1782. *February* 20.

No 137.
An action of damages, founded on an acquittal in the Court of Justiciary, is not competent before the Court of Session.

THOMAS GEMMIL *against* COLONEL JOHN WALKINSHAW-CRAWFORD.

COLONEL CRAWFORD having received certain anonymous threatening or incendiary letters, of which he suspected Gemmil to be the author, brought him to trial before the High Court of Justiciary. But Gemmil having been acquitted by his jury, he instituted, on that ground, an action of damages against Colonel Crawford; in support of which he insisted, that it was not competent to have entered any claim for damages in the criminal court.

THE LORDS were of opinion, That this claim was competent before the Court of Justiciary, and only there; as it would be a solecism, for the one Supreme Court to pronounce a judgment founded upon proceedings held in the other. It was further observed, that the claim's not having been entered there, betrayed such a consciousness of its being ill founded, as would have precluded the present action, though otherwise proper; in the same manner as if the demand had been actually made in that Court and rejected.

THE COURT therefore dismissed the action.

Lord Ordinary, *Alva*. Act. *Geo. Fergusson*. Alt. *J. Boswell*. Clerk, *Menzies*.

S. *Fol. Dic. v.* 3. *p.* 346. *Fac. Col. No* 35. *p.* 56.

1785. *December* 9. ABRAHAM LESLIE *against* ALICIA MACKENZIE.

No 138.
Criminal acts subject to the cognisance of civil courts, *ad civilem effectum*.

A DEED granted by a person in favour of his step-daughter was brought under reduction by his heir at law. One of the grounds of reduction was the plea of *turpis causa*, founded on the allegation of an incestuous commerce having subsisted between the granter and the grantee. In bar of this plea, the defender *objected*, That as it amounted to an accusation of a capital crime, it was subject to the cognisance of the criminal jurisdiction alone, and ought not to be prejudicated by the interference of a civil court.

THE LORDS appointed a hearing in presence on the merits of this objection; in support of which, the defender

Pleaded; The law has not committed to the same judicatories, nor left to the same modes of procedure. the trial of criminal acts, and the cognisance of civil affairs. The determination, therefore, of a civil court, respecting crimes, is not more a legal criterion of guilt, or of innocence, than is the suffrage of any private individual.

If, however, it be said, that civil courts are competent to the trial of such facts, even of a criminal nature, as are necessary to ascertain civil rights, it may be observed, that though the distinction between the two kinds of jurisdiction were supposed to relate, not to the nature of the subject of cognisance, but to that of the penal or patrimonial consequence alone, a *præjudicium* at least must

No 138.

arise from anticipating, by those means, the legal investigation of a criminal charge before the proper tribunal. To that mode of trial every accused person is entitled, and to all the advantages which attend it; but these could not fail to be greatly diminished by the influence of a prior unfavourable decision, which, however erroneous, may have been passed on the matters in question, by a court utterly incompetent to determine on so important a subject.

In the Roman law, such *præjudicium* was prohibited with respect to public crimes, or those which interest the community at large; *l.* 4. *D. De publ. judic.; Vinn. Comment. in Instit. ad tit. de Pub. jud. et tit. de vi. bon. rapt.* The same doctrine is established in our own law, and has been exemplified in the accusation of adultery; the civil court refusing to take cognisance of that crime, though for the sole purpose of the plea of *turpis causa*, urged, as here, in bar of a claim of debt; Durie, 18th February 1624, Ferne *contra* Wishart's Heir, No 79. p. 2742. The case of assythment is an additional proof of the same principle. Though it is but a pecuniary claim, yet it cannot be established, except sentence has been given by the criminal court.

Answered; Cognisance by a civil court, of matters which may infer a crime, taken in order to ascertain rights of property, is quite independent of the trial of the crime in the criminal judicatory. Thus, in the civil courts, facts implying the crime of smuggling are daily judged of, for the purpose of annulling smuggling contracts; facts which infer bribery at elections of members of Parliament, are likewise uniformly tried without the interference of any criminal court; those too in which the crime of adultery consists are brought to trial for the founding of the civil claim of damages; and divorces, after a proof of that crime, are decreed by the consistorial, without the interference of the criminal court.

So totally unconnected, indeed, are the civil and the criminal jurisdiction, that if a person, after undergoing a trial in the criminal court, were even to be acquitted of the crime, this would not hinder parties interested to have the same facts brought under cognisance, and established by proof, in an action *ad civilem effectum.* The civil reparation of assythment, it is true, is generally founded on a sentence of the criminal court, because there the capital crime from which it arises is commonly brought to trial; but were such trial to be precluded by remission, or any other cause, an action for assythment, in which the criminal matter might be ascertained by proof, would lie in the civil court. The single case of Ferne excepted, all the decisions on the point shew, that *ad civilem effectum*, a criminal accusation is cognisable by the civil, altogether independent of the criminal judicatories. Durie, 20th July 1622, Weir *contra* Durhame, *voce* PACTUM ILLICITUM; Fac. Coll. 26th June 1765, Sir William Hamilton *contra* Mary de Gares, IBIDEM; Kilkerran, p. 495. Creditors of Buchanan *contra* Buntein, *voce* RES JUDICATA.

The COURT repelled the objection.

For Alicia Mackenzie, *Buchan-Hepburn.* Alt. *Lord Advocate.* Clerk, *Menzies.*

S. *Fol. Dic. v.* 3. *p.* 346. *Fac. Col. No* 243. *p.* 374.