

tutor to his daughter in her pupillarity, and curator in her minority; and, therefore, without his consent there can be no other curators chosen.

It was ANSWERED, That the daughter hath lands, not flowing from the father, with the rents whereof the father hath intromitted.

The Lords found, That the father, as lawful administrator, was curator; and therefore advocated the cause; but declared, that they would give the daughter curators *ad lites* for clearing accounts of the father's intromission.

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1681. *July 19.* The CHIRURGEONS of EDINBURGH *against* The APOTHECARIES.

THERE were mutual declarators betwixt the chirurgeons of Edinburgh and the apothecaries there, for declaring their privileges.

The chirurgeons insisted, That it might be declared they had the only power of phlebotomy, and application of sear-cloths to dead bodies; and that they might prove the transgression of these privileges against the apothecaries, not only by apprehension of them in the fact, but by witnesses and their oaths; and produced very ancient seals of cause by the town of Edinburgh, giving them the privilege of blood-letting, and all manual operations upon men's bodies. And that they have been immemorially a deaconry, and one of the chief deaconries of the fourteen established by King James the Sixth his decret-arbitral: whereas the apothecaries are no deaconry, and enter not by apprenticeship, but were of late erected in a fraternity, and visitors appointed, that every person might not exercise pharmacy, but only such as the visitors should find skilled; so that no merchant or tradesmen in Edinburgh can be hindered to exercise pharmacy, if the visitors find him skilled; and therefore many of the ablest chirurgeons are also apothecaries, their employments being more congenious. And that the apothecaries' privilege in Edinburgh is by consent of the chirurgeons, by which they got liberty to make sear-cloths for dead bodies; which was not proper to them, but by the chirurgeons' consent; and with express provision, that the chirurgeons should only apply these sear-cloths.

The apothecaries insisted to declare that they had power of phlebotomy, upon occasion of any inward disease: and that the chirurgeons had only the power thereof in relation to wounds, ulcers, or outward diseases: and that they had power to apply sear-cloths, seeing it was the great interest of the lieges not to be put to the expenses of having both apothecaries and chirurgeons to double their expenses. And therefore, if apothecaries did prepare medicines for inward diseases, if the patient had need of letting blood, there was no reason to call in chirurgeons; and, if apothecaries made sear-cloths, the lieges should not be put to the expense of calling for chirurgeons to apply them; for chirurgery gives only right to manual application upon the bodies of the living, but the wrapping up of dead bodies requires no special skill, even though their fleshly parts were to be cut off for preservation of the corpse. *3tio.* By the custom of all nations, inquiry after encroachments upon particular trades is only by apprehension in

the fact ; and oaths or witnesses are excluded in such cases ; which would raise perpetual pleas, and, if sustained, could terminate in no less than 40 years : and therefore none of the trades of Edinburgh can challenge others, except they be deprehended in the fact ; and much more should be indulged to pharmacy, which is a much more liberal profession. 4<sup>to</sup>. That no person should be both chirurgeon and apothecary, which would confound these employments, which are everywhere distinct ; and as no man can exercise two trades in Edinburgh, much less pharmacy and chirurgery, which require much study and long experience, and either of them is sufficient for one man's skill ; so that the chirurgeon-apothecaries, who but study chirurgery, and are bred therein, will but neglect pharmacy, and the single apothecaries will have no employment or encouragement ; seeing the chirurgeon-apothecaries, exercising both employments, will still be made use of for all.

