

portions closed from side to side of the street, and that if the appellants get the consent of the magistrates, there is no limitation as to the time they may occupy the street. Now, sub-sec. B of sec. 37 limits the length of any street they may occupy at any one time to 150 lineal yards. They may use the surface of the street for carrying on their works without any express consent of the magistrates, and close it for traffic for 150 lineal yards. If they want more, they must, under the statute, apply for the express permission of the magistrates. The contention on the part of the respondents is, that the words "portions of the carriageway of any street" relate to any portions which may be actually closed for traffic within a space of 150 lineal yards.

The Sheriff-Substitute in his judgment has adopted this view, and I am of opinion that he is right, and for the following reasons:—Clause 37 of the company's Act, sub-sec. B, imposes a restriction on the company as to the extent to which they may close up any portion of a street for traffic, only as to length and not as to breadth. The expression used is not quite accurate, but the meaning plainly is that you are not to occupy any street for more than 150 yards in length without the consent of the magistrates, whether you occupy the whole breadth of the street or not, but that if you require a greater length than 150 yards, the consent of the magistrates is necessary. It is an extravagant proposition, that unless the company occupy the whole breadth of the street and close it for traffic there is no limitation of time upon them at all. There is a limited power given to them to occupy and close up a street under two conditions—(1) That they do not occupy more than 150 yards of the street in length without the consent of the magistrates; and (2) That they do not occupy and close for traffic any portion of any street for a longer period than three months. As the Act is framed by the Legislature, three months is taken as the longest time that it would be necessary for the railway company to occupy and close for traffic any portion of a street; it is the limit given in the statute. If the company find it convenient to have a shaft, as here, they cannot keep the street closed for more than three months. If they require any more ground to sink a shaft from the outside, they must get it elsewhere than in a street in Glasgow. This is the leading question in the case, and I am of opinion that the Sheriff's view on this question is the right one.

There were several other and minor questions stated to us on which I may give an opinion. (1) I agree with the view of the Sheriff that the bringing of this action under the Summary Procedure Act in no way implied the abandonment of the other action which had been brought in the Sheriff Court by the respondents here against the railway company. (2) The next question is, Whether this action was competently brought under the provisions of the Summary Jurisdiction Acts 1864 and 1881? Whether it was or not depends upon the words in the 39th section of the company's Act of 1882. These words are—"And such penalty shall be recoverable with costs in the Court of the Sheriff of the County of Lanark, on summary application by all or any of the proprietors or tenants in that part of the street which is opposite the respective portions which shall not be restored." Does that expression signify an application

under the Summary Procedure Acts? I am of opinion that these words entitle the complainer to make his application under the Summary Procedure Act. That Act was for regulating the summary procedure in the Sheriff Court, and for the recovery of penalties; in this case the way authorised in the statute for recovery of penalties was by "summary application," and I think, therefore, the application was rightly made under the Acts of 1864 and 1881. (3) The last question is, Whether it was competent to bring the action against the company, being a corporation, under the statute? It is quite plain that a corporation could not suffer imprisonment, but that would not hinder the parts of the Act which could be made operative against a corporation being used against this railway company.

On the whole, I am of opinion that the appeal ought to be refused.

The LORD JUSTICE-CLERK and LORD CRAIGHILL concurred.

The appellants moved the Court to modify the penalty awarded by the Sheriff.

The Court refused the motion, on the ground that no reason had been shown for interfering with the judgment of the Sheriff-Substitute as to the penalty.

Counsel for Appellants—Trayner—R. V. Campbell. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Respondents—Mackintosh—Goudy. Agents—J. & J. Ross, W.S.

Thursday, March 20.

(Before Lords Young, Craighill, and Adam.)

M'LEOD v. SPEIRS.

*Justiciary Cases—Sheriff—Prevarication on Oath—Contempt of Court—Summary Punishment of Prevarication.*

A Sheriff at the conclusion of the examination before him of a witness in a civil action found him guilty of contempt of Court, by having grossly prevaricated in his evidence, and committed him to prison for ten days. The witness raised a suspension on the grounds that the warrant of imprisonment did not set forth any facts from which the Court could judge whether prevarication had really been committed, and that no complaint had been preferred against him nor any opportunity given him of being heard in defence. *Held (diss. Lord Young)* that the Sheriff had power summarily to commit for contempt of Court, that prevarication on oath amounted thereto, and that it was unnecessary to set out in the warrant the facts constituting the prevarication. The Court therefore *refused* the suspension.

