

1699. February 14. The CHIRURGEONS of EDINBURGH *against* The APOTHECARIES.

[See the prior actions between the Chirurgeons and the Apothecaries of Edinburgh pointed out in the Index to the Decisions.]

THE Lords entered to advise the debate betwixt the Chirurgeon-apothecaries of Edinburgh, on the one hand, and Thomas Weir, Alexander Telfer, and some of the other simple Apothecaries, on the other. After a long and contentious debate betwixt thir parties, there was a decret, in March 1682, separating the two callings of chirurgeon and apothecary, and finding they could not be both exercised in one person. In 1694, the chirurgeon-apothecaries pretending the said decret of separation was but an act of policy and regulation for that *interim*, but not to stand as a lasting rule, they obtain a gift and patent from King William uniting the two callings again, as more useful to public utility and the health of the subjects. And the simple apothecaries applying to the Magistrates of Edinburgh for visitors to try and admit their entrants, the Magistrates name some chirurgeon-apothecaries to examine them. They reclaim, and crave one of their own fraternity and number; and thereupon raise a declarator of their privileges, to be subject to none but those of their own employment, in respect of the decret of separation. And the chirurgeon-apothecaries raise a reduction of that decret, and insisted on thir grounds: *1mo.* That his Majesty being the great fountain, arbiter, and dispenser of privileges among incorporations, he has, by his new gift, found it absolutely necessary to restore the chirurgeon-apothecaries, and to reunite the two trades; and so *res devenit in alium casum* from what it was at the time of the decret of separation: *2do.* It was not *res judicata*, but only a temporary settlement of their animosities and differences at that time; in regard the apothecaries being neither a deaconry, society, incorporation, or body of men erected by any law or custom, they could not transmit their privileges to their successors in that employment; but it was merely calculated for the apothecaries then in office: *3tio.* The Lords' decret proceeded without any manner of probation, but merely on a subscribed opinion given in by some of the College of Physicians, who were then at variance with the chirurgeon-apothecaries, and prevailed to get the two trades separated.

ANSWERED to the *first* reason of reduction,---That, there being a *jus quæsitum* to the apothecaries by the foresaid decret *in foro*, no subsequent gift impetrated from his Majesty, derogatory thereto, can deprive them of the benefit of that sentence, all these gifts being obtained *per subreptionem et obreptionem*; and the law ordains, wherever rescripts are *contra jus et utilitatem publicam, ab omnibus judicibus refutari præcipimus*; and our Acts of Parliament prohibit our Lords of Session to regard the King's private writings in the administration of justice; and that it was no temporary regulation appears from the decret itself, but was designed for a perpetual settlement. And, as to the *second*, That the apothecaries are no corporation, and so cannot transmit to successors, it is ANSWERED, That, though they be not one of the fourteen deaconries, yet they are erected into a fraternity by the act of Town-council 1657, which the chirurgeon-apothecaries found upon; and in such cases there is no need of a direct

charter of erection. Though merchants are not in a company, yet they have their known privileges; and so the knights of Nova Scotia. To the *third*, It is a very frequent practice, in cases relating to the mysteries of particular callings, that the Lords use to adhibit the advice of such as be most versant and seen therein. In mercatorian cases they advise with merchants and factors; so here, in redding marches betwixt churgeons and pharmacians, they consult with physicians; yet the decret does not singly proceed on their report, but also on the writs and sundry other documents produced. And as to the inconveniencies urged, there can be several mustered up on both sides. In Galen's time, one man was *medicus, chirurgus*, and *pharmacopæius* all in one person; and even so, among the Romans, their law says,—*Si medicus imperite secuerit, tenetur pœna legis Aquiliæ*; which shows their physicians were also churgeons, and used all manual operations themselves. And, as to the King's posterior gift, it was ARGUED amongst the Lords, What if the Town of Edinburgh obtain a charter from the King declaring all must pay their causeway maills, impositions at the port, &c.: Would this annul the College of Justice's decret of declarator exeming them from all these taxes? The glaziers, painters, plumbers, and other trades, obtained a decret *in foro* against the masons and wrights, finding they were a part of Mary's Chapel, and had a right to vote in the election of their deacons. If either the Town of Edinburgh should give the wrights and masons a new seal of cause, or the King give them a signature, declaring none to have a vote but the two trades of wrights and masons, I believe that would not be sustained as a revocation of the decret *in foro*; seeing it is not to be presumed that his Majesty understands all the private interests of parties in these gifts, or that he designs to interfere with the sentences of his supreme judicatories, but must be all understood to be *periculo petentis, et salvo jure*; else a secretary might, by such gifts, dispose and alter men's rights. See Stair, 19th July 1681, *The Chirurgeons of Edinburgh* against *The Apothecaries*; as also *supra*, 14th of February 1682, where the customs of England and other nations are mentioned: some thinking it better policy to unite them, as making them more knowing and flourishing; and others judging it better to divide them into several hands.

Some of the Lords thought it such a *res judicata* as could not be taken away but by the Parliament, and were for remitting it thither: others craved time to advise on it, and settle them. And so it was deferred. *Vol. II. Page 43.*

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1699. February 16. ANDREW HUNTER of DOD against SCOT of COMISTON.

ANDREW Hunter of Dod pursues a special declarator of the escheat of Graham of Morphy, and convenes John Scot of Comiston as his debtor;—who ALLEGED,—No process, because there is no general declarator of the gift. ANSWERED,—My gift is on the same horning whereon the Lord Rosehill was constituted donatar; and the first gift having been declared in general, he, as second donatar, needed not raise another. Which the Lords sustained.

*2do.* ALLEGED,—The first donatar's representatives ought to have been called, and all the creditors preferred in the first donatar's back-bond to the Exchequer.