for a mutual contract. If a mutual contract, as alleged, then even Goldie's infeftment would be ineffectual.

AUCHINLECK. The security of a seller in a minute of sale is, that the obligation to pay is the counterpart of the obligation to sell, and that the one is not effectual without the other. When a disposition absolute is granted, and a separate obligation for the price, the buyer has nothing to ask from the seller: the seller has nothing to ask but the price: there is no longer any connexion between the price and the lands. It may be right in a seller to take the precaution of making payment of the price a condition of the sale; but, if he does not, how can we do it for him? Could we bring this case under fraud on the part of Goldie, it would be of less moment.

JUSTICE-CLERK. As a judge, I am not bound to give an abstract opinion; I must determine according to the circumstances of the parties.

COALSTON. Had infeftment been taken, it would have been impossible to set aside the sale. But here there are only personal rights: it is still competent for the seller to hold the lands till the price is paid: this was determined in *Selkirk's* case, Dec. 1721.

The Lords assoilyied, and altered Lord Barjarg's interlocutor.

Act. R. M'Queen. *Alt.* A. Crosbie.

Diss. Justice-Clerk, Barjarg, Coalston, Pitfour, Hailes, (the last upon the circumstances of the case as stated by Lord Justice-Clerk.)

1767. *July* 29. JAMES MACHARG, *against* MAJOR COLIN CAMPBELL.

FOREIGN.

A judgment of a court-martial abroad, finding a Scotsman guilty of murder, is evidence for awarding an assythment in Scotland.

[*Fac. Coll. IV.* p. 282; Kaimes's *Sel. Dec.* p. 326; *Dict.* 12,541.]

AUCHINLECK. The defender was guilty of assassination, but there were not numbers enough in the court-martial to condemn him to die. If Major Campbell had been brought before the Court of Justiciary to be tried again for the murder, he would have thought it hard, had the defence of *res hactenus judicata* been repelled. It is ascertained that Major Campbell was guilty of the crime charged: the question is, how far is assythment due? Here it is said, that a crime committed in one country cannot be tried in another.—Will any man pretend, that, if a person commit treason in a foreign country, he may plead, when he is tried at home, that the crime cannot be punished as having been committed abroad? If the defender had been brought before the Justiciary Court, he might have been tried, convicted, and executed.—He has been convicted, but not executed: the question is as to assythment being due or not due. Had the defender been punished with death, there would have

been no assythment due, because *actio pœnalis non transit in hæredes.* In all cases where a man injures another, he must assyth, and this independent of what he may have exacted from him by the public: The defender would have been liable in damages had he given Captain Macharg nine wounds, and none of them mortal. Shall he be liable in no damages when he gave nine wounds that were not mortal, and two that were mortal? If a man is wounded, he is assythed; if he is killed, his friends are assythed. I can never believe that, by the law of Scotland, any man could ever have been allowed to kill his neighbour, or even the king, upon payment of a certain number of cows. The present case, by being new, is obscure: we always go upon supposition that the proper punishment of murder is death, because the best of laws has so said. It is uncommon to pursue a man for the assythment of a murder committed by himself. If the court-martial had acted properly, and hanged Major Campbell, it would have put an end to the question. Instead of hanging, they only cashiered. The difficulty is, that no money can be taken for the life of a man. A like difficulty occurred in a question for damages, on account of adultery, pursued by the husband. It was pleaded, that there was no *æstimatio* there. The Court, however, sustained the action. Injury done must be repaired; if a man maims another, action lies for reparation. Shall he, in effect, have a premium for murdering another? This would be the case were damages awarded for maiming, none for murdering. As I have no doubt of the law, so neither have I of the fact; for the court-martial so found, and it is not said that the court-martial went too far. On the contrary, it went not far enough.

Pitfour. The defender argues from the exceptions, not from the rule; which is erroneous. The rule lies for reparation: damages must be repaired. I admit the exception, that no assythment is due when the man suffers death: but that is not the exception here. The reason of that exception is, that, in the case of murder, the ultimate sentence is death and confiscation of moveables; and no subject for assythment remains: the fire swallows up all. In murder, the lands of the murderer cannot be affected; for murder in landed men is treason, and that implies forfeiture of lands. In other crimes, our law is satisfied with forfeiting life and moveables.

