

1711. January 3.

BURNET, GORDON, and SKEIN *against* The MAGISTRATES and DEAN of GUILD
of ABERDEEN.

Gordon, Burnet, and Skein, being chirurgion-apothecaries in Aberdeen, did, besides their own employment, likewise exercise the trade of merchandizing; which the magistrates conceiving to be an encroachment on their guildry, they convene them by their procurator-fiscal, and fine them in L. 50 Scots each, and discharge them to merchandize in time coming; which decret they suspend, and insist on these reasons: *1mo*, The fine is discharged by the late indemnity: *2do*, They are burgesses, and cannot be hindered to trade; and this is homologated by their being stented for their trade as merchants, and bearing scot and lot, as appears by the collector's receipt produced: *3tio*, They are willing to enter guild-brothers and pay the ordinary dues; but the magistrates, who design to inhanche the trade in their own hands, invidiously refuse to admit them. *Answered*, The indemnity cannot free them, for it expressly excepts, where judgment or sentence had past already: To the *2d*, Their unwarrantable trading subjects them to the stent, but it is only as a passive title, and gives no right; and the act 154th, 1592, allows this exaction whether they be free burgesses or not: To the *3d*, The magistrates are not bound to receive them, because not qualified in terms of the constitution of the burgh, which admits none to be merchants but the sons of actual merchants born there, or such as had served their apprenticeship to a merchant: And the degrees of a tradesman and a merchant being distinct societies, each must keep to his own employment, and must not invade another, unless he renounces his trade: And though they be burgesses, yet they are only admitted to practice *in sua arte*, and no farther, unless they are also guild brother; and in effect chirurgions are no more but a pendicle of the *Barbitonsores*, the old trade of barbers, and have no privilege to trade in any of the royal burghs more than in Aberdeen. *Replied*, That the more diffused and extensive trade was, the nation would flourish the more; and the Parliament had found it their interest to give a communication of trade even to burghs of regality and barony, and *multo magis* should it extend to burgers in burghs royal. And the art of pharmacy and chirurgery is rather a science than a mechanical trade, and they are incorporate under no deaconry, nor claiming any privilege in electing the magistrates, but singly to trade, for which liberty they are willing to pay; and the debarring them hitherto is *prava consuetudo*, and can never overcome law nor common sense: And though some submitted to it, yet *pactis privatorum juri communi derogandum non est*, neither are they subscribers of such indenture.—THE LORDS thought this case might dip on the seals of causes of the incorporations, and concern the merchants in the whole royal burghs of Scotland, therefore ordained it to be heard in their own presence, because of the leading preparative of this cause.

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Surgeons-
apothecaries
carrying on
merchandise
within a royal
burgh, where
they had ac-
cepted of bur-
gess tickets *in
sua arte*, were
prohibited,
unless they
would re-
nounce their
own trade.

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December 21. 1711.

