1742. *February* 26. STEWART and Others *against* BOTHWELL.

No 71.
The jurisdiction of the Court of Session does not extend to sums to be accounted for in another court.

CERTAIN tradesmen having been employed in the years 1731 and 1732 by the Earl of Lauderdale and Mr Bruce, then General and Master of the Mint, to make pretty considerable repairs, a process was brought against the Lord Belhaven and Archibald Bothwell their successors, for payment of the accounts, as those in whose hands the public money was impressed for defraying the charges of the Mint, and which charges were alleged to be a burden, affecting not only the monies impressed for that year, in which such charges occurred, but also for subsequent years.

Some years ago the Lords had repelled the objection then made by Lord Belhaven to the competency of the Court, and sustained action; after which the cause went on, and the pursuers were allowed a proof of the articles of their accounts before answer: But application being now made for Archibald Bothwell, who had not before appeared, the LORDS 'sustained the objection to the competency, and found that the act of sederunt concerning reclaiming bills did not take place in questions touching the jurisdiction of the Court; and therefore dismissed the action, leaving the pursuers to seek their remedy as accords.'

N. B.—The remedy with respect to the present officers of the Mint, was thought to be no other than an application to the Treasury, that being the Court to which only they were to account. That the employers *qua* such were liable there was no doubt.

Fol. Dic. v. 3. *p.* 341. *Kilkerran*, (JURISDICTION.) *No* 3. *p.* 316.

1743. *June* 17.

JAMES STEEDMAN, Merchant in Kinross *against* CHARLES COUPAR, Sheriff-Clerk there.

No 72.
Action of damages is competent before the Court of Session, at a husband's instance, against a third party for seducing his wife, against whom he had obtained a divorce.

THE pursuer having obtained divorce against his wife, before the Commissars, for her adulterous practices with the defender, brought an action against him of damages, for reparation of the injury.

Pleaded in defence, That this process was quite new and unprecedented in the law of Scotland; and however the nature of it may be disguised by words, importing it to be a civil action for damages, yet in reality it was a criminal prosecution, for the alleged crime of adultery, though the Court is not vested with any such criminal jurisdiction, as can authorise it to take proof of the alleged criminal practices, in order to convict the defender of adultery. If this process is therefore of a criminal nature, it surely is not expedient or regular

No 72. for the Court to judge of it, in *prima instantia*. How far it might lie for recovering imaginary damages, after conviction before the Justiciary Court, may be doubted; as neither our law, authorities of our lawyers, or practice of our courts, have given any countenance to such actions. But the present question is allenarly, Whether before any such prosecution is brought, a suit lies before this Court in the first instance? With respect to which it is obvious that the husband and wife are principal offenders in such cases, as being under the strongest mutual obligations of chastity; consequently, such actions should necessarily be directed primarily against the husband or wife, which ever of them was guilty. Upon this principle it is, that when the husband or wife are convicted, they lose the provisions to which they were entitled by the contract, or provision of law. And when provisions were made with this particular view, it could scarcely have escaped the Legislature to have taken some notice of the case of third parties, had such suits as the present been deemed competent for imaginary damages. It would be a novelty surely in our law, to bring an action of assythment against a murderer before conviction; which must conclude *a fortiori* to the present point, where the law gives satisfaction to the injured person out of the effects of the principal offender. It is likewise one of the peculiar privileges of our law, that in all criminal matters, (petty delinquencies excepted) the person accused must be tried and convicted by his country. But if this attempt take place, this part of our constitution will be sensibly struck at. It will not be contested, that where, from the same fact, there arises both a criminal and civil action, the one does not destroy the other. Now, suppose the defender should be convicted, and decreet given against him for a certain sum, could he be prosecuted next day before the Justiciary? it is believed no man will think, that, for the same fact, he could be obliged to stand both trials before different courts; and if such is the law, whence can this proceed? if it is not, that the action now carrying on before this Court, is truly *actio pœnalis non rei persecutoriæ*. No patrimonial prejudice arises from the fact charged against the defender, as in the case of theft, &c. though a consequential imaginary damage may be qualified, on supposition the husband takes the advantage of the law, and obtains a divorce, whereby he may want the assistance of his wife in the management of his family. But as such consequential damage does not arise immediately from the criminal fact, they cannot be the foundation of an action for imaginary damages, incapable of any certain estimation; which, in other words, is demanding a pecuniary penalty, by decreet of the civil Court, without any proper conviction of the offender. Nor can the practice of the law of England avail the pursuer, as it is peculiar to that country; and even there such actions are not pursued before the *Nisi prius* court, but are tried by a jury before the Judge-criminal; where the jury are both judges of the fact and of the *quantum* of the damages.

