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November 8th, 1742.

Unto the Right Honourable, the Lords of Council and Session,

T H E

P E T I T I O N

O F

*John Wilson and Gilbert Blair, Barbers in
the Canongate,**Humbly Sheweth,*

H A T in ancient Times, when curl'd Tupees were not so much in Fashion as in latter Years, shaving, polling and dressing of Hair was in this Part of the World esteem'd no otherwise than as a Branch of Chyrurgery; the Surgeons were Barbers, and the Barbers were Surgeons, so that these were truly but different Branches of the same Trade. And thus it appears, that, as early as the 1505, the Surgeons and Barbers of the City of *Edinburgh* were erected into one Incorporation, under one common Seal of Cause, by an Act of the Town-council of *Edinburgh*, of that Date: From the whole Scope and Tenor of which it is plain, that none

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would be admitted a Member of this Incorporation, not even as a Barber, without being skilled in Anatomy and other Parts of Surgery, and undergoing a Trial in these Particulars.

In Progress of Time, as Luxury encreased, the Surgeons became fine Gentlemen; and by Degrees distinguished themselves from that servile Part of their Business, *Shaving and Polling*; so that the Magistrates of the good Town, and other Inhabitants thereof, being thus brought under great Difficulties how to get their Beards trim'd, an Act of the Town-council of *Edinburgh* was pass'd, of Date the 26th of *July* 1682, whereby it was recommended to the Incorporation of Surgeons, to take some effectual Course that the City might be furnished with a competent and suitable Number of Persons skilled in cutting Hair and taking off Beards; declaring, that the Persons so to be furnish'd, *should be holden as depending upon the said Incorporation of Surgeons, liable to the Laws and Acts of their Calling.*

This last mentioned Act, is the Footing upon which the Barbers of *Edinburgh* now stand; they are not Members of the original Incorporations of Surgeons and Barbers, they neither elect, nor can be elected Deacons of said Incorporation, but are form'd into a Sort of Society dependent upon the original Incorporation, from them they receive their Admissions to shave and poll.

The Barbers, as now distinguish'd by that Name, imagining themselves entitled to all the Privileges of the original Incorporation, and to be jock-fellow like with the Surgeons, did, some Years ago, bring a Process of Declarator before your Lordships, in order to ascertain their being equally entitled, with the Surgeons, to the above-mentioned original Seal of Cause 1505, and haill Privileges consequential thereof; as also, for Relief from sundry Grievances and Oppressions which the Incorporation of Surgeons did daily impose upon them, and which Process was terminated by your Lordships Decreet; Finding, in Substance, That the Barbers, by their Admission, were

not entitled to the Privileges provided to the Masters of Crafts by the original Seal of Cause, but were dependent upon the said Incorporation, and behov'd to receive their Admissions from them; but at the same Time, considering them as a separate Society, tho' not Members of the original Incorporation, your Lordships found them entitled to chuse a Preses of their own Number, a Clerk who might officiate when the Incorporation-Clerk could not attend, and to levy the Upsets and quarterly Payments from such as should enter into their Society.

There is nothing more common than for those who are oppressed by their Superiors, to be themselves guilty of the same Oppression upon their Inferiors. If the Surgeons of *Edinburgh* did oppress the Barbers, the Barbers of *Edinburgh* made themselves full amends, by oppressing the Barbers of the *Canongate*. Your Lordships have had many Occasions to hear of the great Hardships, which the *Canongate*, in general, have suffer'd from the Town of *Edinburgh*, to whom they are no otherwise subject, than as the good Town purchased the Right of Superiority of this Burgh of Regality; and as these Grievances have been the Subject of repeated Processes, the *Canongate* have been thus far relieved by your Lordships Justice, as it has been found that they are not amenable before the Courts of the good Town, however they may be subject to their Jurisdiction *qua* Superiors of the Regality within the Bounds thereof.

