

Saturday, January 31.

## FIRST DIVISION.

[Lord Trayner, Ordinary.]

## WHYTE v. WHYTE.

*Husband and Wife—Separation and Alim-  
ment—Decree in Absence—Reponing.*

In an action of separation and alim-  
ment by a wife against her husband,  
the defender, although the summons  
was served upon him personally, and  
although he had due notice of the day  
of proof, allowed decree in absence to  
pass. He thereafter lodged a reclaiming-  
note and tendered defences, and the  
Court remitted to the Lord Ordinary  
to repone the defender upon such terms  
as seemed just.

Mrs May Philips or Whyte, Aberdeen,  
raised an action of separation and alim-  
ment against her husband George Whyte, Leslie  
Terrace, Aberdeen, the summons in which  
was personally served upon the defender,  
who did not enter appearance or defend  
the action.

In the proceedings an order for proof was  
pronounced and notice thereof was sent to  
the defender by registered letter.

The defender was not represented at the  
proof, and the Lord Ordinary after hearing  
the evidence granted decree of separation  
and decerned against the defender for a  
sum of alimment for herself and her children.

The defender lodged a reclaiming-note  
and tendered defences, which the Court  
allowed to be received.

On the case appearing in the Summar  
Roll, counsel for the pursuer objected to  
the competency of the reclaiming-note, and  
argued that the decree obtained by the pur-  
suer was a decree in absence, recal of which  
by means of a reclaiming-note was by sec. 23  
of the Court of Session Act 1868 incompe-  
tent—Fraser on Husband and Wife, p. 1238.  
The proper course for the defender to follow  
if he was in earnest was to bring a reduc-  
tion of the decree—*Stewart v. Stewart*,  
Feb. 27, 1863, 1 Macph. 449. It was a hard-  
ship that the defender, who was well aware  
of what was going on, should be allowed to  
lie by, and after decree had been pron-  
ounced to have the whole proceedings  
commenced *de novo*.

The defender argued that he was out of  
Scotland when the proceedings were going  
on, and that he was unable from poverty  
to defend the action at the previous stage  
of the proceedings.

The Court remitted to the Lord Ordinary  
to repone the defender upon such terms as  
to his Lordship should seem fit.

Counsel for the Pursuer—Younger. Agent  
—A. Laurie Kennaway, W.S.

Counsel and Agent for the Defender—  
Party.

Saturday, December 20, 1890.

## FIRST DIVISION.

[Lord Kinnear, Ordinary.]

THE GENERAL PROPERTY INVEST-  
MENT COMPANY (LIMITED) AND  
MYLES (LIQUIDATOR) v. CRAIG.*Public Company—Liquidation—Ultra  
Vires—Compromise with Insolvent Share-  
holder—Surrender in Lieu of Forfeiture  
—Purchase by Company of its Own  
Shares—Companies Acts 1862 and 1867.*

A holder of 250 shares in a public  
company became insolvent in conse-  
quence of the failure of the City of  
Glasgow Bank, and made an assign-  
ment of his whole estate including said  
shares to the liquidators. A call there-  
after became due upon the shares, which  
the shareholder was unable to pay, and  
the shares accordingly became liable  
to forfeiture. In point of fact they  
were not forfeited, but the share-  
holder, with the concurrence and ap-  
proval of the liquidators of the bank,  
executed a deed of transfer in favour of  
the company upon 14th April 1879. The  
deed bore to be granted "in considera-  
tion of my being hereby relieved of  
liability for the uncalled portion of the  
share capital of 'The General Property  
Investment Company, Limited,' in re-  
spect of the shares after mentioned, and  
without any price or consideration hav-  
ing been made to me by The General  
Property Investment Company, Limi-  
ted, hereinafter called the said trans-  
ferees." After the date of the transfer  
the shareholder was treated as such no  
longer, his shares were in part re-issued,  
and no steps were taken to recover the  
amount of the call above mentioned.  
The company having gone into liquida-  
tion an action was brought in the year  
1889 for reduction of the transfer, and  
for payment of the amount of the calls  
with the interest attaching to such of  
the shares as had not been re-issued.  
*Held* that the arrangement under which  
the transfer was made and accepted  
was such a compromise as the company  
was entitled to make with an insolvent  
shareholder, and that the transaction  
was not void as being a purchase by the  
company of its own shares.

