

and this is right, because a prescriptive right to withdraw a larger quantity at a lower point, viz., Waterton Dyke, will not justify the taking this larger quantity at Stoneywood. So long as all the water taken by the defenders is taken at Stoneywood the limit of nine inches is sufficient to secure a free passage for the salmon. But, obviously, that limit would not be efficacious for the purpose if the defenders were permitted to make a further withdrawal at a lower point, thus using up the water which was intended to secure a passage for the salmon.

If I had been sitting alone I should have preferred to express the qualification differently. I should have said that the regulation was only to be binding so long as the defenders withdrew the water only at Stoneywood, but that in the event of their desiring to alter their works and to withdraw water at a lower point the pursuers should be at liberty, either in this or in another action, to apply to the Court for a new regulation. I have difficulty in forecasting the effect of future alterations, and I incline to think that the condition, as expressed by the Lord Ordinary, is too complicated for the purposes of a working condition. But as my opinion on this point is not shared by other members of the Court I may add that if the condition only means that the defenders are not to withdraw at a lower point any part of the nine inches of water which they are required to send over the Stoneywood Dyke, then I approve of it; if it means anything more than this, I should prefer not to make a hypothetical declaration as to a condition of things that has not arisen and which may never arise.

With respect to the conditions numbered (1) and (2) as to the erection of gauges, the marking of the sluices, and the preparation of the table recommended in the report of the referees, I think that these conditions are sound, and that they are within the legitimate limits of regulation.

With respect to the interdict to be granted, this will be in accordance with the declaratory findings as these may be adjusted by the Court.

LORD KINNEAR concurred in the opinion of LORD ADAM.

The LORD PRESIDENT was not present at the hearing and gave no opinion.

The Court adhered.

Counsel for the Pursuers and Respondents—Campbell, K.C.—Lord Kinross. Agents—Alex. Morison & Co., W.S.

Counsel for the Defenders and Reclaimers—The Solicitor-General (Salvesen, K.C.)—Clyde, K.C.—Nicolson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Wednesday, June 7.

SECOND DIVISION.

[Sheriff Court of Lanarkshire
at Hamilton.

GRAHAM v. LAMBIE AND OTHERS.

Local Government—Local Government (Scotland) Act 1889 (52 and 53 Vict. c. 50), secs. 70 (5), 75 (1)—Audit of County Council Accounts—Illegal Payments—Disallowance by Secretary for Scotland—Surcharge on Persons “Making” Payments—Secretary’s Decision as to Legality is Final—Persons “Making” Payments are those who Signed Cheques under sec. 75 (1).

The Local Government (Scotland) Act 1889, with respect to the audit of county council accounts, provides, sec. 70 (sub-sec. 5), that if a county auditor thinks that any payment is contrary to law and should be disallowed, he is to report it to the Secretary for Scotland, who after due inquiry shall decide all questions raised by the report and shall “disallow all illegal payments, and surcharge the same on the person or persons making them.”

By section 75 (sub-section 1) it is provided that all payments out of the county funds, with certain exceptions not applicable to this case, “shall be made in pursuance of an order of the council signed by three members of the finance committee, and countersigned by the county clerk. . . . Moreover, all cheques for payment of moneys shall be signed by two members of the finance committee, and be countersigned by the county clerk or, by a deputy approved by the council.”

The Secretary for Scotland, on a report from a county auditor, under section 70 (5) of the Act, disallowed certain payments made out of county funds, and surcharged them upon the individuals who signed and countersigned the cheques under section 75 (1) of the Act.

Held (1) that upon the question of the legality or illegality of the payments the decision of the Secretary for Scotland was final; (2) that the individuals who signed and countersigned the cheques were the persons “making” the payments in the meaning of section 70 (5), and were accordingly rightly surcharged.

The Local Government (Scotland) Act 1889, section 70, provides—“The following regulations with respect to audit shall be observed,” that is to say, . . . sub-sec. (5)—“If it shall appear to any county auditor acting in pursuance of this section that any payment is in his opinion contrary to law and should be disallowed, or that any sum which in his opinion ought to have been is not brought into account by any person, whether such payment or failure to account has been made matter of objection or not, he shall by an interim report under his

