

you require a perpetual flow of water in order to make a *perpetua causa*, half the mills in Scotland would be ruined ; for there are few brooks in Scotland which flow perpetually from one end of the year to the other.

PRESIDENT. The subtleties in the civil law, as to servitudes, are not received into our law. *Here* there is a repository of water : the natural course is to the Avon. A *perpetua causa* is what arises from a natural cause. Mills are built upon the faith of this water continuing to flow. Shall I allow the heritor to turn it away ? Water rising in my ground is mine, for my private uses, but I cannot divert it.

On the 14th November 1767, the Lords assailed the defender. On the 14th January 1768, they adhered.

Act. C. H. Brown, H. Dundas. *Alt.* W. Wallace, R. M'Queen.

Diss. Gardenston, Coalston, Elliock, President. Justice-Clerk, Pitfour, and Kennet, had dissented from the first judgment ; but they changed their opinion.

1767. July 29 ; and 1768, January 15. MRS HARRIET STEWART *against* The EARL OF FIFE.

REPARATION.

Nature of an Assythment.

[*Sel. Dec. No. 258 ; Dictionary, 13,904.*]

PITFOUR. The punishment of murder is death. Such is the voice of nature. Such the law of God, not judicial but moral. Not delivered to the Jewish nation, but to Noah, the father of mankind, at the renovation of the earth, after the flood. If that punishment is inflicted, no more is due. When that punishment is not inflicted, reparation is required. By punishment, I do not mean what is the elusory. There are two differences between this case and that of *Campbell*. *1st*, *There* the crime was proved ; *here* it is not. *2d*, *There* the defender was secured from punishment ; *here* that matter is *in pendente*. I do not think that, in the present state of the case, a proof of the fact can be allowed. The rule is *non debes prejudicium facere publico judicio per privatum judicium*. I grant that the treason may sometimes be proved where the consequences are less than capital ; as if a vassal, pardoned for treason, should have his estate demanded by the superior, on the clan act. The reason is, because such proof cannot hurt the defender nor infer punishment. The pursuer will have an assythment, but not now. If Abernethy compounds, it will be paid : if he is condemned, there will be the reparation by blood : if he dies abroad, the assythment will be due, because it will then be impossible for him to undergo the ultimate punishment. This seems reasonable ; though the question has never been tried, as it seldom occurs. The only objection is, that *actio ex delicto non*

transit in hæredes ; but the answer is, the action was commenced during the life of the party, and so *lis contestata*. I shall only observe farther, that this action of assythment points out one of the many struggles which this nation has had for liberty against the crown ; and, in this struggle, we have been more successful than in England ; for, *there*, if the Crown grant a pardon, the appeal of murder lasts but for a year. *Here*, if the Crown grant a pardon, the right of private parties remains safe, and without limitation.

COALSTON. If I were of opinion that assythment is only due when the king stops justice by a pardon, I should think that assythment was neither due in this case nor in Campbell's. But I think assythment is due whenever one person is hurt in his property by another. It extends to all crimes, small and great. By the Act 1584, *assythment* is applied to " fire-raising, and other odious crimes : " this is, reparation to the private party. I do not think that a pardon is necessary in order to found assythment. The provision as to that in the statutes, was upon two accounts : 1. It might have been thought that the King's pardon might have excluded the claim of the private party : 2. That suing a pardon implied a confession of the crime, which consequently made assythment due. *Here* there is no proof of the murder ; but, if assythment is due, such proof is competent, and this Court may grant it. It is most eligible that the conviction of the crime should proceed before the criminal court ; but, if the criminal is put out of the power of that court by flying, the civil court ought not, upon his own fault, to stop short. Thus, adultery may be tried before the criminal court ; but this will not prevent the proof of adultery being brought into the civil court. There is less difficulty in supposing that assythment may be recovered now, than after the death of Abernethy. I have only to add, which I omitted, that the statute 1425 shows that assythment is due whenever there is a damage sustained.

GARDENSTON. In this case assythment is not due. At first I thought it absurd that there should be assythment due when the King interposes, and not when the party himself interposes, by removing from justice ; but I came to see that assythment was not reparation, but a *solatium* to the friends of the deceased when the course of justice was stopt. This appears from the fact of no assythment being due when the party suffers death. This is a *solatium* to the friends of the deceased, but is no reparation. If assythment is given here, the Court may do wrong two ways : 1st, Abernethy may hereafter be tried, condemned, and executed, or he may be tried and acquitted : in either view no assythment could be due.

KAIMES. The assythment mentioned by most of the judges is the old composition for crimes, or vergelt. It is to be observed, that, by the laws of King Ina, published by Lambert, c. 5, assythment in that sense was due if a man retired to a sanctuary, because his own act, in retiring from justice, cannot profit him : hence assythment in the old sense due in this case, because Abernethy fled ; not in the other, because *Campbell* stood his trial. But, independent of this, *here* action lies for reparation of damages. If *Leithhall* had recovered, he would have been entitled to damages and a *solatium* : he is dead, and the crime committed upon him becomes thereby greater. Shall we hold that there is neither damages nor *solatium* due to his friends ?

The Lords found no assythment due, and assoilyied.

Act. Cosmo Gordon. *Alt.* J. Ferguson.

Diss. Auchinleck, Coalston, Elliock, Stonefield, Hailes.