The Barbers of *Edinburgh*, relying upon the Countenance and Support of the good Town, have endeavoured to establish very extraordinary Power over the Inhabitants of the *Canongate*, *viz.* That none, tho' admitted Burgeses of the *Canongate*, should be at Liberty to shave or poll, even within the Liberties thereof, without being first tried by them, admitted by the Surgeons, and paying to the Barbers of *Edinburgh* a Sum of Money for this Tolerance; by which Usurpation, as they annually draw considerable Sums from such of the Inhabitants of the *Canongate* as follow that Business, and as the Barbers of *Edinburgh* make no Scruple to practise within the *Canongate*, so the Barbers of the
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Canongate have been tolerated openly and avowedly to practise within the City, tho' it must be admitted their Profits, in that Way, have been very inconsiderable, not a Tenth of what the Barbers in *Edinburgh* annually draw by their Practice in the *Canongate*.

The Barbers of *Edinburgh*, resolving for hereafter to exclude the Barbers of the *Canongate* from this Liberty of practising within the City, did, in the Beginning of this Year 1742, exhibite a most formidable Complaint to the Dean of Guild of *Edinburgh*, and his Council, with Concourse of the Fiscal of Court, against your Petitioners, and other Three of the Barbers of the *Canongate* as guilty of a high Trespass, in presuming to practise *shaving, polling and dressing of Hair, making, selling and dressing of Wigs within the City of Edinburgh*; and therefore concluding, that they should be severally fined in the Sum of 40 *l. Scots*, in Terms of an Act of the Town-council of *Edinburgh*, obtain'd by the Barbers of *Edinburgh* upon their own Supplication, whereby this Penalty of 40 *l.* is enacted, in Case any of the Barbers of *Edinburgh* should protect an Unfreeman.

Upon this Complaint, your Petitioners (tho' not residing within the Town, nor anywise subject to the Jurisdiction of the Magistrates of *Edinburgh, qua such*) were summoned to compare before the Dean of Guild and his Court; which Citation, however safely they might have disregarded, as the Inhabitants of the *Canongate* are nowise subject to the Jurisdiction of the Magistrates of the good Town, *qua such, extra territorium* of the *Canongate*; yet, as it seem'd more respectful, they compar'd personally in Court, the very Day to which they were cited, and pled their Declinature, tho' they had not then so much as seen the Complaint; whereupon the Dean of Guild, of the same Date, pronounced this Interlocutor, *Allowing your Petitioners to see and answer the Complaint, they finding Caution to appear, and give in their Answers against next Court Day*. In Terms of which, your Petitioner *John Wilson* was obliged to find
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Caution to compear, under the Penalty of 5 *l. Sterling*, which your Lordships will certainly be of Opinion was a most arbitrary Step of Procedure; first to cause cite Persons who lived out-with the Jurisdiction, and when they mov'd the Declinature, to compel them to find Caution to compear and give in Answers to the Complaint under a Penalty.

Your Petitioners were thereupon advised to bring the Cause by Advocation before your Lordships, which coming of Course before the Lord *Minto* Ordinary, the Pursuers were so sensible of the Incompetency of the Court, that they judicially agreed to the Cause's being advocated; and your Petitioners having also judicially acknowledged that they had shav'd and dress'd Hair within the City, the Lord Ordinary was pleased to pronounce the following Interlocutor, of Date the 28 *July* 1742, *Having advised the Representation with the above Debate, and the Defenders Acknowledgment, that tho' they are Unfree-men of the Barber Craft within the City of Edinburgh, they have within the Time libelled shaved, dress'd and polled Hair within the said City, and thereby encroached upon the Pursuers exclusive Right in the said Business; therefore, finds your Petitioners liable in the Pursuers Expences, and allows them to give in an Accompt thereof.*

This Interlocutor, as already said, bears Date the 28th of *July*, and upon the 29th, being the very next Morning, the Lord Ordinary having called the Cause at the Side-bar, when there was no Outer-house Hours, the Accompt of Expences being in his Lordship's Hands to the Amount of 8 *l.* 14 *s.* 2½ *d.* besides extracting the Decreet; and which Accompt your Petitioners had no Opportunity to see, far less to object against, his Lordship was pleased, by his Interlocutor of that Date, to decern for the whole Accompt, and for the Expences of extracting the Decreet, as the same should be ascertained by the Collector's Receipt or Declaration. And by his other Interlocutor, 30th *July*, did stop extracting till the 6th of *November*, that your Petitioners might have the Opportunity of stating the

Cafe to your Lordships, which they now humbly beg Liberty to do.

