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which I have adverted, that the Court would exercise a sound discretion, in a case of this description, in saying, that Alexander Ritchie ought not to be permitted to rest the case on an appeal to the oath of his brother.

My Lords, the result of what I have stated will be in substance to affirm the judgment of the Court below ;—the only doubt that has occurred to me has been with respect to the terms in which that judgment has been pronounced. The judgment of the Court below is in these terms: ‘ In respect that James Ritchie was convicted
‘ and received sentence for a crime which rendered him infamous,
‘ find, That the proposed reference to his oath is incompetent; and
‘ remit to the Lord Ordinary to proceed accordingly, and to deter-
‘ mine all questions as to expenses.’ Substantially, I should recommend to your Lordships to affirm the judgment; but I am apprehensive, if it is affirmed precisely in the form in which that judgment is pronounced, it may be considered that the Court below meant to lay down as a general rule, and that this House has concurred in the opinion, that where a party had been convicted of a crime which rendered him infamous, under no circumstances, and between no parties, could reference be made to his oath; and I apprehend your Lordships would not be disposed, at least unnecessarily, for it is unnecessary to the decision of this case, to lay down such a doctrine. For the purpose, therefore, of avoiding such a conclusion being drawn from the terms in which this judgment is pronounced, although I should recommend to your Lordships to affirm the judgment in substance, I should suggest at the same time that some alteration should be made in the terms in which the interlocutor is conceived;—that particular alteration I shall take the liberty, on a future day, of submitting to your Lordships.—Ordered accordingly.

Appellant's Authorities.—(2.) Elchies, No. 7. voce Member of Parliament.—(3.) 2. Bell, 512.; 4. Ersk. 2. 21.; Halkerston, Feb. 26. 1783, (12,476).

Respondent's Authorities.—(2.) Burnet, 396.; 4. Ersk. 2. 23.; Black, Dec. 22. 1815, (F. C.); Smith v. Knowles, (Jury Court, 1824).—(3.) 1. Bell, 253.; Tait's Law of Evidence, p. 279.

ANDREW M'CRAE—JAMES DUTHIE,—Solicitors.

CHARLES CUNNINGHAM and CARLYLE BELL, Town-Clerks of No. 36.
Edinburgh, Appellants.—*Sol.-Gen. (Tindal)—Adam.*

HUGH VEITCH, Town-Clerk of Leith, Respondent.

Public Officer—Town-Clerk—Exclusive Privilege.—Held, (ex parte, reversing the judgment of the Court of Session), That the right to receive the fees and emoluments of preparing charters, precepts of clare constat, and other feudal writs granted to

or by the Magistrates of Edinburgh, relative to subjects situated within the burgh of barony of South Leith, and of which the superiority had been acquired by the Magistrates posterior to 1565, is not necessarily incident to the office of clerk of South Leith; but although he had shewn a prima facie case of the right to draw them, yet it was competent for the town-clerks of Edinburgh to prove either a direct authority given by the superiors to them to draw them, or such usage as necessarily inferred such authority.

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1ST DIVISION.
Lord Eldin.

MR VEITCH, as clerk of the burgh of barony of South Leith, under a commission granted to him by the Magistrates of Edinburgh, the superiors, which conferred on him ‘the same fees, profits, emoluments, and casualties thereto belonging, which his predecessors did, might, or could enjoy,’ brought an action against the appellants, the town-clerks of Edinburgh, setting forth, ‘that, in virtue of the said office of clerkship thus conferred upon him, the pursuer has the sole right to prepare all original charters, or charters by progress, precepts of clare constat, and other feudal writings, deeds or instruments, granted by or to the Lord Provost, Magistrates, and Council of the said city, as representing the community thereof, of property situated within the town of South Leith and liberties, privileges and pertinents thereof; and to receive all the fees, profits, emoluments, and casualties arising from this department of his office. That the present Lord Provost, Magistrates, and Council of the city of Edinburgh, and their predecessors in office, have, for several years bypast, permitted those rights and privileges belonging to the pursuer to be greatly encroached upon by the principal clerks of the said city, who have assumed the power of preparing many of those deeds and instruments, and of appropriating to themselves the fees and emoluments thereof,—and the pursuer has in consequence been deprived of the fees, profits, emoluments, and casualties arising therefrom:’ He therefore concluded to have it found and declared, ‘that the pursuer, as clerk of South Leith, has the sole and undoubted right to prepare and to receive the fees, profits, emoluments and casualties, for all charters, both original and by progress, all precepts of clare constat, and all other feudal writings, deeds, and instruments of every description, to be granted to or by the Lord Provost, Magistrates, and Council of the city of Edinburgh, and their successors in office, of property situated within the town of South Leith, and liberties, privileges, and pertinents thereof.’