With respect to the arguments of the parties, the pursuer is right in the law; the defender in the fact and practice. Every country held murder punishable with death; but the practice was for lesser punishments. The assythment, or damages, is not to be inflicted where death follows. Then the ultimate punishment is inflicted, and it is reasonable to suppose that this absorbs every other punishment. Both families are then reduced to the same state. This rule does not apply here. The sentence is not the thing that gratifies the family of the killed, or relieves the family of the killer, but the execution of that sentence. The family of the person killed has an interest: it is *actio rei persecutoria,* but *sub conditione* that reparation be made, or the party suffer death. Put the case that the Court of Justiciary, after a verdict finding guilty, should commute the punishment, assythment would be due. The terms of the Act, 1661, confirm this. I think that Major Campbell has escaped by the mercy of the sovereign. I do not see that the Court was divided in opinion as to his guilt,—it was divided as to his punishment. There were not two-thirds of the members for the capital punishment. This sentence would have had no effect unless the king had con-

firmed it: if the king had not confirmed it, Campbell must have been tried anew.

The matter resolves into this:—If the crime is not tried *ob vindictam publicam*, there is no assythment, because no proof. If the crime is tried, and the person escapes punishment, assythment is due: the interest of the nearest in kin is not hurt by the pardon.

The question is, Whether is the crime proved? We are not to enter into the proof if the court-martial was a legal court and its sentence legal. This is not the sentence of a foreign court, but of a court established by the same sovereign authority under which we sit, viz. statute 27th Geo. II. and the last article of war. It is part of the sovereign's power to make articles of war. In the case of an army being in an enemy's country, courts-martial are necessary, and authorised in the Act of Parliament, which only limits the king as to crimes committed in Great Britain other than military. I do not relish the doctrine that crimes can only be tried *in loco delicti*: this would often prevent the trial of crimes altogether. Suppose Martinico had been recovered by the French, who was it that could have tried Major Campbell?

With respect to the judgment of the Court-martial, it is just the same as if a jury had found a man guilty of killing, but yet he was not liable to capital punishment: this may happen in a verdict upon the Act 1661. Suppose that the Court had found the crime proved, but had also found circumstances sufficient to extenuate and to restrict to an arbitrary punishment. The same thing in effect has been here found. This does not exclude assythment from the analogy of the Act 1661.

Justice-Clerk. Power of the court-martial clear,—so also the jurisdiction of this Court. My doubt arises from the sentence of the court-martial, which alone must be the rule. My difficulty is, what is the meaning of the *Court* finding that Major Campbell was guilty of the crime charged, whether *two-thirds* of the court, or only a *simple majority?* If we could have, upon record, evidence that a *majority* of an English jury found a person guilty of murder, no assythment could be due, because an English jury must be unanimous, and, consequently, in such case there was no proper sentence. I do not see that the law has been impeded in its course: It does not appear that the legal majority of the court-martial found Major Campbell guilty of murder; so that he was acquitted, in effect, of the murder as laid in the charge. Independent of this, I am not a legislator to regulate the action of assythment: were I such, I might think that even the ultimate punishment is not sufficient to acquit the estate of the criminal from a reasonable reparation. I see that the law of assythment does not apply to all the cases where equity might extend it. It is only due where the course of the law is impeded: I do not see the distinction between assythment for murder and the damages for murder.

Strichen. A sentence condemnator of a foreign court is not *res judicata*, though a sentence absolvitor is. In the noted case of *Buchanan of Machar*, a sentence of the Court of Justiciary was not held a *res judicata* in the Court of Session. How then can this judgment be held as *res judicata?*

President. The case of Buchanan was attended with many extraordinary circumstances. In the case of Malloch all the arguments with respect to jurisdiction were treated; and whether the judgment of the Court of Justiciary was

to be held *probatio probata.* An action for pecuniary reparation lies against the heir of the malefactor. So says Sir George M'Kenzie. No assythment is due when the *ultimum supplicium* is inflicted. I cannot well reconcile this with the notion of assythment being a pecuniary recompense. It is rather a retribution to the private party when the punishment is not inflicted. If the public interferes, or if a man withdraw himself from punishment, then the right of the private party revives,—a pleading of pardon is an acknowledgment of guilt. Was there ever an assythment granted after a transportation pardon? The Act 1661 adds to my doubts. It supposes that no assythment is due when capital punishment is inflicted. The act mitigates the rigour of the law, and, on that account, gives an assythment; because, if it had not so done, the Court might have thought that there was a punishment, and, therefore, that there could be no assythment. If assythment is for damages, it must go against the heir as *rei persecutoria.* I cannot find the trace of an action like this, nor can I understand how the statutes have always spoken of one pleading upon a pardon, if assythment is due after a trial and sentence.

As to the jurisdiction of the court-martial I have no doubt, nor upon the jurisdiction of this Court. The Court being of opinion, implies the whole Court. This is explained by the after words, *there not being a sufficient number.* Have great doubt as to holding this decree as evidence: there is no difficulty in the case of a pardon, which is a confession of the crime. There is no occasion to look into the evidence. If a verdict carries a contradiction in its bosom, how can the Court of Session put it in execution.