*Process—Sheriff.*

The complainer having called the Sheriff as respondent in the suspension, *held (diss. Lord Young)* that the Sheriff was right in not appearing as a party.

In an action raised in the Sheriff Court of Inverness, Elgin, and Nairn, at Portree, by Martin Martin against Alexander M'Leod and Lachlan M'Leod, for a sum of £20 as the value of a foal, Lachlan

M'Leod was examined as a witness for the pursuer. His examination was conducted through an interpreter, as he spoke only Gaelic. The evidence was taken down by the Sheriff-Substitute (Speirs). At the conclusion of M'Leod's evidence the Sheriff-Substitute found him guilty of contempt of Court, and sentenced him to be imprisoned for the space of ten days with hard labour, and to be thereafter set at liberty. The warrant set forth the contempt of Court as being, that he being present as a witness for the pursuer in the action, "and having been duly sworn to tell the truth, grossly prevaricated in his evidence in the examination."

M'Leod brought this bill of suspension, calling the Sheriff-Substitute as respondent. He pleaded that he was entitled to suspension of the warrant, and to liberation, in respect (1) that the sentence was unjustifiable and oppressive; (2) that the sentence was passed without the complainer or his agent being heard on his defences against the same, and without any complaint or indictment setting forth the charge against him having been served upon him; (3) that the warrant did not contain or set forth any relevant or sufficient statement of any particular act or acts of prevarication of which the complainer was found to be guilty. On this point it was argued that a Judge may err and may commit a witness to prison as guilty of prevarication whose conduct really does not amount to the crime of prevarication. The Court, then, must have material to enable them to judge of this. In the case of *Laurie v. Roberts*, May 26, 1882, 4 Couper 606, there was a difference of opinion as to whether the acts of which the complainer was convicted did amount to contempt of Court. In the case of *Adam Baxter and Others*, March 4, 1867, 5 Irv. 351, the interlocutor of the Court referred back to a deposition of the witness recorded *ad longum* in the Books of Adjournal as the ground of conviction for prevarication.

MACKINTOSH stated on behalf of the respondent that he was advised that it was not according to practice, or consistent with his official position, that he should appear as a party to oppose the bill.

At advising—

LORD ADAM read the following as the joint opinion of his Lordship and LORD CRAIGHILL.—The matter complained of in this suspension is a warrant of imprisonment, dated at Portree on 1st November 1883, by which the Sheriff (Speirs) found the complainer Lachlan M'Leod guilty of contempt of Court, and sentenced and adjudged him to be imprisoned for the space of ten days, from the date of the warrant, and thereafter to be set at liberty. The contempt of Court which M'Leod is said to have committed is set forth in the warrant as being, that he being present as a witness for the pursuer (in the action in which he was examined), and having been duly sworn to tell the truth, grossly prevaricated in his evidence in his examination.

The warrant was pronounced in the course of the proceedings in an action, depending in ordinary course, before the Sheriff Court of Inverness, in which Martin Martin, tenant, Vallos, was pursuer, and Alexander M'Leod, farmer at Steineach, and the complainer were defenders.

The only person called as respondent in this

suspension is the Sheriff-Substitute himself. He has not appeared in these proceedings, and we have in consequence had no argument in support of the warrant of imprisonment, but although I much regret that we have not had such argument, I think it right to say that in my opinion the Sheriff has been rightly advised in not appearing to defend the judgment.

I have, in the first place, no doubt that it was competent for the Sheriff, sitting in the Sheriff Court, to punish for contempt of Court.

Mr Erskine (i. 2, 8) says—"In all grants of jurisdiction, whether civil or criminal, supreme or inferior, every power is understood to be conferred, without which the jurisdiction cannot be explicated;" and a little further on he says—"By the same rule, every Judge, however limited his jurisdiction may be, is vested with all the powers necessary, either for supporting his jurisdiction and maintaining the authority of the Court, or for the execution of his decrees."

