

No. 136.

so heavy a servitude can never be introduced, but either by consent or prescription, neither of which was in this case ; and the Town's witnesses were most inhabile and suspect, for they were either burgesses, inhabitants, or their tenants, who are so concerned that they may win or tine in the cause, and ought not to be allowed to depone in their own favours ; and to evidence that the Town never believed they had a right, sundry of their burgesses took tolerances from the heritors to cast peats in that place, as the same produced under their hands instruct. The Lords rejected those witnesses that were not legally cited, and had no regard to their testimonies ; and found the burgesses *in re communitatis* were habile witnesses, and could not be repelled ; though some were for admitting them only *cum nota* ; and found, that particular burgesses accepting tolerances, could not prejudge the Town's right by any deed of theirs ; and found the ground and moss controverted lay within the pursuers Frasers and Mackenzie's properties. So the sole question resolved in this, whether they were burdened with the Town's commonty and servitude ? And though the probation was strong on both sides, yet the plurality of the Lords found the heritors' probation more pregnant ; and therefore declared their immunity and freedom, and assoilzied them from the servitude acclaimed.

Fountainhall, v. 2. p. 502.

1709. July 12.

FORBES against FORBES.

No. 137.

Women not habile witnesses to prove that persons were married or held and reputed married.

An objection to a witness that he had been under sentence of death for keeping out the Bass against the Government found taken off by the articles of capitulation betwixt the Government and the garrison, whereby it was agreed that none of

Jean Forbes and John Munro on the one part, and Lydia Forbes and Auchinmouty of Drumeldry, her husband, on the other side, compete for the means of Captain Charles Forbes their father. Jean and her husband repeat a declarator, that her sister Lydia is a bastard, and so has no share in their father's estate. Lydia opposes her counter-declarator of legitimacy, that she was his lawful daughter, and that he was married to Anne Price, her mother, and that they were holden and reputed man and wife. And both their libels being admitted to probation, Lydia cited one Captain Haliburton, as a witness for her ; against whom it was objected, that he could not be a habile witness, because under sentence of death for rebellion, in holding out the Bass against King William ; and *esto* upon its surrender, this crime had been remitted, yet that never redintegrates their hability ; for Cap. 34. Statut. 2. Robert I. bears expressly, that *De crimine capitali convicti repelluntur a testimonio*, though they be *à justitiâ redempti*, the reason whereof is given in the Roman law, L. 3. C. De. generali abolit. and L. 6. and 7. D. De sententiam passis, *Indulgentia principis quos liberat notat, nec infamiam criminis tollit, sed pœnæ tantum gratiam facit.* It remits the punishment, but not the gift ; and therefore my Lord Dirleton, *verbo* Witnesses Remitted, is positive, that a remission does not repon to fame, nor make a man a habile witness, whose great qualification is integrity and honesty ; and though the King may forgive a punishment, yet he cannot make a bad man good ; and this was objected against one Toseheach, suspected for burning the house of Fren draught, and by

my Lord Strathallan, against Murray of Broughton in the convention of estates, held in 1678. And Sir George Mackenzie, in his Criminals, Tit. Probation by Witnesses, distinguishes betwixt a remission before sentence, which is but a presumptive guilt, and one sought after conviction and sentence. Answered, They opposed the articles of capitulation at the delivery up of the Bass, whereby he who was seized and condemned before the surrender, is as fully pardoned as those who were still in it; and though persons sentenced for such crimes as falsehood, perjury, theft, murder, and the like, may be still reputed incapable, though remitted; yet in some State crimes, where a country is divided in their opinion as to the righteous owner of the Crown, it were hard to make such a condemnation after pardon, still to render them incapable of being a witness; and this argument would conclude too much, for it would debar all forfeited in the late times, though now restored.—But the difference is plain, for they are reponed, *per modum justitiæ*, and their forfeitures rescinded, whereas his remission is by way of grace and favour only. The Lords having considered the articles of capitulation for surrendering of the Bass, they found the pardon was not wholly gratuitous, but for an onerous cause, and so fully remitting the crime, he was a habile witness, and not lying under the stain and blot of infamy, and ordained him to be received.

Fountainhall, v. 2. p. 513.

* * * Forbes reports this case :

1709. *February 9.*

In the process at the instance of Lydia Forbes and her husband, against Jean Forbes and her husband, the pursuers condescended upon women witnesses, for proving that Captain Charles Forbes was married to Anne Price the said Lydia's mother, or at least that they were habit and repute married persons.

Alleged for the defenders: Women were excluded from witness-bearing in all cases by our most ancient law, Cap. 34. Robert. I., and exceptions from this have been sustained by custom, allenarly in cases where women only use to be present, or *in criminibus domesticis*, where there is scantness of proof; but in cases merely civil, where men use to be present as well as women, the Lords do not admit women witnesses, July 21, 1675, Wilkie against Morison, No. 76. p. 16675. Dirleton in his Questions, page 225. says, That of forty or fifty processes of divorce for adultery these hundred years, women witnesses were not received; and they were rejected by the Canon law, De Verb. Signif. Cap. 10.