I doubt as to the argument, that *actio pœnalis ex delicto non transit in hæredes.* I doubt as to the *favor fisci.* I doubt as to any action of reparation when a capital punishment is inflicted. In *Broughton's* case the greater punishment was understood to absorb the interest of the private party. When advocate, I did not appeal that question, because I understood that the judgment would be affirmed. The sentence of the Court-martial must be held adequate to the offence; for it is a sentence on the crime by a competent Court.

Monboddo. The question resolves into this, Whether is assythment due as a reparation to the private party, or is it the punishment of murder? Assythment is the punishment for murder. Murder, in ancient times, was not punishable with death: it was thought absurd to take away the life of one citizen for the death of another.

Barjarg. The difficulty is, how far are there *termini habiles* for assythment, when the sentence finding a person guilty is carried into execution? There is no vestige, in our law, of assythment being granted, unless where a pardon was granted. At the same time, I do not see that in ancient times murder was never punished with death. That punishment was expressly provided in the law of Moses for the crime of murder; and the law of Moses is ours whenever our own law is silent.

Elliock. I shall say nothing of the evidence of the crime that appears from the proceedings of the Court-martial. Formerly almost all crimes were punishable by a pecuniary mulct, not by death. But then the criminal was put out of the protection of the law, and the relations of the deceased might kill him. He therefore made a composition both with the public and with the relations of the deceased. Afterwards, when the law inflicted the punishment of

death, the relations had no revenge to take, no composition to stipulate: the criminal was dead, the penalties *non transibant in hæredem.* Our law is still upon this footing: *letters of slains* import no more than that the relations of the deceased have no resentment to gratify, nor further composition to ask.

ALEMORE. I think that *assythment* came in place of the ancient composition for the crime of murder. This composition was allowed, partly on account of a defect in power. The legislature was not able to punish. Every clan or independent horde protected its guilty members. Our own history, as well as the history of other nations, affords examples of the turbulent state of ancient times and of the licentious independency of those hordes. Compositions were first established by private contract; afterwards they were introduced and confirmed by the law. Something also was paid to the prince, either for the violation of his peace, or, as Montesquieu thinks, for obtaining the prince's protection. As these compositions proved unequal,—heavy upon the poor, elusory as to the rich,—capital punishments were introduced. Whenever the law inflicted punishment, composition ceased; because, by punishment, revenge was satisfied. In the lesser punishments of the law, a conclusion of damages is part of the punishment:—there is no such thing as an assythment for murder when punishment is awarded in terms of law. If the king interposes with his prerogative of mercy, the old assythment returns. It is not the degree of punishment, but the law taking place that excludes assythment. Major Campbell has gone through the whole course of the law by receiving the judgment of a competent court. Suppose that, in the Justiciary Court, a pannel should be convicted of murder; if upon this the judges, instead of condemning him to die, should banish, I doubt whether assythment would be due.

KAIMES. I admit the principles, but I deny the conclusion; my idea is, that we are misled by confounding two different things under one word. The punishment of crimes was formerly by fine; hence *vergelt;* but assythment of a very different nature. It arises from the common law,—it is reparation for the loss of a friend. What is here sought is not assythment to gratify revenge, but damages. *Damages* means different things. 1. Restitution: if a criminal steals my goods, and is hanged, I am entitled to get back my goods. 2. *Solatium:* a man is killed, ought not the damages to be made up to his wife and children? This case is not so strong; but still there is due a reparation or *solatium,* different from a gratification of revenge. If a man gains the affections of a woman, and then deserts her, there is a *solatium* due, though there is no direct patrimonial loss.

I doubt as to the evidence before the court-martial, which, though good as to the matter tried, is no more than *testimonium* in this new action; but then I will presume in favour of the decree, when no objection is made to it.

GARDENSTON. When a man is murdered, and the murderer escapes punishment, assythment is due. Here, from the judgment of a legal court, there is evidence of a murder. The decree of the court-martial is not a foreign decree: but this makes no difference, as the decree is founded on evidence.

I am not for tracing antiquities too curiously: these are rather matters of speculation than matters of fact. I will consider the law as it now stands. When one commits murder, and is convicted, if the king interposes and prevents the execution of the capital punishment, reparation is due. Here the court-martial exercised the king's power and commuted the punishment. The king approved

of this, and thereby interposed his clemency. Had he not approved, Major Campbell would have been subjected to a second trial. As to the case put by Lord Pitfour, it is not supposable that the Court of Justiciary would interpose in the case of a verdict returned, finding guilty of murder, and inflict a punishment less than capital, unless you also suppose that the Court had power to pardon or commute the punishment, as the Judges in England have by special commission. Should the king commute a sentence, by granting a transportation pardon, I make no doubt that reparation would be due.

