## No. 43. SOCIETY OF SOLICITORS, Edinburgh, Appellants.—*Lushington*—*Robertson.*

## MATHEW SMILLIE and Others, Respondents.
*John Campbell—Spankie.*

*Exclusive Privilege.*—Held (affirming the judgment of the Court of Session) that the Society of Solicitors before the Sheriff Court of Edinburgh, have no exclusive privilege of practising before the Court of the Sheriff-substitute of Leith.

Nov. 24, 1830.

1ST DIVISION. Lord Corehouse.

BY a statute passed in 1827, relative to the town of Leith, it was enacted:—'That it shall and may be lawful for the Sheriff-'depute of the county of Edinburgh, and he is hereby specially 'authorized and required to nominate and appoint, and from 'time to time thereafter, as any vacancy may occur, or pro tem-'pore if necessary, a fit person, qualified according to law, to 'be the Sheriff-substitute in and for the said town of Leith, and 'such districts adjoining thereto, as to the said Sheriff-depute 'shall seem proper, for the due administration of justice within 'the same.' 'And be it further enacted, that the said Sheriff-'substitute shall be resident within the said town of Leith, and 'shall keep or hold such daily or regular Courts therein, in the 'Court-room to be provided for that purpose, in manner after 'mentioned, as shall be necessary for the full and due adminis-'tration of justice, both civil and criminal, in the said town of 'Leith, as fully as it is competent to any Sheriff-substitute else-'where in Scotland; and the sentences or judgments of the 'said Sheriff-substitute, as Sheriff-substitute, or as Deputy-'Admiral, shall be subject to such and the like review, as the 'sentences or judgments of any Sheriff-substitute, or Deputy-'Admiral, are severally and respectively subject, and liable to 'by the law and practice of Scotland.' It was farther declared, that nothing contained in the statute should affect the power of the Sheriff to exercise all the powers competent to him, including those intrusted to his substitute at Leith, nor injure the rights of any other party, but that the statute should not bestow any right or power on any persons or bodies corporate, which they did not already possess, other than those conferred by the statute.

In consequence of this enactment, and upon a recital of it, the Sheriff appointed a substitute for the town of Leith and certain adjacent districts, with power to him to hold Courts. He also, in virtue of his power as Sheriff of the county, appointed the same gentleman to act as his substitute, not only

for the town of Leith and the above district, but for the whole county. In consequence of this appointment a Court was opened at Leith. Previous to this time, the only Courts which had been held there were those of the Admiral and the Bailie of Leith. Nov. 24, 1830.

By an Act of Sederunt of the Court of Session, relative to inferior Courts, dated 15th November, 1825, it was ordered that 'No person shall be allowed to practise as a procurator, unless 'he has served three years as an apprentice to a writer to the 'signet, solicitor before the Supreme Courts, or to a procurator 'before any Sheriff Court in Scotland, or Court of Royal Burgh, 'or Sheriff-clerk, be twenty-one years of age, and be regularly 'admitted by the Sheriff, without prejudice to the legal rights 'of chartered bodies, and without prejudice to the present regu-'lations of each Sheriff Court on this subject continuing in 'force for three years from this date.' It was also declared, 'That it shall be competent for any Sheriff-substitute to suggest 'for the consideration of the Lords of Council and Session, &c. 'such other or farther regulations for the forms of process in the 'Sheriff Courts as may appear expedient; such suggested regu-'lations being transmitted for that purpose to the senior Prin-'cipal Clerk of Session.' At this time the Leith Court was not in contemplation.

On the institution of this Court, the respondents, Mathew Smillie, Alexander Ross, John Harvie, and Alexander Simpson, writers and practitioners before the Admiralty and Bailie Courts of Leith, presented petitions to the Sheriff, praying that he would admit them as 'ordinary procurators in the 'Court of the Sheriff-substitute of Leith, within the bounds 'of his jurisdiction.' The Sheriff appointed this application to be notified to the incorporated Society of Solicitors before the Commissary, Sheriff, and City Courts of Edinburgh, that they might be heard for their interest, and ordained the above parties to lodge a condescendence, showing their qualifications in terms of the Act of Sederunt. This order was, at their request, recalled, as they admitted that they did not possess the qualifications there mentioned; but they submitted that, in terms of a provision in that Act, and as the institution of this new Court was casus improvisus, the Sheriff should suggest to the Court of Session the propriety of dispensing with the specific qualifications there required; and as they were duly qualified in point of skill, that they should be admitted to practise before the new Court. This motion was in the meanwhile superseded, and answers were lodged by the Society

