

1760. *December 2.*BARBERS of EDINBURGH *against* BARBERS of CANONGATE.

No 75.
Tradesmen residing in a burgh of regality or barony, adjacent to a royal burgh, cannot be subjected to the authority of an incorporation of similar tradesmen residing within the royal burgh.

IN the year 1505, the surgeons and barbers of Edinburgh were, by an act of the town-council, erected into an incorporation, with sundry privileges, which they have ever since enjoyed.

The superiority of the burgh of regality of the Canongate was acquired by the city of Edinburgh in the year 1639, at which time there was in the Canongate no established corporation of surgeons and barbers.

In April 1649, the magistrates and town-council of Edinburgh passed an act, 'requiring the bailies of the Canongate to concur with the deacon and the surgeons and barbers of Edinburgh, in taking order with the unfreemen surgeons and barbers within their several bounds respectively; and that none exercise the said craft, nor put out signs or basons, until they obtain liberty from the deacon and freemen of the surgeons and barbers of Edinburgh, and be subject to their orders and injunctions.'

The bailies and council of the Canongate, upon the 2d of August 1649, passed an act, 'ordaining fourteen persons therein named, unfreemen, barbers within the burgh, to take in their signs and basons, and exercise no part of surgery or barber craft within the burgh, or privileges thereof, in time coming, till they obtain liberty, and be subject to the orders and injunctions of the deacon and freemen of the surgeons and barbers of Edinburgh. And further ordained, That the apprentices of all such as enter, and give satisfaction to the deacon and trade of the burgh of Edinburgh, and their successors, shall pay no more for their burghship than other apprentices have paid within the burgh.'

By these acts the surgeons and barbers of Canongate were put under a dependence and subjection to the surgeons and barbers of Edinburgh. The regulation was acquiesced in by all the parties, and was ratified in Parliament in the year 1670.

Excerpts from the books of the incorporation of surgeons and barbers of Edinburgh were also produced from the year 1649 downwards; by which it appeared, that persons had been, from time to time, regularly admitted, by the surgeons and barbers of Edinburgh, to exercise that trade in the Canongate; and that they had regularly paid their upsets and quarter-dues, and entered their apprentices in the books of the incorporation, in Edinburgh; and when these apprentices had served their time, they were regularly admitted to be free barbers, with liberty to exercise their trade within the bounds of the Canongate only.

In the year 1718, a process of declarator was brought by the barbers of Edinburgh against the surgeons of Edinburgh, in which a decree was pronounced in the 1722. By that decree the two incorporations were, in some respect, sepa-

rated from each other ; and the right of the barbers of Edinburgh over the barbers of the Canongate was referred to, in the proceedings and in the interlocutors of the Court, as undisputed ; and regulations were established with respect to the method, and the dues, of admitting the barbers of the Canongate.

After this decree, the barbers of Canongate, in September 1722, entered into a contract with the barbers of Edinburgh, in which that decree, and an act of the town-council which had followed upon it, were recited. By that contract, the barbers of Edinburgh gave certain abatements to the barbers of Canongate ; and restricted, in many respects, the power they had exercised over them, as established near a century before, reserving only to the barbers of Edinburgh the one-half of their upsets. This contract was signed by all the barbers then residing in the Canongate, and by their successors, till the year 1742, when some of the barbers of the Canongate refused to acquiesce in it. Upon this the barbers of Edinburgh brought a process of declarator for ascertaining their right.

Pleaded for the barbers of Canongate, That the magistrates and town-council of Edinburgh, notwithstanding the purchase of the superiority of the burgh of the Canongate, had no power to restrain the inhabitants of Canongate from exercising any lawful trade or occupation. Their acts of council in the year 1649 were made without any authority, and were so many oppressive acts of power exercised by superiors over their vassals ; and being founded on wrong, they could not be confirmed by any length of time, nor by the acquiescence of the inhabitants of the vassal-burgh. The ratification in Parliament, which passed of course *periculo petentium*, can have no effect : and the contract entered into in the 1722, was an imposition upon the part of the barbers of Edinburgh, who thereby pretended to establish a dependent society within the burgh of the Canongate, and to communicate to them rights and privileges which they could not give, and which the freemen of the burgh were entitled to exercise in their own right. And supposing that contract could bind the particular persons who entered into it, yet it could not be obligatory upon other persons who happened thereafter to exercise the same trade within the Canongate.

Answered, The constant possession and acquiescence of all parties during a century, must have the effect to bar after challenges and inquiries, into the origin of the possession, and the powers of those who first authorised it. Besides, the regulation made in 1649, was in itself reasonable and proper. It was also founded in law ; for the barbers of Canongate were restrained from exercising their craft in that part of the suburbs of Edinburgh, by act 156. Parl. 1592, by which it was declared, ' That, in all time coming, there should be no exercise of crafts in the suburbs adjacent to burghs, but that the same should cease in all time thereafter.'

And though, by a decision, Town of Perth, No 52. p. 1905. this act was found not to extend to tradesmen living within the neighbourhood of a royal burgh, but under the jurisdiction of a third party ; yet this limitation could not apply to the inhabitants of the Canongate in the year 1649, after the town of

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Edinburgh became superiors of the burgh ; and unless suburbs of this kind are understood to have been meant by the act 1592, that statute can have no meaning at all ; since there was no occasion for a statute with respect to suburbs, which were situated within the bounds and liberties of a royal burgh ; because, as to these, the very constitution of incorporations gave them an exclusive privilege.

' THE LORDS found, That the barbers of the burgh and regality of the Canongate were not subject to the incorporation of barbers of the city of Edinburgh, or liable in payment to them of any sums of money ; and therefore assoilzied.'

Act. *Johnstone, Ferguson.*

Alt. *Lockhart.*

Thereafter the society of barbers of the Canongate insisted in a process for having it found and declared, That the barbers of Edinburgh were not an incorporation, having exclusive privileges of exercising their employment within the city ; and that they, the pursuers, had good right and title to shave beards, clip, trim, and dress hair, within the city of Edinburgh, and liberties thereof. The decision of this question depended on the import of a variety of writings, acts of council, and seals of cause, which it is of no importance to state.

' THE LORDS assoilzied ; and found the defenders entitled to their expences.'

Act. *Rae.*

Alt. *Johnstone.*

Clerk, *Pringle.*

I. Campbell.

Fol. Dic. v. 3. p. 107. Fac. Col. No 252. p. 458.

1761. February 17.

PROCURATOR-FISCAL of PAISLEY against The INCORPORATION of WRIGHTS.

No 76.
The magistrates of a burgh, by immemorial possession, gain an exclusive privilege of keeping mort-cloths to be let out for hire.

THE magistrates and town-council of Paisley had been in use, for time immemorial, to keep and let out mort-cloths for the funerals of all such as died within the burgh, at certain prices, and the profits thence arising were distributed among the poor.

The incorporation of wrights having purchased mort-cloths, in order to let them out in the same manner, the magistrates made an act of council, discharging the inhabitants of the burgh from keeping mort-cloths to be let out for hire under the penalty of five pounds Scots for each transgression, besides forfeiting the mort-cloth.

The wrights having let out their mort-cloth at a burial, it was seized by order of the magistrates ; and, upon a complaint at the instance of the procurator-fiscal, the wrights were fined in five pounds Scots, and the mort-cloth was ordained to be restored upon their instructing that it was the property of their poor, and purchased with the money of their incorporation.

This question having been brought into the Court of Session by advocacy, the Lord Ordinary pronounced this interlocutor : ' Having considered the deci-