*Opinion* by Lord M'Laren that a  
company would not be entitled to  
accept a surrender of his shares from  
a solvent shareholder on the under-  
standing that he was to be released  
from liability for calls already made.

(*Vide Matheson v. General Property In-  
vestment Company, ante*, vol. xxvi. p. 185,  
and 16 R. 282.)

This was an action of reduction at the in-  
stance of The General Property Investment  
Company, Limited, and David Myles, ac-  
countant in Dundee, the official liquidator  
of said company, against Robert Craig,  
papermaker, Dalkeith, and the object of

the action was to reduce a transfer of 250 of the company's shares which had been executed upon 14th April 1879 by the defender in favour of the company. There were also conclusions in the summons for reduction of various entries in the company's books which had been made in consequence of the transfer, and for payment of the sum of £1533, 10s. 5d.

The circumstances which gave rise to the action were these:—The General Property Investment Company was incorporated on 3rd February 1876. The object for which it was established was set forth in article 3 of its memorandum as follows:—"To purchase or acquire heritable property of every description within the United Kingdom, and any heritable rights or other rights vested in or secured over heritable property; and to hold, manage, improve, build upon, lend upon, deal with, feu, sell, or dispose of the same in every legitimate way, with power to borrow money on security of property purchased or acquired, or on debenture, or by way of deposit; and the doing all such other things as are incidental or conducive to the attainment of the above objects." The company had no power under its memorandum of association to purchase its own shares. The articles of association of the said company were those of Table A of the 1862 Act, with certain modifications. Articles 4 and 5 were as follows:—"IV. No shareholder shall transfer his shares until he has first made offer of them to the company at the then market price. V. Any shares acquired by the company may be retained as the property of the company, or disposed of in such manner as the company in general meeting thinks fit to direct." The shares never had a quotation on the Stock Exchange, and were never bought or sold in the open market. The capital of the company, so far as issued, consisted of 4250 shares of £10 each, but at the date of liquidation, December 16, 1886, a large number of these shares was held in name of the company itself. Among other shares so held were 250 which had originally been held by Mr Craig the defender. He was a shareholder in the City of Glasgow Bank, and when the bank went into liquidation in October 1878, he was placed upon the list of contributories as a holder of £20,467 of the capital stock thereof. Being unable to meet the calls made upon him by the liquidators of the bank, the defender agreed to make a complete surrender of his estate to the liquidators. His estate so surrendered embraced the 250 shares of The General Property Investment Company in question, upon which a call of £2 per share had been intimated and was due on 24th December 1878. It was arranged between the liquidators and the defender that the latter should realise such portion of his means as could conveniently be disposed of, accounting to the liquidators for the proceeds, and that the liquidators should get an assignation to the remainder from the defender on relieving him of all liability attaching thereto. Accordingly, in answer to an inquiry made by the de-

fender's agent in March 1879, as to how the shares in question could be best disposed of, the secretaries of the company, as the defender was unable to meet the call due of 24th December 1878, suggested that he should give up his shares. This suggestion was, with the assent of the liquidators of the bank, agreed to by the defender, and, in order to give effect to it the transfer sought to be reduced in this action was executed by him on 14th April, and accepted by the company on 5th June 1879.

The deed of transfer bore to be granted "in consideration of my being hereby relieved of liability for the uncalled portion of the share capital of The General Property Investment Company, Limited, in respect of the shares after mentioned, and without any price or consideration having been paid to me by The General Property Investment Company, Limited, hereinafter called the said transferees."

Nothing was said in the correspondence, in which the matter was arranged, as to the defender's liability for the past-due call, but in the proof allowed in this action the agent for the defender deposed that his understanding was that the company waived its right to enforce the call, and as a matter of fact no attempt was made by the company to enforce payment of this call from the defender.