Nov. 24, 1830. of Solicitors, who objected, that if the petition were granted, it would be an encroachment on their exclusive privileges. In support of these privileges they stated, that in 1707 they had been constituted a Society by articles of agreement, which were confirmed by the Commissaries of Edinburgh in the same year;—that in March 1765, the Magistrates of Edinburgh had granted to them a Seal of Cause, conferring on them 'the sole and exclusive privilege of exercising the office or business of procurators before all the Courts held by the Magistrates of Edinburgh, in all time coming;' that in the same year the Sheriff of the county had, upon their application, passed an Act of Sederunt, ordaining that, before any person could be admitted as a procurator, he must have served an apprenticeship with one of their body; and that, on the 12th of April 1780, they had obtained a Royal Charter, proceeding on the narrative of these rights, constituting them an incorporation 'per nomen et titulum 'Societatis Solicitatorum coram Commissarii Vicecomitis et Civi-'tatis Curiis Edinburgi,' and containing a clause in these terms:—'Et ulterius, nos volumus et declaramus, quod nemo jus ha-'bebit aut instructus erit causas agere et exercere coram Com-'missarii Vicecomitis et Civitatis Curiis Edinburgi, vel socius 'fieri dictæ Societatis et corporationis, nisi talis persona prius 'regularum indenturam inserviverit pro tribus annis cum uno 'ex sociis corporationis, attenderit illas curias tanquam clericus 'pro tribus annis alterius post expirationem talis indenturæ, et 'attenderit Collegium legum Scotiae pro uno anno, et subiverit 'privatam examinationem coram Societate, ac etiam publicam 'examinationem in forma nunc usitata de ejus notitia stilorum, 'forma processuum et principium legum Scotiæ, tali persona 'semper existente bonæ famæ et deportationis, solvente feoda 'admissionis tunc usualia et præstabilia, tabilia et contribuente 'ad fundos dict. corporationis cum aliis sociis. Declarando 'quod nihil in præsentibus intelligitur vel intenditur derogare 'ab, impugnare vel afficere privilegia Juridicæ Facultatis.' They farther stated, that in virtue of the ratification of the Commissaries—the Seal of Cause of the Magistrates—the Act of Sederunt of the Sheriff, and the Royal Charter, they had enjoyed the exclusive right of practising before these respective Courts.

To this it was answered: 1st, That although the Court established at Leith was called a Sheriff Court, and was placed under the jurisdiction of the Sheriff of the county, yet it was a new Court created and established by the Legislature, to which, therefore, the exclusive privileges of the Society could

not extend; and 2d, That even if it had not been a new Court, Nov. 24, 1830.
the privileges of the Society were confined to the Court held by the Sheriff within the city of Edinburgh, and did not extend to Courts held by him or his substitutes in other parts of the county.

The Sheriff pronounced this interlocutor:—'The Sheriff having resumed consideration of this process; In respect that all 'rights of monopoly or exclusive privilege ought to be strictly 'interpreted; and in respect that the expressions, "the Commissary, Sheriff, and City Courts," used in the Crown Charter '1780, appear only to apply to the Courts then existing, and 'held in Edinburgh; and that, at the dates of the Act of Court, '16th May 1765, and of the Crown Charter 1780, the Sheriff 'Court held in Edinburgh was the only Sheriff Court for the 'county; Finds, that the right conferred on the Society of Solicitors-at-Law, by the Act of the Sheriff Court, 16th May '1765, and the Crown Charter 1780, must be held restricted 'to the Sheriff Court then constituted and held in Edinburgh, 'and cannot be extended to the right of practising in a Court 'not then in existence, or held in any other place of the county 'of Edinburgh: Therefore, Repels the defences founded by 'the Society of Solicitors-at-Law, on the Act of Court 1765, 'and the Charter 1680: Finds, that the petitioners are not 'qualified, in terms of the Act of Sederunt, November 1825, to 'be admitted to practise in the Sheriff Court: And supersedes 'for six weeks consideration of the expediency of the Sheriff, 'in terms of the last section of the Act of Sederunt, submitting 'for consideration of the Court of Session any suggestion in 'favour of the petitioners, in order that the respondents may, 'in the mean time, have an opportunity of taking such legal 'steps as they may think necessary for having the legal rights 'for which they contend established in a competent form.' The Sheriff at the same time issued the subjoined note.*