In the case of *Hamilton v. Anderson*, reported in 3 Macq. App. Ca. 363, the Sheriff-Substitute had suspended Hamilton, a procurator of his Court, for one month for failure to obey an order to expunge a certain statement from the record. Hamilton thereafter raised an action of damages against the Sheriff-Substitute, which ultimately went to the House of Lords. In giving judgment the Lord Chancellor says—"It is clear that every Court must possess, inherently in itself, a power to prevent any contempt of its proceedings, and undoubtedly, in general it must exercise a controlling and censorial power and authority over the officers practising in the Court." Lord Cranworth also in the same case quotes and adopts the description of the powers of the Sheriff Courts in this respect given by the Lord Justice-Clerk (Hope) in the Court below. "It is," he says, "the case of an action by a practitioner, in what I must call the Superior Courts, against a Judge, not for something done extrajudicially, but, according to the opinion of that practitioner, the Judge had made an order which he thinks was not a correct order." "I have said that this Court (the Sheriff Court) must be considered as one of the Superior Courts. What is meant exactly by 'the Superior Courts' it is difficult to define, but I take it thus from the judgment of the very learned Judge whose loss we all deeply deplore (the late Lord Justice-Clerk), who gives this description of the Sheriff Courts:—"Their position (he says) is quite different from that of Justices of the Peace (alluding to a case of different circumstances where an action had been brought against a Justice of the Peace, not for something he had done, but for something he had said extrajudicially in the opinion or judgment he had pronounced). They (that is, these Courts) are not only—to use an English phrase—Courts of Record (with great deference I think that is a mistake—the term 'Court of Record' has a definite meaning), but Courts of very high authority. Their jurisdiction in many branches of the law, and especially in regard to the ordinary transactions between man and man, is co-extensive with that of the Supreme Court. Their proceedings are conducted by regular pleadings in as formal a manner; their procedure is regulated by statute, and by the rules prescribed by the Supreme Courts. Their Judges are permanent, not acting voluntarily on particular occa-

sions as suits their own convenience, or according to the taste they have for particular cases. Their functions are not limited as that of the Justices to a particular class of cases; their jurisdiction is not summary like that of the Justices.' Therefore, as the Lord Justice-Clerk points out, the Sheriffs are Judges presiding in Courts of the very highest importance in that part of the United Kingdom."

It appears to me, therefore, both on principle and authority, that the Sheriff has powers to punish for contempt of Court. Indeed, I do not see that there is in this respect any difference between a Sheriff and a Judge of the Supreme Court.

With reference to the case of *Lawrie v. Roberts*, which was quoted to us, it seems to me to be quite unnecessary for the purposes of this case to inquire whether, apart from statute, police magistrates have or have not similar powers. Assuming, then, that the Sheriff has power to punish for contempt of Court, I do not doubt that he was entitled to punish gross prevarication on oath summarily by imprisonment as being a contempt of Court. Baron Hume, vol. i., p. 380, thus describes prevarication:—"Before I close this chapter," he says, "it will not be amiss to add a word or two concerning prevarication upon oath, or the wilful concealment of the truth, which is next in degree to perjury, and seems chiefly to differ from it in the inferior boldness of the culprit, who, though desirous to mislead the Judge and make a false impression, has rather chosen to compass this object in the way of an artful and tricking oath than by the direct avowment of utter falsehood, or, if he has ventured on any such, has not persisted in them till the close of his oath. This sort of guilt is chiefly to be gathered from the equivocal answers of the witness, the inconsistency of the different parts of his oath, and his affected ignorance and want of memory with respect to things which he cannot but know, more especially if he is at last driven from all these shifts, and is constrained to emit a true, though, taken on the whole, an incoherent and a contradictory deposition. As a scandalous contempt of the presence of the Court and of the reverence of an oath, this offence may be summarily punished by the Judge before whom it happens (and, it rather appears, only by him and only at that time) with imprisonment, or in a more flagrant case with infamy and pillory. Many examples of both are to be found as well in the Books of Sederunt as of Adjournal."

Again, Baron Hume, vol. ii., p. 138, when treating of summary conviction, points out that the ordinary course of trial is by assize, but that this is subject to exceptions:—"In that view," he says, "every Judge, of whatsoever degree, has power to punish summarily, and of his own motion, all such disorders or misdemeanours committed in Court during the progress of a trial as are a disturbance of the Judge in the exercise of his functions, or a violation of that deference which ought to be observed towards him when proceeding in his office."

After dealing with certain of these disorders or misdemeanours he goes on to say—"On these several occasions there seem to have been sufficient reasons for summary chastisement of the proceedings, and though tending only in a more

remote way to the injury of justice; and still less can there be any doubt of applying the right correction in the case of any direct attempt in the course of a trial or the preparations for it, to detain, mislead, overawe, or corrupt the witnesses, or to alter, suppress, or destroy the written, or other articles of evidence; or to conceal or pervert the truth, or to communicate with and influence the assize; whether this be on the part of the prosecutor or the panel, or their friends and favourers, or of one witness with respect to another, or on the part of the witnesses themselves in the course of their examination. Hence the numerous instances, unhappily too numerous to be recited, of the commitment or other censure of witnesses for prevarication on oath or obstinate concealment of the truth."

