

competent. But, under a petition to remove A and those identified with him, to remove B who for the time at least is not identified with him, is so outwith the powers conferred by the statutes as to ask for the interference of this Court. I am not surprised that the Justices should have made the order craved, because the objection was novel and difficult. But a question of principle is involved, which, once settled, is easy of application, and I feel bound to give the pursuers the remedy they ask."

Counsel for the Pursuers—D. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Defender—Craigie. Agent—James Russell, S.S.C.

Tuesday, March 19.

### FIRST DIVISION.

[Lord Wellwood, Ordinary.

COUNTY COUNCIL OF DUMFRIES, &c.

v. PHYN, &c.

*Sheriff—Justice of the Peace—Distribution of Criminal Business—Action by County Council and Chief-Constable—Competency—Title to Sue—Police Act 1857 (20) and 21 Vict. cap. 72, secs. 12 and 26.*

The County Council and the Chief-Constable of a county brought an action of declarator against the Procurator-Fiscal of the Sheriff Court and the Sheriff to have it found and declared that the said Fiscal was bound to follow forth and dispose of all criminal charges competently reported to him by the said Chief-Constable, by any of the constables under him, or by any of Her Majesty's lieges, and if proceedings were brought to bring the same before the Sheriff Court of the county, and that the Fiscal and Sheriff were not entitled to transfer charges reported to them to the Court of the Justices of the Peace. The Court (*aff. judgment of Lord Wellwood*) *dismissed* the action as incompetent, holding (1) that the duty of the Chief-Constable and of the constables under him was to bring offenders before a magistrate; that in discharging this duty they were bound to obey the orders of the Sheriff and Justices, and that they had no concern with the subsequent prosecution of offenders except to lend aid when called upon; and (2) that the question whether prosecutions should be instituted before the Sheriff or the Justices of the Peace, being one of administration and not of law, was for the Lord Advocate and not the Court to determine.

*Held*, further, that the County Council, having no responsibility as to the distribution of criminal business, had no title to sue an action for the purpose of determining that distribu-

The County Council of Dumfries and William Gordon, Chief-Constable of the said county, brought an action against Charles Steuart Phyn, Procurator-Fiscal of the Sheriff Court of Dumfriesshire, and Richard Vary Campbell, Sheriff of Dumfries and Galloway, to have it found and declared "that the defender the said Charles Steuart Phyn is bound to follow forth and dispose of all criminal charges which may be competently reported to him, whether by the pursuer the said William Gordon, or by any of the constables acting under the said William Gordon, or by any of Her Majesty's lieges, either by bringing no proceedings, or if proceedings are brought, by bringing such proceedings before the Sheriff Court of the county of Dumfries, and that the defenders the said Charles Steuart Phyn and Richard Vary Campbell are not entitled to remit or transfer any charges reported as aforesaid to the Court of the Justices of Peace of the county of Dumfries, or to the Procurator-Fiscal of the said Court, or to any other court or procurator-fiscal whatever."

The pursuers averred, *inter alia*—" (Cond. 2) The Chief-Constable is responsible for the detection and prevention of crime in his county, and he and the constables forming the force under his orders are directed by the Police Act 1857 to bring before the Sheriff or Justices of the Peace persons accused or suspected of any crime or offence. . . . (Cond. 3) In Dumfriesshire there is a Justice of Peace Court Procurator-Fiscal as well as a Sheriff Court Procurator-Fiscal, and the said pursuer in the exercise of his discretion sent some of the cases reported to him to the Procurator-Fiscal of the Justice of Peace Court. He found, however, that the result was most unsatisfactory and detrimental to the maintenance of order in the county. He accordingly refrained from reporting any common law criminal charges to the Procurator-Fiscal of the Justice of Peace Court, and sent them all to the Procurator-Fiscal of the Sheriff Court. In this he took what, in his opinion, was the best course to diminish and prevent crime in the county, and in doing so he acted with the knowledge and approval of the Standing Joint-Committee and of the County Council. The averments in the answer hereto, as to the practice in the country as to dealing with common law cases, are denied. No such cases (with three exceptions, in consequence of the Sheriff Court Fiscal and his deputy being unavailable at the time and the accused being in custody) have been sent to the Justice of Peace Fiscal since 18th August 1891. . . . (Cond. 5) On 21st December 1891 the defender Sheriff Vary Campbell issued an order instructing the Chief-Constable 'to revert to and follow the practice of his office as established under his predecessor with reference to the disposal of common law offences.' An order in the same terms was issued by the Justices in Quarter Sessions on 6th January 1892. These orders, the pursuers were advised, were *ultra vires* and illegal, and