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* 'I am of opinion, that the expressions, "Commissary, Sheriff, and City Courts of Edinburgh," only apply to the Courts held in Edinburgh. No other construction is applicable to the City Court. It is unreasonable to suppose that the same word, Edinburgh, can have a broader construction, in reference to the Sheriff Court, so as to comprehend the whole county of Edinburgh, and the construction of the word, as applying either to the city or to the county of Edinburgh, is inapplicable to the Court of the Commissaries of Edinburgh, the jurisdiction of which extends over the whole of Scotland. If the Commissaries were to hold a court in Glasgow, pro re nata, could the respondents plead that they are the only procurators entitled to practise before the Court thus held in Glasgow? Every legal practitioner must reside, or have chambers, within the bounds of the jurisdiction within which he practises, so that he may easily be made amenable to the orders of

Nov. 24, 1830. The Society having brought an Advocation, and the Lord Ordinary having reported the case, the Court, on the 4th December 1828, repelled the Reasons of Advocation; remitted it simpliciter, and found expenses due.* Thereafter the Court,

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the Court. On this ground, no person can be admitted a procurator in the Leith Court, unless he be either residing, or his chambers be within, the jurisdiction of that Court. With regard to what is stated in page 51, and subsequent pages of the duplies, I have to observe, that any appeals from the interlocutors of Mr Mathieson in Leith district cases, must be entered in the Leith Court, and the process then sent to me; and that my interlocutor will be entered in the books of the Leith Court, and not in the books of the Edinburgh Court; and the whole proceedings, even after appeal, will be carried on by the Leith practitioners.'

* 'The following notes of the speeches of the Judges were laid before the House of Lords:

'*Lord President.* I would remark, that the Act of Parliament does not speak of the Courts of the Sheriff of Edinburgh, but the Sheriff Courts of Edinburgh, which is a very different phrase.

'*Lord Balgray.* I think the Sheriff, by his interlocutor, has put the matter on the proper footing; without deciding on the petitions presented by the respondents, he reserves to himself to apply to this Court for instructions.

'*Lord President.* It is said some of these gentlemen may go down and settle in Leith; but they have not yet done so, nor do we know that they will do so; and, in the meantime, are the people of Leith to have nobody to conduct their causes?

'*Dean of Faculty.* I beg your Lordships' attention to the terms of the Charter. You will find the clause on page 8. (Read the clause beginning at ulterius.) The terms of the Charter are plainly the Courts of the Sheriff.

'*Lord Balgray.* Suppose the clause was as broad as the Dean of Faculty would make it, it never could deprive the Sheriff, and it never could deprive this Court, of the right to make regulations, such regulations as may be necessary for the lieges. Let the interpretation of the Charter be as broad as it will, it could not deprive this Court of the power of making regulations for the due administration of justice.

'Suppose the Sheriff found it necessary to hold a court at Portobello, he has power to do so; but suppose he found that necessary from the increase of that village, it is true, that all the procurators would be entitled to practise there; but still, if resident procurators were necessary, this Court might make regulations regarding these.

'My brother, Lord Craigie, will remember, that the Sheriff of Dumfries used to hold his Court occasionally at Lochmaben, and he went to the Court there attended by all the procurators from Dumfries. In the same way, all the procurators might go in the train of Mr Mathieson to his Court at Portobello. But if it turns out that the public are not supplied, is it not in the power of the Sheriff, and is it not the duty of your Lordships, to appoint procurators? I think, in this case, the Sheriff has put the matter just where it should be.

'*Lord Craigie.* I rather think that, before giving any judgment on the rights of the parties, the Sheriff should have come to this Court for instructions.