Sir A. Alison's Pr., p. 484, says—"Prevarication or wilful contradiction on oath is an offence punished summarily by the pillory or imprisonment at the moment the offence is committed." At a later page he says—"Since the punishment of the pillory has fallen into disuse the usual course has been, when a witness has clearly prevaricated upon oath, to sentence him summarily, *de plano*, to imprisonment or hard labour in Bridewell for a limited period, generally for six weeks to three months." He adds—"It is incompetent to punish a witness in this way because what he has said is at variance with previous testimony; that must be done by a regular indictment for perjury. It is the contradiction of himself on oath which warrants this summary procedure."

I do not doubt, therefore, the power of the Sheriff to punish summarily by imprisonment for prevarication on oath as being a contempt of Court. The question, however, remains whether, as regards either the form or substance of the proceedings there is any ground for the interference of this Court with the judgment of the Sheriff.

With reference to the form of the warrant, the complainer pleads that it is bad because it does not contain any relevant or sufficient statement of any particular act or acts of prevarication of which the complainer was found to be guilty. A form of conviction, setting forth the particular act or acts which the Judge thinks are proved is not in accordance with our ordinary procedure, and would be out of place in it, because the interlocutor finding the panel guilty refers back to the complaint or indictment in which the act or acts which are said to amount to the crime or offence charged are set forth with more or less specification. It is clear that this form of conviction enables a court of review to judge whether or not the acts specified do or do not amount to the crime or offence charged, and we all know that there are numerous cases in which this Court has quashed convictions on the ground that the act specified did not constitute the crime or offence charged, and of which the panel had been convicted.

The conviction in this case, however, did not proceed on any complaint or indictment setting forth the act or acts complained of, and it is said that these ought to have appeared on the face of the conviction, because otherwise it does not afford the necessary materials to enable a court of review to judge whether the inferior Judge may not have erred, and may not have convicted the complainer in respect of acts which do not in

fact amount to any crime or offence. It is of course true that an inferior Judge or any Judge may err and may convict in respect of acts which do not amount to a crime or offence, or even a breach of order in Court. Of that an example may be found in the before-mentioned case of *Lawrie v. Roberts*, High Court, May 26, 1882, Couper vol. iv., p. 606, where there was a difference of opinion on the Bench as to whether or not the acts of which complainer was convicted did amount to contempt of Court. It might possibly be desirable that the form of proceedings in Inferior Courts should be such as to enable a Court of review in all cases to judge, *ex facie* of the proceedings, whether a particular conviction was right or wrong. But the question we have to consider is not whether such a course is desirable, but whether it is necessary by the existing law and practice of Scotland. In this case the conviction distinctly specifies the contempt of which the Sheriff convicted the complainer, viz., gross prevarication on oath. We were not referred to any authority to the effect that the particulars or elements of the pervarication of which the Sheriff convicted the complainer should be set out in the conviction. We were referred to the case of *Adam Baxter and Others*, in the High Court, March 4, 1867, Irv. vol. v., p. 351, where the deposition of the witness was recorded *ad longum* in the Books of Adjournal, and the interlocutor referred to this deposition as the ground of conviction for prevarication. Such is the course which was followed in *Baxter's* case, but there is no rule on the subject, nor is the practice uniform. On the contrary, cases in which the deposition has not been taken down by the clerk, and in which there is no specification of the particulars or acts of the pervarication, occur again and again in the Books of Adjournal. Such was the case of *James Pater-son*, Stirling Circuit, April 29, 1817; and *John Mackenzie*, High Court, January 11, 1823. Furthermore, in none of the cases, not even in that of *Baxter* already referred to, was the evidence, or any part of it, set forth in the warrant, and yet it is the want of that, or a particular specification of the acts of prevarication, which is here the gravamen of the complaint. If such a form of conviction be a valid form of conviction in the Superior Court, I do not see why it should not be a valid form in the Sheriff Court. The cases in which the question can occur are exceptional cases like the present, where the Judge summarily convicts in respect of acts done or committed under his own eyes, and where, therefore, there is no written charge or complaint. In the common enough case, for example, a person appearing intoxicated in Court, and being summarily punished for contempt of Court, I cannot think that it is necessary that the acts which satisfied the Sheriff that he was intoxicated must be set forth in the conviction. Neither in this case, if the Sheriff be satisfied that the witness was prevaricating, do I think it is necessary that the particular act or acts should be set forth. That probably could only be done by setting out at length the deposition of the witness; but the deposition of the witness is recorded by the Sheriff, as it was his duty to do, and forms part of the process, and I cannot see that it would be any advantage that it should be again set forth at length in the judgment, or specially referred

