This was a suspension of a conviction obtained under the Embezzlement Act, 17 Geo. III., c. 56. The suspender alleged that on 20th November last he was waiting at the Newburgh station of the North British Railway, between seven and eight o'clock in the evening, when a policeman came up and asked him if two bags, lying on the platform, belonged to him. On his replying that they did, he and the bags were taken to the Town-house of Newburgh. He was then taken before two justices. The respondents, T. S. Anderson and W. Anderson, manufacturers, compeared and made deposition, and between nine and ten at night a sentence was pronounced against him, bearing that the justices, in respect of the depositions of the Andersons, and in respect of Smith refusing to give any satisfactory account how he came in possession of the yarns, or to produce the party from whom he purchased them, found him guilty of a misdemeanour in terms of 17 Geo. III., c. 56, sec. 11, and in terms of sec. 14 fined him £20, to be paid to the clerk of Court at Newburgh within seven days, warrant of distress to issue on failure of payment within the specified time.

Smith now contended that these proceedings were illegal and oppressive. No complaint had been made by any one under sec. 10, or that the yarns in the bags were suspected to be purloined, and no reasonable suspicion existed before the apprehension that the yarn was embezzled. The deposition on which the judgment proceeded was not signed and authenticated by the respondents; and the judgment was null, as not being in terms of the statute, inasmuch as it did not give one half to the informer and the other half to charitable purposes, but ordained payment to the clerk of court at Newburgh.

Section 11 enacts that "every peace-officer, constable, . . . &c., shall and may apprehend, or cause to be apprehended, all and every person or persons who may reasonably be suspected of having, or carrying, or any ways conveying, at any time after sun setting and before sun rising, any of such materials suspected of being purloined or embezzled, and the same, together with such person or persons, as soon as convenient, may be conveyed or carried before two justices for the county, town, or place, within which the suspected person or persons may be apprehended; and if the person or persons so apprehended in conveying any such materials shall not produce the party or parties duly entitled to dispose thereof, from whom he, she, or they, bought or received the same, or some other credible witness, to testify upon oath or (being of the people called Quakers) upon solemn affirmation, to the sale or delivery of the said materials, or shall not give an account to the satisfaction of such justices, how he, she, or they came by the same; then the said person or persons so apprehended shall be deemed and adjudged guilty of a misdemeanour, and be punished in manner herein aftermentioned, although no proof shall be given to whom such materials belong."

Section 14 provides that every person deemed guilty of a misdemeanour, under the 11th and other sections, "shall, for every such misdemeanour, forfeit, for the first offence, the sum of twenty pounds . . . of which forfeiture one moiety shall be paid to the informer, and the other moiety to and amongst the poor of the parish, town, or place where such conviction shall be, or to such public charity or charities as the justices convicting shall appoint."

Scott for complainer.

Fraser, for respondent, was not called on.

Lord Justice-General—I have no doubt in this case. This appears to me to be a very good conviction under the 11th section of the Act. It is not an Act under which it is very easy to have the proceedings properly conducted. In former times, especially, they were very badly conducted, and the practitioners who acted for the manufacturers were in the habit of bungling the procedure very considerably; but here the clerk of court went about the matter well, both as to calligraphy and composition. The proceedings are entirely under the 11th section, and the penalty is under the 14th. We have nothing to do with the 10th section. That section authorises justices, in certain circumstances, to issue search warrants for the purpose of searching dwelling-houses, out-houses, and other places, and, if the materials suspected to be embezzled are found, the parties in whose hands they are found are to be brought before two justices, and if they shall not give an account to the satisfaction of the justices how they came by the same, they are to be deemed guilty of a misdemeanour, and punished, although no proof be given to whom such materials belong. But that is quite different from the present case. The suspender tells us the nature of this case. He had two bags, and was waiting at a railway station, when he was apprehended and carried before two justices. That was after eight o'clock at night. Is not that the very case for which the 11th section provides? It provides that any constable may apprehend any person who is reasonably suspected of having or carrying embezzled materials, and convey the same along with such person before two justices, and if such person shall not produce the party from whom he bought the same, or give a satisfactory account of how he came by the same, he shall be deemed guilty of a misdemeanour, and punished, although no proof be given to whom the materials belong. Here, the complainer was brought before two justices, and the account he gives is as unsatisfactory as could be, for he could give no account at all, and said he would give no account, and therefore he was convicted. I do not think it was necessary to have the evidence of the Messrs Anderson at all. No doubt it was satisfactory to the minds of the parties to have it, and it does no harm. The conviction is in good form, and in ordering the penalty to be paid to the clerk of court, they take the ordinary procedure in cases where there is no special provision as to payment or recovery. The clerk of court is the proper party to receive all penalties that may be adjudged, unless the statute directs otherwise. There is no special direction here. All that is said is, that ultimately one-half shall go to the informer, and one-half to the poor of the parish; but the proper immediate recipient of all such penalties is the clerk of court.

The other judges concurred.

Agent for Complainer—James Bell, S.S.C.

Agents for Respondents—Macgregor & Barclay, S.S.C.

Tuesday, December 24.

MORRIS AND BOYD *v.* THE EARL OF GLASGOW.

