Wednesday, March 20.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

MITCHELL *v.* ABERDEEN INSURANCE COMMITTEE.

Insurance—National Insurance—National Health Insurance — Over-Prescribing — Surcharge of Panel Doctor — Reduction —Appeal to Insurance Commissioners— National Insurance Acts 1911, *and* 1913 (1 *&* 2 *Geo. V, cap.* 55, *and* 3 *&* 4 *Geo. V, cap.* 37) *— National Health Insurance (Medical Benefit) Regulations* 1913, *Regulation* 40.

Process — Limitation of Actions — Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1—*Act Done in Intended Execution of Act of Parliament — Continuing Wrong.*

A panel doctor brought an action against the burgh insurance committee to reduce its resolution to deduct a certain sum from the amount due to him for that year—a deduction made on the ground that he had over-prescribed during the preceding year—and to recover the sum so deducted. He made averments as to irregularity of procedure on the part of the panel committee on whose report the insurance committee had acted, but did not challenge the good faith of the insurance committee, but only its insufficient knowledge of the facts due to insufficient inquiry.

Held that the insurance committee were entitled to make the deduction from any sum due by it to the doctor, and not only from sums due for the year giving rise to the surcharge.

Held that the action having been raised more than six months after the resolution complained of had been put in force, being based on actings in the intended execution of an Act of Parliament and not contrary to or clearly outwith such Act, and involving no continuing injury, was excluded by the Public Authorities Protection Act 1893, sec. 1.

Opinions that, had the action not been excluded by the Public Authorities Protection Act 1893, inasmuch as the Regulations provided an appeal to the Insurance Commissioners, it would at least have fallen to be dismissed as premature.

Opinions that the averments as to the alleged irregular procedure of the panel committee and insufficient inquiry by the insurance committee were irrelevant.

The National Health Insurance (Medical Benefit) Regulations (Scotland) 1913, sec. 40, enacts—"(1) Where it appears to the panel committee that by reason of the character or amount of the drugs or appliances ordered for insured persons by any practitioner or practitioners on the panel, the cost of the supply of those drugs and appliances is in excess of what may reasonably be necessary for the adequate treatment of those persons, the panel committee may, and if any representations to that effect are made to them by the pharmaceutical committee shall, make an investigation into the circumstances of the case, whether in respect of the drugs and appliances ordered by an individual practitioner or generally as to the orders given for drugs and appliances by practitioners on the panel. (2) The panel committee shall, after hearing the pharmaceutical committee and any practitioner concerned, make a report to the committee, and if, after considering the report, the committee are of opinion that an excessive demand upon the drug fund has arisen owing to orders given by a practitioner which are extravagant either in character or in quantity, they may, if they think fit, make such deduction from the amount payable to that practitioner by the committee as they think fit, and shall pay the amount so deducted to the credit of the drug fund, provided that the practitioner shall be entitled to appeal to the Commissioners, whose decision shall be final."

On April 20, 1917, Dr Alexander Mitchell, 70 High Street, Aberdeen, *pursuer*, raised an action against the Insurance Committee for the Burgh of Aberdeen, *defenders*, and also against the Panel Committee for the Burgh of Aberdeen and the Scottish Insurance Commissioners for any interest competent to them, wherein he concluded for (1) reduction of a decision of the Insurance Committee of date 6th September 1916, whereby they resolved to deduct the sum of £244 from the amount payable to him in respect of his remuneration as a medical practitioner in Aberdeen on the list of the Insurance Committee, and (2) for payment to him of that sum.

The pursuer *averred*—"(Cond. 5) On 13th July 1916 the pursuer received the following letter from the clerk to the Panel Committee:—'80 *Union Street, Aberdeen, 13th July* 1916.—Dr Alexander Mitchell, 70 High Street. Dear Sir—*Aberdeen Burgh Panel Committee*—In terms of s. 40 of the National Health Insurance (Medical Benefit) Regulations (Scotland) 1913, I am instructed to request you to meet the Panel Committee here on Tuesday the 18th inst., at 8·30 p.m., to give explanations regarding your prescribing during the year 1915. The prescriptions to be submitted to you at the meeting will be here for your inspection any day from now till the date of the meeting should you wish to see them. Kindly acknowledge receipt of this intimation.—Yours faithfully, JAMES JOHNSTONE, Clerk to the Panel Committee.' On receipt of this letter the pursuer caused his clerkess to attend at the office of the clerk to the Panel Committee to take a note of the prescriptions referred to therein, when it was found that these related to only three cases on the pursuer's panel. The pursuer thereupon on 17th July 1916 addressed a letter to the clerk to the Panel Committee giving his explanations regarding the said prescriptions. . . . On 20th July 1916 the pursuer received from the clerk to the said Panel Committee a letter in which it was stated that the pursuer's letter of 17th July had been submitted to a meeting of the Panel Committee held on 18th July, when the clerk was instructed to inform the pursuer that the Committee were not satisfied with the

explanations given, and that in compliance with their statutory duty they must report accordingly to the Insurance Committee.... (Cond. 6) On 8th September 1916 the pursuer received from the clerk to the Insurance Committee the following letter:—'Dear Sir,—I have been directed by the Aberdeen Burgh Insurance Committee to intimate that consequent on a report from the Aberdeen Burgh Panel Committee endorsed by the Aberdeen Burgh Pharmaceutical Committee to the effect that these committees were of opinion that an excessive demand upon the drug fund of the area had arisen owing to orders given by you which were extravagant both in character and quantity the committee have decided in virtue of the powers conferred upon them by paragraph 40 (2) of the National Health Insurance (Medical Benefit) Regulations (Scotland) 1913, to make a deduction of £244 from the sums payable to you, being the approximate amount by which the value of the prescriptions written by you during the year 1915 exceeded the amount available on a basis of 2s. per insured person on your list....' (Cond. 7) On making inquiry the pursuer ascertained that the Panel Committee, professing to act in virtue of the powers conferred upon them by the said section 40 (1) of the said Medical Benefit Regulations, had prepared and issued to the Insurance Committee a report in terms of which they purported to have made an investigation into the circumstances of the prescribing by the pursuer and another practitioner, and had, *inter alia*, found that the cost of the prescriptions furnished by the pursuer exceeded the 2s. allowed per insured person by 13·07 pence. The said report bore that the Panel Committee 'after hearing the practitioners concerned and the Pharmaceutical Committee beg to report that in their opinion an excessive demand upon the drug fund has arisen owing to orders given by Drs Agnes Thomson and Alexander Mitchell which are extravagant both in character and in quantity.' The Panel Committee submitted in said report that they had complied with the requirements of section 40 of the regulations, and called upon the Insurance Committee to deal with the matter in terms of sub-section (2) thereof. A copy of the said report will be produced at the calling hereof. With reference to the answer, it is explained that as appears *ex facie* of said report the only element considered by the Panel Committee was the average cost of pursuer's prescriptions as compared with the said arbitrary allowance of 2s. The Insurance Committee accepted the said report as conclusive against the pursuer and made no attempt to ascertain whether the cost of pursuer's prescriptions was or was not in excess of what was reasonably necessary for the treatment of the persons prescribed for. The pursuer had no knowledge of the tenor of the said report until he received the said letter of 8th September 1916 from the clerk to the Insurance Committee, and it was only after difficulty and towards the end of October that he was able to obtain a copy of the report. (Cond. 8) The pursuer further ascertained (1) that on 21st August 1916 the said report of the Panel Committee was brought before a meeting of the Finance and Medical Benefit Sub-Committee of the Insurance Committee, when it was recommended to the Insurance Committee 'that the two doctors be surcharged to the extent of £244 and £46 respectively, being the approximate amounts by which the value of the prescriptions written by these practitioners during 1915 exceeded the amount available on the basis of 2s. per insured person on their list,' and (2) that on 6th September 1916 at a meeting of the Insurance Committee it was resolved by a majority 'that the report of the Finance and Medical Benefit Sub-Committee of date 21st August 1916 be approved, and that in accordance with the terms of said report there be deducted from the amounts payable to Drs Mitchell and Agnes Thomson the sums of £244 and £46 respectively.' Excerpts relating to the said matters from the minutes of the said Medical Benefit Sub-Committee and Insurance Committee meetings will be produced at the calling hereof. . . . (Cond. 9) The decision of the Insurance Committee contained in the said minute of 6th September 1916, in so far as it purported to resolve that there be deducted from the amount due to the pursuer in respect of his remuneration the sum of £244, was arrived at contrary to the provisions of the said statutes and the said Medical Benefit Regulations 1913, and was *ultra vires* of the Insurance Committee and illegal. The whole procedure of the Panel Committee and the Insurance Committee, and the said decision itself, were in gross violation of the statutory provisions and the provisions of the said Regulations. (Cond. 10) It was the duty of the Panel Committee in terms of section 40 (1) of said Regulations, before proceeding to make an investigation into the circumstances of the pursuer's case, to have obtained information from which it should have appeared that by reason of the character or amount of the drugs or appliances ordered for insured persons by the pursuer the cost of the supply of these drugs and appliances was in excess of what was reasonably necessary for the adequate treatment of these persons. No such information was ever obtained by the Panel Committee. The basis upon which the allowance for the drug fund is made to the Insurance Committee is believed by the pursuer to be at the rate of 2s. per insured person, and the only information which the Panel Committee obtained or had submitted to them consisted of the number of prescriptions written by the pursuer for the year 1915 and the total cost thereof, which yielded an average cost per insured person on the pursuer's panel of 3s. 1·07d. The said committee had no information, and made no effort to obtain any information, relating to the illnesses from which persons who had been treated by the pursuer had suffered or as to what medicines were reasonably necessary either in character or quantity for the treatment of these persons. The proceedings of the Panel Committee were therefore fundamentally invalid. (Cond. 11) The Panel Committee