are also void from uncertainty, and the Chief-Constable, with the approval of the Standing Joint-Committee and the County Council, did not comply with them. . . . (Cond. 6) The former practice in Dumfriesshire the pursuers have found to be in accordance with law, that the Chief-Constable had an absolute discretion in determining the fiscal to whom such cases should be reported, and that any attempt to interfere with such discretion was strongly reprobated. . . . (Cond. 8) In the beginning of February 1892 the defender Mr Phyn, acting, it is believed and averred, on the instructions of the defender Sheriff Vary Campbell, commenced to transfer to the Justice of Peace Fiscal for disposal in the Justice of Peace Court a number of common law cases which had been reported to him. This practice is . . . illegal and *ultra vires* of the Sheriff Court Fiscal, and also of the Sheriff under whose orders it is believed and averred the Fiscal has all along acted. . . . (Cond. 10) The Sheriff Court Fiscal receives from Exchequer a salary which practically covers his whole duties, and the expenses of prosecutions at his instance in the Sheriff Court are also borne by Exchequer—the liability of county funds for remuneration or outlays of the Fiscal being strictly limited by the County General Assessment (Scotland) Act 1868 to such salary or fees and outlays as were in use to be paid at the passing of that Act. The remuneration of the Justice of Peace Court Fiscal and the expenses of prosecution of common law offences in the Justice of Peace Court, are, so far as in use to be paid from county funds at the passing of the said County General Assessment (Scotland) Act 1868, a charge upon the assessments levied in terms of that Act. The transfer of cases from the Sheriff Court to the Justice of Peace Court is an attempt to cast a burden on county funds without effecting any pecuniary saving elsewhere, and, if permitted, would increase the total cost of criminal prosecutions.”

Sheriff Vary Campbell lodged a minute in which he stated “that he was advised that it was not consistent with his official position that he should lodge defences to this action. That he has all along been, and still is, willing to consider any representations made to him in regard to the conduct of the criminal business of the county; but until it is recalled, the Chief-Constable is bound to obey the order made by the minuter on 21st December 1891.”

The defender Phyn lodged defences. He stated, *inter alia* (Ans. 2) . . . “Explained that the Chief-Constable is not more than any other police constable responsible for the detection and prevention of crime in the county, except in so far as he is by the said Act directed to carry out the orders of the Sheriff and Justices, and the rules of the Secretary of State, regarding the general disposition and government of the force, and their duties in connection with the police of the county. There is no authority in the Act for a regulation or practice such as is desired by the pursuers, to the effect