hand report thereon to the Secretary for Scotland, setting forth the grounds of his opinion as aforesaid; and the Secretary for Scotland shall cause such interim report to be intimated to the objector, if any, and to the officer or other person affected thereby; and after due inquiry the Secretary for Scotland shall decide all questions raised by such interim report, and shall disallow all illegal payments and surcharge the same on the person or persons making them, and shall allow all sums which ought to have been but have not been brought into account." Sub-section 6—"If the Secretary for Scotland shall be of opinion that, although a disallowance or surcharge might be lawfully made, the subject-matter thereof was incurred under such circumstances as to make it fair and equitable that the disallowance or surcharge should not be made, he may abstain from making the same." Sub-section (7)—"Every sum determined by the Secretary for Scotland under this Act to be due from any person shall be paid by such person to the county council within fourteen days after such determination has been intimated to him, and it shall be the duty of the county auditor to recover the same." Section 75 (1)—"All payments to and out of the county fund shall be made to and by the county treasurer, and all payments out of the fund shall, unless made in pursuance of the specific requirement of an Act of Parliament or of a decree of a competent court, or on the requisition of any district committee or standing joint-committee, or for the periodical payment of salaries and wages, be made in pursuance of an order of the council signed by three members of the finance committee and countersigned by the county clerk, and the same order may include several payments. Moreover, all cheques for payment of moneys shall be signed by two members of the finance committee, and be countersigned by the county clerk or by a deputy approved by the council. (2) Any such order may be stayed by note of suspension in the Bill Chamber, and may be wholly or partially disallowed or confirmed with or without expenses."

John Graham, accountant, No. 212 West George Street, Glasgow, County Auditor of the County of Lanark, brought an action in the Sheriff Court of Lanarkshire at Hamilton against Robert Lambie, William Neilson, William Templeton, and Allan Graham Burns Graham, members of the County Council of the county of Lanark, and William Alston Dykes, County Clerk of the county of Lanark, and Thomas Munro, Deputy County Clerk, in which he sued them for certain sums of money, amounting in all to £102, 9s. 6d.

The pursuer averred as follows:—In the course of the audit of the accounts of the County Council of Lanark for the year ending 15th March 1902 the pursuer found certain payments charged which in his opinion were illegal and fell to be disallowed, and accordingly under section 70 (5) of the Local Government (Scotland) Act of 1889 he submitted an interim report upon the matter to the Secretary for Scotland. The

payments to which he alluded were (1) expenses amounting to £50, 4s. 3d. of two officials and one county councillor to London on the matter of the Police Superannuation (Scotland) Bill, charged on the police assessments; the ground of his objection was that the expenses did not fall within the scope of the Police (Scotland) Act 1857, secs. 27, 28, 29, 40, 55, and 57, which regulated the nature of the expenditure which might be defrayed out of the police assessments. (2) Expenses amounting to £52, 5s. 6d. of deputation of four county councillors and one official to London in the matter of the Agricultural Rates Act 1896, Continuation Act 1901, charged on the General Purposes Assessment; the ground of his objection was that the expenses did not appear to have been incurred in connection with the execution of any Act administered by the County Council. The Secretary for Scotland having intimated the report to each of the defenders, who were the persons who under section 75 (1) of the Local Government (Scotland) Act of 1889 had signed the several cheques by which the payments in question had been made, issued after an inquiry a determination, in which he found that the payments in question were illegal, and surcharged the same upon the defenders "as the persons by whom the payments were made, they having signed the cheques by which payment was effected." The determination of the Secretary for Scotland was duly intimated to each of the defenders, but they failed to make payment of the same due by them within fourteen days as required by section 70, sub-section 7, and accordingly the pursuer, as required by the above section, raised the present action against them.

The pursuer pleaded, *inter alia*—" (1) The sums concluded for in the petition having been determined by the Secretary for Scotland, in virtue of the powers conferred on him by the Local Government (Scotland) Act 1889, to have been illegally paid, and the said sums having been disallowed by him and surcharged on the defenders, the defenders are conjunctly or severally liable to make payment of the respective sums surcharged upon them."

The defenders in answer stated, *inter alia*—"That even if the payments were illegal, they have not been surcharged on the person or persons making them in terms of the statute. The Standing Joint Committee made the first four payments" [those in connection with the first deputation], "and the County Council the remaining five" [those in connection with the second deputation], "both by the medium of the Finance Committee. Under section 75 of the Act of 1889 all cheques for the payment of money from the county funds must be signed by two members of the Finance Committee, and countersigned by the County Clerk, or by a deputy approved by the Council. In such a case the persons signing the cheques are not the persons making the payment. The individual members of the Finance Committee who signed the cheques in question have no veto or

responsibility as such apart from their committee, and their signing the said cheques was merely a method of carrying out a payment made by the County Council or said committees, and a certification that the payment had received the sanction of the Finance Committee. It was in no sense a payment made by such members. The County Clerk and Deputy County Clerk, whose signatures appear on said respective cheques, were bound to obey the instructions of the Finance Committee in granting said cheques, but they did not sign them as the said determination alleges. One or other of them countersigned the said cheques as required by section 75 (1) of the Act of 1889, to attest the authenticity of the signature of the members of the Finance Committee signing them, and the fact that they were such members. Beyond verifying these facts, these officials incurred no responsibility by countersigning. Further, the first four of said payments were disbursed by the County Council on account of the Standing Joint Committee in terms of the Act of 1889, under which the County Council is bound to pay whatever may be required by the Standing Joint Committee, and the Council have no responsibility as to the expenditure of the money."