also violated the terms of the said regulations in respect that while they were bound to hear the Pharmaceutical Committee and the pursuer before making a report to the Insurance Committee they failed to do so or to give the pursuer any opportunity of being heard. The only communication which the pursuer received from the Panel Committee prior to their determining to issue the said report was the letter of 13th July 1916 quoted in Cond. 5. The said letter did not inform the pursuer that the Panel Committee were considering a proposal to surcharge him on the ground of excessive prescribing, but, on the contrary, simply requested the pursuer to give explanations regarding certain particular prescriptions which related to three persons out of a total panel of about 4000. The pursuer by his letter of 17th July 1916 supplied explanations regarding these three cases, and the Panel Committee by their clerk's letter of 20th July 1916 informed the pursuer that they were not satisfied with the explanations and that they must report accordingly to the Insurance Committee, but they did not then or on any other occasion explain to the pursuer that there was a proposal before them to charge him with excessive prescribing and to penalise him therefor. In any event, the pursuer had no notice whatever from the Panel Committee of any charge of excessive prescribing except with regard to the three cases before referred to. Further, instead of hearing the Pharmaceutical Committee as it was the duty of the said Panel Committee to do before resolving to issue their report to the Insurance Committee, the Panel Committee, before even communicating with the Pharmaceutical Committee on the matter, at a meeting held on 18th July 1916, decided to report to the Insurance Committee against the pursuer. Thereafter, on 21st July, the Panel Committee caused their clerk to send to the secretary of the Pharmaceutical Committee the prescriptions in the three cases already mentioned, and on 24th July 1916 the secretary to the Pharmaceutical Committee, by letter addressed to the clerk to the Panel Committee, stated that he was instructed to inform the Panel Committee that the Pharmaceutical Committee, from an examination of the prescriptions submitted and from their knowledge of the prescribing of the practitioners concerned (the pursuer and Dr Thomson) as cited by the Central Checking Bureau in their reports, were satisfied that an excessive demand had been made upon the drug fund through extravagant prescribing. The pursuer believes and avers that prior to issuing their said report the Panel Committee had no communications whatever, other than those above mentioned, with the Pharmaceutical Committee. On 16th August 1916 the Panel Committee issued their report to the Insurance Committee. The said report, in so far as it bears that it was prepared after the Pharmaceutical Committee and the pursuer had been heard, is untrue in point of fact. The Pharmaceutical Committee was never at any time heard before the Panel Committee. The pursuer never attended and was never heard by any meeting of the Panel Committee, and he was never afforded any opportunity of being heard by the Panel Committee in connection with the charge against him of excessive prescribing which was dealt with in their report. The Panel Committee before preparing and issuing the said report did not make any further investigation into the circumstances of the case, and, in particular, they did not make any inquiry into the question whether the drugs prescribed by the pursuer were in excess of what was reasonably necessary for the adequate treatment of the persons prescribed for. They proceeded, as they had done in instituting the investigation, solely on an arithmetical calculation of the average cost of the pursuer's prescriptions, and a comparison of that cost with the said basis of 2s. per insured person. Accordingly the said report was not a report made and issued by the Panel Committee within the meaning of said section 40 of the said regulations and was inept as the foundation for the decision of the Insurance Committee which followed thereon. The explanations in answer are denied. Explained that neither the Panel Committee nor the Insurance Committee had before them at any time a list of the persons prescribed for by the pursuer, or any information regarding the illnesses from which these persons suffered, or any other facts upon which it was possible for either of these bodies to form an opinion as to whether or not the pursuer had been guilty of ordering drugs for the sick persons on his panel which were extravagant either in character or in quantity. The defenders are called upon to produce copies of their own and the Panel Committee's minutes of meeting dealing with the pursuer's case. (Cond. 12) Further, even if the report of the Panel Committee had been made in conformity with the statutory provisions and regulations, it was the duty of the Insurance Committee, before deciding to convict the pursuer of excessive prescribing and to make a deduction from the remuneration payable to the pursuer, to have satisfied themselves that an excessive demand upon the drug fund had arisen owing to orders given by the pursuer which were extravagant in character or in quantity. This they failed to do. Instead of making, as was their duty, an inquiry into the individual cases which had been treated by the pursuer so as to ascertain whether the medicines supplied to the persons prescribed for had been in excess of what was reasonably necessary for the adequate treatment of such persons, the Insurance Committee submitted the Panel Committee report to a Finance and Medical Benefit Sub-Committee, and at a meeting of that sub-committee, held on 21st August 1916, it was minuted that 'after carefully considering the terms of the report it was decided, on the motion of Mr J. W. Gordon, seconded by Mr C. Wright, to recommend to the Insurance Committee that the two doctors be surcharged to the extent of £244 and £46 respectively, being the approximate amounts by which the value of the prescriptions written by these practitioners during 1915 exceeded