From the date of the transfer the defender was treated as if he was in fact no longer a shareholder; his name was removed from the register, he was summoned to no meetings of the company, the shares he had held were in part at least re-issued, and no calls in respect of the shares were made upon him.

After the date of the transfer calls were made to the amount of £8 per share upon the various shareholders, and the object of the petitory conclusion in the present action was to recover the sum of £1533, 10s. 5d. from Mr Craig in respect of calls upon the shares he had held. The calls of £8 per share upon the full number of 250 originally held by Mr Craig would have amounted to £2000, but after the date of the transfer 108 of these shares had been re-issued by the company to subsequent holders, who had paid £742, 2s. 11d. in respect of the calls. The balance of £1257, 17s. 1d. was increased by interest to the sum of £1533, 10s. 5d.

The pursuers maintained that the transaction under which the transfer was accepted was *ultra vires* of the company, as being practically a purchase by the company of its own shares.

They pleaded—"(1) The pretended transfer of shares by the defender to the company condescended on, and relative entries in the books of the company, being illegal and void, and inconsistent with and in violation of the Companies Acts 1862 and 1867—(a) the said transfer and entries should be reduced as concluded for, and (b) decree should be pronounced in terms of the petitory conclusions of the summons."

The defender pleaded—"(2) The transfer sought to be impugned having been truly a

surrender or forfeiture by the defender of his shares to the company solely for the company's benefit, and having been dealt with as such by the company, and not being in violation either of the Companies Acts or the constitution of the company, the defender should be assoilzied. (4) The defender should be assoilzied in respect of the lapse of time since the transfer was accepted, and of the actings of parties and the change of circumstances condescended on. (5) *Restitutio in integrum* being impossible, the defender should be assoilzied. (6) No notice of any calls having ever been given to the defender after the date of the transfer in question, and the said calls not having been duly made, so far as the defender is concerned, the defender should be assoilzied from the petitory conclusions of the summons. (7) The company, and the shareholders and creditors thereof, having acquiesced in, adopted, and homologated the said transfer, and the company having re-issued a portion of the shares in question, the pursuers are barred from maintaining their present claims. (9) The pursuer's whole claims being inequitable and contrary to the justice of the case, the defender should be assoilzied, with expenses."

The Lord Ordinary (KINNEAR) upon 28th February 1890 allowed a proof before answer, the facts established in which, so far as material, have been already narrated, and thereafter, upon 14th June 1890, he assoilzied the defender upon the grounds set forth in the following opinion:—

"*Opinion.*—The pursuer maintains that the defender's transfers of his shares to the company, and all the subsequent entries in the share register and transfer books with reference to the shares transferred, ought to be reduced, so that the defender's name will in effect be replaced upon the register as the holder of the shares in question; and that this being done, he should be ordained to make payment of the calls which have been made since the date of the transfers, amounting, with interest, and after deducting certain payments for which he is entitled to credit, to £1533, 10s. 5d. The ground of action is that the transaction upon which the transfers were made and accepted was *ultra vires* of the company, and that the transfers were therefore void *ab initio*; and this is said to be established by the cases of *Trevor v. Whitworth* in the House of Lords, and *The Property Investment Company v. Matheson*, 16 R. 252.

"The distinction between these cases and the present is manifest, and indeed is very clearly brought out in the conclusions of the summons. In each of the former cases the company had bought its own shares from one of its members for a price; and the ground of judgment was that it had no power under the Companies Acts to purchase its own shares, or, in other words, to pay back to one of its own members the money or part of the money which he had subscribed to the capital of the company. In the present case it is set forth in the conclusions of the summons that the transfers which it is proposed to reduce

were executed 'without any price or consideration having been paid,' and it is established by the minute of admissions that they were given and accepted for the purpose of effecting a surrender of shares by an insolvent shareholder who was unable at the time to meet the calls which had been made upon him.