They pleaded, *inter alia*—" (4) The payments disallowed being lawfully and properly charged against the County Council, *et separatim*, their legal chargeability not being within the competence of the Secretary for Scotland to decide, the determination of the Secretary for Scotland is *ultra vires* and inept, and decree of absolvitor should be granted. (5) The defenders not being within the meaning of the statute the persons making the payments challenged, should not have been surcharged therewith, and are entitled to be assolizied with expenses."

On the 30th March 1904 the Sheriff-Substitute (THOMSON) pronounced the following interlocutor—. . . "Finds that the defences stated are incompetent in the Sheriff Court, repels the same accordingly, and grants decree against the several defenders conjunctly and severally for payment to the pursuer of the several sums in terms of the prayer of the petition." . . .

Note.—"The pursuer's case is simple; he tables a formal determination of the Secretary of State for Scotland, and craves a decree of the Court in terms thereof.

"The defenders object to the determination, first, on the ground that it is wrong in law—wrong on the merits—inasmuch as it determines that certain payments were illegal, whereas on a sound view of the law they are perfectly legal; and second, on the ground that even if the payments were illegal, the determination surcharges the wrong parties, inasmuch as it treats the signers of the cheques by which the payments were made, as the parties by whom the payments were made, whereas the signers were the mere instruments of the County Council or of the Standing Joint Committee; and this objection is specially pressed on behalf of the County

Clerk and Deputy County Clerk, who countersigned the cheques on the express authority of their superiors.

"But even if I thought these objections to the determination were well founded, I could not possibly give effect to them, because they involve a reduction of the determination, and I have no power to reduce it. The statute has made the Secretary for Scotland the judge of the legality or illegality of certain payments and of the devolution of responsibility for such of these payments as he finds to be illegal. The statutory jurisdiction which is thus conferred upon him is a special one, and it is out of the question to hold that his exercise of it can be reviewed in the Sheriff Court. If he exceeds his statutory jurisdiction or fails to take the steps which the statute prescribes, there may be a remedy, but most certainly not in the Sheriff Court, even giving the widest construction to the power conferred by the Sheriff Court Act of 1877, of setting aside 'deeds or writings' by way of exception. Accordingly I must give effect to the determination as it stands." . . .

The defenders appealed to the Sheriff (GUTHRIE), who on 6th August 1904 pronounced the following interlocutor—. . . "Finds that the pursuer has not stated facts and circumstances relevant and sufficient to support the prayer of the petition." . . .

Note.—"It humbly appears to me that the payments were not 'made' by the persons who signed and countersigned the cheques, except in a sense that a payment is made or goods delivered to John Smith by a messenger who is sent to pay or deliver by his employer. Suppose that employer be a banker or a lawyer directed to make a payment for a client, and that by mistake he pays through his messenger to a wrong person, the client's recourse is not against the messenger who did what he was ordered, and was bound to do, but against the banker or lawyer. In this case, which when analysed appears to be equally simple, the gentlemen who signed the cheques were merely the hands of the County Council who ordered the illegal payments to be made. This becomes clear when we turn to section 75 of the Act, which enacts—section 75 (1)—that all payments out of the county fund shall be made by the county treasurer, and except in certain specified cases, not including those now in question, that all payments out of the fund are to be made in pursuance of an order—see section 75 (3)—of the council signed by three members of the finance committee and countersigned by the county clerk. That is followed by a direction that cheques shall be signed by two members of the finance committee, &c. Obviously the duty of the person signing the cheques is only to see that the sum being paid falls under one of the heads enumerated in section 75 (1) or under an order of the council, and they have not to do with the validity or legality of that order. It may even happen, as with the defendant Lovering in *Attorney-General v. Tottenham Local Board*, 27 Law Times, R. 440, cited by Mr Smith, that they