the amount available on the basis of 2s. per insured person on their list.' Thereafter the report of the said sub-committee was circulated amongst the members of the Insurance Committee, and at the meeting of the Insurance Committee at which the decision complained of was pronounced the only information which they had before them was the said invalid report of the Panel Committee and the report of the said sub-committee. Neither the Panel Committee nor the Insurance Committee made any inquiry into the number of sick persons on pursuer's panel during the year, although the average cost of drugs per person on the panel necessarily depended materially on the number of these persons who had to be prescribed for. In point of fact, the average percentage of sick on pursuer's panel during said year, viz., 70 per cent., was greatly in excess of the average percentage of sick on other panels in Aberdeen. In the cases of Dr Beveridge, Dr Gordon, and Dr Williamson, being the only three medical men who attended the said meeting of the Insurance Committee on 6th September 1916, the averages of sick on their panels during 1915 were only 48·64, 50·68, and 51·69 per cent. respectively, as compared with the pursuer's average of 70 per cent. The decision of the Insurance Committee was accordingly illegal and contrary to the provisions of the statutes and of the said Regulations. The explanations in answer which are irrelevant are denied. The pursuer believes and avers that various other practitioners in Aberdeen prescribed in excess of the 2s. allowance. Explained that the Insurance Committee in dealing with the pursuer's case not only proceeded without reference to the requirements of the patients, but made no inquiry for the purpose of being in a position to form an opinion whether the quantities and qualities of medicines prescribed by the pursuer and charged for by the chemists were in fact supplied to the patients. The only matter which the defenders considered in arriving at their decision was the cost of the pursuer's prescription in relation to the said allowance of 2s. per head. (Cond. 13) The said decision of the Insurance Committee was further illegal and *ultra vires* in respect it purported to decide to make a deduction from the remuneration due to the pursuer for the year 1916 of the sum of £244, on the ground of alleged excessive prescribing by the pursuer during the year 1915. By section 2 (1) of the said Regulations 'year' is defined to mean 'such period corresponding as nearly as may be to a calendar year as may be fixed by the Commissioners for the purposes of the administration of medical benefit.' The year fixed by the Commissioners for the purpose of administration of medical benefit runs from 1st January to 31st December, and on a sound construction of section 40 (2) of the said Regulations any deduction from the amount payable to a practitioner in respect of excessive prescribing can only be made from the amount payable for the year in which the excessive prescribing is alleged to have taken place."

The defenders set forth in their statement of facts—"(Stat. 2) Over-prescribing was found to be fairly common in Scotland, and particularly in Aberdeen, during the years succeeding the passing of the Acts. A full analytical report for part of the year 1913 was obtained by the Commissioners from a skilled reporter. The Aberdeen Panel Committee considered that report, and invited the whole doctors concerned to meet them and offer explanations upon the 30th September 1914. The pursuer was asked to do so, but refrained from attending. In November 1914 the Panel Committee forwarded to each doctor on the panel, and in particular to the pursuer, a communication pointing out the results of said investigation, making each doctor aware of his own average rate, and drawing special attention to the terms of section 40 of the medical benefit regulations. The pursuer's rate was one of the highest in Scotland among panel doctors with a considerable practice. For 1914 his results showed no improvement, and the figures brought out for each doctor for the last quarter of 1914 were again communicated to him for his consideration. With reference to the statements in answer, it is admitted that certain drugs have considerably increased in value since the war began. It was however proper for the pursuer to use these particular drugs as sparingly as possible, and to adopt adequate substitutes where the case allowed. It has been found reasonably possible throughout the whole of Scotland to keep the average cost of prescription at not much higher than one-half what the pursuer's prescribing amounted to. The figures and results arrived at were based on a comparison with those of the other doctors on the panel. *Quoad ultra* denied. The written explanations of the pursuer were (as the defenders are now informed) regarded as unsatisfactory, but as the figures then dealt with were for a broken part of a year, the Panel Committee decided, instead of holding an inquiry in any case or cases, to send out the communication above mentioned to each doctor, including the pursuer, showing his rate of prescribing. This was done on or about 14th November 1914. . . . (Stat. 5) During the course of the year 1915 there were issued reports on the chemists' accounts which showed, *inter alia*, evidence of excessive prescribing on the part of certain doctors. The reports referred to are the monthly reports, which called attention to specific cases of over prescribing as by excessive quantities or excessive repetition. These reports were fully examined by the Pharmaceutical Committee, who were satisfied that certain of the panel doctors, including the pursuer, were making an excessive demand on the drug fund, and they required the Panel Committee to take action thereon. Admitted that the reports were not issued at any stated intervals. *Quoad ultra* the averments in answer are denied. Satisfactory explanation, if forthcoming, of particular cases was fully provided for as after mentioned. It was for the doctor and not the Pharmaceutical Committee to specify any such excuse."

The pursuer pleaded, *inter alia*—"2. The

decision complained of having been arrived at without any inquiry having been made as to whether the prescriptions written by the pursuer were in excess of what was reasonably necessary for the treatment of the persons prescribed for by him, was *ultra vires* and contrary to the provisions of the said Regulations, and should be set aside. 3. On a sound construction of section 40 (2) of the said Regulations it was incompetent for the Insurance Committee to direct that the said sum of £244 in respect of alleged excessive prescribing by the pursuer in the year 1915 should be deducted from the amount due to him for the year 1916, and the decision of the Insurance Committee should accordingly be reduced. 4. The said sum of £244 having been illegally retained from the pursuer by the said Insurance Committee on 4th October 1916 the pursuer is entitled to decree for payment of that sum, with interest as concluded for. 5. The Public Authorities Protection Act of 1903 has no application to this action in respect—(1) the proceedings complained of were wholly *ultra vires* of the statutes and regulations, and (2) the illegal withholding from the pursuer of the said sum of £244 is a continuing injury to the pursuer. 6. In any event the defenders are barred by their actings and those of the Panel Committee from pleading the said Public Authorities Protection Act."

The defenders pleaded, *inter alia*—"1. No jurisdiction. 2. The action is incompetent in respect that the only method of review open to the pursuer is the appeal provided in the Medical Benefit Regulations, *et separatim*, in respect that the pursuer is not entitled to resort to the present proceedings without exhausting the said method of review, and the action should accordingly be dismissed. . . . 5. The present action being brought against the defenders for an act done in pursuance or intended execution of an Act of Parliament and of a public duty, and not being instituted within six months thereof, is excluded by the Public Authorities Protection Act 1893, section 1. 6. The averments of the pursuer being irrelevant and insufficient to sustain the conclusion of the summons, the action should be dismissed. *Separatim*, the said averments so far as irrelevant and wanting in specification should not be remitted to probation. . . . 8. The fifth and sixth pleas-in-law for the pursuer ought to be repelled in respect that there are no competent and relevant averments in support thereof."

On 26th January 1918 the Lord Ordinary (ORMIDALE) allowed a proof before answer.

Opinion.—"Dr Mitchell, the pursuer of this action, is a medical practitioner in Aberdeen, and is what is popularly known as a panel doctor, that is, he is on the list of the National Health Insurance Committee of Aberdeen for the purpose of treating persons insured under the National Insurance Acts 1911 to 1913. His panel is one of the largest in Aberdeen, numbering approximately 4000.

"On 6th September 1916 the Insurance Committee having come to the conclusion that an excessive demand on the drug fund had arisen owing to orders given by Dr Mitchell during 1915, resolved to make a deduction of £244 from the amount payable to him, and on 8th September they intimated to him, through their clerk, that he had been surcharged to that extent. On 4th October this resolution was put into effect by deduction of £244 from the payments then made to him.

"On 20th April 1917 Dr Mitchell raised the present action against the Insurance Committee, and also against the Panel Committee of the burgh of Aberdeen and the Scottish Insurance Commissioners, for any interest competent to them in the premises, for reduction of the resolution of 1916 surcharging him £244, and for payment to him of that sum.

"Defences have been lodged by the Insurance Committee of Aberdeen.

"Under powers conferred by the National Insurance Acts certain Regulations were issued, styled the National Health Insurance (Medical Benefit) Regulations (Scotland) 1913. These regulations are to have statutory force and effect.

"By section 40 it is provided as follows— . . . . *quotes, v. supra.* . . . .

"In surcharging the pursuer as they did the defenders purported to act in pursuance of this regulation. No appeal was taken by the pursuer to the Commissioners, and the defenders plead that an appeal, as provided by section 40, is the only competent method of review open to the pursuer, or, at any rate, that that method of review must first be exhausted before the pursuer is entitled to resort to proceedings in this Court.