Answered for the pursuers: Howbeit women are not regularly admitted to give their testimonies in every case, they are not altogether rejected; and *Causa Matrimonii* is excepted, Cap. 1. De Consanguinitate. Again, Women witnesses being always admitted for proving grounds to dissolve marriage, or to separate a mensa et thoro; there is more reason to sustain their testimonies for the constitution of marriage, which is more favourable; *2do*, In a late case betwixt Mr. John Buchanan and Mr. Thomas Paterson, the Lords admitted women witnesses to depone upon the qualifications of Mr. Thomas' eliciting a

No 137.
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No. 137. disposition from his wife, and making himself master thereof; consequently, women may more easily be allowed to depone either as to actual marriage, or as to co-habitation, or entertaining one another at bed and board, where women servants are necessarily present, and may be present at entertainments, visits, or otherwise; *3tio*, The civil law admitted of women witnesses, except in the most solemn case of testaments, and our law doth not exclude them from any presumed defect in their memories or judgments; but, as Sir George Mackenzie observes, because the law was unwilling to trouble them, and thought that thereby they might learn too much confidence, and become too familiar with men and strangers, if they were necessitated to frequent courts on all occasions.

Replied for the defenders: Though carriage and conversation within doors may be called domestic, yet it cannot be said to be that to which women use only to be present; *2do*, Though the Lords may, ad indagandam rei veritatem, examine women upon one single act of its own nature hard to be expiscated, and which perhaps a great deal of care is taken to cover, as in the case of Buchanan and Paterson, that is not to be extended to the examining women upon a long series of acts without any care to conceal them, which scarce could escape the knowledge of strangers. Now, marriage, or habite and repute married, are things most public, which, in the opinion of the Doctors, ought to be proved per turbam testium, Mascardus de Probationibus Concubitus, 1017. As to the pursuer's citation out of the Canon law, the question there is not anent actual or presumed marriage, but anent the proving consanguinity in causa matrimonii, which the law allows to be proved by parents utriusque sexus; because, Qui melius recipi debent, quam qui melius sciunt; *3tio*, There is a great difference betwixt the proving of grounds inferring the dissolution of marriage, or separatio mensæ et thori, which are known only to the people in family, and carefully concealed from strangers; and the case of a voluntary contract of marriage, where habile witnesses might and ought to have been called; *4to*, The reason adduced by Sir George Mackenzie, why women witnesses are rejected, may perhaps not be the only one, and probably infirmitas sexus was the principal motive, since they are ranked with Pueri, &c. But whatever was the reason, ita lex scripta est.

The Lords sustained the defender's objections, and refused to sustain women witnesses as habile to prove that Captain Forbes and Anne Price were married, or habite and repute as married persons; because in notorieties, penuria testium cannot be presumed.

1709. July 7.—In the action at the instance of Lydia Forbes and her husband, against Jean Forbes and her husband, mentioned February 9, 1709, one Captain Halyburton being adduced as a witness for proving Lydia Forbes's legitimacy; the defenders objected that he could not be admitted, because under sentence of death, for assisting in defending and keeping out the Bass against the government.

Alleged for the pursuers: Captain Halyburton is a habile witness, notwithstanding the criminal sentence against him, in respect the same was taken off and discharged by the public articles of the capitulation betwixt the government and

the garrison ; whereby it was expressly stipulated on the government's part, That none of the said garrison should suffer any manner of way on account of their opposition.

No. 137:

Answered for the defender : Though a remission had been past in the terms of the capitulation, that could not have rendered Halyburton a habile witness, because a remission exempts only from punishment, and takes not away the infamy of the crime ; L. 6. L. 7. C. De Sentent. Pass. L. 3. C. De Gen. Abol. Oddus De Rest. in Integ. Q. 49. Art. 4. N. 2. Stat. 2. Rob. I. Cap. 34. ; M^cKenzie Crim. Part. 2. Tit. 26. N. 6. ; Dirleton's Doubts, verb. Witnesses Remitted ; seeing the Sovereign cannot repona a man to integrity and innocency, which fame requires, or cannot make a man good ; consequently cannot make him a sufficient witness.

Replied for the pursuer : The case of the remission of a crime and its punishment *ex gratia*, and the present, are different *toto cælo* ; for here the Captain's crime was indemnified by way of capitulation for an onerous cause, viz. the surrendering the garrison ; and it were against the law of nations to pretend, that a sentence pronounced against him on the foresaid account, should have any penal effect.

The Lords repelled the objection against Captain Halyburton, as being taken off by the articles of capitulation betwixt the government and the garrison of the Bass.

Forbes, pp. 322. and 340.

1709. November 24. MONTEITH against HERITORS of ABBOTS-KERSE.

Lord Cullen reported several objections against some witnesses. Monteith of Millhall, as heritor of the mill of Abbots-Kerse, pursues a declarator of thirlage and astriction against the feuers of the Barony ; and they repeat a counter-process of immunity and exemption ; and there being an act, before answer, extracted for proving their use of coming to the mill, and the possession as to the quantity of multures, and likewise of the frequent use and custom of going to other mills, not by clandestine stealth, but openly and avowedly ; and witnesses being adduced for proving their astriction, it was objected by the defenders against one called Mitchell, that he could not be received, because he was not worth the Queen's unlaw, which is liquidated to £10 Scots ; and because all objections against witnesses must be instantly verified, and must not run a course of probation, they offered to prove it by his oath ; and he deponed he could not well tell if he was worth so much. And it being contended ; that this was sufficient to cast him, it was answered, that there being penuria testium, their hability was not so narrowly to be scanned ; and whatever he said, yet the clothes upon his back were worth more ; besides being a servant, he had a yearly fee. Replied, The legal sense of the words what a man is worth is always deducto ære alieno, and they instructed by bonds produced, he was owing more than either his clothes or fee amounted to ;,

No. 138:

A witness repelled, as being within the forbidden degrees of propinquity to the adducer, although the other party had *ex intervallo* before adduced him.