to in it. In a case of prevarication, the conduct of the witness, his mode and manner of answering questions when under examination, and which cannot be adequately recorded, are all matters so material, that in my opinion it is more than doubtful whether the mere written deposition of a witness would afford adequate means to enable a Court of review to determine whether or not the witness had been rightly convicted of prevarication. Upon this subject I will only add that the form of the conviction appealed against is that which has been furnished as a style in Mr Barclay's Digest of the Law of Scotland (*voce* Prevarication) for use in Inferior Courts. From this it is only reasonable to conclude that what was done by Sheriff Speirs was not inconsistent with the practice in the Sheriff Courts.

The complainer further complains that there was no complaint or indictment setting forth the charge against him, and that no evidence was led previous to the granting of the warrant with the view of rebutting or contradicting the complainer's evidence. But, as I have already said, the offence, if committed, was one which was punishable *de plano*, and the evidence of its commission was to be found, not in any extraneous evidence, but in the examination of the complainer himself.

The complainer further complains, generally, that the conviction was unjustifiable and oppressive; but I do not see that there are any grounds calling for proof or inquiry. There is no reason for interfering with the conviction on the ground of oppression in respect of the length of the sentence of imprisonment. Numerous cases will be found in the books where much longer sentences were awarded than in this case.

I have, I think, now dealt with the whole grounds of suspension which were maintained before us, and I am of opinion that the bill should be refused.

Lord Young.—The complainer asks suspension of a sentence of imprisonment with hard labour pronounced against him by the Sheriff-Substitute at Portree for "contempt of Court," committed by his "having grossly prevaricated in his evidence" as a witness for the pursuer, in an action in the Sheriff Court at Portree in which he was a defender. The material grounds of suspension are—1st, that the sentence was pronounced without any charge preferred, and without hearing the complainer or his agent in his defence; and 2d, that the sentence does not set forth a relevant or sufficient statement of any act of prevarication of which the complainer was found guilty.

The complainer avers that he gave his evidence in Gaelic; that being ignorant of English he "did not know what was taking place" after he gave it; and that the Sheriff-Substitute refused his agent's request to be allowed to speak in his defence.

The Sheriff-Substitute is called as respondent, and the bill of suspension was by order of this Court served upon him accordingly. When the case came on for hearing, Mr Mackintosh appeared for him and stated that, acting on his advice, he declined to appear as respondent in the suspension, but that he would, in the form of a report, afford any information which the Court

might desire on a remit being made to him for that purpose. We had of course no power to compel him to appear as respondent, but I ventured to express my own opinion to the effect, that if he meant to defend the sentence which the complainer impeaches, the regular and proper course was to appear and do so at the bar in the usual way. Your Lordships thought otherwise, and so the case was heard *ex parte*, and we must decide it without the aid of any explanation or argument on behalf of the respondent. But before addressing myself to the merits of the case, I think it is proper that I should explain distinctly my own views of this question of regularity and propriety of procedure on which I have the misfortune to differ from your Lordships.

I must assume, and indeed think it clear, that there is a competent process regularly before us in which we must pronounce a decision. The complainer, who appeared both personally and by counsel, is one of the parties to that process. On the face of it, the Sheriff-Substitute of Portree is the other and the only other—so that if he is not competently and regularly called as respondent, the process must fail on that ground. The person called as sole respondent in a bill of suspension may show that not he but some other is the proper respondent, or the Court may possibly so decide without appearance by the person erroneously called. But the notion of a bill of suspension without any proper respondent or contradictor in existence is too novel and indeed absurd to be entertained for a moment. When an inferior judge or magistrate, without any charge laid before him, without any motion by a party in a cause before him, at his own hand sentences a subject of the Queen, whether a party to a cause, or a witness in a cause, or a stranger present in his Court, to imprisonment with hard labour for conduct which he deems to be a contempt of Court, and the sentence is duly impeached in this Court as illegal, I should have thought it not doubtful that the magistrate is himself the proper respondent to be called as contradictor to defend it. If he is not, there is certainly no other, and such a sentence must either be unassailable in this Court, or be complained of in a process to which there is no respondent. A sentence is indeed usually and properly defended by the party at whose instance or on whose motion it was pronounced. But if the magistrate pronounces it at his own hand in vindication of his dignity, he is clearly the proper party to defend it if he sees fit, and indeed to judge in the first instance whether it is defensible, having regard to the grounds on which it is impeached. It is *prima facie* presumable that he acted from a sense of public duty, and I should have thought that the same sense of duty would induce him to defend it, or abandon it (if on consideration satisfied that he was in error), when his conduct was complained of in this Court. The cost is not considerable, and the Treasury, on the advice of the Lord Advocate, would probably see that a conscientious magistrate, like a conscientious public prosecutor, was indemnified of the costs properly incurred by him in defending his public conduct. That it is incompatible with the dignity of a Sheriff-Substitute to appear as a respondent in this Court is an idea almost too ridiculous to be expressed.