The defenders also plead that the present action is excluded by the Public Authorities Protection Act, section 1. The pursuer meets both these pleas, *inter alia*, by the contention that the proceedings complained of were *ultra vires* of the statutes and statutory regulations, that the defenders having departed from the course prescribed by the statutes and regulations in question the provision as to appeal—assuming it to have otherwise the effect contended for—and also the Public Authorities Protection Act—have no application.

"This contention is based on many averments—as to the failure of the Panel Committee to make any such investigation as is provided for in section 40 (1) into the requirements of the cases for which he prescribed, and in respect of which he was found fault with, and also as to their failure to hear him or the Pharmaceutical Committee, as enacted in section 40 (2), and as to his ignorance even of the tenor of the report until he received the letter of 8th September 1916. I do not propose to examine these averments in detail. I have come to the conclusion, after carefully considering them in the light of the argument addressed to me, that they cannot be held irrelevant to support the plea that the proceedings complained of were *ultra vires* and in violation of the statutory Regulations, and that accordingly there must be inquiry. I cannot accept the view that what are disclosed by the pursuer's case—assuming, as I must assume at this stage, that they are

well founded in fact—are merely minor irregularities which might have been corrected on appeal by the Commissioners. If true, they go to show that the proceedings were without statutory warrant. If that be so, then, notwithstanding the so-called finality clause, the remedy of reduction is open to the pursuer, and it may be that the Public Authorities Protection Act has no application. If, for example, as the pursuer avers and explains, the Panel Committee sent in their report without hearing him or giving him a fair opportunity of being heard before sending in their report, then to surcharge him was neither an act in the execution or, in any reasonable sense, in the intended execution of the regulation.

"Again, before dealing with the third plea-in-law for the pursuer, it is necessary to know just exactly what the arrangements as to the payment of the remuneration earned by the panel doctors for a particular year are, and out of what sum due to the pursuer the deduction in question was in fact made.

"I should add that, as at present advised, the present question does not appear to me to fall to be referred to the Commissioners under article 14 of the agreement between the pursuer and the defenders. Not much was said at the debate about this agreement. That may be because its application, according to plea 3 for the defenders is dependent on the ultimate decision in regard to the right of appeal.

"Without therefore disposing of any of the pleas I shall allow a proof before answer."

The defenders reclaimed, and argued—By virtue of regulation 40 (2) of the National Health Insurance (Medical Benefit) Regulations 1913, the pursuer could appeal from the decision of the Insurance Committee to the Insurance Commissioners, whose decision was final. These Regulations had been given statutory force and effect by the National Insurance Act 1911 (1 and 2 Geo. V, cap. 55), and the National Insurance Act 1913 (3 and 4 Geo. V, cap. 37). The pursuer, not having availed himself of the statutory remedy thus provided by Act of Parliament, could not competently raise an action of reduction—*Craig* v. *City of Edinburgh Parish Council*, (1917) 55 S.L.R. 146; *Pasmore* v. *Oswaldtwistle Urban Council*, [1898] A.C. 387; *Denny Brothers, &c.* v. *Board of Trade*, (1880) 7 R. 1019, 17 S.L.R. 694; *M'Laren* v. *Steele*, (1857) 20 D. 48; *O'Neill* v. *Middlesex Insurance Committee*, [1916] 1 K.B. 331; *Watt Brothers & Company* v. *Foyn, &c.*, (1879) 7 R. 126, 17 S.L.R. 54. The following cases were distinguishable—*Maitland* v. *Douglas*, (1861) 24 D. 193; *Pryde* v. *Heritors and Kirk Session of Ceres*, (1843) 5 D. 552; *Lord Advocate* v. *Police Commissioners of Perth*, (1869) 8 Macph. 244, 7 S.L.R. 147; *Stirling, &c.* v. *Hutcheon, &c.*, (1874) 1 R. 935, 11 S.L.R. 542. The remedy provided by statute was the only remedy open to the pursuer, but even if this were not the case it would first require to be exhausted before proceeding further—*Caledonian Railway Company* v. *Glasgow Corporation*, (1905) 7 F. 1020, 42 S.L.R. 773. Only cases which were *funditus* null could be remedied by an action of reduction—*Leith Police Commissioners* v. *Campbell*, (1867) 5 Macph. 247, 3 S.L.R. 133, *per* Lord Justice-Clerk Inglis; *Smeaton* v. *Police Commissioners of St Andrews*, (1865) 3 Macph. 816, *per* Lord Mure; *Lord Advocate* v. *Police Commissioners of Perth* (*cit.*), *per* Lord Justice-Clerk Moncreiff. The decision to surcharge, which had been arrived at here by an expert body, was challenged solely on the ground that there had not been sufficient inquiry made. By statute four conditions had to be fulfilled—(*a*) Investigation of the case by the Panel Committee, (*b*) Hearing of the Pharmaceutical Committee, (*c*) Hearing of the panel doctor, (*d*) Consideration of these. All these steps had here been followed except (*c*), and that was owing to the pursuer's refusal to appear before the committee. The action was also excluded by the Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61), sec. 1, the act complained of having been done in pursuance or the intended execution of an Act of Parliament and of a public duty, and the action in respect thereof not having been commenced within six months thereafter. Only two classes of actions were not covered by the Act, viz., actions founded on contract and declaratory actions—*Morries Stirling* v. *Stirling County Council and Others*, (1900) 7 S.L.T. 351; *Midland Railway Company* v. *Withington Local Board*, (1883) 11 Q.B.D. 788, *per* Brett, M.R., and Lindley, L.J. The defenders having all along acted within their statutory powers, the pursuer had adduced no relevant averment to found an action of reduction.

Argued for the respondent—This case was one of the highest importance to medical practitioners. The defenders were *ultra vires* in imposing the surcharge. The year in respect of which it was made should be that in which it was earned, and they were not entitled to make it on sums due in respect of a different year. An act on the part of the defenders which was *ultra vires* was *funditus* null, and accordingly the pursuer was entitled to bring his case before the Court of Session without first having recourse to the Scottish Insurance Commissioners—Maclaren's Court of Session Practice, p. 116. The report of the Panel Committee not having been made in terms of the Regulations, which had been given statutory force and effect by the National Health Insurance Acts 1911 and 1913, the defenders' decision was *ultra vires*, and accordingly fundamentally null. No investigation had been made as to the nature of the diseases or as to the relation of the various medicines to the various patients for whom they were prescribed. The Public Authorities Protection Act 1893 (*cit.*) did not operate to shield the defenders, their mere statement that they were acting by virtue of a statute being inadequate if in reality their act was *ultra vires* of that statute—*Edwards* v. *Parochial Board of Kinloss*, (1891) 18 R. 867, *per* Lord M'Laren, at p. 869, 28 S.L.R. 669; *Mitchell* v. *Magistrates of Aberdeen*, (1893) 20 R. 253, 30 S.L.R. 351; *Sutherland* v. *Magistrates of Aberdeen*, (1894) 22 R. 95, 32 S.L.R. 81, *per* the

Lord President; *M'Ternan* v. *Bennett*, (1898) 1 F. 333, 36 S.L.R. 239, *per* Lord Low; Chartres on Protection of Public Authorities, p. 70. The Act should not apply, as the pursuer was lulled into a sense of security and postponed raising his action, and further because of the fact that this was a case of a continuing wrong, as the imposition of the surcharge really set up a title in the defenders to keep the pursuer's money.