"Such a case is very clearly distinguished from a case of sale by all the learned Lords who took part in the decision of *Trevor v. Whitworth*. Lord Herschell, after explaining as the ground upon which a purchase by the company cannot be supported, 'that the statutes require that the whole of 'the subscribed capital, unless diminished by expenditure upon the objects of the memorandum, shall remain available for the discharge of its liabilities,' goes on to say that the view which he had thus expressed, is not inconsistent with the forfeiture and surrender of shares—'The forfeiture of shares is distinctly recognised by the Companies Act, and by the articles contained in the schedule, which, in the absence of other provisions, regulate the management of a limited liability company. It does not involve any payment by the company, and it presumably exonerates from future liability those who have shown themselves unable to contribute what is due from them to the capital of the company. Surrender no doubt stands on a different footing. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case where the company were in a position to forfeit the shares, the transaction would seem to me perfectly valid.' Lord Watson and Lord Macnaghten made observations to the same effect.

"The question is, whether the transaction between the company and the defender satisfies the conditions upon which, according to these opinions, a surrender may be sustained? It is certain that it did not involve any payment by the company, and therefore the first condition laid down by Lord Herschell was completely satisfied. But it seems to me to be equally clear that the second condition also is satisfied, because the surrender was accepted from a shareholder who was quite unable to pay the amount due by him at the time as a contributor to the capital, and whose shares were therefore liable to be forfeited for non-payment. He was the holder of more than £20,000 of the stock of the City of Glasgow Bank, which failed in October 1878, and was liable for calls exceeding £562,000. He appears to have had no other liability of any moment, but his liability to the liquidators of the bank was enough to make him utterly insolvent. In December 1878 a call of £2 per share, or £500, became due to the pursuer's company, and the directors knowing him to be insolvent in consequence of the failure of the bank, agreed to accept a surrender and to relieve him of his liability for the call.

"It is said that the discharge of his liability to the company was a consideration for the surrender; and therefore that the transaction was in effect a sale. But the same thing must happen in every case of the forfeiture or surrender of the shares of an insolvent shareholder, and also in every case of forfeiture when any part of the capital remains uncalled, even although the call for which the shares are forfeited may be recovered in full. The pursuer, however, maintains that in the present case there was a gratuitous discharge of the shareholders' liability to contribute to the extent of £500, because the liquidators of the bank might have been compelled to pay the call, since they were taking over the whole estate. Mr Haldane's statement makes it probable that the liquidators might have thought it reasonable to pay such a call rather than force a shareholder, who had no other debts, into bankruptcy. But they were not bound to consent to such an arrangement because the defender's estate was altogether insufficient to meet their claims, and a dividend upon the claim of the Investment Company would have fallen far short of £500. But whatever sum they might have agreed to pay, it cannot be supposed that they would have taken over the shares and so incurred personal liability for the £6 of capital still uncalled. For the evidence is that the shares were not marketable, and the liquidators thought they were not worth enough to cover the calls. If the liquidators had proposed to pay the call in these circumstances, it might have been a fair question for the consideration of the directors whether they should leave shares to which so large a liability would still be attached in the hands of an insolvent shareholder, or whether they should accept a surrender, with the hope of effecting a re-issue to persons who would be able to meet any future calls. This question did not arise for consideration because no such proposal was made. But the validity of the transaction must depend upon the power of the directors to accept a surrender, and not upon the discretion with which they exercised that power. They had power to accept a surrender, according to the opinions expressed in the House of Lords, because the shareholder was unable to meet his liabilities to the company. He cannot be required to show that no better arrangement could have been made for the company through the intervention of third persons, who were under no legal obligation to pay the calls in full."