In defence the appellants stated, ‘that the precise rights and privileges of the clerk of Leith, as opposed to those of the town-clerk of Edinburgh, have been fixed and settled by long usage.

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‘ He enjoys, within the town of South Leith, the right and privilege of preparing all renewals of investitures, whether in favour of heirs or singular successors, in every case where the property was feued out prior to the period when the superiority was acquired by the Magistrates of Edinburgh. But, in so far as regards original grants since that period, and the renewals of such original grants, it has been the right and privilege of the town-clerks of Edinburgh, as well in virtue of their office as by long and uniform usage, to prepare all such; and, therefore, the declaratory conclusions in the pursuer’s summons are by far too broad, and ought to be limited in the manner now mentioned.’

After some preliminary procedure, Lord Eldin pronounced this interlocutor: ‘ Finds that the pursuer, as town-clerk of South Leith, has the sole and undoubted right to prepare and receive the fees, profits, emoluments, and casualties, of all renewals of investitures, whether in favour of heirs or singular successors, of property situated within the town of South Leith, and liberties, privileges and pertinents thereof, in every case where the property was feued out prior to the period when the superiority of South Leith was acquired by the Magistrates of Edinburgh; and decerns and declares accordingly: quoad ultra assoilzies the defenders from the conclusions of the summons, and decerns.’

Veitch having reclaimed, the Court, after appointing him to lodge a condescendence of the boundaries of the burgh of Leith, pronounced, on the 16th May 1826, this judgment:—

‘ Recall the interlocutor of the Lord Ordinary reclaimed against, in so far as applies to the case of the town-clerks of Edinburgh: Find that the petitioner, as town-clerk of the burgh of barony of South Leith, has the sole and undoubted right to prepare and receive the fees, profits, emoluments, and casualties, for all charters both original and by progress, all precepts of clare constat, and all the feudal writings, deeds and instruments of every description, to be granted to or by the Lord Provost, Magistrates, and Council of the city of Edinburgh, and their successors in office, of subjects situated within the said burgh of barony of South Leith, according to the boundaries thereof, as now fixed and ascertained, so far as concerns the rights of parties in this process, by the mutual minutes in process,—the superiority of which subjects the said Lord Provost, Magistrates, and Council, hold in virtue of their rights to the superiority of the said burgh of barony, and as part of the said burgh of barony, excepting the King’s work, and the subjects within the aforesaid boundaries, the superiority of which was not com-

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Cunningham and Bell appealed; but no case was lodged, nor appearance made for Veitch.

Appellants.—There are certain duties, peculiar to the clerk of every burgh, which can be exercised by no other person; and he is entitled to the emoluments arising out of the performance of these duties. The appellants, therefore, do not dispute that the respondent is entitled to the profits arising out of his proper office, as clerk of Leith. But the question here is, whether, as town-clerk, he is entitled exclusively to prepare all the charters, precepts of clare constat, and other feudal writings granted to or by the Magistrates of Edinburgh, in relation to subjects situated within the burgh of barony of South Leith. The appellants maintain, that, as clerk, he has no such exclusive right. It is in the power of the Magistrates, like any other proprietor or superior, to employ any man of business they think fit. The property over which they are superiors is not burgage, and the superiority forms part of the private estate of the city of Edinburgh. But there is nothing in the commission granted by the Magistrates to the respondent, which bestows on him such an exclusive right. Neither has he any title arising out of immemorial usage, except to the limited extent admitted in the defences. The appellants were ready to have shewn in the Court below, that no such usage existed; and although it was incumbent on the respondent to have proved the existence of the usage, yet no proof on the subject was allowed. Neither is there any such usage in regard to other burghs of barony;†

* 4. Shaw and Dunlop, No. 371.

† On this point the appellants stated, that by accurate inquiries they had ascertained, 1st, That in 30 burghs of barony, the charters and other feudal writings, granted by the respective superiors, of property situated within their limits, are not prepared by the town-clerks at all, but by other men of business appointed by the superiors. 2d, In two burghs of barony, the town-clerk is in use to prepare a certain class of the charters, &c. granted by the superiors, but not the whole of them. 3d, As to the remainder of

and the appellants were able to have proved, that the town-clerks of Edinburgh have uniformly enjoyed the privilege of preparing original grants flowing from the Magistrates subsequent to 1565, when the superiority was acquired by the Magistrates; but this was not permitted by the Court below to be proved. June 24. 1829.