At advising—

LORD JUSTICE-CLERK—The only party called as defenders in this action is the Insurance Committee for the burgh of Aberdeen. Certain other parties, and in particular the Panel Committee for the burgh, are called for any interest competent to them, but no conclusions are directed against these parties. The only conclusions are (1) to reduce a decision of the defenders contained in their minute of 6th September 1916 by which they resolved to deduct £244 from the remuneration due to the pursuer as a panel doctor, and (2) for decree against the defenders for £244.

The Lord Ordinary by the interlocutor reclaimed against allowed the parties a proof of their averments before answer. But there are certain preliminary pleas which I think we can and ought to dispose of now.

In the first place, the third plea for the pursuer is in my opinion unsound and ought to be repelled. It depends on the construction of section 40 of the Regulations quoted in condescendence 3, and particularly on sub-section (2) of that section, which provides that the defenders are to make the deduction of the character which we are now considering "from the amount payable to" the pursuer by the defenders. In my opinion this entitles the defenders to make the deduction from any sum that is or may be due by the defenders to the pursuer under the statute and relative agreement, and does not restrict them to making the deduction from the amount which was so due in respect of the year when the cause of the deduction arose. I am therefore of opinion that this plea should be repelled.

The next plea which falls to be considered is the fifth plea for the defenders, and the relative pleas in answer by the pursuer, viz., his fifth and sixth pleas, with the defenders' eighth plea. Several of the questions arising out of the consideration of this group of pleas are in some repects novel, and are undoubtedly difficult.

The first point to be considered is the position of the Panel Committee. Lengthy and detailed averments are made by the pursuer as to the actings of this Committee. But as I have already pointed out, no conclusion is directed against this body, and there is no averment that the defenders are responsible for the Panel Committee. I think they are not. The Panel Committee is quite independent of the defenders. It is appointed by the panel doctors, and its duties and powers are determined by the Insurance Commissioners.

In my opinion the powers and duties of the defenders in such a case as the present must be found in section 40 of the Regulations. They begin only after the Panel Committee have made their report to the Insurance Committee. It is provided by the said regulation that "if after considering the report the committee," that is, the Insurance Committee "are of opinion that an excessive demand upon the drug fund has arisen owing to orders given by a practitioner which are extravagant either in character or in quantity, they may if they think fit" make a deduction. Now if the statute had been duly complied with the following investigations and proceedings must, according to the pursuer, have taken place if and when it appeared to the Panel Committee that the cost of the supply of drugs was in excess of what was reasonably necessary for adequate treatment—(1) the Panel Committee must have made an investigation into the circumstances; (2) that Committee must have heard the Pharmaceutical Committee; (3) they must also have heard the practitioner concerned; and (4) they must have made a report to the Insurance Committee. All these conditions it appears to me were represented by the Panel Committee's report as having been fulfilled. Thereupon the Insurance Committee had the duty of considering the report of the Panel Committee. I do not find that anything further is prescribed to be done by the Insurance Committee after that before they come to determine whether they shall make a deduction.

The pursuer does not aver that the defenders were not of opinion that an excessive demand upon the drug fund had arisen owing to extravagant orders by the practitioner, but he maintains that no such opinion could be formed in compliance with the statute on the materials before the defenders, and unless, *inter alia*, the Insurance Committee before coming to that opinion made, "as was their duty, an inquiry into the individual cases which had been treated by the pursuer," and had in this way satisfied themselves that there had been an excessive demand on the drug fund owing to extravagant orders as aforesaid.

I cannot so read the statute. I think the investigations were to be made by the Panel Committee who are appointed by the panel doctors, and consist almost entirely if not altogether of panel doctors, and that committee before they make their report are to hear the practitioner involved, and also the Pharmaceutical Committee, who represent the chemists. In my opinion when the Panel Committee's report came before the defenders they were entitled to act on the footing that what it represented was accurate, and to proceed on the view *omnia rite et solemniter acta*, unless they were advised or ought to have been in knowledge to the contrary.

In my opinion the alleged misdeeds and omissions of the Panel Committee are irrelevant in a question with the Insurance Committee unless it is alleged that they participated therein, or at least proceeded in the knowledge thereof. But the pursuer in the argument before us advanced no such contention.

Turning now to the report of the Panel Committee which the Insurance Committee had to consider, what did it represent? (1) It bore to be a report made "in virtue of the duties and powers conferred upon that committee by section 40." (2) It referred to a communication from the Insurance Commissioners, a copy of which had been forwarded to the Panel Committee by the defenders, and said that "the Panel Committee made an investigation into the circumstances of the prescribing by the practitioners referred to in the communication," among whom the pursuer was included. It stated that the pursuer's excess over the 2s. allowed per insured person was 13·07d. per insured person. Further, it stated that while the local average frequency of repeats was 2·36, the pursuer's was 2·65. (3) It further bore that the Panel Committee after hearing the pursuer and the Pharmaceutical Committee "beg to report that in their opinion an excessive demand upon the drug fund has arisen" owing to extravagant orders as aforesaid given by the pursuer. (4) It further gave what it called "the result of the Pharmaceutical Committee's investigation into the prescribing of" the pursuer, in the form of a letter from the secretary of that committee. (5) It concluded by submitting that the Panel Committee "have complied with the requirements of section 40," and called upon the defenders "to deal with the matter in terms of sub-section 2 thereof."

That report was dated 16th August 1916, and was referred by the defenders to one of their sub-committees, who reported thereon on 21st August 1916 recommending a surcharge of £244. This report the defenders on 6th September 1916 considered along with the Panel Committee's report, and "after consideration and discussion" it was resolved to make the surcharge or reduction recommended. This is the decision which the pursuer seeks to reduce. It was reported to the pursuer by a letter dated 8th September 1916, and was given effect to on 4th October 1916 by deduction from the payments then made to the pursuer. The action was not raised till 20th April 1917.

As I have said, I do not find any averment by the pursuer to the effect that the defenders were not of the opinion that there had been an excessive demand following upon extravagant orders by the pursuer. His case, as I understand it, is that the defenders had not sufficient grounds on which to form such an opinion, and that such sufficient grounds could only be found as the result of independent investigations by the defenders into the individual cases prescribed for by the pursuer. In my opinion such averments are not relevant as a ground for challenging the soundness of the decision arrived at by the defenders to make a deduction or to support a claim for payment of the sum deducted.

But that is not the question raised by the defenders' fifth plea founded on the Statute of 1893. The pursuer complains of two acts —a decision and a deduction. It is, I think, plain, subject to the second branch of the pursuer's fifth plea, that the action was instituted and commenced too late. But I think the acts complained of were done in pursuance or execution, or at anyrate—and that under the statute is sufficient—in intended execution, of an Act of Parliament or of a public duty. The defenders' decision is contained in a writing, and was come to in answer to a call to proceed under said Regulations, which Regulations "have effect as if enacted in" the Statute of 1911 (section 65), and there was no suggestion in the argument before us that the defenders had not acted in perfect good faith.

There have been many cases both in England and Scotland on limitation clauses similar to that which we are now concerned with, and though different statutes were involved the general principles to be applied seem to have been clearly enough laid down and to be of service in considering a question under the Statute of 1893, although questions of delicacy and difficulty may arise in applying the said principles.

