1767. *February* 24. MACHARGS *against* CAMPBELL.

No 429.
Sentence of a Court-martial, evidence in an action of assythment.

COLIN CAMPBELL of Kilberry, Major-commandant of the 100dth regiment of foot, encamped before Fort Royal, in the island of Martinico, being accused of the murder of John Macharg, a captain in the same regiment, was tried upon the spot by a court-martial, who pronounced this sentence:

"The Court is of opinion, that Major-commandant Colin Campbell is guilty of the crime laid to his charge; but there not being a sufficient majority of voices to punish with death, as required by the articles of war, the Court doth adjudge the said Major-commandant Colin Campbell to be cashiered for the same. And it is the farther opinion of the Court, that he is incapable to serve his Majesty in any military employment whatsoever."

The proceedings of the Court-martial were approved by the King; and Colin Campbell was cashiered accordingly.

James Macharg of Keirs, father to the deceased, and Quintin and Isabel Machargs, his brother and sister, brought an action of assythment in the Court of Session.

Pleaded in defence, *1mo*, Assythment, in the case of slaughter, appears to have been a refinement upon the original practice of the northern nations, when beginning to emerge from a state of barbarity. Private revenge was the only punishment of crimes in the first stage of society. It was an improvement to substitute in its place a pecuniary reparation, known in all the northern nations under various denominations, taken from the species in which the satisfaction was made. As *ero*, which in Celtic signifies kine, *galnes*, calves, *vergelt*, perhaps *airget*, money, *Kelchyn*, *Enach*, &c.

But so imperfect a system of punishment, which in effect gave an immunity to the wealthy, could not subsist in a maturer state of society. Corporal punishments were introduced, as a more effectual method of checking the progress of crimes; and the change was submitted to, as affording a more ample gratification of resentment. That, however, might be disappointed by the pardoning mercy of the Sovereign; and it became necessary to substitute a pecuniary satisfaction, to prevent the murmurs of the persons injured, and to obtain their consent.

Such is the idea of assythment given us by President Balfour, who says that it was paid "to the kin, bairnis, and freindis, in contentatioun of their damage, and for pacifying of thair rancor." Pract. p. 516. c. 1.

The stile of letters of Slains, as given by Dallas, is agreeable to this idea. It expressly stipulates forgiveness and oblivion of all rancour, grudge, and resentment. Lord Bankton tells us, that assythment was given to the wife and nearest of kin, "that they might be reconciled to the man-slayer." Bankt. 1. 10. 15.

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Accordingly, it appears from the whole strain of our statutes, that assythment did not take place, unless where the King had interposed by granting a remission. See 1424. c. 46. 1528. c. 7. 1584. c. 136. 1592. c. 157. 1593. c. 173. & 178. By these statutes, persons who take themselves to remissions are obliged to pay an assythment. But the act 1528. c. 7. makes an exception of slaughter and mutilation, which are declared " to keip the ordour of the act maid thereupon of before." This Sir George Mackenzie, in his Observations upon the statue, explains to import, that, " because by the 63d act of Parliament, 6th James IV. (i. e. 1503. c. 63.) no remission can be granted for these crimes, therefore there can be no assythment."

No instance can be pointed out where assythment was awarded, or even claimed, except where a remission had taken place; and this is strong negative evidence, that it was considered as a *succedaneum* to the punishment, and not as a civil claim of damages or reparation.

It is upon this principle, that assythment is proportioned to the rank of the deceased, not to his estate; that the action is limited to the nearest in kin, though others may be equal sufferers; that it cannot be pursued without the concurrence of all the nearest in kin; that it is not competent, when the manslayer has suffered the last punishment of the law.

In the present case, the law has had its course; the Sovereign has not interposed to mitigate it; the defender has suffered the punishment commensurated to his guilt.

2*do*, *Et separatim.* The sentence of the Court-martial affords no proof that a murder was committed, so as to give room for the demand of an assythment.

For, *first*, The Court of Session is not at liberty to go upon the evidence led before the Court-martial, or to proceed upon the sentence pronounced by them.

Evidence adduced in one Court, for a special purpose, cannot be pleaded in another Court for a different purpose. A proof of forgery, brought in the Court of Justiciary, *ad vindictam publicam*, would not be evidence in the Court of Session, in an action of improbation of the same writings.

The verdict of a jury, returned in the Court of Justiciary, convicting of theft, was found not to be *probatio probata*, in an after action of damages in the Court of Session, 27th November 1739, Creditors of Machar *contra* Bontein, (See Appendix). Nay, in the same Court, evidence adduced *ad hunc effectum*, would not be evidence to another effect. In the Court of Exchequer, the condemnation of the ship, and that of the cargo, may turn upon the same facts; but evidence led in a trial for condemning the one, would not be sustained in a trial for condemning the other.

