

protected from punishment by the King's pardon. The King may pass from the atonement due to the public; but the private party concerned is entitled to have his resentment gratified, either by condign punishment, or by a composition, which in that case is stiled assythment. In the present case there can be no claim for such assythment, because Mayen, the criminal, has got no pardon; on the contrary, will suffer capital punishment if he be apprehended; and while this matter is uncertain, there can be no claim for assythment, for it would be absurd that a man should be liable to punishment even after paying a sum to free him from it.

But assythment, in a more general sense, means the reparation that is due to an innocent man who is hurt by a criminal act. In that sense, reparation, or assythment, is unquestionably due. If a man, who is culpable only, be liable in damages, what doubt can there be of his being liable when the damages are occasioned by his being guilty of a flagrant crime?

"THE COURT accordingly sustained the claim for assythment."

*Sel. Dec. No 258. p. 339.*

1804. February 9. BLACK against CADDELL.

HENRY BLACK, tenant in Scotstown, returning home on horseback, in a dark tempestuous evening, in January 1801, by a road leading through the estate of Grange, belonging to William Caddell of Banton, fell into an old coal-pit near the road, and was drowned, together with his horse.

The pit had been opened by the former proprietor, but for many years had been abandoned. As it had been used as an engine-pit, the mouth had been surrounded by a wall of stone and lime, which, at the time of the accident, was about eighteen inches high. It lay about four feet from the road, which had been a road used by the proprietor when the coal was formerly worked, but which was also frequently used by the neighbourhood, as the field through which it led was uninclosed.

An action was brought against Mr Caddell and his brother, John Caddell of Cockenzie, by the Children of Black, concluding against them for the expense attending the search for his body in the coal-pit; for the price of the horse which perished along with him; and for L. 2000, as a reparation for the loss and damage sustained by the death of their father.

THE LORD ORDINARY, (12th November 1801,) "having considered this condescendence, with the answers thereto, with the plan and copy of writings therein referred to, and having visited the ground where the pit is situated, in which the pursuers' father lost his life, assolizies the defender, Mr John Caddell, in respect he had ceased to be proprietor of the ground before the accident happened; as to the other defender, William Caddel, observes, that though there are some particulars, in point of fact, about which the parties differ, yet the most

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The owner of a coal-pit, improperly fenced, obliged to pay damages to the family of a man who had fallen into it, and perished.

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material circumstances, on which the general issue of the cause will turn, are either agreed on, or cannot be seriously controverted, so that the main dispute will turn on their relevancy, to support the conclusions contended for by the pursuers; therefore appoints memorials *hinc inde* upon the different points of law which may occur, particularly holding the road at the side of which the pit is situated to be so far public, as that the lieges in general are entitled to the use of it, (which seems obviously to be the case,) whether the said defender, having acquired upon singular titles this property with the pit in it, which had been dug many years before his purchase, and had not been rendered by him more dangerous than it was before, is *de jure* liable for any damage that may be thereby occasioned to passengers, subsequent to his purchase; or whether is any thing more incumbent upon him, than to inclose or fill it up when required so to do; or to suffer the public, or those who have the charge of the public roads, so to secure it, as would be the case where there happens to be a scar, or precipice, at the side of a road, from which danger to passengers may be apprehended? Further, *esto*, the said defenders were found liable in reparation of any estimable damage which may be occasioned by the said pit, to the property, or persons, of the lieges, such as the loss of a horse or a cow, or where a person is only hurt, and claims reimbursement of the expense of his cure, or of his loss of wages while disabled from working, whether is the loss of a person's life such a damage as can be legally estimated, or as the children or representatives of the deceased can claim any sum of money in reparation to them; and whether the doctrine of assythment can apply to this case, or to what extent or effect; and what rule is to be followed in the estimation of it? Appoints said memorials to be seen and interchanged, and afterwards lodged in process."

Upon advising these memorials, (16th December 1802,) informations were ordered, and reported to the Court.

The pursuers

*Pleaded*; In the use of property, the safety of the neighbourhood must be consulted, and every fellow-subject is entitled, in the territory of his native country, to expect that every act inconsistent with his personal safety shall be regarded as a crime. The owner of the land is undoubtedly responsible for the consequences of his criminality, who, by the result of his operations, has made it possible for a man pursuing his lawful occupations to suffer injury, still more if he be precipitated to instant destruction. This is the universal law of humanity, as exemplified in the Jewish law, Deut. xxii. 28.; Exod. xxi. 28.; and in the Roman law, L. 44. D. *Ad leg. Aquil.* L. 5. § 6. D. *De his qui effud.* L. 7. D. *De damno infect.* By our law, damages have been awarded to those who have suffered injury from falling into unfenced areas, Innes against Magistrates of Edinburgh, 6th February 1798, *h. t.*

