allowed the holders of debentures and the creditors of the company to lodge objections within fourteen days from the date of the last advertisement. The advertisements, in which the proposed alterations on the memorandum of association are distinctly set forth, have been made as ordered, the last having been on 19th January 1891, and the time allowed has elapsed without any objections being lodged."

The Court, giving effect to the amendments suggested by Mr Logan, confirmed the alterations of the memorandum of association with respect to the objects of the company passed on 11th and 30th December 1890, and directed that a certified copy of the present order, along with a printed copy of the memorandum of association as altered, should be delivered by the company to the Registrar of Joint-Stock Companies in Scotland within fifteen days from the date thereof, in terms of section 2 of 53 and 54 Vict. cap. 62, Companies (Memorandum of Associations) Act 1890.

Counsel for Petitioners—J. C. Lorimer. Agents—Menzies, Black, & Menzies, W.S.

Friday, February 27.

SECOND DIVISION.

[Exchequer Cause.

WAITE *v.* M'INTOSH.

Exchequer—7 and 8 Geo. IV. c. 53, sec. 68—Proceedings "Null and Void"—Conviction Standing Unquashed by Court of Competent Jurisdiction.

The Act 7 and 8 Geo. IV. c. 53, sec. 68, provides that it shall not be lawful for a justice of the peace employed in the collection of the revenue to act as a justice in matters relating to the revenue, and if he so act, "all proceedings . . . are . . . declared to be utterly null and void to all intents and purposes."

A person was convicted before two Justices of the Peace of selling spirits without a licence, and fined. It was afterwards discovered that one of the Justices was disqualified under said statute. The fine was returned, and the accused again brought before two Justices, by whom, after proof of the disqualification of the Justice who had previously sat, the accused was tried, convicted, and fined. He appealed to Quarter Sessions, who at his request stated a case to the Court of Exchequer.

Held that the Justices at the second trial had not jurisdiction to set aside the previous conviction, and were not at liberty to disregard it.

On 19th June 1890 Robert M'Intosh, grocer, Whitehilloch, Cabrach, Aberdeenshire, was, on complaint at the instance of William Waite, officer of Inland Revenue, Huntly, convicted at Huntly by James Lawson and Adam Dunbar, Esquires, two of Her Majesty's Justices of the Peace for the county of Aberdeen, of contravening the Act of Parliament 6 Geo. IV. cap. 81, as altered or amended by the Act 16 and 17 Vict. cap. 67, and the Inland Revenue Act 1880, in respect that on two separate occasions he had sold spirits without a licence, and he was adjudged to forfeit and pay the sum of £25 of modified penalty, with execution by imprisonment for three months.

Robert M'Intosh having paid the penalty imposed, lodged, two days after, on 21st June, an appeal to the next General Quarter Sessions of the Peace for the county, but said appeal was subsequently withdrawn as after mentioned.

It was proved at the proceedings after mentioned that Adam Dunbar, one of the Justices who heard the complaint, was at the time a person employed to collect certain duties of Excise by means of Excise licences, and therefore disqualified from so acting as a Justice in said complaint. Accordingly the penalty imposed by the conviction of 19th June 1890, viz., £25, was repaid on the 4th day of July 1890.

On 15th July 1890 Robert M'Intosh appeared at Huntly before James Lawson and George Park Wilson, Esquires, two of Her Majesty's Justices of the Peace for the county of Aberdeen, to answer to a new complaint, hereafter called the second complaint, at the instance of William Waite, containing precisely the same charges as those contained in the first complaint. Along with the second complaint William Waite presented to the Justices a minute, setting forth, *inter alia*, that Adam Dunbar was at the time of the hearing of the first complaint a person employed to collect certain duties of Excise by means of Excise licences; that as such a person was disqualified from acting as a Justice in said complaint, and having acted as a Justice therein, all the proceedings under the complaint were by the Statute 7 and 8 Geo. IV. cap. 53, sec. 68, "declared to be utterly null and void to all intents and purposes;" and that the previous proceedings being utterly null and void, the proceedings under the new complaint were rendered necessary. The minute further set forth that the fine of £25 had been repaid, and there was produced to the Court the receipt of said Robert M'Intosh for said repayment.

At the hearing of the second complaint on 15th July 1890 M'Intosh pleaded in bar of trial—"(1) That Mr Lawson was disqualified, as he sat at the former trial; (2) that the complaint was incompetent, on the ground that the respondent had already been tried and convicted of the offences libelled, and had paid the penalty, and that the case was under appeal; and (3) that the respondent did not admit Mr Dunbar's disqualification."