'In regard to the case of the Sheriff of Dumfries, alluded to by my brother, it was, no doubt, the practice of the Sheriff to hold a Court at Lochmaben, and he was attended there by the procurators from Dumfries, but, what was worse, the expense was put upon the poor litigants. This was complained of, and I at last suppressed the Court at Lochmaben altogether.

'This is a case, however, somewhat different from that of Lochmaben; for there is not merely a Sheriff Court held at Leith, but the Government has expressly en-

on the suggestion of the Sheriff, so far modified the Act of Nov. 24, 1830. Sederunt, as to authorize the Sheriff to admit the respondents as procurators before the Sheriff Court of Leith.

The Society appealed.*

*Appellants.* 1. At the time when the respondents presented their petition to the Sheriff, they had no legal title to maintain the prayer of it. They admit that they had not the qualification required by the Act of Sederunt, and the subsequent modification of that act, and the admission of the respondents, cannot affect the right of the appellants to object to the title of the respondents. Their petitions, therefore, ought to have been dismissed.

2. The judgments are ultra petita. The only question which was raised by the petition of the respondents, was, whether they were entitled to be admitted as practitioners before the Leith Court. But the Courts below have decided a point which was not before them, by finding that the exclusive privileges of the appellants are confined to the Courts in the city of Edinburgh.

3. The judgments proceed on a misconstruction of the terms of the charter. It is quite clear that it was the meaning and intention of that deed to confer upon the appellants the exclusive right of practising before the Sheriff, and in order to enjoy this privilege, they are required to possess certain qualifications. It never could be meant, that if the Sheriff were to hold his Court out of Edinburgh, that any person, whether qualified or not, might practise before him. But it is said that the Court at Leith is a new Court. In one sense it is so; but it is a Court of which the Sheriff is the head; and, if the appellants be right in their construction of the charter, that they have the exclusive right of practising before the Sheriff, then they must also have that right in regard to the Court in question.

The counsel for the respondents were stopped.

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abled and required the Sheriff to do so, in consequence of the size, importance, and population of the place, and I think it necessary that there should be procurators there to conduct the business of the Court.'

* The Lord Chancellor Brougham, before counsel were heard in this case, stated that, as he had been consulted when at the bar for the appellants, he would rather decline hearing the cause; but at the request of the respondents, and by consent of parties, his Lordship heard it.

Nov. 24, 1830. LORD CHANCELLOR.—My Lords, in this cause, if I had entertained any thing like a reasonable doubt of the soundness of the judgment of the Sheriff, and of the Court of Session, I should not have advised your Lordships to decide, without hearing the counsel of the respondents; but, after having given my individual attention to the cause—to the powerful arguments of the appellants' counsel—after having carefully considered the facts which are not disputed, and referred to the several instruments, viz. the regulations of the Commissaries—the Seal of Cause of the City of Edinburgh, of 6th March 1765—the Act of Court of the Sheriff-depute of the county of Edinburgh, of the 16th May 1765—the Royal Charter of 1780, and the Act of Parliament of 7th and 8th Geo. IV.—I entertain no doubt whatever, that the Court have come to a right decision, in repelling the reasons of advocation, and remitting to the Sheriff. Your Lordships, sitting in the highest judicature, will always be anxious to set the salutary example of avoiding, in any particular case, to deal with questions which do not present themselves as necessary for the decision of that case. This measure of judicial reserve is the more needful, in proportion to the importance of the questions which are thus unnecessarily offered to the Court; but if there be any question to which this rule ought to be with peculiar strictness applied, it is where matters of great general and constitutional import, such as the rights and prerogatives of the crown, are involved. If, indeed, the interests of the subjects of the crown could not be well adjudged without going into the discussion of those high questions, your Lordships must, no doubt, of necessity, go into the enquiry; but it must always be inexpedient to do so, where the necessity does not exist. It is extremely satisfactory to me, that, in affirming the interlocutors complained of, I do not find it necessary here, any more than the learned Judges below deemed it requisite, to raise the point, how far the crown could, by law, grant the exclusive right in question. To enable the appellants to prevail, they must satisfy your Lordships of the truth of both the propositions maintained by them, first, That by the Act of the Commissaries, the Seal of Cause of the Magistrates of Edinburgh (which would, indeed, only give them the right to sue and be sued), the Act of Sederunt of the Sheriff-depute, or the Crown Charter of 1780—that by all of these instruments together, or by long usage, with or without those authorities, there is something, I will not call it monopoly (though the case cited from Viner would plainly authorize the appellation), but some kind of exclusive right conferred on them to practise in the Courts to which the instruments refer, and an exclusive right of a large and indeed peculiar nature; for it is not only to be applied to Courts existing at that time, which it ought to be, but to new Courts to be created in future times. But, secondly, after the appellants shall have satisfied your Lordships of the legal existence of this exclusive right, they must go a step farther, and show your Lordships that the right extends to the Court of the Sheriff-substitute at Leith; unless they can take this step (and it is the one in which your Lordships will find most difficulty in following them), they will in vain have demonstrated the legality of