2. The sentence of the Court-martial does not import that the defender was guilty of murder.

It bears, indeed, that the defender was guilty of the crime laid to his charge; but this is obviously an inaccuracy, and it is explained by the tenor of the sen-

tence. If murder had been found proved, the punishment of murder must have been inflicted. Since, then, the defender was not condemned to the punishment of murder, he cannot have been found guilty of the crime. No 429.

In every Court there is a legal number which must concur, before a condemnatory sentence can be pronounced. Suppose in Scotland seven of the jury voted for finding the pannel guilty; or, suppose in England, all but one juryman gave their voices for it, still, whatever presumptions might arise, the pannel would be an innocent man in the eye of the law. Just so in a Court-martial, whatever may be the opinion of a majority of the members, yet, unless a legal majority, nine out of thirteen, give their concurrence, a capital punishment cannot be inflicted, nor a capital crime be found proved. And judging of the sentence by this simple rule, it is clear that it affords no proof of murder, though it should be held as probative, in this Court, so far as it goes.

Answered, to the first defence, In all cases of damage incurred *dolo aut culpa* of another, the person injured is entitled to reparation, every crime producing a two-fold action, one criminal, *ad vindictam publicam*, another civil, *ad damnatum et interesse*. "Ex quibus causis publica sunt judicia, ex his causis non esse nos prohibendos, quo minus et privato agamus," is the rule laid down by Ulpian, L. 7. § 1. D. De Injur. And, in the case of murder, the action is competent to the relations of the deceased, "In factum actio moribus comparata est, quæ datur conjugi superstiti, hæredibus, liberis, et iis quos defunctus alere tenebatur," Math. Tit. de Sicar. cap. 7. § 11.

And this action is not confined to the case of murder. By a variety of statutes, assythment is given in other crimes. See 1424. c. 33. 1425. c. 51. 1426. c. 95. 1457. c. 74. 1528. c. 7. 1584. c. 136. 1593. c. 178. In many of these statutes it is expressly provided, that remissions shall not be granted, without caution found for the assythment. And so little reason is there for supposing that the claim of assythment is limited to the crime of slaughter, that it is excepted in the statute 1528. c. 7. At that period, murder was incapable of being pardoned; so that it was unnecessary to make any enactment, with respect to the assythment, in the event of a remission, which could not take place. But this does not imply, that assythment could not be exacted where punishment had been inflicted. On the contrary, the multitude of statutes, providing for payment of the assythment, notwithstanding a remission, clearly points out, that it was in that case only, that any doubt was entertained on the subject. At common law, the criminal was bound to assyth the party whom he had injured; no special statute was necessary to establish a point received and understood; but a doubt might be entertained, how far crimes were not entirely abolished by a remission, so as not only to stop the punishment of the law, but to exclude the claim of damages. To obviate this doubt was the intention of those various statutes, which provide that assythment shall be due, notwithstanding a remission. The Sovereign, the fountain of jurisdiction, and the representative of the public, may pardon the injury done to the public;

No 429. but he cannot encroach upon private right, or deprive the party injured of his claim to indemnification.

Accordingly, all our lawyers have considered assythment in the light, not of punishment, but of reparation. In *Quoniam Attachiamenta*, the title of the 69th chapter is, " Licet curiæ in causa criminali taxare *damnum* partis;" and that damages were understood to be due in the case of crimes, is proved by the contents of the chapter itself. The passage from Balfour, quoted by the defender, is really an authority to the same purpose. Lord Stair considered assythment in that light, Stair, I. 9. 7. Sir George Mackenzie's authority, in his criminal law, is express to the same purpose, see Tit. Remission, § 3. And Lord Bankton lays down the like doctrine, I. 10. § 14, 15. 17.

The act 1661. c. 22. is, by itself, a demonstration, that assythment was not looked upon in the light of punishment. Homicide, in self-defence, or even casual homicide, is not, properly speaking, criminal; though, therefore, the statute directs, that the man-slayer, in these cases, shall be assoilzied from death, yet it expressly provides for payment of a fine to the use of the defunct's wife and bairns, i. e. for an assythment; not as a *succedaneum* to capital punishment, but as a pecuniary reparation, in a case where no crime can be said to have been committed. Mere fault infers damages; but *dolus* is the essence of crimes.

Answered, to the second defence, 1*mo*, The defender's argument, were it well founded, would put an end to the claim of assythment in all capital crimes. These cannot be tried in the Court of Session; and it may be doubted, if a proof could be brought of them in that Court, even to the effect of decreeing an assythment. Accordingly, in practice, the sentence of the criminal Court, establishing the crime, is the ground of the civil procedure, and *probatio probata* of the guilt.