In the absence of the only respondent called,

and the only possible respondent, we must necessarily consider the case on the complainer's uncontradicted statement of facts and the terms of the sentence. Taking it as it is thus presented, it may, I think, be decided without determining the general question whether a Sheriff may in any circumstances punish contempt of Court by a sentence of imprisonment. That question has not, so far as I know, hitherto occurred for judgment, and I would rather reserve my opinion upon it till it is presented more purely and simply than in the present case. That a Sheriff may do what is necessary to maintain order and decorum in his Court, or to enforce an order requiring to be obeyed on the instant, may be assumed, although I venture to think it doubtful whether a sentence of imprisonment with or without hard labour is within his power as a necessary or proper proceeding for this purpose. The fact that it has never, so far as any of us know, been resorted to is a strong argument against its necessity, and if unnecessary it is certainly unwarrantable. The Judges in the Police Court of Edinburgh are by statute empowered to punish contempt of Court with a limited period of imprisonment. But the power being given by statute and within specified limits is itself an argument, though not a conclusive argument, against the notion of such power being inherent in inferior Judges. I know of no authority for saying that it is, and certainly no instance of the exercise of such a power has hitherto occurred or at least been brought under the notice of the Supreme Court.

There are no doubt many recorded instances of the Lords of Justiciary having summarily sentenced witnesses in criminal cases to imprisonment and other punishments for prevarication. I should have thought these cases not in point, and that for several reasons, all of which I think strong. In the first place, the Lords of Justiciary are Supreme Judges. In the second place, they have pronounced such sentences in the exercise not of civil but of criminal jurisdiction. In the third place, they did not confine their punishments to imprisonment, but went the length of banishment, mutilation (as by cropping the ears), whipping, and setting in the stocks, and pillory. These barbarities diminished with advancing civilisation, and at length disappeared. During the present generation there has not, so far as I know, been an instance of even imprisonment so inflicted by a Judge of this Court. My own memory, and I may say experience of the Court, extend over a long period, and I have never known of one.

It is not in the present day thought expedient or even reasonably safe to find a party guilty of a criminal offence and punish him as a criminal accordingly without a regular prosecution and charge, and the ordinary safe-guards of a trial, on the fiction of a contempt of Court, for it is in truth only a fiction. Prevarication by a witness on oath—if such as may fittingly be punished by imprisonment with hard labour, not to speak of banishment or the pillory—is crime, and modern ideas are against regarding it as a constructive contempt so as to warrant such punishment on the spot without trial, and I for my part am strongly against countenancing the introduction into Inferior Civil Courts of a high-handed summary procedure founded on a fiction, which has long been practically abandoned in the

Supreme Criminal Court, where alone, so far as I know, it was ever adopted.

The practice of the Supreme Civil Court is, I should think, more to the purpose, and I venture to say that it has never at any time been the practice of the Supreme Civil Court to punish witnesses summarily by imprisonment for prevarication. I may even, I think, go the length of asserting that there is no reported case of a Judge of the Court of Session having done so.

Still more in point is the practice of the Sheriff Courts, and without presuming on a universal negative—for I cannot speak of what may have been done without being brought under the notice of the Supreme Court—I venture to assert that it has not been the practice of Sheriffs in their Civil Courts to sentence witnesses in civil causes to imprisonment for prevarication, and that not a single instance of such a proceeding has been brought before the Supreme Court.

Here, according to the only information before us, the Sheriff-Substitute of Portree, sitting in his Civil Court, summarily sentenced a defender in a civil cause depending before him to be imprisoned with hard labour for ten days because he “grossly prevaricated in his evidence” as a witness called by his adversary in the cause. If this proceeding is defensible at all, it is not upon precedent, for there is none. Such a thing was never done before, and I must decline the responsibility of concurring in a judgment which will make a precedent for any similar proceeding in future.