The Justices, on proof of Mr Dunbar's disqualification, and after the examination of witnesses for the prosecution and witnesses for the defence, repelled the objec-

tions in bar of trial, and convicted the respondent of the contraventions charged, adjudged him to forfeit and pay the sum of £12, 10s. sterling of modified penalty for each of the two offences charged, with execution by imprisonment for three months, and on the same date, viz., 15th July 1890, the respondent appealed to the next General Quarter Sessions.

The appeals in both cases came up before the Statutory Court of Quarter Sessions held at Aberdeen on 28th October 1890, when the respondent stated that he did not insist on the appeal in the first complaint, and that in the second complaint the preliminary objections now insisted on were—"(1) That the first conviction could only be set aside by decree of reduction of a competent court; and (2) whether so set aside or not, the respondent could not be tried a second time for the same offences, as he had already 'tholed' a trial." He craved the Court to state a case for the opinion and direction of the Court of Exchequer in Scotland in terms of the Act. This the Court of Quarter Sessions agreed to do, and adjourned the further consideration of the case to the next statutory meeting of Quarter Sessions.

A case setting forth the above facts was accordingly stated, and the opinion and direction of the Court of Exchequer in Scotland requested on the following points, viz.—"(1) On proof of the disqualification of the Justice Adam Dunbar, is the conviction of 19th June 1890 *ipso facto* 'utterly null and void to all intents and purposes, by virtue of the declaratory words contained in the Act 7 and 8 Geo. IV. cap. 53, sec. 68, or is a decree of reduction by a competent court necessary? and (2) Whether, being *ipso facto* null or set aside, is a second trial barred by the respondent having been already tried and convicted under the first complaint?"

Argued for appellant—1. At the date of the second trial there was an unquashed conviction standing against the accused, in the face of which the Justices had no right to proceed. It might have been set aside on the ground that the whole proceedings had been null and void, but only by a court of competent jurisdiction. It was beyond the jurisdiction of the Justices to do so. 2. But even if the conviction had been set aside, the accused had "tholed" an assize, and could not be tried over again—Hume, ii. 465-466, and case of *Hannah* there cited.

Argued for respondent—1. The Justices at the second trial were entitled to deal with any plea in bar of trial. The previous proceedings were null and void by force of the statute. That was so clear that the Justices were entitled to act upon it, and to proceed to a regular trial, which had not yet taken place. 2. The plea of having "tholed" an assize only applied where the assize "tholed" had been a regular one, which it had plainly not been in this case—Hume, ii. 468; Alison, ii. 618, 5.

At advising—

LORD JUSTICE-CLERK—This is a case sent to this Court by the Quarter Sessions of Aberdeenshire for an opinion on a point of law. The case arises under the Inland Revenue Acts, Robert M'Intosh having upon the 19th of June 1890 been brought before two Justices of the Peace for a breach of the Excise law, and adjudged to pay a sum of £25 of penalty, with an alternative of imprisonment. M'Intosh paid the penalty, and entered an appeal to the Quarter Sessions against the conviction. It was discovered afterwards that Adam Dunbar, one of the Justices who heard the case at the Petty Sessions, was a person employed to collect certain duties of Excise in the neighbourhood, and that in accordance with the Act 7 and 8 George IV. c. 53, sec. 68, the proceedings would be—if so declared by a competent Court—null and void to all intents and purposes. Upon that discovery being made the prosecutor in the case returned the fine which had been paid, got a receipt for it, and then proceeded to raise a second complaint before the Petty Sessions on 15th July for the same offence. The accused appeared at the bar and stated objections to the trial proceeding, on the ground that the case had already been tried, and that there was a judgment standing against him in the other case. He stated two pleas—1st, that one of the Justices was disqualified, he having sat at the former trial; and 2nd, that the complaint was incompetent, on the ground that the respondent had already been tried and convicted of the offences libelled, and had paid the penalty, and that the case was under appeal. Thirdly, he stated what apparently there was nothing to support, that he did not admit the disqualification of the Justice in the former case, for I think it is quite plain according to the law that the Justice was disqualified. The prosecutor, on the other hand, maintained that the proceedings at the previous trial were absolutely null and void, and must be held as having no existence, and that therefore the two Justices sitting were perfectly entitled to proceed with the case. This view was adopted by the two Justices sitting in Petty Sessions, and they proceeded to hear the case out, again convicted the accused, and again fined him. Against that he appealed to the Quarter Sessions, and the Quarter Sessions have sent the case to this Court in order to get instructions as to how they should deal with it.

