented by Alfred John List, chief constable of the county of Edinburgh, and procurator-fiscal in the Justice of Peace Court for the county.

The bill narrated that on 21st May last the complainer presented a complaint to the justices, under the Summary Procedure Act, against John Pirrie, carter, charging him with an offence against the Act for the more effectual Prevention of Cruelty to Animals, 13 and 14 Vict., c. 92. Pirrie appeared on 30th May, and, after evidence, was convicted before two justices, and sentenced to six weeks' imprisonment. Pirrie appealed to the Quarter Sessions, and also presented a note to the High Court of Justiciary, praying for interim liberation on caution, pending the result of the appeal to the Quarter Sessions. On 8th June last the Court, the procurator-fiscal not opposing, and without prejudice to any objection that might be stated to the competency of the appeal to the Quarter Sessions against the judgment of the justices, and in the circumstances set forth in the application, granted warrant for the interim liberation of the petitioner, on his finding caution to the amount of £10, to return to prison to undergo the unexpired period of his imprisonment under the sentence, in the event of his appeal to the Quarter Sessions being dismissed.

On 16th July 1867, at a meeting of Quarter Sessions, the appeal was taken up. The Procurator-fiscal objected to the competency of the appeal. The meeting, after hearing parties on the question of competency, sustained the competency of the appeal, and, in respect it was intimated by counsel at the bar that this judgment was to be appealed to the High Court of Justiciary, adjourned the farther hearing, pending the appeal, to the 21st of January 1868.

The complainer presented this bill of advocation, contending (1) that the offence of which Pirrie was convicted being criminal, and no power of review on the merits being conferred by the statute, such review was excluded; (2) the prosecution had been under a special statute, which conferred no right of review on the Quarter Sessions; (3) the complaint and procedure had been under the Summary Procedure Act 1864, and, no record of the evidence having been made, appeal on the merits was incompetent; (4) the Quarter Sessions had no power to take proof of the matters in the original complaint, and, there being no record of the evidence led, they had no means of reviewing the conviction.

The complainer asked the Court to advocate the proceedings, and find that it was not competent for the Quarter Sessions to review the judgment and conviction.

Macdonald for advocator.

No appearance was made for the respondent.

Lord Justice-General—It appears to me that this bill of advocation is incompetent. Advocation is a known process in this Court, either by itself, or in combination with suspension. But advocation is a proper process of review, whereas the question to be raised here is, whether an inferior judicatory is not threatening to overstep the limits of its jurisdiction? It is not competent to appeal in order to prevent that. Such an appeal is unprecedented. I give no opinion whether the Quarter Sessions were right or wrong; and I think our judgment should contain a reservation of that question. All we should do is, to find that we cannot interfere in this form.

The other judges concurred.

Bill of advocation refused, without prejudice to any question as to right of appeal to Quarter Sessions.

Agent for Advocator—William Saunders, S.S.C.

JURY TRIALS—CHRISTMAS SITTINGS.

Thursday-Friday, December 12–20.

NORTH *v.* WARING BROTHERS AND ECKERSLEY.

(Before Lord Mure,)

Wrongous dismissal—Engineer—Breach of Agreement—Jury Trial. In counter actions by engineer for wrongous dismissal, and by employers for breach of agreement, verdict for pursuer in first action, and for defender in second.

Messrs Waring Brothers and Eckersley, Victoria Street, Westminster, and at Shawhill, near Annan, in the county of Dumfries, were contractors for the Solway Junction Railway, including the making of the iron viaduct over the Solway Firth, and in May 1865 they employed Mr Robert Samuel North, C.E., Whinnyrigg House, near Annan, to take charge of the construction of the viaduct. The agreement between the parties was expressed in the following letters:—