

The Court answered the first question in the affirmative and the second in the negative.

Counsel for the First Parties—King. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Second and Third Parties—Hon. W. Watson. Agents—Guild & Guild, W.S.

Friday, March 1.

## SECOND DIVISION.

### SMITH v. AYR COUNTY COUNCIL.

*Burgh—County Council—Police—Licensing Acts—Burgh Police Act Offence or Licensing Act Offence—Expenses of Prosecuting Offences under Licensing (Scotland) Act 1903, sec. 70, in Police Burghs to which Burgh Police (Scotland) Act 1892 Applies—Licensing (Scotland) Act 1903 (3 Edw. VII, cap. 25), secs. 70, 91, 110.*

Section 70 of the Licensing (Scotland) Act 1903 sets forth certain offences in which drunkenness is an element, and sub-section 4 thereof provides that the provisions of this section shall, in the burghs to which certain Police Acts, including the Burgh Police Act 1892, apply, "have effect as if they were provisions of and enacted in such Acts," which "shall be construed accordingly both as regards the application of penalties and in all other respects." Section 91, sub-section (1), provides that offenders against the Act shall be prosecuted and penalties shall be recovered "unless by this Act otherwise specially directed or authorised" by certain procedure, and the fees of the prosecutor and other expenses of such prosecutions shall, except in Royal or Parliamentary Burghs, "be paid annually out of the fund of the county out of which the expenses of criminal prosecutors are in use to be paid."

The Burgh Prosecutor of a police burgh, to which the Burgh Police Act of 1892 applied, was also appointed to prosecute offences within the burgh under the Licensing (Scotland) Act 1903.

*Held* that he was not entitled under section 91 (1) of the Licensing Act to be remunerated by the County Council in respect of prosecutions by him for offences specified in section 70 of that Act, such offences being in virtue of sub-section 4 of that section offences against the Police Acts and not against the Licensing Act.

The Licensing (Scotland) Act 1903 (3 Edw. VII, cap. 25) enacts—Section 70—"(1) Every person found in a state of intoxication, and incapable of taking care of himself, and not under the care or protection of some suitable person, in any street, thoroughfare, or public place, whether a building or not, or on any licensed premises, and every person who is drunk while in charge in any street or other place of any carriage, horse, cattle,

or steam engine, or when in the possession of any loaded firearms, shall be thereby guilty of an offence, and may be taken into custody by any constable and detained in any police office or police cells or other convenient place, and not later than in the course of the first lawful day after he shall have been so taken into custody shall be brought before a sheriff or any one justice of the peace or magistrate, or if not so taken into custody, may be summoned to appear before a sheriff, justice of the peace, or magistrate, and on being convicted of such offence shall be liable to a fine not exceeding forty shillings and failing payment to imprisonment for a period not exceeding thirty days. Every person who in any street, thoroughfare, or public place, whether a building or not, or on any licensed premises, behaves while drunk in a riotous or disorderly manner, or while drunk uses obscene or indecent language to the annoyance of any person, shall be liable on summary conviction to a fine not exceeding forty shillings, and failing payment to imprisonment for a period not exceeding thirty days, or in the discretion of the Court to imprisonment for a period not exceeding thirty days. . . . (4) The provisions of this section shall, in the burghs to which the general or local Police Acts specified in Part II of the Twelfth Schedule annexed hereto respectively apply, have effect as if they were provisions of and enacted in such Acts, and where enactments dealing with the same matter are mentioned in such Part, in lieu of such enactments, and such Acts and references therein shall be construed accordingly, both as regards the application of penalties and in all other respects."

Section 91—"(1) Every person who shall commit any breach of certificate, or who shall in any other manner offend against this Act, shall be prosecuted, and all penalties together with the expenses of prosecution and conviction to be ascertained on conviction shall be recovered, unless by this Act otherwise specially directed or authorised, before the sheriff or any two or more justices of the peace of a county or any magistrate of a royal, parliamentary, or police burgh having jurisdiction in the county or burgh, as the case may be, in which such offender shall reside or such offence shall have been committed, at the instance of the procurator-fiscal, or other prosecutor ordinarily acting in such respective courts, or in the case of a justice of the peace or burgh police court at the instance of such other party as shall be specially appointed to prosecute such class of offences, by the justices of the peace of the county in general quarter sessions assembled, or the town council of the burgh, as the case may be, and which appointment they are hereby specially authorised to make, and such justices of the peace in general quarter sessions, or town council, as the case may be, may from time to time fix a reasonable sum in name of salary, or a reasonable rate of remuneration by fees for prosecutions, and all other business under this Act, to be paid annually to such procurator-fiscal or

