CASES

DECIDED IN

THE HOUSE OF LORDS,

UPON APPEAL FROM

THE COURTS OF SCOTLAND.

JAMES CARSE, the Younger of Blackhouse, *Appellant;*

HIS MAJESTY'S ADVOCATE and SOLICITOR GENERAL for Scotland, for the Public Interest, and JOHN CORBET and JOHN COLQUHOUN, - - - } *Respondents.*

House of Lords, 26th July 1784.

APPEAL—COMPETENCY—JURISDICTION—WITNESS.—The Court of Session has a criminal jurisdiction vested in it to try certain crimes emerging in the course of any civil suit conducted before it. But their sentence, in such cases, is subject to appeal to the House of Lords. Appeal by a witness examined in a case, though not a party to the suit, sustained.

DISPUTES having arisen between the respondents, Corbet and Colquhoun, the appellant, along with Robert Gray, Esq., was induced, from motives of friendship, to become arbiter to settle their differences; and, accordingly, both were appointed by the parties as arbiters, to settle "all claims, "controversies, and debateable matters whatever, subsist-"ing between the parties, preceding that date," and particularly, the subject matter of three actions depending in the Court of Session, at the instance of Colquhoun against Corbet, and also a process before the Sheriff of Dumbarton: And the parties agreed and bound themselves to abide by "whatever the said arbiters, or, in case of their varying in "opinion, whatever they, or either of them, with David

1784.

CARSE
v.
HIS MAJESTY'S
ADVOCATE,
&c.

" Muir, portioner of Garferry, hereby elected umpire or " oversman, shall give forth and pronounce as their final " sentence and decreet arbitral."

The arbiters gave a final decree arbitral in the whole matters submitted to them; but this decree was brought under reduction, in an action raised for that purpose, on the ground of their giving decreet, on the footing that they had differed in opinion, and had therefore been under the necessity of calling in the oversman, as provided by the reference.

The case being reported, the Court, before determining the question, ordered James Carse, one of the arbiters, to be examined on oath before the Lord Ordinary, upon the point of a difference of opinion, and he having been accordingly examined, and his deposition printed, the Lords resumed
Dec. 17, 1783. the consideration of the cause, and found, " That in respect " there was no written evidence that the arbiters had differed " in opinion, they reduced the said decreet arbitral." Against this decree, Mr. Corbet petitioned the Court for an alteration. The Court, before answer, allowed the other arbiter, with the oversman, and the clerk to the submission, to be examined upon oath, before the Lord Ordinary, upon the difference in opinion of the two arbiters; and also upon the improper conduct of James Carse, the other arbiter, who had been formerly examined; and, upon advising this petition, with answers for John Colquhoun, and the depositions so ordered, they " repelled the reasons of reduction of the " decreet arbitral quarrelled, assoilzied Mr. Corbet, and de- " cerned; and it appearing to the Court that James Carse, " in his deposition, had not told the truth, and had prevari- " cated, they granted a warrant to cite him to appear be- " fore them four days after such citation, and he having ap- " peared at the bar, upon Tuesday the 9th then current, the " Lords allowed him to be heard by counsel, upon the im- " port of the said deposition. And having, upon the 16th " day of December 1783 years, resumed the consideration of " the said deposition, with the other depositions taken in " the said cause; and also having heard counsel for the said " James Carse, upon the import of the said depositions, they " found, and hereby find the said James Carse guilty of gross " prevarication, and wilful concealment of the truth, in the " oath emitted by him in the said cause, and therefore or- " dained, and hereby ordain him to be carried from the bar " to the Tolbooth of Edinburgh, therein to remain until Wed-

" nesday the 14th day of January next; on which day they " decerned and ordained, and hereby decern and ordain the " said James Carse to be carried to, and put upon the pillory, " there to stand bareheaded for the space of one hour, from " twelve at noon, to one o'clock afternoon, with a paper affixed " upon his breast, with these words wrote in large characters, " *gross prevaricator*, and *wilful concealer of the truth upon* " *oath;* and thereafter to be dismissed; and they ordained, " and hereby ordain the Magistrates of Edinburgh to see " this sentence put into execution; and they also declared, " and hereby declare the said James Carse infamous, and in- " capable in all time coming, of bearing any public trust, " or of being a witness in any action or cause; and ordained " this sentence to be recorded in the books of sederunt, to " the terror of others to commit the like crime in all time " coming." In virtue of this sentence the appellant was committed to prison.

In the meantime, he presented the present appeal of the sentence to the House of Lords, to which answers being lodged, it was objected, 1st, That such an appeal was incompetent, and, 2d, That it was further incompetent, as not being brought by a party in the cause, but by a witness found guilty of prevaricating.