that in no circumstances shall the Justices be allowed to try any common law charges. Each constable is to report his charge to the Sheriff or Justices, and the Chief-Constable has no power to direct them as he does to go to the Sheriff only. (Ans. 3.) . . . Denied that the sending of cases to the Justice of Peace Fiscal for disposal by the Justices is, or has ever been, unsatisfactory, or in any way detrimental to the maintenance of order in the county. . . . *Quoad ultra* not known and not admitted, with the explanation that it is for the Sheriff and not the Standing Joint-Committee, or the County Council, or the Chief-Constable to regulate the prosecution of offences and the preservation of the Queen's peace. Explained that it has always been the practice in the county to transmit to the Justice of Peace Fiscal all petty common law offences for trial in the Justice of Peace Court—offences of a more serious character being reserved for trial by the Sheriff. . . . Explained further, that the pursuer has departed from the established practice of the county, and that by the statute the Justice of Peace Court has as much right to exercise its criminal jurisdiction within its appointed limits as the Sheriff Court, and that it is not within the power of the pursuers to abolish the Justice of Peace criminal jurisdiction. . . . (Ans. 5) . . . The Sheriff's order of 21st December 1891 bears to be and was an interim order directed to the maintenance of the *status quo*. It was open to the pursuers at any time to move for reconsideration of this order, but they would not do so. . . . (Ans. 6) Explained that since 14th September 1891 the Chief-Constable, without exercising any discretion in the matter, has sent all cases, however trivial, to the Sheriff's Fiscal. The defender has done no more than send to the J. P. Fiscal the cases which belong to the Justices by practice of the county and the Sheriff's order, and were incompetently reported to him. (Ans. 10) Explained that . . . the County Council . . . resolved to pay the present Justice of Peace Fiscal by fees, at the same time arranging with the Chief-Constable to transmit no common law cases to him; and thus depriving him of almost all remuneration. There is no transference of cases from the Sheriff Court to the J. P. Court, but only the sending to the latter Court of the cases belonging to it by the practice of the county, and the orders of the Sheriff and Justices, which the Chief-Constable contumaciously refuses to report to the Justice of the Peace Fiscal.”

The pursuer pleaded—“It being *ultra vires* of the defenders, or either of them, to transmit charges reported as aforesaid, to any other Court, decree should be granted as craved.”

The defender Phyn pleaded—“(1) No jurisdiction, or alternatively, the action is incompetent. (2) No title to sue. (3) All parties not called. (4) The Sheriff's orders as to the disposal of common law offences, on which the action of the defender depends, being administrative in their nature and proceeding from the Sheriff's authority

as the Chief Magistrate responsible for the peace of the county, are not subject to challenge in the present action. (5) The orders complained of being interim orders, and the Sheriff not having been moved by the pursuers to recal the same, the action is unfounded. (6) The new regulation made by the Chief-Constable for the government of the constables in reporting common law charges, and sought to be enforced by this action, not having had the approval of the Sheriff, this action is unfounded. (7) The pursuers' averments being unfounded in fact, or alternatively, being irrelevant and and insufficient in law to support the conclusions of the summons, the defender should be assolizied. (8) The orders of the Sheriff and Justices referred to in the condescendence respectively being lawfully made by the said Sheriff and by the said Justices, and being still in force and not recalled or reduced, the defender is entitled to absolvitor."

The Police Act of 1857 (20 and 21 Vict. c. 72), section 12, enacts—"The constables to be appointed in any county under this Act are hereby required, authorised, and empowered to guard, patrol, and watch within the county according to such regulations as may from time to time be prescribed by competent authority under this Act, and to bring before the sheriff or the justice of the peace, one or more, all persons who may be found within the county actually engaged in or committing any criminal, riotous, or disorderly conduct or act, including offences committed on any turnpike or statute labour road, or otherwise in contravention of the provisions of the general or any local Turnpike Act, or of the general or any local Statute Labour Act, or accused or suspected of having committed crimes, delinquencies, or offences of whatsoever description, and at what place soever the same may have been or are suspected to have been committed, whether the same be of such a kind as can competently be tried before such sheriff or justices, or be of a nature requiring to be remitted for trial before a higher tribunal, or which from having been committed beyond the bounds of the county, fall to be tried in another jurisdiction, and such constables shall perform all the duties attaching to constables or police officers within any county at the date of the passing of this Act, and shall carry into effect, as far as may be, the whole provisions and regulations herein contained." Section 26 enacts—"Every chief-constable shall, when so required, make reports to the police committee, sheriff, and justices of the peace . . . and shall obey all lawful orders and warrants of the sheriff and justices in the execution of his duty."

Upon 20th July the Lord Ordinary (WELLWOOD) dismissed the action.