And, in the *first* Place, Supposing your Petitioners had done wrong in thus shaving, dressing or polling of Hair within the City of *Edinburgh*, they submit it to your Lordships if a Complaint on that Account is competent to the Barbers of *Edinburgh*, under their present Constitution, as they are no Incorporation, have no Deacon, are not Members of the original Incorporation of Surgeons and Barbers; and therefore cannot, as a Body incorporate, pursue, in Name of their Preses, for Encroachments upon their Right as an incorporated Society.

It has been already noticed, that shaving, polling and dressing of Hair, is, by the original Constitution and Seal of Cause, Part of Chyrurgery; so that none could be admitted into that Incorporation, even to the Effect of Barbarising, without first undergoing a Trial upon their Skill in Chyrurgery; in which if found qualified, they were thereupon admitted Members of the Incorporation, and were thereby entitled to exerce that Calling in all the Branches thereof, and upon that Footing does the original Incorporation subsist even to this Day; so that if any Encroachment is made upon the Privileges of the Incorporation in any of the Branches thereof, a Complaint or Prosecution on that Account can only be competent to the Incorporation itself, and not to the Barbers of *Edinburgh*, as they are now so denominated, who are no Members of that original Incorporation.

For your Lordships have also heard upon what Footing those who practise the Barber Trade in *Edinburgh* do now stand; it was recommended to the Incorporation of Surgeons, by the Act of Council 1682, to provide a sufficient Number of Persons capable of Shaving and Polling, who should be dependent upon the Incorporation, but were not to be Members thereof; and so your Lordships have found in the aforesaid Process of Declarator at the Barbers Instance, that they have no Right to the aforesaid original Seal of Cause; they are not an incorporated

rated Body in any legal Sense ; they have no Deacon ; they do not sit with the Members of the aforesaid original Incorporation, nor have any Vote in chusing the Deacon, or other Affairs of that Incorporation : So that however by their Admission from the aforesaid Incorporation they may be entitled to barbarise within the City, there is nothing either in the aforesaid Act of Council 1682, nor in any subsequent Grant from the original Incorporation, that gives them a Monopoly. It cannot be a Question, but that the Surgeons may to this Hour practise all the Parts of a Barber ; and however the Barbers of *Edinburgh*, so called, may, by their Admission from the Surgeons, be entitled to barbarise, which otherwise they could not do, it can by no Means thence follow, that, as a Body incorporated, they can prosecute third Parties on account of these alleged Encroachments ; the Right still remains with the original Incorporation ; and if any Encroachments are made, it is an Encroachment upon the Right of the Incorporation, which the Incorporation itself, and none other, are entitled to prosecute : So that upon this Point, supposing an Offence to have been committed, 'tis hoped your Lordships will be of Opinion, that the Prosecution thereof does allenarly belong to the Deacon, and other Office-bearers in the aforesaid original Incorporation, and not to the Preses of the Barbers so called, tho' under the false Designation of an Incorporation.

Nor can the Pursuers avail themselves of an Act of Council 1722, obtained upon their own Supplication, to which the Incorporation of Surgeons were not so much as Parties ; so that nothing thereby granted could prejudice their Right, or give the Barbers any greater Powers than they had by their Admission from the Surgeons ; nor does this Act enact any such Penalty as is here pursued for, *viz.* 40 *L. Scots*, for every Encroachment upon the Barber Craft, tho' 40 *L.* is thereby enacted against every Freeman who should protect an Unfreeman. And as a Specimen of this Act, which was past *ex parte* in the precise Terms of what the Barbers themselves demanded,

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one remarkable Article is, *That none should be allowed to practise as a Barber, within the Canongate, Leith, &c. but who should be admitted by the Barbers of Edinburgh*, tho' the *Canongate*, as already said, is nowise subject to the Jurisdiction of the Magistrates of *Edinburgh*, but *qua* Superiors of the Regality.