Though the present proprietor be only a singular successor of the person who opened this pit, yet he himself has used it; and every day that it remain-

ed insufficiently fenced, in fact made him responsible for the damage which might be sustained from it,

That the damage occasioned by the loss of a human life can be legally estimated in money, in favour of the representatives of the deceased, is a doctrine recognised in our law; Quon. Attach. c. 69.; Bank. B. 1. Tit. 10. § 2. Hence the introduction of assythment into our practice, 1424, c. 46.; Mackenzie's Crim. Tit. 28. § 5.; Stair, B. 1. Tit. 9. § 7.; *Machargs against Campbell*, No 4. 13904. 24th February 1767, (in *Maclaurin*, p. 673.) A personal accession to the injury is not essentially requisite in such claims. It seems enough that culpable conduct has proved fatal to the life for which reparation is sought.

*Answered*; If a person in the use of his property has wilfully done any thing to the prejudice of his neighbour, there cannot be a doubt but he must be responsible for the consequences. So far only the Jewish and Roman laws carry their enactments; in the latter of which, however, is this adage, *Occiso homine libero non agitur ex lege Aquilia, quia liberi corporis nulla est æstimatio*; Vinnius, *Comm. De lege Aquil.* With us, however, it is different. A claim for reparation, or an assythment, is due at the instance of the representatives of the deceased against the person who has been the means of his death. It is intended as a composition for the commission of the highest of all crimes, that of slaughter; *Reg. Mag. b. 4. c. 24.*; *Balf.* p. 516.; and is exigible even in those cases where a pardon by the Sovereign frees from that part of the punishment inflicted for the sake of public example; *Stat. 1661, c. 22.* In all these authorities, the fact of the death of the person, for whose loss assythment is due, is always understood to be by the immediate and wilful act of the party from whom this assythment is demanded. There are many cases of negligence, without which death could not have ensued, and yet where the person who commits the negligence cannot be considered as the direct committer of the slaughter. His negligence is reprehensible, but it does not amount to that direct concern in the killing or accession to it, which can either be the subject of punishment, or render him liable in reparation to the family of the deceased. These always go together. Wherever an assythment is due, the homicide must be such as to be the subject of criminal prosecution; *Machargs against Campbell*, 24th February 1767, No 4. p. 13904.; *Storie*, 25th January 1785, in *Maclaurin*.

Now, the pit in question was situated within the defender's own property, and remote from any road by which the public had a right to pass. It was fenced in such a manner, that the tenant whose cattle pastured there made no complaint. It seems impossible to consider the proprietor, in such circumstances, guilty of such a culpable negligence as to make him liable for the consequences; *Inst. § 5. De Leg. Aquil.* If, on the other hand, it be granted, that though at first private, the public had acquired a right to pass this way, it was the duty of the trustees to ordain the pit to be secured by the defender, or to have done it themselves. Since no complaint was ever made by them, the pro-

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THE LORDS (9th February 1804) " find the defender William Caddell liable in damages and expenses, and appoint a condescendence of damages, and an account of expenses, to be given in \*."

Lord Ordinary, *Polkemmet.*

Act. *Erskine, Forsyth.*

Agent, *John Sommerville.*

Alt *Boyle.*

Agent, *Ro. Cathcart, W. S.*

Clerk, *Menzies.*

F.

*Fac. Col. No 147. p. 320.*

## SECT. II.

### Seduction.—Adultery.—Breach of promise of Marriage.

1696. *July 15.*

*HISLOP against KER.*

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CROCERIG reported William Ker, writer, and Isobel Hislop, the stationer's daughter, who pursued him for refunding her damages, in so far as he had induced her, by false and flattering insinuations, to grant him the use of her body, and got her with child, and by letters promised to make her happy, only he behoved to conceal it from his friends for a while; and he made her give over her shop, and take a greater house; and, after all this, married another, and so perfidiously deceived her expectation; and all the casuists are clear that such a fraud *obligat ad reparationem damni*. *Answered*, He denied the child to be his, which she must prove, conform to the decision, January 1665, Barclay *contra* Bapty, No 26. p. 8413.; et is tantum est filius quem nuptiæ demonstrant, et vulgo quæsitum patrem habere non censentur; et semel mala, semper præsumitur in eodem genere; et mater tenetur lactare infantem, and can crave no expense *eo nomine*. THE LORDS found a woman's being got with child was no ground of action for damages, else a hundred such processes would be intended by whores; as also they thought that every promise and insinuation of marriage was not sufficient to found this action, because these are made at such times very lightly; yet, on the other hand, such debauchery and fraudulent designs ought not to pass undiscouraged, therefore, in such a circumstantiated case, the LORDS declared they would allow damages against the man who had *dolore in-*

\* The damages and expenses were afterward ascertained by the Court, damages L. 800, expenses L. 100.