had voted against the payments for which in an executive capacity they sign the cheque. The accurate application of the rule would lead to the Treasurer's clerks being surcharged with 10s. paid by him by the Council's direction to a carriage-hirer for driving the members of a deputation in question to the railway station. It appears therefore that the rule *respondent superior* must here be applied in construing the words in section 70, 'persons making them,' *i.e.*, the payments, and that the pursuer has failed in his condescendence to set forth any case against the defenders. He avers (Art. 4) that notice was given to 'each of the defenders being the persons who had signed the several cheques,' but entirely forgets that the real responsibility rested on those who ordered the payments of which the cheques were but the means or the signs. It is not alleged that the objection was ever notified to those truly responsible, for there is not, as I have tried to show, reason or justice in saying that the defenders in respect of the ministerial act of signing the cheques were the 'officers or persons' to whom, as 'affected thereby,' notice of the objection should be made. The result of sustaining the relevancy would be, if a decree were ultimately given against them, that the defenders would be forced to raise other actions for their relief, whether against the persons receiving the moneys or against the individual councillors who authorised the payment it is unnecessary now to inquire."

The pursuer appealed to the Court of Session.

The case was, by arrangement, argued and decided as though the defenders had brought an action of reduction of the Secretary for Scotland's determination.

Argued for the appellant—(1) On both questions, *viz.*, whether the payments were legal or illegal, and who were the parties who made them, the decision of the Secretary for Scotland was final—*MacLachlan & Mackinnon v. Cameron and Others*, March 12, 1899, reported immediately *infra*. No provision for review was contained in the statute, and sub-secs. 6 and 7 of sec. 70 were quite incompatible with the idea of review. That the Secretary for Scotland's decision should be final was supported by the analogy of the English Local Government Act 1888, sec. 71, which, by reference to the Public Health Act 1875, sec. 247, permitted an appeal to the Local Government Board, which was final, as well as to the King's Bench Division. (2) His decision was in fact a right one, as the persons who signed the cheques were the persons who made the payments in the sense of the Act. The object of the Act was to provide a check against maladministration, and the only way to effect this was to provide a means of recovery from individuals. If the County Council as a whole or any of its committees were to be regarded as having made the payments, the money illegally paid out could never be restored to the county funds. Section 70, sub-sec. 5, differed on this point from sec. 247 of the Public Health Act 1875,

which contained the additional words "or authorising the making of the illegal payment."

Argued for the respondents—(1) On neither question was the Secretary for Scotland's decision final. It was contrary to principle and policy that upon a question involving rights to property there should be no appeal to a court of law. Such right of appeal could only be taken away by explicit enactment, and there was none such in the Act. Such an idea was incompatible with sub-sec. 2 of sec. 5. The corresponding English Act of 1888 favoured the respondent's view, for by a reference to the Public Health Act 1875, sec. 247, it permitted appeal to the Court of King's Bench. (2) The persons signing the cheques were not the persons "making" the payments in any reasonable sense. The people who really made the payments were the committees who had the right to authorise, and did in fact authorise, the payments. The persons who signed the cheques merely performed a mechanical function under sec. 75 (1), and their only duty was to see that the cheques were technically correct. The cases of the *Magistrates of Leith v. Leith Dock Commissioners*, July 25, 1899, 1 F. (H.L.) 65, 36 S.L.R. 956, and *Osborne v. Barclay, Curle, & Company*, 1901, A.C. 269, were also referred to.

LORD STORMONTH DARLING—This is an appeal from a judgment of the Sheriff of Lanarkshire dismissing as irrelevant an action brought by the Auditor of that county for recovery of the sums surcharged upon the defenders by a determination of the then Secretary for Scotland, dated 4th June 1903. This determination bears to have been made under sec. 70 (5) of the Local Government (Scotland) Act 1889, which requires the Secretary for Scotland, on receiving an interim report from the County Auditor that any payment is, in his opinion, contrary to law, and should be disallowed, to intimate the report, and after due inquiry to "decide all questions" raised thereby, and to "disallow all illegal payments, and surcharge the same on the person or persons making them." The payments in question were charged in the accounts of the County Council for the year ending 15th May 1902, and consisted of sums amounting to £50, 4s. 3d. and £52, 5s. 6d. respectively for expenses of certain county councillors and officials on visits to London in connection with Parliamentary proceedings. The Secretary for Scotland, after intimation to the defenders and due inquiry, determined that these payments were illegal, disallowed them, and surcharged the same upon the defenders as the persons by whom the payments were made, "they having signed the cheques by which payment was effected."

