

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.

No. 138. and in dubiis interpretatio semper sumenda est contra proferentem qui potuit aper-
 tius dicere. The Lords thought that witnesses by collusion might be prevailed with
 so far to gratify the other party as to cast themselves; therefore they ordained him to
 be re-examined what yearly fee he received; and if he truly believed that his debts
 exceeded his free gear, so as he would not be worth £10 free. (See No. 139. *infra*.)
 The second objection was against Johnston, another witness, that the pursuer having
 cited and adduced some of the defenders as witnesses as to the rest, the Lords
 rejected them because of the connection of the cause; now he cites some who are
 within the forbidden degrees of relation to these defenders; against whom it was
 objected, that they were no more receivable than the defenders to whom they stood
 in blood related. Answered, He did not adduce them to be anywise interrogated
 as to their friends' concern, but only to depone against the other defenders to
 whom they had no relation; and this were to stretch it too far; it is sufficient to
 cast a witness, that consimilem fovet causam, and so will probably favour it, but
 to extend it to the blood relations of him who hath a parallel case, so as to repel
 them, were fictio fictionis. The Lords, by plurality, received him cum nota,
 though some were for admitting him simply. It was objected against a third
 witness, that he was a moveable tenant, and so not receivable in law. Answered,
 He was cited and made use of by yourself, and so being a common witness, can
 never be refused for me as well as you. Replied, One may be a habile witness
 for me, that cannot be for my adversary; as for instance, I may introduce my
 contrary party's father, brother, or domestic servant, to bear witness on the points
 I am to prove; and yet my party can use none of these to be witnesses against
 me; and so does Sir George Mackenzie think in his Criminals, Tit. Probation by
 Witnesses; and Stair, on the same title. The Lords found where such witnesses
 were cited, the contrary party might use counter and cross interrogatories; but if
 that was omitted, they could not be received to be re-examined of new at the in-
 stance of the party to whom they were related; so that his using them did not
 rehabilitate them ad omnes effectus; and therefore they sustained the objection,
 and repelled the witness.

Fountainhall, v. 2. p. 529.

* * Forbes reports this case:

In the action at the instance of Millhall against the heritors of the Barony of
 Abbots-Kerse, the Lords repelled a witness as being within the forbidden degrees
 to the adducer, albeit the other party had before adduced him; in respect, though
 when one party produceth a witness who is within the degrees to the other, that
 other may, notwithstanding his propinquity, put counter-interrogatories to the
 witness at the same time that he is examining by his adversary, he cannot crave
 him to be re-examined *ex intervallo*, more than he could have produced him at first
 at his own instance.

Forbes, p. 355.