MESSRS Burnet, Gordon, and Skein, three chirurgion-apothecaries in Aberdeen, using likewise the trade of merchandizing, the Magistrates and Dean of Guild convene them by the Procurator-Fiscal, and fine them in L. 50 each, for contravening the statutes of the burgh, prohibiting any craftsman to merchandize till he renounce his trade. Which decret they suspend, (as mentioned *supra* 3d January 1711,) and raise a declarator, that they being burgesses, and not incorporate into any of the deaconries of tradesmen, it was lawful for them to export and import, as any guild brother might, and the Magistrates ought to be discharged to molest or hinder them in so doing, the presumption lying for liberty and freedom.—*Alleged* for the Dean of Guild, That the policy and government of the royal burghs in Scotland, had divided the constituent members of their bodies incorporate and politic, into merchants and trades, as quite contradistinct; and the one not to inroach upon the other; whereof there were many vestiges in our laws, and particularly the 12th act 1466, that no man of craft use merchandise till he renounce his craft, without all colour or dissimulation. Now it cannot be denied but chirurgions and apothecaries are craftsmen and artificers, and so fall directly under the prohibition, as the learned Benev. Scaccia *de Mercatura* very plainly distinguishes them; ‘mercator est qui negotiationis seu quæstus liciti causa frequenter merces emit vel permutat, et si eas non minutatim vel mutata earum forma distrahit;’ but he who ‘eas sua opera in aliam formam redigit, et sic eas vendit, non mercator sed artifex dicendus est.’ And instances *in eo qui pharmaca conficit et officinis assidet*, that he is not a merchant but a tradesman; and he designs the two capacities by *officium et artificium*: He who brings home silk, wool, marble, timber, and other such materials, is a merchant; but the weaver, wright, and mason, that joins them together, is a tradesman. Even so he that imports drugs, and deals in simples, is a merchant; but if he mix and compound the drugs, and keep an apothecary’s shop, he is a tradesman; the altering them by specification, and introducing a new form and species, alters likewise the employment. And it were derogatory to the estate and dignity of merchants, that every tradesman might, at his own hand, without competent stocks, invade their office, to the reproach of our merchants in foreign countries; and those marches being so wisely set by our predecessors, they are become fundamentals *non tangenda non movenda*. And to jumble the two would stir up such jealousies betwixt these two great bodies of merchants and trades, that, without either witchcraft, or spirit of prophecy, one may easily foresee what confusion, tumult, yea bloodshed, would inevitably follow thereupon. Besides, these men can, least of all others, plead their liberty; for, by their burgh tickets and oaths, they are allennarly admitted burgesses *in arte sua tantummodo*; that is to say, you may practise surgery and pharmacy, the trades you profess, but no more. And it were an insolence

to force the Magistrates to admit them guild-brothers, whether they will or not. See the *statutæ gildæ*, cap. 25. *leges burgor*, cap. 99. and act 107th, 1487.—*Answered*, imo, Chirurgery and pharmacy are rather sciences and branches of medicine than manual arts, and so must be designed *a famosiori analogato*; and they are none of the erected deaconries, and so must necessarily come under the denomination of merchants: And as to the old acts of Parliament, made in the infancy of trade, they are now in desuetude, when commerce is turned more diffusive; and our Parliaments at last became sensible of the prejudice our monopolizing burghs did the rest of the nation; therefore, by the 5th 1672, and 31st and 32d acts 1693, for communication of trade and erecting merchant companies, liberty is given to the burghs of barony and regality, and others, to trade, they paying a proportion of the cess imposed on the royal burghs, who pay the sixth part of all our taxations; so those apothecaries must come under the notion of the word *others*; likeas in Edinburgh, and all the other royal burghs, the apothecaries are reckoned with the merchants; which shews these old acts are no more *in viridi observantia*: Likeas, they have been stented for their trade, and paid accordingly, and so cannot be quarrelled; and some have been advanced to the magistracy, and yet kept their apothecaries' shops notwithstanding; and there is nothing but emulation and humour in this debarment, seeing they have offered to pay in all the dues a guild-brother uses to give at his entry; and, at Amsterdam, and all the flourishing trading cities abroad, the freedom of merchandizing is to be got for a few guilders: And though Rome, at first, was very nice in communicating her privileges; yet, at last, the Emperor Antoninus, L. 17. D. *de statu hominum*, extended them to the provinces, and the whole Roman world; and so did the Jewish republic to their proselytes. And their accepting burghs-tickets *in sua arte solummodo* can never debar them; for *id non agebatur*, but only to license them in surgery and pharmacy. Yea of the old physicians practised surgery, as appears § 7. *Instit. de lege Aquil.*—THE LORDS, by plurality, found, That these chirurgion-apothecaries, having accepted of burghs-tickets with that express restriction, only to practise *in arte sua*, the Magistrates and Dean of Guild might restrain and stop them from merchandizing unless they renounced their trades. (An appeal was lodged against this judgment, see Fountainhall, v. 2. p. 734.)

There was a case, somewhat parallel, betwixt the Trades of Bruntisland and the Magistrates, marked at the 20th of February 1679, No 2. p. 1836, where the seven trades in that burgh craved the Magistrates may erect them into deaconries, (as in other towns) that they may have a share in the administration and government; and the Lords found they could not compel the Magistrates to erect them unless they pleased; but, on the 20th January 1681, they, in imitation of the custom of Edinburgh, did appoint the Council to consist, two parts of merchants, and a third of trades. And, though they would not give them deacons, yet

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they ordained yearly visiters to be named, to try the sufficiency of their work, and to exclude unfreemen. It appears by act 86th, 1426, that deacons of trades, have made factions and seditions in burghs, and were, therefore, discharged and put down (as it is there worded) and wardens appointed in their place; but afterwards they were restored.