Pleaded for the Appellant.—Upon the competency of the appeal. Before the Union, an appeal always lay to the Parliament of Scotland, from the sentence of the Court of Session. All the institutional writers agree in this, and make no distinction between the civil jurisdiction of the Court, and its incidental criminal jurisdiction. And in the Scots claim of rights, the broad right is conceded:—" That " it is the right and privilege of the subject to protest for " remeid of law to the king and parliament, against " sentences pronounced by the Lords of Session, provided " the same do not stop execution of those sentences." If therefore an appeal lay to Parliament before the Union, and if, as the appellant contends, this sentence is a sentence of the Court of Session, then it is clear that the present appeal is competent. Upon the merits;—it is equally clear, that although the Court of Session have a sort of criminal jurisdiction, which entitles it to punish perjury and prevarication upon oath, committed in the course of a depending action before them; yet, in such cases, *that* Court cannot, (as they have done in the present case) inflict the *pains of law*, that is, the punishment which the law in its rigour annexes

1784.

CARSE
v.
HIS MAJESTY'S
ADVOCATE,
&c.

to the commission of such crime upon a regular trial, and conviction in the proper criminal court; but must restrict their sentence to a slighter corporal punishment. There is no precedent for the Court's judging, as they have done here, and inflicting punishment for such crimes, under circumstances similar to those which occur in the present case. In all the instances that occur, it is of persons accused and tried at the instant upon their behaviour in the Court, or in consequence of what appeared in the face of their deposition, striking the judge at first view, or of collateral depositions, taken at the same time, when the accused had it in his power to command exculpatory evidence. But here the appellant was not accused of having prevaricated, or misbehaved; or done wrong in any shape, at the time of giving his evidence; on the contrary, when reflections were thrown out, the judge checked them as improper and unmerited. It was not until eleven months after, that the appellant was convicted upon the evidence of others, given with the view to contradict him, in a cause to which he was a stranger.—The appellant does not mean to say, that being suspected of a crime, he ought to have gone untried; what he contends for is, that the Court of Session ought to have remitted him to the Court of Justiciary, where he would have had the advantage of an indictment, and the opportunity of preparing his defence, and cross-examining those witnesses, Gray and Smith, who are said to have established the perjury against him. In denying him this mode of trial, and in depriving him of the benefit of exculpatory proof, *that* justice was denied him, which would have been accorded in the worst criminal proceeding.

After hearing counsel,

LORD CHANCELLOR THURLOW :—

"MY LORDS,

"The Lord Advocate, in answer to this appeal, at first, had pleaded that it was incompetent to appeal from such a sentence, though he has now given up that point at the bar of your Lordships' House. I have no doubt, that an appeal lay from every order of the Court of Session, and, without meaning any reflection, even think it unfortunate for the people of Scotland, that an appeal did not lie from the sentences of the Justiciary, as from the King's Bench in England. I do not approve of the conduct of the Court of Session, or the severity of their sentence in this case. No doubt, Carse appeared not to have spoken out the truth fully; but the im-

prisonment he had undergone was punishment sufficient; and I therefore move your Lordships to affirm the sentence, so far as it directed Carse to be imprisoned for a month; but to *reverse* so far as it directed him to be put on the pillory, &c.; and so far as it declares him infamous and incapable of bearing public trust."

Accordingly, it was

Ordered and adjudged that the two interlocutors complained of, in so far as they ordain James Carse to be carried from the bar to the tolbooth of Edinburgh, therein to be imprisoned, be affirmed. And it is further ordered, that the said interlocutors, so far as they ordain him to be put upon the pillory for one hour, with a paper fixed on his breast, denoting his crime, and the Magistrates to see the sentence put in execution, and so far as they declare him infamous and incapable of bearing public trust, &c., be *reversed*.

For Appellants, *J. Erksine, J. Anstruther.*

WILLIAM BRUCE, Late Shipmaster, Dundee, *Appellant;*

ROBERT CLEGHORN & ALEXANDER CLEGHORN, Bakers in Leith, - - - } *Respondents.*

House of Lords, 2d March 1785.

SALE—TITLE—INCUMBRANCES—PRICE.—Circumstances held not sufficient to set aside and void the sale, although the missives on one side expressly declared, that unless the titles were found sufficient, the bargain then made was to be null and void. Also held, that the purchasers were not bound to pay the price until certain incumbrances were purged affecting the purchase.

Robert Johnston, proprietor of some houses in Leith, mortgaged them to William Petrie, and Helen Berrel, for two distinct and separate sums, amounting to £200. Johnston thereafter failed in business, and removed himself to London, whereupon two of his creditors adjudged the property, and entered into possession, by uplifting the rents of the same.

Some years thereafter, the appellant Bruce acquired, by purchase from Johnston, the right to this property, paying him at the time, £150 for the reversion, and the purchaser,