In *Russell* v. *Lang*, 7 D. 919 (where the words were "in pursuance of this Act") it was pleaded that the irregularities committed were so flagrant and fundamental that what was complained of could not be said to have been done "in pursuance" of the statute. This argument, however, was rejected. The Lord Ordinary (Ivory), whose interlocutor was adhered to, said the words "'in pursuance of the Act' do not imply that the proceedings must in all points have been regular and correct," and he quotes with approval two passages from Chitty's Burn's Justice. He concluded by observing that "the statute itself implies that there is to be protection for something more than mere formal irregularity; for it expressly excludes 'want of form' as a ground for quashing the conviction (section 15), and therefore the further protection given by section 17 to parties acting 'in the execution or pursuance of the Act' must necessarily have reference to errors in the substance of the case." Lord Fullerton said—"The only question is, Whether what the defender did was in pursuance of the statute? Now on reading the summons, and taking it in its most obvious sense, it seems to admit of no doubt that the whole series of facts charged against the defender are nothing but acts done by him in pursuance of the statute—*i.e.*, acts of the nature described and authorised by the statute, done by a person contemplated by the statute as one of the instruments for carrying it into effect. . . . The fair and even necessary construction of the words in this clause is that they denote things done not *de jure* but *de facto* in carrying out the statute. Indeed, but for this construction, the protection would be nugatory, as there is hardly a conceivable case in which things done *de jure* in terms of the statute could be even made the subject of prosecution at all." In *Melvin* v. *Wilson*, 9 D. 1129 (where the words were "in the execution of this Act") *Russell's* case was followed and most instructive judgments were delivered. I refer also to *Ferguson* v. *M'Ewen*, 14 D. 457. In that case Lord Justice-Clerk Hope said what was complained of "was a thing done erroneously,

irregularly, incompetently, but plainly in the execution of the Act," and notice therefore should have been given.

No doubt, if the thing complained of was not authorised by the Act at all the limitation may not apply. Thus in *Edwards*, 18 R. 8671, (where the words were "acting under this Act"), an action for the wrongful demolition of a house was held to be not subject to the limitation on the ground that the public authority had no power to do anything of the kind. Lord Adam said — "I cannot see that what they did was done in execution of the Act, or was done *in bona fide*, or that it was done under the Act." Lord M'Laren said the Act would not apply "where the thing complained of is something altogether without the powers conferred by the statute;" it "has no application where the person has been acting altogether without the authority of the Act." Lord Kinnear said what was done was "altogether beyond the scope and powers of the Act;" there was not "even the colour of a warrant for what the defenders have done."

The material distinction in such cases is also brought out in the opinion delivered in the case of *M'Fadzean*, 40 S.L.R. 239. The pupose of the Statute of 1893 is not to take away any right of action, but only to limit the time within which the action may be brought. In some of the cases it has been held that the act complained of was so clearly outwith the purview of the statute in the execution of which it was said to have been done that the limitation statute did not apply. The decision and deduction here, however, are the very things which the Insurance Acts and Regulations authorise. The scope of the limitation is by the Act of 1893 extended so as not only to apply to what is done in pursuance or execution of statutory powers, but also to what is done in the intended execution of such powers or of a public duty or authority. The averments as to neglects and omissions on the part of the Panel Committee to comply with the Regulations are, as I have said, in my opinion irrelevant as against the Insurance Committee, and especially so in view of the terms of the Panel Committee's report. It was not suggested in the argument before us for the pursuer that the Insurance Committee did not honestly believe that there had been the excess and extravagance required by the statute. In my opinion the terms of the Panel Committee's report in law entitled the Insurance Committee *bona fide* to believe that the requirements of the Regulations had been in all respects complied with by the Panel Committee. Even if (contrary to my opinion) a very critical consideration of the position might show some neglects or defaults, I do not think these would preclude the defenders from entertaining the *bona fide* belief that everything had been done according to law by the Panel Committee.

As to the defenders' own actings, I think the pursuer's averments show that what they did was in accordance with the statute, and that the averments he makes as to the duties required of them in the circumstances would impose on them a far greater burden than the statute requires, and we had no argument to the effect that the defenders had not acted in intended execution of the Insurance Regulation.

I am therefore of opinion that the defenders' fifth plea is sound.

The first branch of the pursuer's fifth plea-in-law is that the proceedings complained of were wholly *ultra vires* of the statutes and regulations. Now the only proceedings complained of, or for which redress is sought by the summons, are the said decision and deduction. These are all that the defenders are responsible for or against which redress is sought. In my opinion the defenders cannot be held responsible for anything the Panel Committee did or failed to do. I am further of opinion that there are no sufficient averments by the pursuer relevant to prevent the application of section 1 of the statute of 1893. To my mind the relevancy required for that result is different from the question of relevancy which might have been raised if the action had been brought in time. Indeed it might be said in our view that the statute of 1893 only requires to be appealed to if the latter relevancy exists. I am of opinion that this part of the pursuer's fifth plea is bad.

Equally I think that the second branch is unsound. The claim for the £244 is just a claim for debt which became due at latest on 4th October 1916. The deduction which is complained of was then made and given effect to, and there is, in my opinion, no continuance of injury or damage in the sense of the statute. To hold otherwise would, I think, involve that persistence in a refusal to pay damages for any wrongful appropriation of, or refusal to pay, money due would require to be held to be "a case of a continuance of injury or damage,"—see *Spittal's* case, 6 F. 828.

Finally, I am of opinion that there are no averments relevant or sufficient to support the pursuer's plea of bar.

While, as I have said, I consider the averments as to the actings of the Panel Committee not relevant, in this action all that is averred in that respect, as well as the other points brought out by the pursuer on record, could have been presented in an appeal to the Insurance Commissioners. Such an appeal is provided for by the Regulations. I cannot understand why such an appeal was not taken here if the pursuer's allegations be well founded, and I do not think we ought to assume that the Commissioners would have dealt otherwise than justly with the pursuer. Many of the points involved are much more suitable for determination in the manner provided by the statute where what is involved is a matter as much of conduct and administration as of purely legal right. I incline to think that the resources of the statute were intended to be exhausted before recourse was had to the courts of law, in which event, in accordance with *Caledonian Railway Company* v. *Glasgow Corporation*, 7 F. 1020, the present action would be premature. But it is unnecessary in the view I have taken to decide this.

The first plea-in-law for the defenders is

thus stated "No jurisdiction." It is not easy on this record to understand precisely what that means, and I agree with the views suggested by Lord Dundas in the course of the discussion, and which he thus expressed in the case of *Love* v. *Love*, 1907 S.C. 728—"The plea as stated, though it has passed muster in various reported cases, is not, I think, in point of form a plea-in-law at all, because it does not amount to a proposition in law." In certain circumstances, even stated as it is here, the averments on record may make the point intended to be raised quite clear, but in others—and the present case is an example—that is not so, and there it is the duty of the pleader so to express the plea as to make it clear what is the point really intended to be raised by it.

The result is that in my opinion the Lord Ordinary's interlocutor should be recalled and the action dismissed.

LORD DUNDAS—The Lord Ordinary has adopted an easy and attractive, but not in my judgment a legitimate course in ordering proof before answer upon the whole case without specifically dealing with any of the preliminary or prejudicial pleas stated by the parties. It seems to me that some at all events of these pleas could and ought to have been considered and disposed of before proof upon the merits was allowed, and I have come to the conclusion that the defenders are entitled to succeed without the necessity of any inquiry into the facts.

On the one hand the pursuer has a plea-in-law (*third*), which, as I think both counsel admitted, is capable of being disposed of upon the pleadings and the Regulations, and which if sustained would entitle him to immediate success. It would, if well founded, exclude consideration of the defenders' preliminary pleas, *e.g.*, under the Public Authorities Protection Act, for their actings would, *ex hypothesi*, be in plain contravention of their statutory powers and duties. The basis of the plea is fully explained in condescendence 13. But I am unable to hold, upon a construction of sections 40 (2) and 2 (1) of the Regulations there set forth that any deduction from the amount payable to a practitioner in respect of excessive prescribing can only be made from the amount payable for the year in which the excessive prescribing is alleged to have taken place. If this had been the intention, it ought to have been, and could easily have been, explicitly provided. But looking to the terms of the sections referred to, and also to section 37, I do not think that any such provision was intended to be made or has been made. The pursuer's third plea should therefore in my opinion be repelled.