other party appointed to prosecute as aforesaid; and which salary, or the amount of the account of such fees, as the same shall be taxed on behalf of the county council or town council, as the case may be, together with all necessary and proper outlays attending such prosecutions and such business, shall form a proper charge against, and shall be paid annually out of, the fund of the county out of which the expenses of criminal prosecutions are in use to be paid, and in royal or parliamentary burghs having a separate licensing court out of the police funds, or, where there are no police funds, out of the corporation funds of the burgh, as the case may be; and all penalties and expenses of prosecutions and convictions incurred under and imposed by this Act shall, when recovered, if adjudged by any sheriff, or justice or justices of the peace, or magistrate of any burgh (other than a royal or parliamentary burgh having a separate licensing court) be wholly paid into the county fund, and, if adjudged by any magistrate of any royal or parliamentary burgh having a separate licensing court, be wholly paid into the police funds, or, where there shall be no police funds, into the corporation funds of the burgh in which such penalties shall be imposed, respectively."

Section 110 with Schedule 12, *inter alia*, repeals the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sections 380 (11) and 381 (24), dealing with offences in which drunkenness formed an element, and section 515 dealing with offences for breach of certificate.

This was a special case brought by Thomas Smith, Procurator-Fiscal in the Court of the Police Burgh of Saltcoats, of the *first part*, and the County Council of the County of Ayr of the *second part*, to determine a question as to the expense of prosecutions for the offences set forth in the Licensing (Scotland) Act 1903 (3 Edw. VII, cap. 25), section 70.

The facts as set forth in the case were as follows:—"The first party is Procurator-Fiscal in the Court of the Police Burgh of Saltcoats. He was appointed by the Commissioners of the Burgh of Saltcoats burgh prosecutor of the Burgh under the provisions of section 461 of the Burgh Police (Scotland) Act 1892, on 12th November 1894, at a salary of £25 per annum when the number of his cases is less than 250, and when the cases exceed that number 1s. 6d. per case extra is allowed. The first party's said remuneration is payable out of the Burgh General Assessment. On the 9th February 1904 the Town Council of said burgh appointed the first party, under section 91 of the Licensing (Scotland) Act 1903, to prosecute offences within the burgh under that statute. . . . The second party is the County Council of the County of Ayr established under the Local Government (Scotland) Act 1889. Saltcoats is a police burgh containing a population exceeding 7000, and has a separate Licensing Court in terms of section 2 of said Licensing Act. It is a burgh to which the General Police Act specified in part 2 of the 12th

Schedule annexed to the said Licensing Act [The Burgh Police (Scotland) Act 1892] applies. Prior to said Licensing Act coming into operation the first party prosecuted in the Burgh Police Court offences of drunkenness and riotous behaviour as offences against the provisions of the Burgh Police (Scotland) Act 1892, and his salary covered his fees in connection with these prosecutions. Since the Licensing Act came into force he has prosecuted such offences, and other offences involving drunkenness, on complaints in which such offences were libelled as against the said Licensing Act. The first party is debarred by section 106 of said Act from practising as a solicitor in said Licensing Court and thereby deprived of emoluments hitherto earned by him. . . . The first party recently made a claim against the second party for remuneration in respect of work done by him in connection with prosecutions under the said Licensing Act, and conducted by him in the Police Court of the Burgh of Saltcoats between 1st January 1904 and 20th April 1905, and he submitted to the second party, at the request of their clerk, a detailed account charging fees against the second party in respect of his work done in conducting prosecutions both under section 70 of said Act and section 68 thereof. The said account was taxed by the auditor of the second party at the sum of £141, 18s. 6d., of which £138, 16s. applied to cases under section 70 of said Act. The second party declined to pay the said account in so far as it referred to cases under section 70. The cases under section 70 referred to in said account were cases in which the offences charged against the accused were those of being 'drunk and incapable' or 'drunk and disorderly.' The second party has never hitherto borne the cost of such prosecutions within the Burgh of Saltcoats. . . . The first party *maintains* that he is entitled to be remunerated by the second party, in terms of section 91, in respect of all prosecutions conducted by him for the offences specified in section 70 of said Act. The second party, on the other hand, maintains that the prosecutions conducted by the first party under section 70 within the said Burgh of Saltcoats are to be regarded as prosecutions in respect of offences not against the said Licensing Act but against the Burgh Police Acts, and that on a just construction of the said Licensing Act the duty and expense of prosecuting the said offences falls upon the said Burgh of Saltcoats and not upon the second party, who is under no liability to make payment of said fees to the first party."

The following was the *question of law*—"Is the first party entitled, under the terms of section 91 (1) of the Licensing (Scotland) Act 1903, to be remunerated by the second party in respect of the said prosecutions conducted by him for the offences specified in section 70 of the said statute?"