KENNET. I do not consider this as an action for damages. Our law is not all derived from the civil law, or from the law of Moses: part of it is derived from the sources of the laws of barbarous nations. If this were an action of damages, it would not be taken away even by death. The Court, in determining assythments, has never entered into a question of the extent of the damages. It has always considered the quality of the offender, and the extent of his estate. This shows that, in propriety of speech, assythment is not the same thing as damages.

COALSTON. The action of assythment lies before the civil court. This court-martial had the power of judging by Act of Parliament. The judgment is the judgment of a proper court; still it is the decree of a foreign court, and therefore evidence of the justice of that decree must be had. Such evidence is *here* produced. This court is competent. There is no occasion for further proof. The case of *Machar* was particular. *There* the verdict in Justiciary was improper.

The ground upon which some of the Judges have stated assythment is too wide. There is a two-fold claim; one at the instance of the public, another at the instance of the private party. Neither can discharge the claim of the other. When one is guilty of a breach of the peace, and of an assault, either the procurator-fiscal or the private party may pursue. Their actions are separate and independent. The same is the case in spuilyies. If this holds in lesser crimes, why not in greater? If my house is burnt, will not an action for reparation arise to me? Why not then in the same manner, when my son or my father is murdered? Whenever my private interest is affected by a crime committed, action lies at my instance.

With respect to the statutes concerning the assythment for murder, a doubt had arisen whether a remission did not bar the private action. The statutes were made to remove that doubt. When one took a remission before trial, it implied an acknowledgment of the crime; but this implied acknowledgment would never have a stronger effect than an actual proof before a competent court. It never could be the intention of the statutes to preclude any man from reparation.

HAILES. Considered the assythment sought as a reparation of damages, which was due when not actually or virtually discharged. That, in this view of the case, assythment, according to his opinion, was due in *Mrs Harriet Stewart's* case. But, as the court had just now found assythment not due in that case, he considered himself as bound to submit to the judgment of the court, and therefore to give his voice against assythment in this case.

The Lords found assythment due.
Act. A. Lockhart. *Alt.* R. Campbell. H. Dundas. R. Elliock.
Diss. Strichen, Justice-Clerk, Barjarg, Kennet, Hailes, President.

1767. *August* . JOHN BAXTER and The PARISHES of ROXBURGH, MAXTON, and ECKFORD, *against* The PARISH of CRAILING.

POOR.

Poor are a burden on the Parish where they have resided for the three last years.

[*Fac. Col. IV.* 296; *Kaimes's Select. Dec.* 329; *Dict.* 10,573.]

HAILES. I incline to think that the statutes rather point to the parish of nativity than the parish of residence; but then the universal practice of the nation in maintaining the poor has been to consider the parish of residence as bound, not the parish of nativity. Laws relating to police may go into desuetude, or may be explained by general usage, in a sense different from what was probably the sense of the legislature. There are laws which prohibit any person from being in a tavern after ten o'clock at night: These laws have never been repealed, and yet no one will say that they are still in force. They relate to police, and they are abrogated by disuse. No one example can be given of the parish of nativity being bound to maintain the poor. Many certificates are produced to the contrary. The only example given is that of the Sheriff of Roxburgh, who sometimes makes the parish of nativity liable, sometimes the parish of residence. The last decision of the Court, *Parish of Edrom*, 1745, is for the parish of residence. The decision, *Parish of Inveresk* 1757, is not in point; for *there* the case was of a little girl who had no choice of her residence, and was taken from parish to parish without any act of her will. Besides, she, from her tender years, could not have benefited the parish of her residence. I presume that the judges, who pronounced the decision 1745, had in their eye the general practice over the nation; and this shows that the practice has been as inveterate as it is general. If the Court now alter that rule, the consequences will be dreadful. All the poor's houses in the cities of Scotland will be cleared of inhabitants. At Edinburgh the inhabitants are composed of persons from every county and parish. The poor were admitted into the workhouse, not on account of the place of birth, but of residence. Glasgow is supplied with inhabitants principally from the West Highlands. When these strangers become unable to labour, they are admitted into the poor's house. If the parish of nativity is to be the rule, they must all be sent to the respective places of their nativity. The cities which owe their prosperity and opulence to the labour of those strangers, will have no burden of them in their old age. And where are they to be sent? To the Highlands and Islands, to places where the legal tax for maintaining the poor will not be suffi-