"*Opinion.*—The undisguised object of this action, which is directed against the Sheriff of the county of Dumfries and the Procurator-Fiscal, as his hand and agent, is to have it declared by this Court that the Chief-Constable of the county of Dumfries may in his discretion report all common

law criminal charges to the Sheriff; and that the Sheriff's Procurator-Fiscal shall be bound to follow forth and dispose of the same, and that against the express orders of the Sheriff and the wishes of the Justices of the Peace. The conclusions are—[quoted above]. It clearly appears from the condescendence that by the word 'competently,' as used in the summons, the pursuers mean 'at the will of the Chief-Constable.' 'The knowledge and approval' of the County Council on which the pursuers seem to rely, are immaterial, because in this matter they have no power to control the Chief-Constable or interfere with the orders of the Sheriff or Justices as to the disposition and government of the police. No such power is given or transferred to them by the Local Government Act of 1889.

"Any powers which the Chief-Constable or any other constable possesses in the matter are derived from section 12 of the Police Act of 1857 (20 and 21 Vict. c. 72) —[quoted above]. This section simply requires and empowers the constables—any constable—to bring before a magistrate persons found in the commission of crime; so that there may be no delay in securing the investigation of crime, and the committal and trial or liberation of accused persons, by a competent tribunal. It is on this slender foundation that the Chief-Constable rests his claim to regulate the criminal business of the county in opposition to both of the authorities who are competent to entertain and dispose of it.

"If I had thought that there was any substance in the pursuers' case, I should have given effect to the defenders' plea of 'all parties not called,' as the Justices of the Peace are not represented. But, in my opinion, the claim is extravagant. Under section 26 of the Act of 1857 the Chief-Constable is bound to obey all lawful orders of the Sheriff or the Justices. It is said that this refers merely to ordinary constabulary duty. Be it so. Are not the apprehension of criminals, and the bringing of them before a magistrate, ordinary constabulary duty? And is it *ultra vires* of the Sheriff and Justices to give directions as to how those duties are to be performed? If it is, it is in the power of any constable, however trivial the crime or offence may be, and wherever it may have been committed, to pass by the Justice of Peace Court at the spot, and bring the accused and witnesses to Dumfries for trial before the Sheriff.

"I cannot assent to such a proposition. In order to reject it it is not necessary to invoke the power, apart from statute, claimed by the Sheriff, as chief magistrate of the county, and as such primarily responsible for the peace of the county and the repression and punishment of crime, to give directions as to the ordering and disposal of criminal business. The provisions of the statute from which the Chief-Constable derives any power he possesses are quite sufficient.

"It is said that the Sheriff and his Fiscal have no power to remit to the Justice of Peace Court cases competently brought to the Sheriff Court. That is the way in

which the pursuers desire to present their case, ignoring the Chief-Constable's alleged disobedience altogether. Now, a case brought to the Sheriff Court against the express lawful orders of the Sheriff is not, in my opinion, competently brought. But supposing that, the case having been once reported to the Sheriff, the Justices of the Peace would be entitled to object to its being remitted to them, it is clear that the Chief-Constable, who had *ex hypothesi* disobeyed the Sheriff's lawful orders in so reporting it, would have no right to object to such a remit. Assuming unwarrantable disobedience on his part, it would be the height of effrontery for him to do so.

"It is not necessary to inquire closely into the previous practice in the county of Dumfries. There is no doubt that before the time of the present Chief-Constable the Chief-Constable was allowed to exercise, and did exercise in the first instance, a certain discretion as to the Court to which cases should be reported, and so long as it was judiciously exercised this discretion was not interfered with by the Sheriff or Justices. The returns show that before the present Chief-Constable attempted to alter the system the common law cases were in point of number very evenly divided between the Sheriff Court and the Justice of Peace Court.

"The graver cases, such as theft and aggravated assaults, went to the Sheriff Court; charges of breach of the peace and malicious mischief, &c., or at least a large proportion of them, to the Justice of Peace Court. In 1892 and 1893 the present Chief-Constable sent everything to the Sheriff Court. Nothing of the sort was ever attempted or thought of before.

"It is said that in 1877 Sheriff Napier sustained the Chief-Constable's right of selection against his own Fiscal; but in that case there is no doubt the Sheriff's Fiscal was acting against the Sheriff's instructions—a totally different case from the present.