The House of Lords pronounced this judgment:—‘ The Lords
 ‘ find, that the right to prepare charters, and other writings of
 ‘ the description mentioned in the said interlocutor of the 16th
 ‘ May 1826, and to receive the fees, profits, and emoluments
 ‘ and casualties thereof, is not necessarily by law incident to the
 ‘ office of town-clerk of a burgh of barony, such as that of South
 ‘ Leith; but that, under the circumstances of this case, the Lords
 ‘ are of opinion, that there is a prima facie case established in
 ‘ favour of the claim of the town-clerk of South Leith; and that
 ‘ the town-clerks of Edinburgh are entitled to shew, on their side,
 ‘ that the said fees, profits, emoluments and casualties, and the
 ‘ right to prepare the said charters and writings, belong to them,
 ‘ either by the proof of some direct authority for that purpose
 ‘ given to them by the persons entitled to the superiority, or by
 ‘ evidence of long and continued usage, from which such autho-
 ‘ rity may be legitimately inferred; and it is therefore ordered
 ‘ and adjudged, that such parts of the interlocutors appealed
 ‘ from as are inconsistent with the above findings be reversed:
 ‘ And it is further ordered, that the cause be remitted back to
 ‘ the Court of Session, to do farther therein as may be consistent
 ‘ with the above findings, and this judgment, and as may be just.’

LORD CHANCELLOR.—My Lords, There is a case which stands for the judgment of your Lordships; a case in which Charles Cunningham and Carlyle Bell, who are described as writers to the signet, and conjunct town-clerks of the city of Edinburgh, are the appellants; and Hugh Veitch, town-clerk of Leith, is respondent. This, my Lords, is an appeal from certain interlocutors pronounced by the Court of Session in proceedings originally instituted by Mr Veitch, as town-

the burghs of barony, the appellants have no certain information; but in the course of the whole of their inquiries on the subject, they have not been informed of any instance in which the town-clerk prepares the whole of the feudal deeds flowing from the superior, with the single exception of the burgh of barony of Paisley. It ought to be explained, however, that Paisley stands in a particular situation. It held originally of the Church, and the superiority was afterwards acquired by the Magistrates of the burgh, for the community. Hence the Magistrates themselves grant the investitures, and are naturally led to employ their own clerk in preparing them.

June 24. 1829. clerk of South Leith, for the purpose of establishing his right 'to prepare and receive the fees, profits, emoluments and casualties, for all charters, both original and by progress, all precepts of clare constat, and other feudal writings, deeds, and instruments of every description, to be granted to or by the Lord Provost, Magistrates, and Council of the city of Edinburgh, and their successors in office, of property situated within the town of South Leith, and the liberties, privileges, and pertinents thereof.' This was the object for which the suit was instituted by the town-clerk of South Leith.

It appears that South Leith is a burgh of barony, the superiority of which belonged, in the 16th century, to a person of the name of Logan. In the year 1555 that superiority was sold to the Crown of Scotland, and about ten years afterwards, in the year 1565, the superiority was again transferred by the Crown of Scotland to the city of Edinburgh. The city of Edinburgh has held that superiority from the year 1565 down to the present time; and, as being the superiors, the Provost, Magistrates, and Council of the city of Edinburgh, have from time to time appointed the town-clerk of South Leith. The appointment of the present town-clerk of South Leith is in the terms I shall read to your Lordships. It appears that he paid the sum of L. 1200 for the office, and the appointment was,—'We hereby elect, nominate, and appoint the said Mr Hugh Veitch to be clerk of South Leith, and that ad vitam aut culpam, hereby giving and granting to him the same fees, profits, and emoluments and casualties thereto belonging, which the said Mr John Pattison, or any of his predecessors in the said office, did, might, or could enjoy; and with power to appoint a deputy.' It appears also that the terms of the appointment of the joint town-clerks of Edinburgh are nearly the same, or in substance the same, as the appointment to which I have referred.

Now, my Lords, it is under this appointment of the town-clerk of Leith that he has made the claim which I have stated; and that claim is, 'to prepare all charters, both original and by progress, all precepts of clare constat, and other feudal writings, deeds, and instruments of every description, to be granted to or by the Lord Provost, Magistrates, and Council of the city of Edinburgh, and their successors in office, of properties situated within the town of South Leith, liberties, privileges, and pertinents thereof; to receive the fees and profits, and prepare the deeds.'

When this case came on before the Lord Ordinary, he did not find the right to the extent that was claimed; on the contrary, he was of opinion that the pursuer, as town-clerk of South Leith, had the sole and undoubted right to prepare and receive the fees, profits, emoluments, and casualties of all renewals of investitures, whether in favour of the heirs or singular successors of property situated within the town of South Leith, and liberties and pertinents thereof, only in any case where the property was feued out prior to the period when the superiority of South Leith was acquired by the Magistrates of Edin-

burgh. When the case was afterwards brought before the Court of Session, the Court were of opinion that the restriction imposed by the Lord Ordinary was not correct, and that the right of the town-clerk of South Leith was to prepare the deeds, not only of the property that had been feued out before the year 1565, but also of the property that had been feued at any subsequent period, provided it was a part of the property under the superiority which was granted to the city of Edinburgh by the Crown at the period to which I have referred. June 24: 1829.