The defenders on the other hand state a variety of pleas-in-law directed against the jurisdiction of the Court and the competency and relevancy of the action. I shall consider in the first place their fifth plea, which is based on the Public Authorities Protection Act 1893. This is a preliminary defence which ought as a rule to be disposed of on the pleadings, or if the averments in support of it are not admitted, by a proof limited to these. I agree with a recent judicial observation to the effect that "it would be a very inefficient protecting Act which left the protection to stand over until the conclusion of a contested case"—*per* Lord M'Laren in *Wilson*, (1904) 7 F. at p. 173. In this case I think the plea can be disposed of without any inquiry into the facts. It is admitted that the defenders are a public authority within the meaning of the Act. The decision complained of was on 6th September 1916, and it was put into effect by making the deduction on 4th October. The action was not raised till 20th April 1917, *i.e.*, more than six months subsequent to the later of the dates mentioned. I find it impossible to hold, even upon the pursuer's averments, that the defenders were not acting in the intended execution of their statutory duty as a public authority. These averments are mainly contained in condescendence 12. It is there said that it was the defenders' duty, which they failed to perform, to make "inquiry into the individual cases which had been treated by the pursuer, so as to ascertain whether the medicines supplied to the persons prescribed for had been in excess of what was reasonably necessary for the adequate treatment of such persons." I do not think the defenders had any duty to make such inquiry. Section 40 (2) of the Regulations only provides that if, after considering the report of the Panel Committee, they are of opinion that an excessive demand upon the drug fund has arisen owing to orders given by a practitioner which are extravagant either in character or in quantity, they may, if they think fit, make deduction as therein set forth. The gravamen of the pursuer's charge against the defenders seems to lie in the averment (condescendence 11) that the Panel Committee's report to them "was not a report made and issued by the Panel Committee within the meaning of said section 40 of the said Regulations, and was inept as the foundation for the decision" by the defenders which is now complained of. The gist of the pursuer's case is an attack upon the Panel Committee's report. He alleges that that Committee, in violation of section 40 (2), did not in fact hear the pursuer or the Pharmaceutical Committee before issuing their report, and also attacks the mode in which, as he alleges, they conducted their investigation into the circumstances of the case. These points are directly countered by the defenders in their answers. But even assuming that the pursuer has set forth a relevant case against the Panel Committee, the point for our consideration is whether there is anything in his record to show that the defenders, the Insurance Committee, against whom alone any operative decree is sought, were not acting (as *prima facie* they were) in the intended execution of their public duty. I can find nothing of the sort. The defenders when making their decision had before them a report by the Panel Committee which stated that they had made an investigation into the circumstances of the prescribing by the pursuer, certain of the results of which

were particularly set forth, and that after hearing the pursuer and the Pharmaceutical Committee they begged to report that in their opinion an excessive demand upon the drug fund had arisen owing to orders given by the pursuer which were extravagant both in character and quantity. It was the defenders' duty to consider this report, which was apparently in order, and they did so. They remitted the matter to the Finance and Medical Benefit Sub-Committee, who reported to them. With these two reports before them the defenders made the decision now sought to be reduced. The case thus disclosed seems to me, upon the pursuer's averments, to be a clear instance of the kind which the statute was meant to protect where a public authority is acting in intended execution of their duty. The protection is not absolute but qualified. Right of action is not excluded, but a wholesome stimulus is administered to pursuers to bring their cases within the reasonable time limit prescribed. The protection of the Act would never be required if public authorities always acted in exact conformity with their statutory duties, any more than the validating effect of the statute of prescription is needed where titles are above reproach. But the Act's protection is accorded where an authority have acted in the intended execution of their powers and duties; and I find nothing in the pursuer's averments to suggest that the defenders were not so acting.

The cases cited by the pursuer on this point do not, in my judgment, help him. In *Edwards*, 18 R. 667, *Mitchell*, 20 R. 253, and *Sutherland*, 22 R. 95, the defenders' plea was based on section 118 of the Public Health Act 1867, the language of which is not the same as that of the Act here pleaded. And in each case the defenders had plainly acted in contravention of the statute. In *Edwards* Lord Kinnear observed that "counsel were unable to refer to any provision in the statute which gave even the colour of a warrant for what the defenders have done." In the other two cases the local authority had removed a patient from hospital without having obtained a warrant from a magistrate, as prescribed by section 42 of the Act. In *M'Ternan*, 1 F. 333, a plea stated for the defenders under the Act of 1893 was repelled. But the case does not aid the pursuer. The defenders, two police-constables, were sued for damages for having maliciously and without probable cause charged the pursuer with an assault upon them. The Act was held not to apply because the defenders in charging the pursuer with assault were, as the Lord Justice-Clerk put it, "practically citizens making a complaint against another citizen for having done something to them," and not acting in the execution of their public duty. Here of course there is no suggestion that the defenders acted maliciously, nor, as I think, anything to show that they were not acting in the intended execution of their public duty and authority.

The pursuer's fifth and sixth pleas are stated as in bar of the application of the Public Authorities Protection Act. I do not think these pleas are well founded. The first branch of plea 5 has been dealt with in what I have already said. The second branch pleads that the injury complained of is a continuing injury. But the sole object of attack by the summons is the "pretended decision" of 6th September 1916, and I am unable to see that the fact that in consequence thereof £244 is "withheld" from the pursuer can be said to constitute a continuing injury. The sixth plea is that the defenders are barred by their actings and those of the Panel Committee from pleading the Act of 1893. The correspondence on which this plea is based is printed in the joint appendix. I do not think that it affords any substantial basis for the plea.

In my opinion therefore we ought to sustain the defenders' fifth plea-in-law, and also their eighth plea, which is ancillary to it. If this view is right there is a clear cut and sufficient ground for the disposal of the case, and it is unnecessary to form a concluded opinion in regard to the defenders' other preliminary pleas. I shall make but a few observations in regard to them. The defenders' first plea is stated in the two words "no jurisdiction." This is not proper pleading. A plea-in-law should be a proposition in law as I have pointed out (apparently without effect) on more than one occasion—*Ponton's Executors*, 1913 S.C. at p. 600; and *Love*, 1907 S.C. at p. 729. But from counsel's explanations it appears that the plea has really no different meaning or intention from what is expressed in the one which immediately follows it, and is directed against the competency of the action. Of the second plea I need only say that as presented by Mr Constable it appeared to me to be in both its branches possessed of considerable force. The third and fourth pleas were not mentioned at our bar, and I think both—certainly the fourth—should have been repelled in the Outer House. The sixth plea is directed to the relevancy of the action. If it were necessary to do so I should be prepared to sustain it for reasons which appear in what I have already stated.

On the whole matter I think we should recal the Lord Ordinary's interlocutor, repel the pursuer's third plea, sustain the defenders' fifth and eighth pleas, and dismiss the action.

LORD SALVESEN—This action is brought to reduce the decision contained in a minute of meeting of the defenders, by which they resolved to deduct from the amount payable to the pursuer in respect of his remuneration as medical practitioner in Aberdeen on the list of the Aberdeen Burgh Insurance Committee the sum of £244. There is also a pecuniary conclusion for payment of this sum. The Panel Committee for the Burgh of Aberdeen and the individuals who compose it are also called for their interest. The main ground of reduction is that the proceedings of the Panel Committee, on which the decision of the Insurance Committee sought to be reduced is founded, are *ultra vires*, and are therefore *funditus* null and void.