The pursuers reclaimed, and argued—it was held in the case of *Matheson v. General Property Investment Company*, 16 R. 282, that the purchase of its own shares by this company was void; therefore if the transfer here was for value it must be reduced. The transaction was represented as a "surrender" or "forfeiture" of the shares, but it was neither. Surrender was a statutory term occurring in the Companies Clauses Act 1863 (26 and 27 Vict. cap. 118), secs. 9 and 10, and (1) it was not competent with-

out a special Act (section 3), which this company had not; and (2) it was prohibited where it involved payment or refunding of money to a shareholder. Apart from the Act of 1863, surrender was competent if permitted by the articles of association—*Teasdale's case*, 9 Ch. 54—but the articles here did not permit it. In the case of *Dronfield Silkstone Coal Company*, 17 Ch. Div. 76, surrender was said to be not more open to objection than forfeiture on the ground of being a reduction of capital. But forfeiture was specially provided for in the Companies Clauses Consolidation Act 1845 (8 and 9 Vict. cap. 17), secs. 30, 32, &c., and in *Trevor v. Whitworth*, 12 App. Cas. 409, it was laid down that surrender was illegal if it involved payment by the company; to be competent it must be an exact equivalent for forfeiture. Now, here there was not forfeiture in terms of the Acts. [LORD PRESIDENT—The question here depends upon whether there was value given by the company for the surrender of the shares.] That was so, and the Lord Ordinary held *Trevor v. Whitworth* inapplicable because there was no return of the capital contributed. But only by statutory forfeiture of the shares could the company forego its right to payment of future calls. If the company ingathered its capital and returned it, or if it neglected to ingather the full amount (as happened in *Klenck*, 16 R. 271, where the shares were issued at a discount), the company acted *ultra vires*. It was surely the same thing if by any method short of forfeiture it parted with its rights to ingather the amount of future calls, or if in any case it gave up its right to payment of past calls. This was parting with the company's capital, and it was the valuable consideration for the present transfer which made that transfer illegal.

Argued for respondent—The transaction was admittedly neither surrender nor forfeiture in terms of statute. But the company was in a position to forfeit the shares at the time, and it accepted an actual surrender in lieu of forfeiture. It was substantially forfeiture that was intended, though it took the form of a transfer, and the subsequent actings of the company shut them off from objection—*Knight's case*, 2 Ch. 321; *Lyster's case*, 4 Eq. 233. In the various cases arising in connection with the Agriculturist Cattle Insurance Company, and specially *Evans v. Smallcombe*, L.R., 3 H. of L. 249, it was established that a company might be barred even from questioning an act *ultra vires*, and here that principle was applicable. But further, the Judges in *Trevor v. Whitworth* specially said that surrender might be competent apart from statute in cases where forfeiture was open, and here it was an exact equivalent. The argument was that the company was bound to proceed to the bankruptcy of the shareholder. It could have done so, but it would have taken little benefit by that. The company had to deal with a shareholder who was liable to such enormous claims that theirs was not worth pressing, and by the method adopted im-

mediate command was obtained of his shares, with power to re-issue to a solvent shareholder. It was a shorthand method of effecting forfeiture, and it fell quite within the company's undoubted power to compromise—*Bath's* case, 8 Ch. Div. 334. Apart from this, there could not now be *restitutio in integrum*, and the "justice of the case" demanded that reduction should now be refused—section 35 Companies Act 1862.

At advising—

The judgment of the Court was delivered by

LORD M'LAREN—The question in this case is, whether the transfer of Mr Craig's shares to the company is void, as falling under the general rule that a company constituted under the Companies Acts is not entitled to purchase its own shares. There can be no doubt as to the justice of the rule or as to its obligatory character. It is a condition of the constitution of every limited company that there shall be individual liability to the extent defined by its memorandum and articles of association, and it is evident that the purchase of its own shares by such a company is equivalent to a reduction of its uncalled capital, or, in other words, is an extinction of individual liability to the extent of the value of the shares purchased by the company. This is the ground of the judgments of the House of Lords in *Trevor v. Whitworth*, and of this Court in the case of *Matheson v. The Property Investment Company*, 16 R. 252.

