

conjunctly and severally for payment to the pursuer of the several sums, amounting in all to the sum of £102, 9s. 6d., in terms of the prayer of the petition.”

Counsel for the Appellant—C. K. MacKenzie, K.C.—J. A. T. Robertson. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Respondents—Campbell, K.C.—Constable. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, March 11, 1899.

OUTER HOUSE.

[Lord Kyllachy.

MACLACHLAN & MACKINNON v.
CAMERON AND OTHERS.

Local Government—Local Government (Scotland) Act 1889 (52 and 53 Vict. c. 50), secs. 70 (5) and 75 (1)—Illegal Payments—Surcharge on Persons “Making” them—Finality of Secretary for Scotland’s Decision.

Held, under the Local Government Act 1889, section 70 (5), (1) that the Secretary for Scotland’s decision on the questions whether a payment is legal or illegal and who is the person who made it is final; (2) that the clerks of a district committee of a county council and two members of the committee who signed a cheque were the persons “making” the payment for which the cheque was drawn.

The questions in this case arose out of the sections of the Local Government (Scotland) Act 1889, which are quoted in the immediately preceding report. The following is a brief narrative of the special facts:—

A special grant had been made to the District Committee for Skye of the County Council of Inverness for the purpose of the construction of roads. In an action between the District Committee and a proprietor the former were found liable to the latter in expenses, and were refused permission to defray them out of the special grant. They were ultimately paid by the County Council of Inverness, partly out of a fund which had been presented to the County Council for the relief of rates, and partly out of the ordinary funds of the County Council.

The cheque drawn for the payment of the expenses was signed by the clerks of the District Committee, Maclachlan & Mackinnon, and by two members of the District Committee.

On a report by the county auditor the Secretary for Scotland surcharged the amount of the expenses upon the persons who had signed the cheque.

In July 1897 the auditor, under section 70 (7) of the Act, raised an action against Maclachlan & Mackinnon and the two members of the District Committee, being

the persons who had signed the cheque, for payment of the sum surcharged. The defenders obtained a sist upon the ground that they intended to bring an action of reduction of the deliverance of the Secretary for Scotland. On 19th January they raised an action of reduction against the Secretary for Scotland and the Lord Advocate. The Lord Advocate in preliminary defences pleaded that the action was incompetent and that all parties were not called. On 20th July 1898 the Lord Ordinary (KYLACHY) sustained the preliminary defences and dismissed the action as incompetent, on the ground that the Secretary for Scotland having discharged his statutory duty was *functus* and had no interest or right to defend.

On 21st December 1898 Maclachlan & Mackinnon and the two members of the District Committee who signed the cheque brought the present action against the county auditor Cameron, in which they sought reduction of the deliverance of the Secretary for Scotland on which the action brought by the auditor against them in July 1897 was founded. The ground of reduction was that the Secretary for Scotland had acted *ultra vires*, having failed to make proper inquiry into the facts of the case and having surcharged the wrong persons.

LORD KYLLACHY—[*After disposing of various subsidiary points*]—“The points, however, which are really important are—(1) Whether in making the determination here challenged the Secretary for Scotland has exceeded his powers; and (2) whether, if not, the statute permits review by this Court on the merits. This last point may perhaps belong rather to the original action (which has not, I observe, been conjoined), but it formed part of the argument, and I think I may deal with it now.

“Now, the deviations from the statute alleged by the pursuers are, I think, these—They say, in the first place, that the Secretary for Scotland had only power to surcharge the alleged illegal payment ‘on the person or persons making it,’ these last being the words of the statute (sec. 70, sub-sec. 5), and that in surcharging the pursuers, who merely signed the cheque by which the payment in question was made, he has not surcharged the right persons—that is to say, the right persons in the sense of the Act. This is the first and principal excess of power which the pursuers allege.

“Now, as to this the defenders’ answer is twofold. They say, to begin with, that the ascertainment of the person or persons making the illegal payment is just one of the matters left to the Secretary for Scotland—the statute (sec. 70, sub-sec. 5) providing that he ‘shall decide all questions raised by the interim report,’ and sub-sec. 7 providing further that ‘any sum determined by the Secretary of Scotland under this Act to be due by any person shall be paid by such person to the county council within fourteen days after such determination.’