"To report all common law cases without exception to the Sheriff is not to exercise discretion in any reasonable sense. It is an attempt on the part of the Chief-Constable to bring about at his own hand a change in the practice of the county, depriving one of the courts of the county of a certain class of cases competent to be tried before it, which would require an Act of Parliament, or at least the consent, tacit or express, of all concerned to effect.

"It is sufficient for the decision of this case to say that the Chief-Constable is not entitled to disobey the lawful orders of the Sheriff; and that if the declarator sought were granted he would be enabled to do so, and to defy both the Sheriff and the Justices whose orders he is bound by statute, if not at common law, to obey.

"Although the County Council of the county of Dumfries are the leading pursuers in this action, their interest in the matter is indirect and somewhat remote. Notwithstanding what is said on record as to the Chief-Constable having acted with their knowledge and authority, they have no power whatever to authorise or control

the actings of the Chief-Constable in this matter. Their interest is simply this. They have now resolved to pay the Justice of Peace Fiscal by fees instead of salary; the fewer the cases that come to the Justice of Peace Court the better for the rates; that is all. I doubt their title to sue; but whether they have a title to sue or not, no relevant case has been stated to warrant the declarator sought, either at their instance or at that of the Chief-Constable. I shall therefore dismiss the action, with expenses."

The pursuers reclaimed, and after partly hearing the case, the Court appointed the cause to be intimated to the Lord Advocate, who lodged a minute but did not otherwise appear in the cause.

Thereafter the case was again put out for hearing.

Argued for the reclaimers—(1) The Court of Session had jurisdiction. It had complete control over all law officers, and that control was not limited to their civil functions. Some Court must have jurisdiction, and no other Court, such as the High Court of Justiciary, had been suggested—*M'Aulay v. M'Kenzie*, November 23, 1830, 9 S. 48, was a case brought against a sheriff-substitute for not holding certain courts. It was dismissed because of the want of the concurrence of the Lord Advocate, but the jurisdiction was recognised. (2) The Chief-Constable was entitled to act as he had done. He, with the approval of the County Council, had brought cases before the Sheriff, rather than before the Justices, not to save the rates—that was merely a coincidence—but in the interests of justice. If cases were competently brought before the Sheriff he was bound to try them, and no one disputed that all the cases brought might have been tried by him. He had no power to transfer cases to another Court. In the Court of Session even the Lord President only exercised that power by virtue of an Act of Parliament. If it was said that the discretion claimed by the Chief-Constable might be exercised by any ordinary rural constable, it must be remembered that the members of the force acted upon the instructions of the Chief-Constable. (3) It was admitted that the declarator sought must conserve the undisputed control as to prosecutions exercised by the Lord Advocate.

Argued for the defender, Phyn—(1) The Court of Session had no jurisdiction with respect to questions as to the administration of the criminal department of justice—*Mackay's Manual of Practice*, pp. 98 *et seq.*, and cases there cited. (2) This case could not be determined in the absence of the Lord Advocate and of the Justices, who were all interested parties. (3) The County Council had no title to sue. They, no doubt, now appointed the Chief-Constable, but they had no concern with the administration of justice in the county. (4) The Chief-Constable had entirely mistaken his rights and duties. (a) Under the Police Act 1857 he and all constables were bound to obey the

Sheriff and Justices. If they differed, the Secretary for Scotland would decide, but here they were at one. (b) There was no such discretion under the 12th section as was here claimed. That section required constables to bring persons apprehended before a magistrate—sheriff or justice—that the offence alleged against them might be immediately investigated. Prosecution and trial were subsequent steps which might never be reached, and with which no constable—not even the chief-constable—had any concern. Still less had they right to say in what court, if any, the trial should take place. (5) The Sheriff's orders as to the reporting of cases, and as to the court in which particular classes of cases should be tried, were liable to be overruled by the Lord Advocate, but until he had been appealed to, which had not been done here, and he had given his instructions, those of the Sheriff must prevail.