the general claim. My Lords, it is contended on the one side, that the power given under the words of the charter,—'Et ulterius, nos volumus 'et declaramus, quod nemo jus habebit aut instructus erit causas agere et 'exercere coram Commissarii Vicecomitatis et Civitatis Curiis Edinburgi,' —mean an exclusive power to practise before the Commissary Courts, City Courts, and Sheriff Courts of Edinburgh. On the other hand, it is contended, that it gives exclusive power to practise in those Courts at Edinburgh, in Courts at or in Edinburgh; and this translation is borne out by the Act of the Sheriff-depute of Edinburgh in 1765, in which the words are—'before the Sheriff Court of Edinburgh.' I am satisfied that the right construction is, the Commissary Courts, City Courts, and Sheriff Courts of, or at Edinburgh, and not the Courts of the Commissary, City and Sheriff of Edinburgh: but, even without this, there are sufficient grounds to satisfy my mind, that the power, whether legally or not given by charter, does not extend beyond this limit. A remark has been made at the Bar upon the Latin construction of the genitive case 'Edin-'burgi,' and you have been told, that the analogies of classical style are not to govern such instruments as the charter of 1780. No doubt, your Lordships are not to expect pure Latin in composition of this sort, but it is to be observed, that when 'of Edinburgh' is plainly meant to be expressed by the charter, the words 'de Edinburgh' are used, not 'Edinburgi;'—but this question is not necessarily involved in the grounds upon which I am about to advise your Lordships to give judgment. Nothing is more clear in law, than that grants from the crown are to be interpreted altogether differently from private grants, the latter being always taken most favourably to the grantee—crown grants being always interpreted most favourably to the grantor; and if any crown grant is to be taken most unfavourably to the grantee, it is when the King is granting in favour of one individual, or body of individuals, some right or practice, to the exclusion and injury of all others. This would be true, were the disputed words applied to existing rights and existing institutions; but, in the present case, they must be interpreted according to the appellants' arguments, as if they went forward to future time, covered future rights, excluded future generations from their share in future institutions,—and it is upon this ground that I will strictly interpret the present charter. In affirming, it might not be necessary to go into much argument. I shall, however, add a few words, to satisfy your Lordships that this is not an old Court, existing at the time these different instruments were made, but a new Court. The Sheriff takes this view, as appears from the terms of his commission. He first sets forth, that, by the Act of Parliament, he is 'specially authorized and required 'to nominate a fit person to be Sheriff-substitute,' but when he comes to vest in the substitute his power over the whole county, he does not do it under the authority of the Act of Parliament—he conveys it as having power by his commission as Sheriff-depute: and at common law, he says—I, by my general power, make him my general substitute, after having created him the Leith substitute, by the power given in the Act

Nov. 24, 1830.

Nov. 24, 1830.