But this, although in my opinion sufficient to quash the sentence, is not all, for the complainer avers that he was not informed wherein the supposed prevarication consisted, and that the law agent who was present and charged with his interests as a party to the cause, was refused a hearing although he demanded it. This is no doubt a grave impeachment of the Sheriff-Substitute's conduct, but it may be true and I cannot say it is irrelevant. The Sheriff-Substitute declines to appear to contradict it, or give any explanation whatever, and I cannot simply disregard it or decide the case on the assumption that it is untrue. Your Lordships altogether ignore it, no doubt for some reason, though it does not occur to me what it is. But farther, the sentence gives no information whatever as to wherein the supposed prevarication consisted. The complainer says he was not informed and does not know, and I must say that is my own condition. I have not been informed, and do not know. We do indeed know that the Sheriff-Substitute thought that the complainer “grossly prevaricated in his evidence,” but we know no more, for these words which I have cited from the sentence comprise all that has been communicated to us. But we are sitting as a Court of review on a reviewable sentence. If we are not, the whole procedure before us is a farce; but if we are, the question is so simple as this, whether a party to a civil cause is liable to be imprisoned with hard labour on a general statement by a Sheriff-Substitute that he had “grossly prevaricated in his evidence as a witness,” and that on being satisfied that the Sheriff-Substitute thought so, we must affirm his sentence, having no concern with whether he was right or wrong. I thought it had been firmly established that a reviewable sentence must either in itself, on the face of it, or by reference, give

such information of the facts held to be established as may enable the Court of review to determine whether or not the inferior Judge who pronounced it was in error, and that if it does not, that is in itself sufficient reason for setting it aside. I appreciate the difficulty of defining prevarication, and of specifying wherein it consists in any particular case. It is a loose and indefinite term, which may mean many different things short of perjury; the general idea which it conveys is manifest unwillingness candidly to tell the whole truth, fencing with questions in such manner as to show reluctance to disclose the truth, and a disposition to conceal or withhold it. So regarded, it is difficult of specification undoubtedly. But only fancy the impression or opinion of a Judge to this effect, stated as a reason for sentencing a party to a civil cause to imprisonment with hard labour! A distinct falsehood sworn to, although detected and exposed or even confessed on cross-examination, could be clearly stated without difficulty. What was the prevarication here, in the Sheriff's estimation, nobody but himself knows, or it is perhaps more accurate to say this Court has not been informed.

The case of *Hamilton v. Anderson* has in my opinion no bearing on the question before us. It was decided in that case (1st), That a Sheriff-Substitute had jurisdiction to suspend a practitioner before his Court for contumaciously refusing to obey a lawful order of the Court, of a nature admitting of and requiring instant obedience; and (2d), That even if the order was not lawful (although it was held to be so), the practitioner had no cause of action against the Sheriff-Substitute. I am unable to conceive how the case is supposed to be in point. The notion that a sentence of imprisonment pronounced by a Sheriff-Substitute, and not final by statute, is not reviewable in the Supreme Court was certainly not mooted in that case. From the citations which my brother Lord Adam has made from the report, I infer that he thinks the case in point, because the Sheriff Courts were spoken of as “Superior” Courts—not technically as distinguished from “inferior”—but colloquially as you speak of a “superior person” or a “superior article.” Whether on such sentence being quashed the Sheriff-Substitute is subject to an action of damages is another question altogether, and does not arise here, where the only question is, whether the sentence shall be upheld or set aside?

The only case of a sentence of imprisonment for contempt submitted to the review of this Court affords a striking illustration of the necessity in the interests of justice of requiring a specification of the very facts as distinguished from the use of mere epithets. I refer to the case of *Laurie v. Roberts*, 26th May 1882, 4 Coup. 606. There a police magistrate sentenced a man to three days' imprisonment for contempt of Court by grossly insulting the Judge. The language used being there set out, a majority of us were of opinion that it did not amount to insult or contempt, and so quashed the sentence. One Judge thought it did, but nevertheless agreed in the judgment, a sentence of imprisonment being in his opinion oppressive, not of course for any contempt by insulting language, but for the particular contempt set out in the sentence. Suppose the sentence there had been in such general terms as the one before us, and had only found that

the party had grossly insulted the Court, and so was guilty of contempt, we must, assuming the *ex facie* regularity of the sentence, have done an injustice, and left the party to suffer punishment for what (the facts being unnecessarily disclosed) we accidentally discovered to be no offence at all. One of your Lordships has spoken of oppression as the only ground for quashing such a sentence. But to imprison a man with hard labour for no offence is oppression, and even if the oppression consist in the extent or character of the punishment being incommensurate with the particular offence actually committed, how, I venture to ask, can we judge of this without knowing the facts.