At advising—

LORD PRESIDENT—There are so many reasons for dismissing this action that the only difficulty is to determine which of those reasons is entitled to precedence. The action is based on a series of misconceptions of the relations of the several public authorities mentioned on record, including the Court of Session. In practice, as is well known all over Scotland, the existing system of the prosecution of crime works with the most perfect smoothness, and it is to be regretted that in the county of Dumfries there should have arisen, or should have been brought about, difficulties unknown to the rest of the country.

In Dumfriesshire, as in a number of other counties, two jurisdictions are effectively available for the prosecution of minor criminal offences against the common law, viz., the Sheriff Court and the Justice of the Peace Court. The theory of this action is that the Chief-Constable of the county has the right to elect and determine which of these tribunals shall try the causes reported by the police, and that his election may be so exercised as to bring about, and for the purpose of bringing about, the surcease of one of these jurisdictions. It happens to be the will and pleasure of the present Chief-Constable of Dumfriesshire that the Sheriff shall try all criminal cases in Dumfriesshire. His counsel avowed, however, that had his choice been the other way, the Chief-Constable might, according to his estimate of his own influence and authority, take all the cases to the Justices and none to the Sheriff. By the present action the Court of Session is asked to declare against the Sheriff and his Procurator-Fiscal that they are bound to carry through to judgment in the Sheriff Court all charges reported by the Chief-Constable in which proceedings are taken at all, and that the Sheriff and his Fiscal are not entitled to remit any of the Chief-Constable's cases—that is to say, any cases reported by the police, or in other words, any cases at all—to any other court or procurator-fiscal whatever.

To anyone accustomed to the administra-

tion of justice in Scotland all this is strange hearing. To begin with, who is the Chief-Constable to whose behests Sheriffs, Justices, and (so far as the summons expresses the pursuer's position) the Lord Advocates are to bow, and whose edicts are to be ratified by the decree of this Court? By the Police (Scotland) Act 1857 the duty is laid on each county of equipping a disciplined police force, of which the chief-constable is the commanding officer. The force thus equipped is placed, along with its commanding officer as an integral part of it, at the disposal of the authorities charged with the preservation of peace and the prosecution of crime; and to make matters perfectly clear, the chief-constable is by the 26th section directed to obey all lawful orders and warrants of the sheriff and justices in the execution of his duty.

Now, I take it to be quite manifest that those two authorities are within their province, if one of them acting without the dissent of the other, or both acting collectively, as is the case here, direct the Chief-Constable to report certain cases, or certain classes of cases, to the Justice of the Peace Fiscal, or to the Sheriff's Fiscal, as they may determine; and that the Chief-Constable is bound to render obedience to those orders. Upon what ground, then, does the Chief-Constable claim to disobey his superiors, and to enforce his disobedience by a decree of the Court? Upon a palpable misreading of the very plain enactment of section 12. That section not singling out the Chief-Constable, but, on the contrary, speaking of every constable in the force, authorises constables (I put it shortly) to apprehend offenders and take them before a magistrate, sheriff, or justice as the case may be. This, as public officials ought to know, is a stage of criminal proceedings anterior to even the consideration of the question in what court, if any, the offender shall be tried. Yet upon what the Lord Ordinary (with great moderation) calls the "slender foundation" of this 12th section, the pursuers rest their claim to dictate to the criminal authorities charged with the duty of prosecution as to the court in which offences shall be tried. The two things are totally unconnected. It is not to the Sheriff Court or the Justice of Peace Court that a person apprehended is taken; he is taken before someone (be he sheriff or be he justice) who is a magistrate; and once this is done, the functions of the constable end so far as the 12th section is concerned. The next chapter in the course of events is that of prosecution; and with that the police have nothing whatever to do except to render aid when called on. Yet on this 12th section, relating solely to apprehension and taking before a magistrate, this action is rested, which is brought to determine the court in which prosecution shall ensue. The length to which this strange confusion of two totally different matters would carry is shown by the fact that the senior counsel for the pursuers admitted that, if his construction were correct, any rural constable who takes up a thief and brings him before a sheriff

or justice can insist that the sheriff's fiscal or justice of peace fiscal, as the case might be, and none other, shall prosecute his thief, and that the policeman can sue an action in the Court of Session to prevent the case going to any other court. It is difficult to imagine a more complete *reductio ad absurdum*.