2^{dly}, Supposing the Action to be competent, and whatever Effect it might have as a Declarator of Right in Time coming, yet in the present Question, as to Penalties for bygone Offences, your Petitioners humbly apprehend themselves safe from the general, constant and avowed Practice ; for that, as the Barbers of *Edinburgh* have at Pleasure practised as Employment offered within the Burgh of the *Canongate*, so the Barbers of the *Canongate* have been allowed to practise within the Privileges of the City, not in a clandestine and hidden Way, but openly and avowedly.

The Pursuers are pleas'd to say, That they are entitled to practise within the Burgh of the *Canongate* by their Admission from the Incorporation of Surgeons, whereby they are authorised to exerce their Calling within the City, and Liberties thereof, which must comprehend the *Canongate*, as one of the Liberties of the City of *Edinburgh*. But this is plainly most affected ; the *Canongate* is none of the Liberties of the Royalty of *Edinburgh*, nor is anywise subject thereto, further than as in the 1639, the good Town purchast the Right of Superiority ; the *Canongate* have many Incorporations within themselves, and it is ludicrous to pretend, that any Persons, by being admitted Members of any of the Incorporations of *Edinburgh*, can practise within the Regality of the *Canongate*, unless they are also admitted Burgeses of the *Canongate*, or Members of some Incorporation thereof ; so that this mutual Tolerance established by ancient Practice, open and avowed, must at least have the Effect to exeem from any Penalty as to Bygones, reserving it to the Barbers of *Edinburgh* to declare their Right in Time to come as accords. And as the general
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Practice in Time bypast is not controverted, so if the same should now be denied, it is offered to be proven.

3^{dly}, Supposing the Barbers should be considered as an Incorporation established within a Royal Burgh, and as such entitled to pursue, it is submitted to your Lordships, if the Action is competent for recovering Penalties in a Case of this Kind, when none such are imposed by any Statute or Act of the Town-Council of *Edinburgh*. By the 24th Act, Parliament 1663, and 5th Act Parliament 2^d, Session 3^d of King *Charles II.* which were specially intended for establishing and securing the Privileges of the Royal Burghs, against all Encroachments from unfree Traders, &c. the Penalty of Contravention is declared to be Confiscation of the Goods; and it is thereby *in terminis* enacted, that the Magistrates of Burghs shall not on the Accounts foresaid, “any
“wise trouble or molest his Majesty’s Subjects, unless they
“be apprehended in the actual and present Transgression of
“the Privilege.”

This is the Sum of the Act, which must regulate all Controversies betwixt Unfreemen and the Incorporations of Royal Burrows: And therefore, supposing the Case, that an Unfreeman had dealt in Trade proper only to Freemen of the Royal Burrows, or had imported, within the Privilege of said Burrows, Goods of any Species which they were not intitled to traffick in, it would be a Novelty to maintain an Action against such Unfreemen, in order to recover Penalties, The Penalty which the Law has enacted is Confiscation of the Goods, if they are apprehended; and as the Legislator consider’d this as a sufficient Security of the Privileges of the Royal Burrows, the Pursuers cannot be heard, in their particular Case, to superad a Penalty which the Law has not enacted.

The same Thing obtains with Regard to the Duties and Customs of Goods imported contrary to Law, without Payment or Security of the King’s Duty; if the Goods are caught they are condemn’d; but if they escape, it has never hitherto
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been deem'd warranted by Law, to bring an Action even for Payment of the Duties, far less for imaginary Penalties as incur'd by the undue Importation.

In all such Cases, therefore, the Remedy prescrib'd by Law, is *inherere rei*; and surely the Barbers of *Edinburgh*, can with no Reason pretend to have a stronger Security than is provided to all the Royal Burrows, with regard to their Privileges; and therefore, supposing that a Shoe-maker in the Country should bring into the good Town and sell a Pair of Shoes off the Market Day, without being apprehended in the Transgression, 'tis, with Reason believed, no Complaint or Prosecution would ly for Recovery of any Penalty. And there is a Cause now depending before your Lordships, to be reported by the Lord *Arniston* Ordinary, at the Instance of the Good Town's Tacksmen, against a Number of Merchants, alledged Importers of Spirits and Wine, without Payment of the Town's Impost, where one of the Points taken to report, is this very Question, Whether the Action is competent, even for recovering the Town's Impost, *ex post facto*, where the Goods themselves were not stopped or apprehended upon the Importation? And surely such Action must still be less competent for recovering Penalties, which are not imposed by Law.