Now, as I have said already, there cannot be a doubt that at the first trial one of the Justices who sat, though a competent Justice to sit in ordinary cases before the Petty Sessions, was not a competent Judge to sit in that particular case; and accordingly there can be no doubt that the proceedings in that prosecution, if competently brought up before a competent Court, ought to be declared utterly null and void to all intents and purposes. But that is not the question which we have to decide here. Nor is the question before us whether the appellant has tholed an assize. The question here is, whether, there being on the books of the Justices of Peace sitting in Petty Sessions a standing conviction for a particular offence, that can be declared null and void by

two other Justices sitting in Petty Sessions, so that they can set it aside as if it had no existence and proceed with a new trial? I am of opinion that two Justices sitting in Petty Sessions have no such power, and that although this first conviction must be set aside and got rid of, if it be brought upon appeal or otherwise before a Court competent to set it aside, they have no power to do so. And upon these grounds I have come to be of opinion that the answer we must give to the Quarter Sessions is that the appeal must be sustained against the subsequent proceedings taken before the two new Justices, and that they had no right in the circumstances to proceed as they did.

LORD YOUNG—I am of the same opinion, and in the view which I take of the case the matter is not doubtful. We have here what I do not remember ever to have seen before—two recorded convictions and sentences against the same man for the same offence. It really is before the same Court, but it is unprecedented in my experience to see two convictions against the same man for the same offence, whether in the same Court or not, standing at the same time. One understands the view quite well, that the Inland Revenue authorities finding out that there was a nullity in the proceedings under which the first conviction was obtained, handed back to the man the amount of the penalty which he had paid—that is to say, they handed to him a sum of the same amount as the penalty which he had paid to the Queen. I do not know what would have been their position if they had not done that. I do not know whether in that case the Justices upon the second occasion would have proceeded to try him over again, and inflict upon him the punishment which they thought the offence deserved, upon the ground that the previous proceedings were void, saying—"If you, under proceedings void in our judgment, have paid five and twenty pounds to the Exchequer or to the proper officer, there will be some means of getting that back, but we must regard the proceedings as void, and so proceed to try you as if there had been none such." Or suppose instead of paying the fine he had suffered imprisonment, they could not have restored that to him, and taken his receipt for it. But if he had suffered the imprisonment, what about the proceedings being a nullity? "Oh! we will try you again," the second justices would say, "for the proceedings under which you were tried and imprisoned, and the conviction following, and the imprisonment are void; and you may recover your damages for the imprisonment." although I daresay the imprisonment would be void too, according to the argument, although it had been suffered.

I think that is all an erroneous view together. When a man has been convicted, and the conviction is either by a rule of the common law void, or by a statutory rule void, why, the voidness by statute or by common law is all with reference to the rule of the common law that the facts upon which it depends must be ascertained by a competent tribunal, and declared; and the statute declaring that all such proceedings are void does not apply to the proceedings in any particular case according to the rules of our common law until a court of competent jurisdiction has examined the grounds and made the general declaration applicable to the particular case in hand. Now, every statute is with reference to the rules of the common law. There is no exception to that as a general proposition. The particular rules of the common law may be made by the statute inapplicable to the particular case, but in so far as they are not made inapplicable they do not require to be enacted. The rules of the common law apply here to the statutory provision declaring that a conviction or any proceedings before justices under certain circumstances shall be null and void. They might declare that with reference to proceedings in this Court, or the Court of Justiciary, or anywhere else, but that is all subject to this rule of the common law, that the fact must be ascertained and declared, and made applicable to the particular case, the general declarator being unavailing until that is done.

I am therefore of opinion that the conviction upon the 19th of June had to be set aside by a court of competent jurisdiction before the man could be tried again; and that just as certainly as if he had suffered the imprisonment under it. It might have been set aside notwithstanding that he had suffered imprisonment. I daresay the Excise authorities in the exercise of their judgment and discretion—and I have no reason in the world to doubt their judgment and discretion—would not have seen fit to proceed again against a man who had suffered imprisonment under an incompetent conviction. Probably they might have heard from him, or others might have heard from him as to the consequences of that suffering of imprisonment, although the protection is very large both to public officers and to Justices of the Peace against claims of damages. But I am of opinion, upon the ordinary rules of the common law, that that conviction must be set aside by a court of competent jurisdiction before the man can be tried over again. Whether he can be tried over again after it has been set aside is a question upon which I am not required to form or to express any opinion.