of Parliament. It is clear, that, according to his view of his own powers, he granted the commission partly under the Act of Parliament, and partly under his general powers. Then comes the Act of Parliament, the terms of which are of considerable importance: 'And be it further 'enacted, that within six weeks from and after the passing of this Act, 'it shall and may be lawful for the Sheriff-depute of the county of Edin- 'burgh, and he is hereby specially authorized and required to nomi- 'nate and appoint, and from time to time thereafter, as any vacancy 'may occur, or pro tempore if necessary, a fit person, qualified accord- 'ing to law, to be the Sheriff-substitute in and for the said town of Leith, 'and such districts adjoining thereto, as to the said Sheriff-depute shall 'seem proper, for the due administration of justice within the same; 'and that no appointment of any such person as Sheriff-substitute shall 'be valid, or enable any such person to do any act by virtue thereof, un- 'less there shall be annexed a certificate under the hands of the Lord 'President of the Court of Session, and the Lord Justice-Clerk, bear- 'ing that such person is duly qualified and capable to discharge the 'duties of the said office, which certificate, after due enquiry made, the 'Lord President and Lord Justice-Clerk are hereby required either to 'grant or refuse.' Observe that the act describes the particular persons, and provides that 'no appointment of any person as Sheriff-substitute 'shall be valid,' unless qualified as there directed—which qualification does not appear to be required of an ordinary Sheriff-depute. The powers being granted, the constitution of the Court is set forth as follows: 'And be it further enacted, that the said Sheriff-substitute shall 'be resident within the said town of Leith, and shall keep or hold such 'daily or regular Courts therein, in the Court-room to be provided for 'that purpose, in manner after mentioned, as shall be necessary for the 'full and due administration of justice, both civil and criminal, as fully 'as it is competent to any Sheriff-substitute elsewhere in Scotland; and 'the sentences or judgments of the said Sheriff-substitute, as Sheriff- 'substitute, or as Depute-Admiral, shall be subject to such and the like 'review, as the sentences or judgments of any Sheriff-substitute or De- 'pute-Admiral are severally and respectively subject and liable to by 'the law and practice of Scotland.' Where was the reason for these regulations? Money might be wanted, but was the power of regulation wanted? If the Sheriff had the power before, where was the necessity for saying that the substitute should have an appeal from this Court to himself? He had that at common law, according to the argument for the appellants. It is nevertheless enacted, that he shall have jurisdiction and appeal, as in the case of ordinary substitutes. Your Lordships will observe how differently the deputation by the Admiral is mentioned. The expression is, 'If the Judge Admiral of Scotland shall grant,'—it is only *if* he think fit to exercise his anterior powers, that the substitute is to do certain things, when empowered. The Sheriff-depute was to appoint a substitute to the Court when created. Had the appointment been upon the old common law footing, and in execution of the Sheriff's

common law power, it would have been in different terms; it would have been in terms similar to those of the clause applicable to the Admiral deputation,—'If the Sheriff-depute shall appoint a substitute'—and as the act requires him to do so.—'When the Sheriff shall appoint, be 'it enacted, that the substitute appointed shall' do and enjoy certain things. These are the grounds on which, independently of the construction of the charter, (though I think the construction aids my proposition,) and purposely leaving out of view altogether the power of the Crown to grant such charters, I am led to the conclusion, that the judgment must be affirmed. Upon the ground that the Court is a new one, not in existence at the date of the former grants; and on the construction of the charter of 1780, and on principle, I take leave to advise your Lordships, that the appellants cannot have an exclusive right of practice, and that the several interlocutors of the Court below, repelling the reasons of advocation, were well founded. My Lords, I would therefore move your Lordships that the appeal be dismissed, and the interlocutors affirmed. Nov. 24, 1830.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be affirmed.

SPOTTISWOODE and ROBERTSON,—RICHARDSON and CONNELL, —Solicitors.

JAMES MORTON, (BROWN'S Trustee,) Appellant.—*Campbell—Jarves.* No. 44.

HUNTERS and Co., Respondents.—*Robertson.*

*Sasine.—Right in Security.*—Held (affirming the judgment of the Court of Session), 1. That the omission of the Christian name of the Bailie, where his surname and place of residence is given, is no objection to a sasine. 2. That although the Christian name of a witness be written on an erasure in the instrument of sasine, it is no objection to it; and 3. That a sasine proceeding on an heritable bond for a cash credit for L.5000, and three years interest thereon, at the rate of five per cent, is good.

*Proof.*—Observed, That hearsay evidence and parole testimony, as to the contents of a letter not alleged to be destroyed, ought to be struck out of a proof taken on commission.

The Respondents, Messrs Hunters and Co., bankers in Ayr, having agreed to allow William Brown of Lawhill a cash credit, to the extent of L.5000, he granted an heritable bond and disposition to them for the advances to be made to him, but declaring that 'the whole sums to be recovered, in virtue of the said Nov. 26, 1830.

1ST DIVISION. Lord Newton.