The Pursuers are indeed pleas'd to say, that this would evacuate their Privileges entirely, as all they could pretend to seize, would be the Barber's Bason, Razors and other Utensils proper for shaving, dressing or polling of Hair, which are so trifling, that it could not be consider'd as any Penalty whatever. But, with all due Submission, the Penalty even in this View would be full Reparation for any Damage sustained. A Barber does seldom earn above Sixpence, for most Part not Twopence at a Time for shaving, polling or dressing: And if, on that Account, he were to forfeit the whole Barber Accouttrements, the Penalty cannot be deemed too slight for the Offence. But it is sufficient, in the present Case, that no such Penalty as is here sued for, is decreed.

4thly, Supposing Expences were due, which as decerned for by the Lord Ordinary, are to the Amount of 8 £ . 14 s . 3 $\frac{1}{2}$, besides extracting the Decreet, which was the whole of the Accompt of these Expences, as claimed by the Pursuers, without any Modification, as your Petitioners have hitherto had no Opportunity to object to this Accompt, nor had so much as seen the same when it was decerned for, they must be forgiven shortly to state their Objections to your Lordships.

And with respect to the four first Articles, which regard the Proceedings before the Dean of Guild Court; as the Court was most incompetent, and the Citation given to the Defenders, who do not reside within the Jurisdiction; and this Incompetency, in Effect, acknowledged by the Pursuers Council, who therefore agreed, that the Cause should be advocated; it is surprising, how these Expences should be charged to your Petitioners, besides what might otherwise be objected to the Extravagance of some of these Articles; in one of which a Guinea is stated for drawing the Complaint, which would be overpaid with Half a Crown; and 12 s . and 6 d . for the Fiscal's Concurrence and Pleadings, when there was no other Proceeding before the Dean of Guild, but one single Interlocutor, ordaining your Petitioners to find Caution under a Penalty.

The next Nine Articles of the Accompt relate to the Bill of Advocation, for which, *inter alia*, no less than two Consultations to a Lawyer are stated. But, with all due Submission, if your Petitioners were entitled to have the Cause advocated, as well on Account of Incompetency, as of the Iniquity committed by the Dean of Guild in ordaining us to find Caution for our Appearance under a Penalty, before we were so much as allowed to see the Process; it is equally mysterious, how the Expences in opposing the Advocation before the Cause came to be argued, when the Pursuers consented, that the Advocation should go, should be charged as an Article of Expence against us.

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So that, in the last Place, supposing your Petitioners were to be liable in Expences, they can with no Reason be charged further, than with the last Nine Articles of the Accompt, and one Consultation to a Lawyer, and for a proportional Part of the Extract corresponding to the Proceedings after the Cause was advocated. But, as they humbly hope, your Lordships will see Cause to assoilzie them from Expences *simpliciter*; it is unnecessary to be more particular in these Objections.

May it therefore please your Lordships, to alter the Lord Ordinary's Interlocutor above-recited, and to find, in the first Place, That no Prosecution on Account of this alledged Trespass is competent to the Pursuers, but that the same does allenarly belong to the Incorporation of Surgeons. 2dly, To sustain our Defence against Penalties for Bygones founded upon the general, constant and avowed Custom of the Barbers of Edinburgh their practising within the Burgh of the Canongate; and the Barbers of the Canongate their being tolerated in the same publick and avowed Manner to practise within the City. 3dly, In all Events to find, That as no such Penalty is enacted, as was here pursued for, the Defenders ought not to be liable in Expences for defending against that Penalty: And, in the last Place, if Expences are to be awarded, to find, That your Petitioners cannot be liable to any Expences contained in this Accompt, but such as were truly expended, after the Cause was advocated.

According to Justice, &c.

ALEX. LOCKHART.