

1709. June 14. MACKENZIE and FRASERS *against* The TOWN of INVERNESS.

No. 136.
Burgesses, *in re communi*,
are habile
witnesses, and
cannot be re-
pelled.

A controversy arising about a moss lying in the hill called Mountcaploch, the Town of Inverness claiming a right of servitude of digging peats out of it; and Mr. John Mackenzie of Delvin, and Frasers of Dumballoch and Kinnairies, neighbouring heritors, alleging the said lands and moss belong to them in property, without the burden of any servitude; there are mutual declarators raised, one at the instance of the Town of Inverness, to find they have a right of commony in these hills and mosses; and the other raised at Mr. Mackenzie's and the other heritors' instance for declaring their right of property in that bounds, and a plain exemption and immunity from any servitude of digging peats out of that moss. Both parties were allowed to adduce what probation they could for instructing deeds of property or possession in the ground controverted, as also part and pertinent of their respective lands, and their mutual interruptions. The Town of Inverness, for instructing their right, produced a charter from King James VI. in 1591, ratifying their former gifts from King William the Lyon, and our subsequent kings, and giving them the power, privilege, and liberty of pasturing their goods, pulling heather, casting and winning fuel, feal, fearns, peats, divots, turfs, lime, clay, mortar, and stones in the hills called Craigfadrick, Caplochmount, &c. which are the very lands now in question; and led witnesses, proving they were in possession accordingly, and that the places controverted were reputed to be parts and pertinents of the hills now acclaimed. The heritors, for their interest, produced sasines to them, and their authors, instructing these hills and mosses belonged to them in property; and by witnesses, proved they were ever holden and repute a part of their lands, and that they used to cut the Town's peats when they offered to cast in that moss, and interrupted their encroachments thereon; and that, if they gave way to this destructive ruinous servitude of casting peats there, their tenants would be forced to quit their lands; having no fire but what they got out of that moss; and, in a few years, so populous a corporation as Inverness would wholly absorb and consume it, so that their properties wholly depended upon their being exeemed from this wasting slavery. The probation coming to be advised, it was alleged for the Town, that they were both prior in right, by so ancient charters, and likewise in possession, seeing men of sixty and seventy years had deponed, that, ever since they can remember, or were capable to keep goods, the Town had not only pastured there, but also casten peats in that ground, and it was ever repute part and pertinent of their bounding charters; and no regard was to be had to some of Delvin's witnesses, for they acknowledged they got no written copy nor citation, but were only verbally warned, and so were ultroneous witnesses. Answered for the heritors, That they opposed their rights and probation, by which it clearly appeared, that the moss in controversy was not only within the bounds of their property, but likewise that they had interrupted the Town's invasions thereon, though they had proved forty years possession, as truly they had proved no higher than thirty-two; and

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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 reponne 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