And this is agreeable to the analogy of law. The proof of forgery, led before the Court of Session, is *probatio probata* upon a remit to the Court of Justiciary. A declarator of marriage, in the consistorial Court, is *probatio probata* in an action of aliment before the Court of Session. The case of Bontein, is a single decision, and was attended with very particular circumstances.

The instance of foreign decrees can scarcely be considered as a parallel example. These receive execution only *ex comitate*. And yet, even in a foreign decree, a decree of the Court of King's Bench, it was found by the House of Lords, that the Court of Session were bound to give execution, 7th January 1756, Wilson against Brunton and Chalmers, No 84. p. 4549.

2. The sentence of the Court-martial sufficiently establishes that murder was committed. The crime laid to the defender's charge was murder, and the sentence finds the crime laid to his charge proved. He escaped, indeed, a capital punishment, from the peculiar constitution of the Court, where some of the members laid more weight than others upon certain alleged circumstances of al-

leviation; but they appear to have been unanimously of opinion that he was guilty of murder. No 429.

"The Lords found the defender liable to the pursuers in an assythment, and remitted to the Ordinary to modify it.—See Reparation.—Res Inter Alios.

Act. *Lockhart.* Alt. *Solicitor Dundas, Ro. Campbell.*

G. F. *Fol. Dic. v. 4. p. 166. Fac. Col. No 53. p. 282.*

*** Lord Kames reports this case:

The term assythment bears two significations in our law. In the most common sense, it is the same with the vergelt, that composition in money which anciently was paid by the criminal to the person he had injured, or to his relations. In a sense less common, though far from rare, it is the same with reparation of the loss I have sustained by any wrong done me. In the first sense, assythment is a punishment inflicted upon the delinquent, and is awarded to the person injured, for gratifying his resentment. And hence it follows, that where the delinquent has suffered the legal punishment, by the sentence of a criminal Court, which ought to satisfy the resentment of the injured person, that person has no claim for an assythment, which would be punishing a man twice for the same crime. In the other sense, assythment being a species of reparation, produces a civil action for damages proportioned to the extent of the mischief done.

In the year 1762, when Martinico was in the possession of Britain, Captain M'Harg was basely murdered by Major Colin Campbell; and as there was no Civil Judge in that island to apply to, the delinquent being tried by a Court Martial, the verdict was as follows: 'The Court, on due consideration of the 'whole matter before them, is of opinion, that Major-Commandant Colin 'Campbell is guilty of the crime laid to his charge; but there not being a sufficient majority of voices to punish with death, as required by the articles of 'war, the Court doth adjudge the said Major-Commandant Colin Campbell to 'be cashiered for the same. And it is the farther opinion of the Court, that 'he is incapable to serve his Majesty in any military employment whatsoever.'

Captain M'Harg having contracted considerable debts, his father, James M'Harg of Kiers, in order to enable him to satisfy his son's creditors, brought a process of assythment against the Major, concluding for a certain sum to repair the loss he and his children had sustained by his son the Captain's death. The first question that occurred was, Whether the sentence of the Court Martial was sufficient evidence of the crime? All the Judges were of opinion, that it was sufficient evidence; for though the crime fell properly under the cognizance of a criminal Court, as not being a transgression of any article of war, yet it being necessary to repress crimes among the military as well as among others, a Court Martial is the only resource where there is no other Court. This sentence, then, may be considered as at least equivalent in authority to a decree

No 429. of a foreign Court brought here for execution. We ought to rely upon it as good evidence, unless the contrary be proved, which is not attempted.

" It carried by a great plurality to sustain the claim."

Sel. Dec. No 253. *p.* 326.

1768. *February* 6.

Mr David Dickson *against* Heritors of Newlands.

No 430.

A Minister being deposed by his Presbytery for irregularities, pursued the Heritors, who refused to pay him his stipend, and *urged*, That the sentence of deposition not being signed by the Moderator of the Presbytery, or any of the members, was void, in terms of act of Parliament 1686, cap. 3.—*Answered*, The act relates to civil, not ecclesiastical judicatories.—The Lords found the extract of the sentence, under the hand of the Presbytery Clerk, was not proper evidence of the deposition.

Fol. Dic. v. 4. *p.* 165. *Fac. Col.*

*** This case is No 184. p. 7464. *voce* Jurisdiction.

SECT. V.

Extract.

1622. *November* 27. Earl Marr *against* Lord Elphingston.

No 431.

A Writ lying in the King's register, though it bear not registration, may be extracted by the Clerk-register, and a copy thereof subscribed will make as great faith as the principal, except in improbations.

Fol. Dic. v. 2. *p.* 250. *Haddington.*

*** This case is No 80. p. 2218. *voce* Citation.

1627. *July* 17. Ker *against* The Minister of Ancrum.

No 432.
An extract of a comprising

In a spuilzie at the instance of Sir Robert Ker against the Minister of Ancrum, a comprising produced of the tack of the teinds of that parish being