An exception to this rule of company law is indicated in the opinions of the Lords of Appeal who advised the case of *Trevor v. Whitworth*, and particularly in the passage quoted by the Lord Ordinary from the judgment of Lord Herschell. The exception is, that where the company is in a position to forfeit the shares, a surrender of the shares to the company may be valid. By a surrender I understand a transfer of the shares to the company without consideration. The statutes do not prescribe any special form of surrender, probably because it was not thought desirable to give facilities for the release of a shareholder from his obligations to the creditors of the company, and it may be assumed that a surrender must take the form of a transfer by the shareholder to the company.

Now, in seeking to apply the principle of the exception indicated by Lord Herschell and the other Judges of the House of Lords to an actual case, it may be observed that their Lordships had not a case of this kind before them. They were only pointing out that there was or might be a limit to the application of the general rule against the acquisition by a company of its own shares. The present case is said to be an exceptional case, and it is therefore necessary to define the exception, or at least to consider its application to the circumstances of the present case.

Under the Companies Acts the shares of a member may be forfeited because of his inability or refusal to pay calls which are due, and in such a case the right of the

company is reserved to recover the unpaid calls notwithstanding the forfeiture of the shares.

If a shareholder being solvent should refuse to pay his calls, it may be theoretically true that the company would be within its rights in accepting a surrender from him. It would, however, be the duty of the company to enforce payment of the calls already made notwithstanding the surrender, and the acceptance of a surrender from a solvent shareholder on a tacit understanding that he was to be released from his obligation to pay the calls already made, would, in my apprehension, be undistinguishable in principle from a purchase of the shares, because it would amount to a surrender by the company of a part of the capital which ought to be available for the payment of its debts. But if the shareholder be insolvent, and if the transaction he entered into is in good faith, I think it is within the spirit of the exception indicated in the case of *Trevor v. Whitworth*. In the present case there can be no doubt that Mr Craig was insolvent when he surrendered his shares to the company which is now represented by its liquidator. Mr Craig was a shareholder in the City of Glasgow Bank; calls had been made upon him by the liquidator of the bank which he was unable to meet, and he had in consequence assigned all his property to the liquidator. It is not to be altogether overlooked that the directors of the General Property Investment Company might have reduced the assignment to the liquidator of the City of Glasgow Bank, or might have applied for sequestration of the estates of Mr Craig, which would have had the effect of cutting down the assignment, and might in one or other of these ways have recovered a dividend on these calls, less the expense of the proceedings necessary to establish their right.

On the other hand, it is fair to remember that the creditors of an insolvent, when they come to consider an offer of compromise, never have exact information as to what the insolvent's estate is likely to produce if brought to sale. For this reason, and no doubt in many cases out of consideration for the character and future prospects of a debtor who has been brought to bankruptcy by innocent misfortune, creditors are generally willing to consider favourably a fair offer by an honest debtor, and I may add that our law of bankruptcy recognises the expediency of such voluntary arrangements, and makes provision for carrying them into effect.

In the case before us, Mr Craig being unable to pay the calls due to the General Property Investment Company, and having, as I have said, conveyed his whole estate to the liquidator of the City of Glasgow Bank, proposed to transfer his shares in the Investment Company to the company by way of surrender. His proposal was accepted, and he executed a gratuitous transfer accordingly. The matter was arranged by correspondence, nothing being said in the letters about liability for past-due calls. It is right to notice that Mr

Craig's agent gave evidence to the effect that he understood that the company waived its right to enforce the calls, but so far as I can gather this understanding rested on nothing more than reasonable expectation. Mr Craig had not the means to pay anything personally, and there was no question of cutting down the conveyance to the City of Glasgow Bank. It was therefore not an unreasonable expectation on the part of Mr Craig and his agent that after he had surrendered his shares the company would not press him further for payment of the past-due calls. The case against Mr Craig is thus reduced to this extremely fine point, that this surrender of shares is to be treated as a purchase by the company, either because the company did not expressly reserve its right to sue for arrears, or because the company did not in fact press Mr Craig for payment after accepting the surrender. The company could not get anything out of Mr Craig's estate without making him bankrupt, and I rather think that the argument for the pursuer must be carried this length, that it is the duty of a company in such a case to make its shareholder bankrupt on the chance of recovering a dividend, without any consideration of his conduct, of the value of his estate, or of the effect of such a proceeding on the prospects of their debtor and on the interests of other creditors. The other view is, that the surrender was a fair settlement with an insolvent debtor such as the law will support, and in no true sense a purchase of the company's shares or a giving away of the company's capital. The latter is in my opinion the true character of the transaction, and I agree with the Lord Ordinary that the defender has been released from his obligations to the company by the surrender of his shares, and that he is not liable to contribute to its funds.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court refused the reclaiming-note.

