

MONBODDO. If a person acknowledge his subscription, there is no danger of forgery: so the Act 1681 is out of the question. Late decisions may be against me, and perhaps my law may be antiquated.

HAILES. Let me add, that Lord Coalston thought as Lord Monboddo does; but, after the case of *Fogo* and *Milligan*, which was deliberately judged, he gave up his opinion to that of the majority, that there might be no longer any controversy on this point. It is now settled, if any thing can be settled.

PRESIDENT. The Act 1681 is not merely intended to prevent forgery: it introduces a solemn form of a *literarum obligatio*.

On the 9th December 1785, "The Lords assoilyed;" altering the interlocutor of Lord Anker ville.

*Act.* E. M'Cormick. *Alt.* A. Abercrombie.

*Diss.* Anker ville, Monboddo; *non liquet*, Rockville.

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

#### JURISDICTION.

Criminal acts subject to the cognizance of criminal courts, *ad civilem effectum*.

[*Fac. Coll. IX. 374; Dict. 7422.*]

BRAXFIELD. Suppose that Lord Advocate should pursue *ob vindictam publicam*, and that the party should obtain the verdict of a jury in his favour, this will not be a bar to an action *rei persecutoria*. Besides, the private party, in support of his claims, might discover more evidence than was laid before the jury. The private party cannot be obliged to stop till the prosecution shall be carried on by Lord Advocate. It is also a maxim in law, that "no man, with whom I have no concern, can hurt me." The civil law will not apply; because, *in crimine publico, quilibet ex populo* might pursue. Now the very reverse is the rule of our law. A cow, value five pounds, is taken from me. May I not pursue to recover the cow, or its value, in the civil court? or must I, first of all, lay out a hundred pounds in the criminal court, to pave the way for my recovering five pounds on the cow in a civil court? Every day, actions for recovering penalties on account of bribery are brought; but was it ever heard that a criminal process for punishing the bribery must be first brought? In the late case of *Lady Erskine*, though strenuously litigated, it was never pleaded that an accusation for bigamy ought to have been brought and determined before the civil action would be heard.

SWINTON. The civil law in this case has been much misunderstood, particularly L. 4. D. *De Except.*

ESK GROVE. I am now satisfied that the plea of Alicia M'Kenzie is ill-founded; and I approve of Lord Swinton's interpretation. See also L. in Cod. *quando Civilis Actio*, (L. 9. tit. 31,) and Perezius, *ad Leg. Aquil.* (L. 73. tit. 9.) The decision in Durie is altogether erroneous. In England action for damages on the head of adultery goes first, and the action for separation follows. As to assythment, it comes in place of punishment; and, if there is punishment, there is no assythment.

ROCKVILLE. It will be singular, should Abraham Lesley be debarred from asserting his right because he does not bring a criminal action, which he cannot bring.

PRESIDENT. Our predecessors were as wise as we are. This objection is contrary to all received opinions. I respect the civil law; but I will not haul it in to destroy our own institutions. The crime of incest is not triable in this Court; but every man may bring his civil action, and then a proof of incest may be produced, *ad civilem effectum*, or even a proof of something wrong and indecent. A jury cannot be moved by any thing found in this Court. Forgery may be tried *ad civilem effectum*, or by complaint for punishment. In the case of *Steedman* against *Couper* damages were decreed for adultery.

MONBODDO. In the civil law there is a distinction between *delicta privata* and *publica judicia*. See Vinnius, pr. Inst. *De Obligationibus quæ ex Delicto*. There are many *privata delicta* prosecuted criminally, as *furtum*. But *publica crimina*, such as incest, are of another nature. There no action for damage lies. A man cannot pursue for damages arising out of a murder, unless a trial for murder be first brought. Should this Court find incest proved, I hope that the Court is not so low in the opinion of the world as that such a judgment would have no weight with a jury. [He forgot that a jury, who must judge on the evidence before them, could not, without breach of oath, lay any weight on the judgment of the civil court.]

JUSTICE-CLERK. A great deal of the argument here proceeds on a misapplication of terms. An action is sometimes of that nature that it cannot be tried in one court till the case has been heard before another. Thus, an action for aliment was brought by a woman against her supposed husband. The action for aliment was undoubtedly competent in this Court, yet the Court stopped until it should appear, by decree of the Commissaries, whether the woman was married. So also, in the case of *The Magistrates of Elgin* against *Blair*, the Court of Justiciary stopped till it should appear, by a decree of the Court of Session, whether the place of worship belonged to the magistrates or not. Our law does not make the same distinction of crimes that the civil law did. The issue from trial is different. One is for punishing crimes in the criminal court, and the other for recovering damages in the civil: so the one is not prejudicial to the other. If the Advocate should bring a person to trial for stealing my charter-chest, and should be able to prove the offence, will that preclude me from recovering it from the person accused in an action of exhibition? It is an abuse of law language to speak of a *prejudice* arising to a party in the criminal court, in consequence of a judgment pronounced by a civil court. Can it be said that a jury will be influenced, on that account,

either for or against the party? At any rate, the civil law does not apply, for the reason given by Lord Braxfield. It might have been wise in the Roman legislature to say, "As you have the right to bring both actions, you ought first to insist in the *publicum iudicium*." The same thing cannot be said in Scotland. As to assythment, *that* is a matter fixed by common law, and cannot apply to this case.

On the 9th December 1785, "The Lords, having heard parties in their own presence, repelled the objection."

For Alicia M'Kenzie,—G. B. Hepburn. *Alt. R. Blair.*  
*Diss. Monboddo.*

*N.B.* This hearing was brought on in consequence of some doubts started by Lord Eskgrove and enforced by Lord Monboddo. But Lord Eskgrove, as soon as he had studied the point, declared himself satisfied that there was nothing in the objection: so Lord Monboddo was left single.

---

1785. *December 23.* ARTHUR SINCLAIR *against* BARBARA BAIKIE.

#### HERITABLE AND MOVEABLE.

The annualrents due on a decret of adjudication go to the heir, and not to the executor of the adjudger.

[*Faculty Collection, IX. 377; Dictionary, 5545.*]

MONBODDO. I never could satisfy myself as to the justice of the decision in the case of the *Creditors of Clapperton*, 1738: [and yet, in the case of *Oughterlony*, 1772, when that decision was objected to at the bar, he defended it well, and said it was not given on subtleties, but on principles.] It was well altered by the House of Peers, in the case of *Oughterlony*. To make our law consistent, we ought to adopt that judgment. [On being informed that the House of Peers had given no such judgment, he acquiesced.]

BRAXFIELD. The only point under the Ordinary's consideration was, whether the annualrents on the adjudication are moveable or heritable? This point was solemnly determined in 1738. It is said to be a *single* decision. True,—because the point was understood to be fixed. But the case has occurred five hundred times. No instance can be given of a nearest in kin taking up annualrents of an adjudication by confirmation. Lands are adjudged to creditors in payment of principal, &c.—all accumulated. The land is the creditor's, though the debtor has a power of redemption. If a creditor should enter into possession and bring an action of mails and duties, the rents in the hands of the tenant would be moveable at the death of the creditor. But if the creditor does not enter into possession, and only rests on his legal right as adjudger, the whole will be heritable, and the annualrent, as well as the prin-