[A petition was presented against this interlocutor ; on advising which, with answers, the following opinions were delivered :—]

HAILES. When this cause was advised, the cause of *M'Harg* was also advised. In this cause I gave my vote for an assythment. My opinion was chiefly founded on that of Lord Stair, who expressly says, that an assythment is for reparation of damages ; and I thought his authority sufficient for determining me. The Court, however, found that no assythment could be claimed. Immediately after, they gave judgment in the case of *M'Harg*. I considered that the two cases depended on the same principles ; but, desirous that decisions might be uniform, I gave up my own opinion, and voted against an assythment in *Mac-Harg's* case : the Court, however, found assythment due. Now that *Mrs Harriet Stewart's* cause is again brought into Court, I come back to my old opinion, and am for an assythment. It is said that here no proof of the murder ; therefore no assythment. This signifies nothing ; for we are determining a relevancy, and proof may be hereafter brought. It is said that assythment cannot be awarded ; for *Abernethy* may hereafter be reponed against the fugitation, and stand his trial. If he is acquitted, there is no claim for assythment ; if he is condemned, and suffer death, there is as little. I answer, that the civil court cannot stay their proceedings, because *Abernethy* has withdrawn himself from trial. If he should hereafter return to Scotland, stand trial, and be acquitted, he may have repetition of the assythment : if he should be condemned, and suffer death, his heirs may have repetition of the assythment. But the consequences of such events are not the present subject of deliberation.

COALSTON. Our ancient statutes show that assythment is due for all crimes ; and that, whether a pardon intervenes or not. It is admitted, that, if *Abernethy* had been guilty of robbery, assythment would have been due. Why not, when guilty of murder. It is true that a precise value cannot be put on the life of a man ; but still the judge, *ex arbitrio*, may determine the value. The decision in the case of *M'Harg* shows the sense of the Court, that assythment was *actio rei persecutoria* : we cannot find otherwise here.

BARJARG. I can distinguish this case from that of *M'Harg* : *there* evidence of a murder, *here* none.

MONBODDO. I thought that the case of *M'Harg* was doubtful ; but I was for the judgment. There, there was an extension of the law of assythment, which I thought just. *Campbell* was tried, but escaped punishment by means of the form of the sentence. Here there is no proof at all : Neither sentence nor pardon. Assythment is the old punishment of murder, not a reparation.

AUCHINLECK. I was against the interlocutor. I was convinced that it would have been iniquitous that a man should be guilty of the highest of crimes, and yet be subject to no punishment. This case is clearer than *M'Harg's* : there a sentence, such as it was ; here none. It is true, there is yet no proof of the murder as there was in the other case ; but a proof may be brought,—and here we are only upon the relevancy.

KAIMES. There is nothing in the objection that *Abernethy* may yet be tried

in the Justiciary Court. Two different courts may take up the same *species facti*, and give different judgments: This is distressing, but there is no help for it. *Assythment* has two senses: it is the punishment of a crime, or it is a *solatium*. Mrs Harriet Stewart asks the last, but not the first. We ought not to be misled by names. Had she asked damages, there would have been no doubt. She asks assythment as damages. Why should there be a doubt?

GARDENSTON. This is not a claim of damages, but of amends. It may often happen that the death of the person murdered may benefit his surviving relations. Suppose that a worthless elder brother were knocked on the head, his next brother will be a gainer; yet still revenge may be desirous of satisfaction. One does not like to see the murderer of one's relation going about without chastisement. Human nature revolts at this, and yet there may chance to be no damages. In the case of M'Harg, assythment was awarded, because murder was established, and yet the punishment of murder was not inflicted.

PITFOUR. Both judgments were right. There is no interference. In assythment, two things are required. 1. That the crime be proved. 2. That the offender be secure from punishment. In M'Harg's case, both concurred; here neither. It seems very strange that a civil court should lead a proof of what may infer a capital crime, and, in effect, try a man for murder. I do not understand the distinction between damages and assythment.

PRESIDENT. You every day take proof of crimes, *ad civilem effectum*. Thus, by the clan act, treason might be incidentally proved *ad civilem effectum*. Here there is no question as to the extent of the assythment. No proof taken in the civil court can affect Abernethy, on a criminal trial. I thought that no assythment was due in a case of this kind; but your Lordships taught me otherwise in M'Harg's case: the only difference between the two cases is, that Campbell did stand a trial, and that Abernethy did not. In M'Harg's case, the court went upon this, that assythment was reparation: if so, then Abernethy's flying the country can never deprive the creditor of his right of action for reparation.

ELLIOCK. The claim of assythment is both for reparation and damages. In most cases both concur. No proof to be brought here can affect Abernethy in the criminal court.

JUSTICE-CLERK. I was clear against the judgment in M'Harg's case: it was a singular case. This is a common one in the law of Scotland. There is no evidence that ever assythment was granted when there was only a *fugitation*. I am not to judge according to my inclinations: I must take the law as I find it upon our records: In them there is no vestige of such an action of assythment as this: nor am I at liberty to sustain it.

On the 15th January 1768, The Lords sustained action for assythment, and altered their former interlocutor.

Act. A. Crosbie. *Alt.* A. Lockhart. *Diss.* Justice-Clerk, Barjarg, Pitfour, Gardenston, Kennet, Monboddo.