The defenders challenged the determination upon two main grounds. They say (1) that the Secretary for Scotland is not final as to the illegality of the payments, and (2) that even if he were he has surcharged the wrong persons. It is on the second of these grounds that the Sheriff

has dismissed the action as irrelevant, for on the first question, though not actually deciding it, he indicates an opinion adverse to the defenders. I am unable to agree with the conclusion of the learned Sheriff in dismissing the action.

I admit that the legality of any payment made out of a statutory fund would, apart from express provision in the statute establishing the fund, be a question for the courts of law. This statute contains a provision—sec. 75 (2)—for any order of a county council for payment out of the county fund being stayed by a prescribed legal proceeding. But it also contains the provision—sec. 70 (5)—in virtue of which the Secretary for Scotland has issued his determination. That provision does not in terms declare that his decision shall be final. But it does not contain any machinery for review; it does not require him to describe the nature of the inquiry which he has made, or to state any reasons for his decision. The whole proceeding has reference merely to the particular items in the accounts under audit; it is essentially of a partly discretionary and altogether summary kind, for the Minister, even when satisfied that a surcharge might lawfully be made, may abstain from making it if circumstances render such a course fair and equitable, and when he does make a surcharge payment is to follow within fourteen days from the determination being intimated. It seems to me, therefore, that we have no materials and no jurisdiction to review what the Minister has done in the exercise of a statutory duty which is partly, no doubt, judicial but is also largely administrative.

On the second question it is unnecessary to consider whether there also the determination is conclusive, for I am clearly of opinion that, whether conclusive or not, it is right. Once the Secretary for Scotland has decided that payments are contrary to law, he has no option but to disallow them, and to “surcharge the same on the person or persons making them.” These latter words are in marked contrast to the words in the English Local Government Act (57 and 58 Vict. c. 41), which by reference to sec. 247 of the Public Health Act 1875 (7) and (8) directs the auditor to “disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment subject to appeal either to the Court of Queen’s Bench or to the Local Government Board.” Who then are the persons making the payments under the Scottish Act? Clearly I think the persons who sign and countersign the cheques, by which alone, under sec. 26 (2), and sec. 75, (1) payments out of the county fund can be made. It is said that these persons in so doing acted ministerially, and as the mere hands of the Standing Joint-Committee or the County Council and its Finance Committee as the case may be. I do not doubt it, nor do I doubt that there may be hardship in holding the defenders personally liable for their ministerial acts. They may or may not have claims of relief

against the persons who directed the payments to be made, or against the persons who received the money. As to that we can decide nothing in this action. All we can do is to construe sec. 70, and its meaning seems to be clear. If considerations of hardship be relevant at all, I would venture to point out that in general it is better for county councillors and county officials to be subject to the arbitrament of a minister of the Crown invested with large discretionary or dispensary powers in individual cases than to be left to the decision of a court of law which would have no such discretion on the abstract question of legality.

I am therefore of opinion that we should sustain the appeal and substantially revert to the judgment of the Sheriff-Substitute, omitting his finding that the defences stated are incompetent in the Sheriff Court, for the pursuer asked us to take the case on the same footing as if the defenders had brought a reduction of the Secretary of Scotland’s determination.

LORD KYLLACHY — I concur, and have nothing to add except this—I had occasion so far back as April 1899 to consider and decide in the Outer House a precisely similar question to that raised in this action. The question there arose in a reduction of a certain report to and deliverance by the Secretary of Scotland made with reference to alleged illegal payments in the county of Inverness — payments made by cheque—and surcharged as here upon the persons signing the cheques. The whole matter was then very fully argued, some other questions being included which do not arise here, and I came to the conclusion which Lord Stormonth Darling has just expressed, both in respect to the question (1) whether the Secretary for Scotland had gone outside the statute, and (2) supposing he kept within the statute, his deliverance was subject to review. I do not think it necessary to say more than that I have endeavoured to reconsider with all possible impartiality the judgment I then pronounced. I remain of the opinion I then expressed—an opinion which will be found reported in 6 S.L.T. 384, the case being *Maclachlan & Mackinnon v. Cameron and Others*—[This case is reported immediately *infra*].

LORD KINCAIRNEY — I concur in the opinion read by Lord Stormonth Darling and concurred in by Lord Kyllachy. I have felt the greatest difficulty on the second point, that of surcharge, but I have been forced to the conclusion that the opinion expressed, though it seems somewhat strained, is necessitated by the absolute and express provisions of the statute.

LORD JUSTICE-CLERK—I also concur.

The Court pronounced this interlocutor—

“Sustain the appeal: Recal the said interlocutor appealed against, as also the interlocutor of the Sheriff-Substitute dated 30th March 1904: Grant decree against the several defenders

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.’