Fol. Dic. v. 1. p. 118. Fountainball, v. 2. p. 620. & 691.

* * * The same case is reported by Forbes :

THE Magistrates of Aberdeen having, upon a complaint at the instance of their dean of guild as fiscal, fined John Gordon and George Burnet, chirurgion-apothecaries, in the sum of L. 50 Scots, payable by each of them, for exercising merchandise there, contrary to the act 67th, Parl. 14th, James II. ; act 12th, Parl. 2d ; act 107th, Parl. 14th, James III. ; and the constitution of the burgh. They suspended upon the reasons following : *1mo*, These acts of Parliament restraining craftsmen from merchandizing, extend not to chirurgion-apothecaries ; but only to crafts where essays of work are taken, who have deacons or visiters for that end, and where the craftsmen work for days-wages, and are employed in manufacturing the product of Scotland ; that they might not neglect that and their own craft, by having liberty to import made work from abroad, which is not applicable to chirurgion-apothecaries, (especially those in Aberdeen, who are under no deaconries,) whose profession is more properly a science, (being a part of medicine) than a handicraft. For every art that is performed by manual operation, goes not under the denomination of mechanick, unless it be exercised with a painful laborious working. So chirurgery is to be reckoned a liberal art, as well as the arts of fortification, musick and limning, which are all executed by manual operation. *2do*, The laws restraining craftsmen from merchandizing were never in observance, at least are altered by posterior laws, enlarging the freedom of trade, or are gone into desuetude. Doth not King James the Sixth's determination, upon the submission made to him by the guildry and craftsmen of Edinburgh, more than 150 years ago, for settling differences betwixt them, allow craftsmen to be received guild-brethren, they being fit and qualified burgesses of the burgh? Every inhabitant of a burgh was anciently entitled to merchandize, and use his craft promiscuously at his pleasure. The first attempts to restrain this liberty, did only hinder craftsmen to merchandize, if they used their craft with their own hands, and not by servants ; Leg. Bur. cap. 99. Again, most of the burghs of Scotland, particularly Aberdeen, would never have allowed by indentures, (as they have done) their incorporated craftsmen to trade in all inland merchandise, and debarred them from foreign trade, upon certain conditions to be performed by them on the other part, had craftsmen been wholly excluded from merchandizing by standing laws. Besides, the wisdom of the nation, finding at length that the more hands were employed in a foreign trade, riches would the more encrease, and the nation flourish ; they gave freedom of

trade to all persons without distinction : After which so universal communication of trade, it is not supposable that the greatest part of the burgesses in royal burghs are still debarred. *3tio*, It is the right of every burghess to claim to be admitted to the guildry, upon paying the ordinary dues payable at such admission ; and the guildry are obliged to receive him. For though incorporated craftsmen have, by a voluntary agreement, tied themselves up from trading, unless they renounce their craft ; that doth not concern the suspenders, who have the same freedom that any other subjects have.