It was ANSWERED for the chirurgeons, That whatever might be pretended as to the privilege of these employments abstractly, or if both were *in pari casu*, yet here the chirurgeons are an ancient deaconry ; having express privileges and immemorial possession, and confirmations of Parliament ; which cannot be derogated from by a new erection of the fraternity of apothecaries, further than consent or ancient custom hath given them ; which was never to phlebotomy, except in the case of necessity, where chirurgeons could not be had, or of charity to the poor. And the lance is a proper instrument of chirurgery, and a manual operation upon the body, and requiring singular skill ; for, by piercing of an artery, many persons have lost their lives. And, as to sear-cloths, chirurgeons might as well make these as plasters applicable to the living ; but, seeing they have yielded them to the apothecaries, they will not contend : yet, since they expressly reserved the application, the apothecaries have no pretence thereto ; for they could not pretend the skill or power of exintrinsication, or any incision upon the body : and even when these are not, the chirurgeons have only skill to know what is requisite to preserve corpses, and to make incision when necessary ; and when not, to stop the passages of nature. Neither will the pretence of more expense confound distinct trades ; and the difference will be inconsiderable : for the parties concerned will give but to both that which they would give to one. And, as to the manner of probation, it is certain, that whatsoever is just is probable by oath, except a contrary privilege be attained by ancient possession : as it is amongst the ordinary trades, where deprehension may, without inconveniency, be effectual ; seeing these trades have or carry always some instrument belonging to their own trade, which may be deprehended ; but, in phlebotomy or other manual applications, the apothecary needs carry no instrument but a lance, or such other instruments as he may carry in his pocket : and the acts are subite and transient ; and it would breed great disturbance to thrust in upon patients to search whether any were letting blood of them, or exercising other acts of chirurgery. And, as to chirurgeon-apothecaries, they are as ancient as the privilege of apothecaries in Edinburgh, and very necessary for the ease, and saving expenses to the lieges.

The Lords having appointed some of their number to speak with the doctors of medicine, who did report their opinion ; which was,—that phlebotomy was proper to the chirurgeons, except in the case of necessity or charity ; and the application of sear-cloths, where incision was made upon the corpse : but other-

wise, that apothecaries might apply the same; and that oaths were not allowed to any party any where; and that it was a great inconvenience to the lieges, and to both employments, that one person should exercise both:—

The Lords found, That the chirurgeons of Edinburgh had the only power of phlebotomy, except in the case of necessity or charity, in so far as concerned the citizens of Edinburgh: But whether the same was to be extended to the suburbs or to the inhabitants not being citizens, they ordained the parties to be further heard; and found the apothecaries might apply sear-cloths where there was no incision, and the chirurgeons only where incision was to be made. And, as for the manner of probation, and conjunction of the employments, they ordained the parties to be further heard; but that forbearance should be *medio tempore*, as to the particular manner of probation.

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1681. *July 19.* JOHN BURTON *against* MR ALEXANDER BURTON.

JOHN BURTON, having raised a brief of idiotry or furiosity against Mr Alexander BURTON, his brother; and, accordingly, an inquest being called by the Bailies of Edinburgh: Mr Alexander, having given in a bill of advocation upon this reason, That this unjust design of his brother was to enhance his estate, and restrain his person; and being of the greatest moment to him as to his fortune, liberty, and fame, it ought to be advocated from the Bailies, who have called a number of obscure persons upon the inquest; that the Lords may remit the brieves to the macers, and appoint assessors, as is ordinary in brieves of difficulty and importance:—

The Lords advocated the brieves *in statu quo*, and gave commission to the macers to serve upon the same day which was appointed by the Bailies, and to make use of the persons of the inquest, if they found them qualified; and named three of their number to be assessors.

The macers having kept the diet, it was ALLEGED for Mr Alexander BURTON, That the service of the brief could not proceed; because, before the raising thereof, he had raised a declarator before the Lords that he was *compos mentis*, and so was neither idiot nor furious; which is prejudicial, and ought to be first discussed, and is, in effect, a precognition necessary for preserving the reputation of the lieges against the groundless pretensions by such brieves: which pass of course, and whereby any man, how judicious soever, may be brought before an inquest as an idiot, or furious person, and be thereby abused and disgraced: So that, if the Lords, upon the declarator, find Mr Alexander to be *compos mentis*, they ought simply to discharge the service of the brief.

It was ANSWERED, That, in this case, there is sufficient ground to raise the brief; Mr Alexander having been, by the Privy Council, appointed to be restrained and kept by his brother, upon extravagant letters of his, read in council; and, therefore, the law of the kingdom having prefixed a peculiar form for trial of the discretion of the idiotry or furiosity of any person to be by brief and inquest, it cannot be otherwise determined by a declarator more than a