Let me just illustrate by one other observation what I am now saying. This conviction of 15th July proceeded upon a simple complaint setting forth the offence against the Excise law, and the conviction itself is simply an affirmance of that accusation. There is no setting aside of the previous conviction in it. Suppose they had refused—said "We won't, he has been tried already, and we won't convict him"—could the Excise have taken him before other two Justices and said, "We have failed to satisfy A and B that the conviction of 19th July was void, and to induce them to proceed—will you?" And they refuse. Where is that to stop? There seems no stoppage at all until you resort to a court of com-

petent jurisdiction to deal with that conviction and either sustain it or set it aside. If there had been an appeal—a resort to the Court of Justiciary or to this Court to set it aside as a nullity—the nullity appearing when we apply the rules of the statute to it and the facts proved otherwise—would the Justices still have had jurisdiction to say "Oh! it is a nullity, and it is none the less a nullity under the statutory declarator, because the Court of Session is of opinion that it is not? It is declared by the statute to be a nullity." All that illustrates the expediency in the interests of the public of attending to and observing the rules of the common law anent such matters.

With these explanations, which are perhaps superfluous, although I have thought it proper upon the whole to make them, the case being one of some general interest and importance, I am of opinion with your Lordships that this second conviction must be set aside.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD JUSTICE-CLERK—Then we answer the first question put by the Quarter Sessions by saying that the conviction must be set aside by decree of a competent court, and we do not answer the other question at all.

The Court pronounced the following interlocutor:—

"Find that the conviction of 15th July 1890 is bad, in respect of the previous conviction for the same offence of 19th June 1890, which the Justices sitting on 15th July had not jurisdiction to set aside, and were not at liberty to disregard, and decern."

Counsel for the Appellant—Shaw. Agents—Douglas & Miller, W.S.

Counsel for the Respondent—Asher, Q.C.—A. J. Young. Agent—David Crole, Solicitor of Inland Revenue.

Friday, February 27.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

GILROY, SONS, & COMPANY *v.* PRICE & COMPANY.

Shipping — Bill of Lading — Default in Navigation in Course of the Voyage.

A cargo of jute was damaged by seawater through the bales breaking a pipe which ought to have been but was not cased. The bill of lading contained the following exception, "any act, neglect, or default whatsoever of pilot, master, or crew in the navigation of the ship in the ordinary course of the voyage." . . .

In an action of damages at the instance of the owners of the cargo against the owners of the ship it was *held* that the failure to case was a default or neglect on the part of the master or crew in the navigation of the ship, committed by them in the ordinary course of the voyage, and that from liability for the damage caused thereby the defenders were exempted by the terms of the bill of lading.

Messrs Gilroy, Sons, & Company, merchants, Dundee, owners of a cargo of jute carried on board the ship "Tilkhurst" from Chittagong to Dundee, as holders and onerous indorsees of the bills of lading, sued Messrs W. R. Price & Company, London, owners of the said ship, in the Sheriff Court at Glasgow for £6000 in name of damages sustained through the cargo being spoiled by sea-water.

The pursuers alleged that when the ship sailed from Chittagong upon 5th December 1888 it was in an unseaworthy condition, the water-closet pipe on the port side being cracked or otherwise faulty, and having no casing such as is usually put round such pipes and is necessary for their safety, and that the damage to said cargo was caused in consequence of the defective state of the pipe and/or the want of casing.

They pleaded—"(1) Said vessel not being in a seaworthy condition at the time of sailing, whereby pursuers' goods became injured, the defenders are liable to pay pursuers the loss so sustained by them. (2) The defenders having undertaken to deliver said goods in good order and condition at Dundee, and same being in a damaged state, they are liable to pursuers as holders and onerous endorsees of the bills of lading for the loss sustained thereby. (3) The pursuers, through defenders' breach of contract in their failing to supply a seaworthy ship, having suffered loss and damage to the amount claimed, decree should be granted, with interest and expenses as craved."

The defenders explained that the bill of lading contained the following exception—"Any act, neglect, or default whatsoever of pilot, master, or crew in the navigation of the ship in the ordinary course of the voyage, and all and every dangers and accidents of the seas and rivers, and of navigation of whatever nature and kind excepted." Further, that the pipe was in perfect order when the vessel left Chittagong, but that on the 11th, 12th, and 13th December she had encountered a severe gale with a very heavy sea, and that during the gale the force of the sea and the working, straining, and labouring of the ship, or one or other of these causes, had broken the iron portion of the said pipe at the flange on the ship's side.

They pleaded—"(1) The pursuers' averments being unfounded in fact, the defenders should be assoilzied. (3) In any view, the damage having emerged through one or other of the perils excepted from the contract, the defenders should be assoilzied."

The Sheriff-Substitute (GUTHRIE) allowed a proof from which it appeared that the ship had experienced heavy weather as alleged, that thereafter the leak and dam