Answered for the town of Aberdeen, *imo*, The policy of royal burghs is lodged in the magistracy and town council, with a jurisdiction over all craftsmen, and power of regulating them, except in so far as their incorporations have by special constitutions, certain privileges, and seals of cause, for overseeing their work by deacons ; so that no handy-craft can be set up in royal burghs, except as freemen of a corporation, by allowance of the magistrates. Craft and art, or special cunning in handy-work, and craftsmen or workmen, are synonymous terms. Nor is there any distinction between crafts where an essay of the work can be taken, and others ; for what can hinder magistrates to appoint an essay upon intransit churgeons, and to debar them from practice till they be tried by a physician or two, before the magistrates ; or to appoint a form of visiting an apothecary's shop, with the assistance of men of skill ; as listers are not admitted burgesses *in sua arte*, till they have given proof of their skill before the dean of guild : That a churgeon is a craftsman is unquestionable ; the name imports, as well as the object of his cure is, handy-work ; and though the object, viz. the body of man, be indeed more noble than any other, and the rules more delicate, and more closely connected with other sciences ; that hinders him not to be a craftsman, but serves only to give him a greater dignity among artists. Apothecaries are also craftsmen ; for as he who brings home silk, wool, marble, timber, or any other materials, is a merchant, and he who joins them by art, and makes a specification, is a craftsman ; so he that deals in simples is a merchant, and he that compounds drugs and keeps an apothecary's shop, is a craftsman ; Straccha. tract. de Mercat. Par. 1. No 4. *in fin.* No 23. 24. 25. and 51. Whether they have deacons or essay-masters or not, doth not alter the case ; because, the magistrates may name deacons or essay-masters when they please : and the arts of both churgeons and apothecaries are capable of essays, that is forms of trial, before their being permitted to exercise their crafts, and censures in case they fail in the exercise of it. *2do*, There are no laws derogating from the ancient laws restraining craftsmen from trafficking ; for the statutes allowing all freemen to trade, are to be understood according to their different privileges, without prejudice to the particular laws regulating the policy of the burgh, whereof one was, that the same person could not be merchant and craftsman at the same time ; and though the acts for communication of trade did impair the interest of the royal burghs in general, with respect to traders without burgh ; yet none of these laws alter the distinctions and orders of men within burgh directly or indirectly. Nor is there

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any contrary custom. It is in vain to recur to the custom of Edinburgh; for that is indeed singular, and the matter was settled by King James the Sixth's decret-arbitral, and confirmed by several acts of Parliament. Yea even the apothecaries of Edinburgh have oft times sought to be incorporated under a deacon, but did not obtain it; and the magistrates appointed overseers of the apothecaries. For though the magistrates had power to erect deaconries when they thought it necessary for the good of a town, they were under no necessity to do so; as appears from the case, 20th February 1679, and 20th January 1681, Craftsmen of Bruntisland *contra* the Town, No 2. p. 1836. But, 3tio, Whatever be observed in Edinburgh, that is not to the present purpose: The custom of one burgh is not a rule to another. It is sufficient that the town of Aberdeen doth preserve the ancient institution, in which burgh the suspenders not being admitted burgesses simply, but having accepted of burgess-tickets *in sua arte*, and being under no deaconry, can be restrained from using merchandise, and obliged to renounce their trade; and are not entitled to crave to be admitted guild-brethren, and to exercise merchandise upon payment of the ordinary dues; albeit there were no better reason to be given for it, than what is printed in very legible letters in the council-house of Aberdeen, *servate terminos quos patres vestri posuere*; which is indeed a principal of civil society, on which its tranquility depends; and therefore the civil law says, 'Non omnium, quæ a majoribus constituta sunt, ratio reddi potest; et ideo ratio eorum quæ constituuntur inquiri non oportet: Alioquin multa ex his quæ certa sunt, subvertuntur, minime sunt mutanda, quæ interpretationem certam habuerunt,' l. 20. 21. 23. ff. de Legib. It is *meræ facultatis* in magistrates to admit a burgess or not, or to grant or refuse the privilege of guild, except to burgesses by succession; for though Sir George M'Kenzie in his Observations says, the act 86th, Parl. 6th, James IV. is in desuetude, that is only in so far as it requires to the making of burgesses the formal consent of the great council of the town; for to this day, no burgess and guild brother can be made without consent of the dean of guild, who hath a discretionary power in that matter, and cannot be compelled.

THE LORDS found, That the suspenders having accepted burgess-tickets *in sua arte*, the magistrates of Aberdeen had right to restrain them from exercising merchandise within their burgh, notwithstanding they be willing to enter guild-brethren, and pay the ordinary dues for their admission.

Forbes, p. 557.

1725. January 13.

THE INCORPORATION OF GIRDLE-SMITHS of Culross, *against* JOHN WATSON and JAMES MASTERTON, Smiths in Kilmarnock.

No 60.

The girdle-smiths of Culross have two royal

THE defenders having been for some time girdle-smiths in Culross, left the place and set up that work at Kilmarnock; upon which the girdle-smiths of