Counsel for the Reclaimers—Graham Murray—Salvesen. Agent—J. Smith Clark, S.S.C.

Counsel for the Respondent—Asher, Q.C.—Dundas. Agent—David Turnbull, W.S.

## HIGH COURT OF JUSTICIARY.

Monday, January 26, 1891.

(Before Lord Justice-Clerk, Lord Stormonth Darling, and Lord Low.)

MACKENZIE v. MARTIN.

Justiciary Cases—Revenue Prosecution—Suspension—Competency—Act 7 and 8 Geo. IV. c. 53, sec. 79.

A party who had been convicted of selling beer by retail without having obtained a certificate and Excise licence,

in contravention of the Act 24 and 25 Vict. c. 91, brought a suspension of the conviction, on the ground that the justices before convicting had seen and considered a previous conviction for a similar offence. Held that the ground stated was not such as entitled the High Court of Justiciary to entertain a suspension, in view of the prohibition of suspensions of proceedings in Revenue prosecutions by 7 and 8 Geo. IV. cap. 53.

This was a bill of suspension brought by Donald Mackenzie, beer-dealer, Stornoway, against Henry James Martin, officer of Inland Revenue at Stornoway, craving suspension of a "conviction and sentence, dated on or about the 27th day of June 1890, whereby Messrs Murdo Macleod and Kenneth Smith, two of Her Majesty's Justices of the Peace for the county of Ross, found the complainer guilty of a contravention of the Act 24 and 25 Vict. c. 91, in so far as on the 7th day of May 1890, in premises at Bayhead Street occupied by him, he did sell beer, to wit, eleven pint bottles of beer, by retail without having duly obtained a certificate and also an Excise licence respectively authorising him then and there to sell beer under the provisions of the statute in that case made and provided." The bill set forth, *inter alia*—"After the evidence had been led, Mr Thomas Shillington, Excise officer, Portree, who appeared on behalf of the respondent, referred to the fact that the complainer had been convicted of a similar offence before. Mr C. G. Mackenzie, solicitor, Stornoway, who appeared on behalf of the complainer, protested against any reference being made to said previous conviction, but the Justices overruled his objection, and in coming to a judgment had in their minds the fact that the complainer had been previously convicted, and looked at the previous conviction, and in giving judgment referred to that fact. The Justices convicted the complainer of the said contravention, and sentenced him to pay the sum of £7, 10s. of modified penalty. The complainer has paid the said penalty."

The complainer pleaded—" (4) The reference to and consideration of said previous conviction, in the circumstances stated, was illegal and oppressive, and contrary to statute."

The respondent objected to the competency of the bill on the ground that review by suspension was excluded by 7 and 8 Geo. IV. c. 53, sec. 99, and referred to *Schulze v. Steele*, 2 White, 449; *Lazenby v. Macarthur*, 3 Coup. 23; *Evans v. M'Lachlan*, 4 Macq. 89; *Dodsworth v. Rijnbergen*, 14 R. 238.

The complainer argued that the suspension was competent, as the Justices had acted contrary to the known rules of judicial procedure, and therefore quite illegally—*Hunter v. Manlam*, 5 Coup. 354; *Mackenzie v. M'Phee*, 2 White, 188; *Grant v. Allen*, 2 White, 261.

At advising—

LORD JUSTICE-CLERK—This is a bill of