For the pursuer it was *pleaded*, That it was impossible to figure an injury of a deeper dye, or more pernicious consequences, than that of debauch-

ing a man's wife: That the nature of an injury did not depend so much upon the patrimonial interest that may be affected by it, as upon the real hurt and blemish that the injured person may suffer in his fame, in the estimation of the world, and with regard to the peace of his family: That all injuries, whether real or verbal, afford sufficient ground of action, for reparation to the injured. If, indeed, only such injuries as affect a man's estate could give a proper rise to an action of damages, then all verbal injuries might be struck out, since no man is a shilling the poorer for being called a rogue; consequently, an injury of this nature could be estimated, and a proper reparation given to the injured person; otherwise this absurdity would follow, that a man might be injured in the most sensible manner, and yet no reparation afforded to him in law. Further, there were obligations arising *ex delicto*, which were the mother of actions of a mixed nature, *partim pœnales*, *partim rei persecutoriæ*; in which the injured party had his choice, either to insist for reparation of the injury and damage in a civil way, or publicly, if there was a *publicum judicium* that concurred with it; and the only rule observed in instituting these actions was, that the same thing, whether a penalty or damages, could not be twice enacted, *ne bis idem exigetur*. By the civil law, which is likewise ours, the very attempting to debauch a man's wife afforded an action for redress, much more must the completion of the injury; and though suits of this nature have not been frequent in this country, yet they are well founded, though our ancient law-books have not put any estimation upon such injuries, as that must always be regulated according to the circumstances of the case. No 72.

And, as this suit is only for damages, or reparation *ad civilem effectum*, the Court is surely competent, even before convicting the defender, to cognosce upon, and take proof of, the trespass from whence this process takes its rise; otherwise, in the case of theft or robbery, restitution would be barred till the offenders were convicted before a criminal court. It is admitted, a trespass of this kind affords an action upon the case in England, at common law; and it does not denote its being purely criminal, that the method used there for coming at the reparation is by a trial by jury; since, it is well known, that most civil causes are tried there in the same manner. See l. 1. § 2. *D. De injur. et l.* 19. *ejusd. tit.* Huber, in his commentary on the tit. *De injuriis, lib.* 1. *tit.* 5. *Quib. modis feudum amittitur; et Reg. Majest. lib.* 2. *cap.* 12. § 7. Skeen *de verb. sig. verb. Ænach.*

THE LORDS found the action competent. See REPARATION.

Fol. Dic. v. 3. *p.* 340. *C. Home, No* 239. *p.* 387.

*** Kilkerran reports this case:

AFTER that James Steedman merchant in Kinross, had obtained a decree of divorce before the Commissaries of Edinburgh against Janet Steedman his wife, he pursued Charles Couper, sheriff-clerk of Kinross, as him who had seduced

No 72. and enticed her, for damages, which was the first instance of such process in this country.

The Lords, 17th June 1743, 'Found the action competent;' and upon advising the proof on the 20th January 1744, 'Found the libel proved, and the 'defender liable to the pursuer in the expenses of the process of divorce, and 'of the appeal to the House of Lords, which followed thereupon, and of the 'expenses of this process; and remitted to the Ordinary in the cause to examine the accounts of these expenses, and to report the same to the Lords; 'and ordained the pursuer to give in a condescendence of what damages he 'had sustained through the loss of his trade and business, and to condescend 'on the method whereby he could liquidate and instruct the same.'

Kilkerran, (Reparation.) *No* 2. *p.* 484.

1744. *July* 25. Robertson *against* Justices of Peace of Stirlingshire.

No 73. Robertson having been adjudged as a recruit, in terms of an act for the more speedy recruiting of his Majesty's forces, presented a bill of suspension, as he did not fall under the description of the act. The Lords, in consideration that the power of adjudging men for certain purposes, was given to the commissioners named in that act, found that a suspension was not competent; and a reclaiming petition being presented, setting forth, that supposing the Lords of Session were not competent judges in matters of this kind, if the person was adjudged by those who had due power, yet it was deficient in this case, where the persons who had adjudged Robertson could not legally do it, as they were not qualified in terms of the said act, and had no power of adjudging; the Lords adhered to their former interlocutor, and found, that as they had no jurisdiction in questions relating to the act of Parliament, they could not stop the execution of it, or enquire whether the judges were duly qualified or not.

Fol. Dic. v. 3. *p.* 342.

1745. *February* 2. Campbell, Petitioner.

No 74. Upon a petition of Archibald Campbell of Ellersly writer to the signet, whose vote for a member of Parliament, on the title of the said lands, was objected to by some of the freeholders of the shire of Renfrew, my Lord Drummore declining to judge, as being brother-in-law to Sir John Shaw of Greenock, one of the complainers; the Lords were of opinion, that as it was not a case for any private interest, but a complaint brought by a member of a sort of community, on the account of the public, his nearest relations were competent judges; and therefore repelled the declinature.

D. Falconer, v. 1. *p.* 61.