Argued for the first party—The clause in section 91 "unless by this Act otherwise specially provided" was introduced because

certain offences were appropriate to certain *fora*, i.e., it referred to the differentiation between *fora*. Accordingly, even in a burgh to which the Burgh Police (Scotland) Act 1892 applied the offences specified in section 70 were offences under the Licensing Act, and by section 90 the fees for prosecuting such offences fell to be paid by the county. *Rowland v. Deas*, July 10, 1906, 8 F. (J.) 86, 43 S.L.R. 859, and especially the opinion of Lord M'Laren therein, implied that section 91 applied to such offences, and accordingly the fees therefor must be paid by the county. Reference was also made to *Tasker v. Simpson*, December 21, 1904, 4 Adam 495, 7 F. (J.) 33, 42 S.L.R. 228.

Argued for the second party—Section 70 was, so far as concerned the burghs to which the general or local Police Acts specified in part 2 of the twelfth Schedule applied, put back into such Acts, i.e., in the present case was put back into the Burgh Police (Scotland) Act 1892. Section 91 dealt with licensing offences such as breaches of certificate; there was nothing in it which would apply to police offences. The exception clause in section 91 safeguarded the operation of sub-section 4 of section 70. The result of the argument of the first party would be that the burgh might, under section 461 of the Burgh Police (Scotland) Act 1892, fix the salary of the prosecutor at what they chose, and that the county would have to pay for it. Sub-section (3) of section 70 was enacted to ensure that there should be a complaint; it was enacted in consequence of *Gray v. Dewar*, July 18, 1889, 2 White 290, 16 R. (J) 97, 26 S.L.R. 685. The decision in *Rowland v. Deas* (*cit. supra*) was not opposed to their contention, and regarding the opinion of Lord M'Laren it was to be observed that sub-sec. 4 of section 70 was not brought before the notice of the Court.

LORD JUSTICE-CLERK—I am of opinion that this question must be answered in the negative. No doubt this clause in the Act of Parliament, like those in most Acts of Parliament having a very wide range, is somewhat less particularly expressed than would be the case in an Act of Parliament relating to much more minute matters. But I have come to be of opinion that these offences which are detailed to us in this case, and which are set forth in the 70th section of the Licensing Act of 1903, are by the terms of the Act not licensing offences in any true sense of the Licensing Act, but are imported by this Act into the jurisdiction of the Burgh Courts. That being so, the simple answer to the question is that as they are Burgh Court offences all questions of expenses of prosecution must be met by those who have to provide for Burgh Court prosecutions.

LORD STORMONTH DARLING—I entirely agree. The claim of the first party to be remunerated by the County Council of Ayrshire, the second parties, in respect of certain prosecutions, is entirely founded on section 91 of the Licensing Act of 1903. He can only obtain an affirmative answer

to the question (which admittedly would make a change in the practice hitherto existing) if he can show that the offences in question, being, speaking generally, offences involving drunkenness, are offences under the Licensing Act alone. I am of opinion, for the reasons stated by your Lordship in the chair, that they are brought by sub-section 4 of section 70 of the Licensing Act back into the position of offences under the Police Acts, whether special or general. If so, they are not offences under the Licensing Act, and accordingly do not fall under the provisions of section 91.

LORD LOW—I am of the same opinion.

LORD ARDWALL—I am of opinion that the effect of sub-section 4 of section 70 of the Licensing (Scotland) Act 1903, although not happily expressed, is practically this, that it substitutes the provisions of sub-sections (1) and (2) of section 70 for sub-section (1) of section 380 and sub-section (24) of section 381 of the Burgh Police Act 1892, just as much as if it expressly said so. Accordingly, section 91 of the Licensing (Scotland) Act 1903 does not apply to the offences mentioned in said sub-sections (1) and (2) so far as regards the burgh of Saltcoats and other Police Burghs to which the provisions of the General Police Act of 1892 apply.

The Court answered the question of law in the negative.

Counsel for the First Party—The Dean of Faculty (Campbell, K.C.)—A. M. Anderson. Agent—Alexander Ramsay, S.S.C.

Counsel for the Second Party—Morison, K.C. — Leadbetter. Agents — Webster, Will, & Company, S.S.C.

Wednesday, March 13.

## FIRST DIVISION.

[Dean of Guild Court,  
Gourock.

### CRAWFORD v. DARROCH AND ANOTHER.

*Superior and Vassal—Feu-Contract—Condition of Feu Right—Building Restriction—Construction—Building Line Fixed by Superior—Continuance of Obligation to Observe Original Building Line.*

By a feu-contract several pieces of ground were disposed to a vassal. The vassal was taken bound to build a dwelling-house on each piece of ground "and to maintain the same in sufficient repair." The vassal further bound himself to build the houses "on the exact line to be fixed by" the superior or his agent. Held that a singular successor in one of the pieces of ground was not entitled to alter the building line without the consent of the superior.

By feu-contract dated 19th April and 11th June 1845, the factor and commissioner for General Duncan Darroch of Gourock