No 59. 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 decreet-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 in-'quiri non oportet: Alioquin multa ex his quæ certa sunt, subvertuntur, mini-'me 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

No 60.
grants ratified in Parliament, giving them the exclusive privilege of making girdles for all Scotland. It was found that no such perpetual monopoly could be effectually granted.

Culross raised a declarator against them, to have it found, That the said incorporation had the sole and exclusive privilege of making girdles in Culross for the service of all Scotland: And this right they founded upon two royal grants, the one by King James VI. in the year 1599, and the other by King Charles II. *anno* 1666, and ratified in Parliament in the 1669.

It was *answered* for the defenders, That all perpetual monopolies were odious and unlawful; that these private grants were surreptitious; and even the ratification in Parliament could not mend the matter, being granted *parte inaudita*, under a *salvo jure*; and therefore these grants could not prejudge the burgh of Kilmarnock, which had, by a prior grant, *anno* 1592, ratified in Parliament that same year, a *jus quæsitum* of having all trades and artificers which any free burgh had been in use to have.

Replied, That such a general privilege of having all trades, &c. could not restrain the Crown from granting a special privilege of exercising a particular trade to one society: That all monopolies were not absolutely unlawful, and therefore the Crown, by its prerogative, might, for good reasons, grant a privilege of this kind; and in the present case there was a very good one, namely, that this art was first invented in Culross, and carried to the utmost perfection there. And Grotius observes, *lib.* 2. *cap.* 12. § 16. *De jure belli*, That, *non omnia cum jure naturæ pugnant, sed possunt interdum a summa potestate permitti justa de causa*; and he mentions several monopolies granted under the Roman government.

THE LORDS found, That no such perpetual monopoly could have been granted in prejudice of this or any other burgh.

Reporter, *Lord Pollock*. Act. *Jas. Boswell*. Alt. *Sir Tho. Wallace*. Clerk, *Dalrymple*.
Fol. Dic. v. 3. *p.* 105. *Edgar*, *p.* 145.

1738. *December* 1.
INCORPORATION of BARBERS of Edinburgh *against* M'DUFF and MENZIES.

No 61.
A non-residing burgess has not the privilege of taking apprentices for the freedom of the burgh; and is not entitled to carry on his trade by means of apprentices or others.

DANIEL M'DUFF had been admitted a freeman of the incorporation of barbers of Edinburgh, and had practiced the trade for several years. He accepted of the office of tide-waiter at Leith, and went with his family to reside there. George Menzies his nephew, who had been a journeymen with others in the trade, opened a shop, without entering burgess. He was prosecuted. M'Duff put his own name upon the sign-board, and entered into an indenture with Menzies.

The Dean of Guild and Council found 'That the said Daniel M'Duff, as he is not a resident burgess, has not the privilege of taking apprentices, for the freedom of the burgh or the incorporation; and that he is not entitled to carry on the trade of wig-making or barber craft, by the said George Menzies; and