By refusing this suspension we should affirm the proposition that if a Sheriff-Substitute sentences a party in a civil cause to imprisonment with hard labour for ten days (or ten months) because he had grossly prevaricated in his evidence as a witness, and so was guilty of contempt of Court, giving us no information except what these words convey, we can require no more, and must affirm the sentence. I cannot assent to that. I think the sentence is illegal, as it is certainly unprecedented. I should have thought so even if facts had been stated on the face of it showing that the suspender had manifested unwillingness to disclose, and an inclination to conceal, the truth of a particular fact within his knowledge, which he was at last compelled to reveal, for I think that is not an offence for which by the law and practice of Scotland a party in a civil action may in a Civil Court be summarily sentenced to imprisonment. But I think the want of specification is itself fatal, and if I am to assume the truth of the assertion in the bill to the effect that the complainer was not at the time informed of any fact as to which the Sheriff thought he had prevaricated, and that his agent was refused a hearing, he himself being ignorant of the English language, I should think the case on its specialities a clear one for suspension irrespective of the larger question.

Lord Adam was good enough to communicate his judgment to me before it was delivered, and having read it carefully, and listened to it to-day with due attention, I desire with all respect to say that I find in it no reason for declining, as his Lordship does, to take any notice of the complainer's denial of prevarication, or of his averment that none was stated to him at the time, any more than is disclosed to us on the face of the sentence, and that he was preemptorily refused a hearing. Neither do I find in it any notice of what I must regard as the most important general feature of the case, viz., that the sentence is unprecedented, for I quite understand from both your Lordships that you did not, any more than myself, know of any case in which a defender in a civil cause had been summarily sentenced by a Sheriff to imprisonment with hard labour for prevarication—no such case has been mentioned. The Justiciary precedents alone, as I understand, are relied on by your Lordships, and certainly if these are hereafter, in deference to the judgment we are to pronounce, to be followed by Sheriffs in civil causes, we may have numerous sentences like the present, for since parties have been admitted as witnesses, what may be regarded as prevarication, and such constructive contempt of Court as that infers, is not

uncommon. But it will be in vain to seek relief in this Court on a denial of any prevarication or want of specification, or on refusal of a hearing, or indeed on any ground that at present occurs to me. For if the Sheriff shall only say that he is of opinion that the party prevaricated, we shall, following our present judgment, hold that sufficient to uphold the sentence, and refuse to hear anything to the contrary, or even listen to a request for particulars. Nor do I know any limit to the punishment, unless indeed we are to find that also in the Justiciary precedents. There is none by statute or by custom—for there is neither statute or custom on the subject—a custom may possibly grow out of this Portree sentence and our judgment affirming it, but as yet there is none.

The LORD JUSTICE-CLERK was not present at the hearing.

The Court refused the bill.

Counsel for Complainer—Dickson. Agent—T. & R. B. Ranken, W.S.

Tuesday, March 18.

(Before Lord Justice-Clerk, Lord Young, and Lord Craighill.)

DARGIE v. DUNBAR (PROCURATOR-FISCAL OF FORFARSHIRE).

*Justiciary Cases—Adulteration of Food—Milk—Sale of Food and Drugs Act 1875 (38 and 39 Vict. c. 63), sec. 6.*

A dealer in milk was convicted of selling as sweet milk, milk which was "not of the nature, substance, and quality of sweet milk, being deficient in fat to the extent of 8.3 per cent. or thereby." It appeared that the analysts of Somerset House had certified that in their opinion the milk contained only 2.21 per cent. of fat, and had been deprived of 8 per cent. of its fat, but that other analysts who had examined it, while agreeing that the milk contained only about 2 per cent. of fat, differed as to whether that imported that it had been in any way deprived of fat which had belonged to it. The Court (*disc.* Lord Craighill) set aside the conviction.

The Sale of Food and Drugs Act 1875 provides by sec. 6—"No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds."

On 11th January 1884 Agnes Dargie was charged at Dundee, before the Sheriff-Substitute of Forfarshire (CHEYNE), "with a contravention of the 6th section of the Sale of Food and Drugs Act 1875, as amended by the Sale of Food and Drugs Amendment Act 1879, 'in so far as on the 10th day of December 1883, or about that time, within the shop in Perth Road, Dundee, possessed by David Dargie, farmer and dairyman, Tarbrax, Inverarity, the said Agnes Dargie did sell to William Paterson, sanitary inspector in the Dundee police, and George Beveridge, sanitary officer in said police, or one or other of them, threepence worth of milk as sweet milk, but