I have already indicated that, in the matter of reporting criminal offences to a competent prosecutor, the Chief-Constable is engaged in the execution of his duty as constable, and is therefore subject to the orders of the Sheriff and the Justices. In seeking a declarator that his disobedience is to be legalised, the Chief-Constable makes a demand which is not to be listened to.

Nor, in my opinion, is the situation at all improved by the Chief-Constable sheltering himself behind the Standing Joint-Committee and the County Council. Neither of those bodies would be within its province in giving any orders whatever to the Chief-Constable as to which of the two prosecutors he shall report cases to. Accordingly I have heard nothing to satisfy one of the title of the County Council to sue this action. I should be sorry to say anything to discourage a County Council in its legitimate desire to promote the convenience of the county, and a saving in the rates. Convenience and economy are the points at which the interests confided to the County Council are affected by the arrangements of the criminal authorities; and I can quite understand the County Council representing to or conferring with the criminal authorities on such matters. But to sue an action in a Court of law is a very different matter, and requires a much more direct concern and responsibility. Now, the County Council has no responsibility for the distribution of criminal business by the criminal authorities, of whom they are not one; and they do not seem to be proper pursuers in an action at law to determine that distribution, were any such action competent.

I am happy to say that this is not to deny to the County Council any valuable privilege, for the action seems to me untenable at the instance of anyone. I greatly doubt whether any action on this subject could be entertained without the Lord Advocate and the Justices of the Peace being parties to the action, because the summons directly invades the rights of both. But, even as things stand, I find in the unquestioned rights and duties of the Lord Advocate a conclusive reason against this Court pronouncing any decree such as is sought.

We are here in the region of administration; shall this official or shall that official do that which it is perfectly certain will be done by one or other of them? To put the question in concrete form—is the Sheriff's Procurator-Fiscal himself to prosecute certain offenders, or shall he transmit the papers to the Justice of Peace Fiscal, with a view to a prosecution before the Justices? Now, I am not aware that the Sheriff has any power to transfer to the Justices cases

already initiated in his own Court by complaint. Nor do I know that it can be said, as matter of legal dogma, that the Sheriff can direct the Justice of Peace Fiscal to proceed in any particular case or class of cases, although the dutiful comity and good sense of the two sets of officials prevents this point from ever arising. But the question whether the Sheriff's Fiscal shall or shall not prosecute in any given case or class of cases, and shall or shall not transmit the papers to the Justice of the Peace Fiscal, with a view to a prosecution in that Court, is one upon which the Lord Advocate is master of the situation. If the Lord Advocate thought good to direct the defender Mr Phyn to prosecute the cases in dispute, Mr Phyn must obey. If the Lord Advocate thought good to direct Mr Phyn not himself to prosecute, but to transmit the papers to the Justice of the Peace Fiscal, with a view to proceedings before the Justices, again Mr Phyn must obey. If, as appears to be the case, the Lord Advocate has not thought good as yet to intervene, then Mr Phyn must obey the Sheriff, until the Lord Advocate shall further direct him. There being thus, within the department in which the Procurator-Fiscal is an officer, a supreme authority competent to solve the present question, it seems to me that this action cannot be entertained by this Court. That being so, it does not appear to me to be within my province to express in this place any opinion on the merits of the disputed question, which is one of administration and not of law.

I am for adhering to the interlocutor of the Lord Ordinary, by which the action stands dismissed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—W. Campbell—Fleming. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender, Phyn—Comrie Thomson—Clyde. Agents—Drummond & Reid, W.S.

Wednesday, March 20.

## FIRST DIVISION.

[Sheriff Court at Aberdeen.]

### LAING v. LAING'S TRUSTEES.

*Succession—Legacy—Election—Discharge of Legitim.*

A testator directed the trustees under his trust-disposition and settlement to pay a legacy of £100 "to my reputed son J." He further provided that the provisions in favour of his children were to be in satisfaction of all claims for legitim. J survived his father, but died before receiving the legacy. J's widow and executrix claimed the legacy, at the same time intimating that she