Now, my Lords, the point that has arisen, by way of appeal, is against that decision of the Court of Session; and the question is, whether that decision can be sustained? I mean, whether that decision can be sustained under the circumstances in which it was pronounced.

It appears in the papers on your Lordships' table,—and it appears, I think, from what fell from the learned Judges themselves,—that the right of preparing these charters is not by law necessarily incident to the office of town-clerk—it is not a necessary part of his duty. It appears, that not unfrequently (and it is natural) the town-clerk is entrusted by the person entitled to the superiority with the discharge of this particular duty; but it does not, from the mere appointment of the person to the office of town-clerk, follow that he has a right to prepare writings of this description. Indeed it was admitted, as stated by one of the learned Judges—the Lord President—that the Magistrates of the city might employ any person they thought proper for that purpose. It seems necessarily to follow, my Lords, that if this is not by law a necessary incident to the office, we must then come to consider it as a question of fact, namely, whether the person holding the office of town-clerk for the time being has had this right conveyed and granted to him, either by the city of Edinburgh, or by the persons holding the superiority for the time being?

Now, my Lords, it was admitted, and that was the foundation of the judgment of the Lord Ordinary, that, with respect to the property which was feued out previously to the granting of the superiority to the city of Edinburgh, the right was in the town-clerk; and I should conceive, that if the evidence was of such a description as to shew that the right was in the town-clerk of Leith, in respect of property feued out down to the period to which I have referred, that would form a *prima facie* case, which might justify the Court, in the absence of all other evidence, to conclude that the general right belonged to the town-clerk of Leith; but still it was competent, as I apprehend, to the persons contesting this claim, namely, the joint town-clerks of the city of Edinburgh, to say, that this particular privilege had to a certain extent been granted to them. If, for instance, they had produced any authority to them for the performance of those acts, that would have been a sufficient answer to the case set up on the other side; or it was competent to them to rely upon evidence of what had been the usage in this respect before the tribunal which was to decide on the case; and if doubts occurred one way or the other from the effect of

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I apprehend, therefore, my Lords, that in this case the course we ought to pursue would be this:—That it would be proper that your Lordships should remit, for the consideration of the learned Judges of that Court, the question to which I have referred, namely, whether there is evidence to shew that the whole of this right, or any part of this right, was conferred by those who had the power of conferring it, namely the superiors, the Provost, Magistrates, and Council of the city of Edinburgh, on the town-clerks of the city of Edinburgh? whether the Court are satisfied that this authority was conferred on the joint clerks of the city of Edinburgh? or whether the evidence of usage was of such a description as to lead them to the conclusion that such an authority had been formerly granted? I think that it is proper that a minute should be prepared, under these circumstances, for the purpose of the case being submitted to the Court of Session, that they may go into that investigation with a view of ascertaining whether, in point of fact, there is evidence to shew that the Magistrates have done that which in point of law they had a power of doing, namely, conferring this right on the joint town-clerks of the city of Edinburgh. I shall take the liberty of preparing this minute, and submit it to the consideration of the House on a future day.

My Lords, I embrace this opportunity of stating to your Lordships, that your Lordships are in this case put into a situation of considerable difficulty. The appellants appear at your Lordships' bar. They have printed their Case, and they attend here by Counsel, for the purpose of impeaching the judgment of the Court of Session. There are no papers printed in support of that judgment; no Counsel attend for the purpose of stating the grounds on which the judgment was pronounced; and we are driven to the necessity, in this *ex parte* proceeding, of going over those papers printed by the appellants, and collecting, as well as we can, the facts of the case, and the grounds of the judgment. We are proceeding with some degree of hazard, when under such circumstances we undertake, either in whole or in part, to differ from the Court below. But it is our duty to exercise the best judgment we are able. I have read over these papers, and I have arrived at the result, that this is a question of facts which ought to be submitted to the consideration of the Court below, who should examine the evidence of usage, for the purpose of ascertaining whether that usage has been of such a nature, and carried on and conducted under such circumstances, as to lead fairly to the inference, that the Magistrates of the city of Edinburgh have conferred this privilege on the town-clerks of the city of Edinburgh. If the Court below should be of opinion that there was no sufficient evidence for the purpose of establishing that fact, there is, I think, a *prima facie* case on the other

side, in support of the claim which has been preferred by the town-clerk of Leith, as modified by the decision of the Court below. June 24. 1829.

Appellants' Authorities.—2. Bank. 3. 70.; 1. Bell on Deeds, p. 383.; 1. Ersk. 1. 30.; 1. Bank. 1. 71.; 1. Ersk. 1. 46.

SPOTTISWOODE and ROBERTSON,—Solicitors.