Suspension—2 & 3 Will. IV., c. 68—25 & 26 Vict., c. 114—Oath of Credulity. Conviction of the

Justices quashed, in respect a charge of contravening the Act 25 and 26 Vict. was not preceded by an oath of credulity.

This is a suspension of a judgment pronounced by the justices of the county of Ayr. The suspenders were charged with a contravention of the Act 2 and 3 Will. IV., c. 68, and also of the Act 25 and 26 Vict., c. 114, "in so far as they, the said Hugh B. Morris and Hugh Boyd, were, upon Monday the 12th day of August 1867, or about that time, and between the hours of three o'clock afternoon and five o'clock afternoon of said day, and without leave of the proprietor, found trespassing upon one or more fields on the farm of Knockendon, occupied and possessed by Andrew Aitken, Carsehead, Dalry, and Andrew Allan, Munnock, there, part of the lands and estate of the said Right Honourable James Carr Boyle, Earl of Glasgow, and situated in the parish of Dalry, and county of Ayr, in search or pursuit of game, or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies, whereby the said Hugh B. Morris and Hugh Boyd are liable to forfeit and pay a sum of money not exceeding £5 sterling each, as to your Honours shall seem meet, together with the costs of conviction, and, in default of immediate payment, to be imprisoned in the common jail or house of correction for the county of Ayr (with or without hard labour) for any term not exceeding two calendar months."

The following is the prayer of the complaint:—"May it therefore please your Honours to grant warrant to cite the said Hugh B. Morris and Hugh Boyd to appear before you to answer to this complaint, and thereafter to convict them of the aforesaid contravention, and to adjudge them to suffer the penalties provided by the said Acts, or any of them."

When the diet was called before the justices at Largs, Mr Dickie, solicitor, Irvine, agent for the suspenders, appeared, and stated a number of objections to the complaint, and these the justices repelled. At this diet, also, the petitioner was allowed to amend his complaint to the effect of introducing the words, "did obtain game by unlawfully going on said fields in search or pursuit of game, with guns, and did unlawfully kill and take game thereon, and," after the words "Hugh Boyd," last mentioned in the complaint. The case was adjourned at this diet until the 11th of September, when the suspenders appeared in person. Mr Dickie urged further objections to the amended complaint, which the justices again repelled. The complaint having gone to trial, one witness, gamekeeper to the Earl of Glasgow, was examined as a witness, and thereafter the justices found the complaint proved, and pronounced the following sentence:—"The justices, in respect of the evidence adduced, convict the said Hugh B. Morris and Hugh Boyd of the contravention charged, and therefore adjudge them each to forfeit and pay the sum of £3 sterling of modified penalty, with the sum of £2, 5s. sterling each of modified expenses, and, in default of payment within fourteen days from this date, adjudge them to be imprisoned in the prison of Ayr for the period of two calendar months from the date of their imprisonment, unless the said sums shall be sooner paid, and grant warrant to officers of court to apprehend them, and convey them to the said prison, and to the keeper thereof to receive and detain them accordingly."

Morris and Boyd suspended on various grounds. The first of these to which the argument, upon the direction of the Court, was confined, and upon which the case was decided, turned upon a construction of sec. 11 of the Act 2 and 3 Will. IV., c. 68, and sec. 2 of the Act 25 and 26 Vic. c. 114. The former provides:—"And be it enacted, that the prosecution for every offence punishable by virtue of this Act shall be commenced within three calendar months after the commission of the offence; and that where any person shall be charged on the oath of a credible witness with any such offence before a justice of the peace, the justice may summon the party charged to appear before himself or any one or two justices of the peace, as the case may require, at any time and place to be named in such summons; and if such party shall not appear accordingly, then (upon proof of the due service of the summons, by delivering a copy thereof to the party, or by delivering such copy at the party's usual place of abode to some inmate thereat, and explaining the purport thereof to such inmate) the justice or justices may either proceed to hear and determine the case in the absence of the party, or may issue his or their warrant for apprehending and bringing such party before him or them, as the case may be; or the justice before whom the charge shall be made may, if he shall have reason to suspect, from information upon oath, that the party is likely to abscond, issue such warrant in the first instance, without any previous summons." The latter provides:—"It shall be lawful for any constable or peace-officer in any county, borough, or place in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace-officer shall have good cause to suspect that any such game, or any such article or thing is being carried by any such person, and should there be found any game, or any such article or thing, as aforesaid, upon such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or peace-officer shall in such case apply to some justice of the peace for a summons citing such person to appear before two justices of the peace, assembled in petty sessions, as provided in the 18th and 19th of her present Majesty, chapter 126, section 9, as far as regards England and Ireland, and before a sheriff or any two justices of the peace in Scotland; and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid, for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding five pounds, and shall forfeit such game, guns, parts of guns, nets, and engines, and the justices shall direct the same to be sold or destroyed, and the proceeds of such sale, with the amount of the penalty, to be paid to the treasuer of the county or borough where the conviction takes place; and no person who, by direction of a justice in writing, shall sell any game so seized, shall be liable to any penalty for such sale; and it no conviction takes place, the game, or any such article or thing, as aforesaid, or the value thereof, shall be restored to the person from whom it had been seized."

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 pork-hams 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.