“The defenders contend further that, even if the construction of the statutory words is ultimately for the Court, the Secretary for Scotland has selected the right persons. They urge that where a payment is made by cheque, the persons making the payment are and can only be the persons who sign the cheque, and that the statute contemplating, as it does, that all payments shall be made by cheque must be held to have had this in view. They point out further that the surcharge falls to be made, not on the persons authorising the payment, but on the persons making it—and the Scotch Statute, in this respect differing from the English Local Government Act of 1888, which (incorporating the provisions of the Public Health Act of 1875) provides for illegal payments being surcharged (subject to appeal) ‘upon the person making or authorising the making of the alleged payment.’

“I am of opinion that on both points the defenders are right. I agree with them in their view that the Secretary for Scotland has to decide as to the person to be surcharged, and I incline to agree also—taking the facts as they appear upon record—that there is no sufficient ground for impeaching his decision on that question. . . . I am therefore of opinion that the pursuers have failed to impugn the validity of the Secretary for Scotland’s determination as being outwith or disconform to the statute. And that is, I apprehend, enough to dispose of this action of reduction.

“But the original action is still before me, and it remains to consider whether in the one action or the other the pursuers can successfully maintain what I think was their last contention, viz., that, assuming the entire validity of the determination as a determination under the statute, it was not, on the just reading of the statute, final, but operated merely as a *prima facie* deliverance, which, under the statute, put the duty upon the county auditor of impeaching the legality of the surcharged payment in a court of law.

“I must say that, having given it all attention, I have not been able to appreciate this argument. It is quite true that when a new jurisdiction is conferred by statute upon a sheriff or magistrate or other inferior judge, there is, as has often been said, no such thing as implied finality. The presumption always is that review exists, unless clearly excluded. But it is, I should think, obvious that this principle, sound as it is, can have no application to the Secretary for Scotland, or to a jurisdiction such as that here in question conferred upon or transferred to him as the head of the Scotch Executive. The jurisdiction is partly, no doubt, judicial, but to a large extent it is also administrative, and involves, moreover, as section 70 of the Act shows, a very large element of discretion. I should not, I confess, expect to find that the Legislature in putting such duties upon the Secretary for Scotland placed him with respect to review in the position of an inferior judge. And accordingly when I find, as I do, that the statute declares that

he shall decide certain questions, and that upon his decisions payments shall be made and may be enforced by action, it appears to me that, so far from the statute contemplating review on the merits, it excludes such review as plainly as it can do so without express words. On the whole matter I shall repel the reasons of reduction and assoilzie the defenders; and with respect to the petitory action, I shall recal the sist and grant decree in terms of the summons.”

In the action of reduction of 21st December 1898 the Lord Ordinary assoilzied the defenders, and on the petitory action raised in July 1897 recalled the sist and granted decree in terms of the summons.

Counsel for Pursuers—Campbell, Q.C.—Cook. Agents—Duncan Smith & M'Laren, S.S.C.

Counsel for Defenders—The Solicitor-General (Dickson, Q.C.)—M'Lennan. Agents—Forbes, Dallas, & Co., W.S.

Thursday, June 8.

SECOND DIVISION.

[Sheriff Court of Lanarkshire
at Glasgow.]

DAWSON *v.* STEWART & SHAW.

Process—Proof—Jury Trial—Proof or Jury Trial—Appeal for Jury Trial—Remit to Sheriff—Court of Session Act 1825 (6 Geo. IV, cap. 120), sec. 40—Case Disclosing Claim which would not Justify Verdict of £40.

In an action of damages for personal injury, the pursuer averred that while employed as a workman at the discharging of iron ore from a ship a piece of ore fell and struck him on the wrist; that he sustained injuries to his wrist which necessitated his going to an infirmary where the wound was stitched; and that he would be unable to resume work for a considerable time to come. He further averred that his average wage was 30s. a-week. The action was raised about a week, and the record was closed ten weeks, after the injury was sustained. The Sheriff allowed a proof. The pursuer appealed for jury trial. The Court, in respect that the pursuer’s case as disclosed on record would not justify a verdict of £40, *refused* the appeal and remitted to the Sheriff to proceed with the proof. Rule of *Sharples v. Yuill & Company*, May 23, 1905, 42 S.L.R. 538, *followed*.

John Dawson, docker, 105 Hydepark Street, Glasgow, raised an action of damages for personal injury in the Sheriff Court there against Stewart & Shaw, stevedores, General Terminus, Glasgow.

The pursuer averred—“(Cond. 2) On 9th March 1905 the pursuer was in the employment of the defenders as a workman at the