The action is based on section 40 of the National Insurance Joint Committee Regulations, which were issued on 14th November 1914 and have the force of statute. Under sub-section (*b*), where it appears to the Panel Committee "that by reason of the character or amount of the drugs or appliances ordered for insured persons by any practitioner or practitioners on the panel, the cost of the supply of these drugs or appliances is in excess of what may reasonably be necessary for the adequate treatment of those persons, the panel committee may, and if any representations to that effect are made to them by the pharmaceutical committee, shall make an investigation into the circumstances of the case, whether in respect of the drugs and appliances ordered by an individual practitioner or generally as to the orders given for drugs and appliances by practitioners on the panel."

On 13th July 1916 the pursuer received a letter bearing to be in terms of section 40 of the Regulations, requesting him to meet the Panel Committee on Tuesday 18th July at 8·30 p.m., to give explanations regarding his prescribing during the year 1915. The letter stated—"The prescriptions to be submitted to you at the meeting will be here for your inspection on any day from now till the date of the meeting." On receipt of this letter the pursuer avers that he caused his clerkess to attend at the office of the clerk to the Panel Committee to take a note of the prescriptions referred to therein. He avers that the clerkess examined the bundle of prescriptions and took a note of the cases to which the prescriptions referred, and that these involved three cases and about 30 prescriptions in all out of a total of about 10,000 written by him during the year in question. Having obtained this information he wrote the clerk on 17th July giving certain explanations in regard to the amount of the drugs supplied in these three cases. He did not attend the meeting fixed for 18th July.

On 20th July he received a letter of that date from the clerk to the Panel Committee intimating that his letter of 17th had been submitted to a meeting of the Panel Committee held on the 18th, and that the clerk was instructed to inform the pursuer that the Committee were not satisfied with the explanations given, and that in compliance with their statutory duty they must report accordingly to the Insurance Committee. The next step taken by the Panel Committee was on 21st July to send to the Pharmaceutical Committee a letter along with certain prescriptions. This letter is unfortunately not produced, but the reply of the clerk to the Panel Committee is made part of the report to which I shall afterwards refer. It bears that the letter of 21st July with prescriptions had been submitted at a meeting of the Pharmaceutical Committee, which had instructed the clerk to say that that Committee "from an examination of the prescriptions submitted, and from their knowledge of the prescribing of the practitioners concerned" (one of whom is the pursuer), "as cited by the Central Checking Bureau in their reports, are satisfied that an excessive demand has been made upon the drugs funds from extravagant prescribing." A report was thereupon prepared and issued by the Panel Committee on 16th August 1916, which bears that following on a letter of 27th June 1916 from the National Health Insurance Commissioners (Scotland) the Panel Committee have made an investigation into the circumstances of the prescribing by the practitioners referred to, and that in the case of Dr Mitchell his excess over the 2s. allowed per insured person was 13·07d. per insured person. They further found that the local average of repeats was 2·36, and that the pursuer's was 2·65. They also stated that after hearing him and the Pharmaceutical Committee they begged to report that excessive demands upon the drugs funds had arisen owing to orders given by the pursuer, which were extravagant both in character and quantity.

The pursuer attacks the proceedings of the Panel Committee on various grounds. He maintains that before making the reports as to whether he had in fact prescribed drugs in excess of what might reasonably be necessary for the adequate treatment of his patients it was the duty of the Committee to make inquiry into the individual cases which had been treated by him. I do not think such a duty is imposed upon the Panel Committee. The Committee consists entirely of local practitioners, who would necessarily be acquainted with the medical history of the burgh of Aberdeen for the year in question, and who are themselves experts in the matter of prescribing for insured persons. It appears to me out of the question to suggest that before such a body could form any opinion as to whether a given practitioner's prescribing had been extravagant they should investigate nearly 3000 cases for which the pursuer states that he prescribed during the year in question. If they selected typical forms of over-prescribing, and considered these in the light of the total cost of the prescriptions issued by the pursuer and of their own knowledge, I think they might well believe that they had adequate information to enable them to make the report with regard to a matter in which they had no personal interest, for the loss occasioned by over-prescribing falls, in the first instance at all events, on the persons who supply the drugs. The strongest point that the pursuer makes is that he was misled into believing that there were only three typical cases considered, which *prima facie* would seem to be an inadequate selection, and that accordingly his attention was directed only to these. The defenders on the other hand say that not fewer than about 150 typical forms of prescribing were considered, involving a large number of insured persons, but at this stage the pursuer's averments must be taken *pro veritate*. All that they amount to, however, is that an inadequate investigation was made, and one from which no fair inference could be deduced. But the statute gives no directions as to the nature of the investigation which the Panel Committee are to make, and this accordingly falls to be determined in the first instance by them. Even on the pursuer's averments I cannot see that in this

matter the Panel Committee went outside of the duties imposed on them by the Regulations. There is no provision that the medical practitioner concerned shall be present during the investigation, and the scope and extent of it falls to be determined by them. If they have acted in *bona fide*, and there is no suggestion to the contrary, the fact that they reported on insufficient grounds appears to me irrelevant as a ground of challenge of their report in a court of law.

It is, however, a statutory requirement that the Panel Committee shall hear the practitioner before reporting, and in this case the pursuer was not heard. For this, however, he was himself entirely to blame owing to his failure to attend before them at the time that he was cited to do so. There is nothing in the averments to suggest that the Panel Committee were in any sense responsible for his non-attendance. As regards the Pharmaceutical Committee the report shows that the matter was submitted to them by letter, and their letter in reply, embodied in the report, shows that they had reached the same conclusion as the Panel Committee. It was therefore unnecessary that they should be further heard.

But this case is concerned not directly with the proceedings of the Panel Committee but with those of the Insurance Committee, against whom the action is laid, and I fail to see in the pursuer's averments anything that can lead to the view that the Insurance Committee acted *ultra vires*. The only averment that points in this direction is that it was their duty to make an inquiry into the individual cases which had been treated by the pursuer. On the face of it this is in my opinion an untenable position, and certainly no such procedure is enjoined by the Regulations. The only direction to the Insurance Committee is that they are to consider the report of the Panel Committee, and if they are of opinion that an excessive demand has arisen owing to orders given by a practitioner which are extravagant they are authorised if they think fit to make such deduction from the amount payable to that practitioner as they think fit. What they actually did was to submit the report to a Finance and Medical Benefit Sub-Committee, which on 21st August 1916 minuted a recommendation which bore to proceed on a careful consideration of the report of the Panel Committee that the pursuer should be surcharged to the extent of £244. Their report was considered by the Insurance Committee on 6th September 1916 at a meeting specially called for the purpose and after consideration and discussion the resolution complained of was adopted by 16 to 6 of the members present. The pursuer's counsel argued that on the face of the original report it was plain that the Panel Committee had not proceeded in terms of the statute and that therefore the Insurance Committee ought to have made further inquiry. I am unable so to hold. The report is in all respects regular, and sets forth that the statutory requirements have been complied with. It would of course have been perfectly open to the Insurance Committee to adopt the amendment proposed at the meeting, or to have ordered fresh inquiry, or to have conferred with the Panel Committee and ascertained the grounds on which they had reached the conclusion stated in the report, but they had no duty to do so and I see no proof of their having acted in excess of their statutory powers. I should therefore have been disposed, had it been necessary to decide the case on this point, to sustain the first branch of the sixth plea-in-law for the defenders.

It is unnecessary, however, to put the decision of the case on this ground, as there are two preliminary pleas which in my judgment afford a complete answer to the action but which cannot well be considered apart from the general narrative which I have given. The first of these is that the action is incompetent or at all events premature in respect that there is open to the pursuer another method of review under the very Regulations on which he founds. This is provided for by article 51 of the Regulations, which gives an appeal from the decision of the Committee to the Commissioners, "and any decision of the Commissioners or any of them made under this Regulation shall be final and conclusive." Now even if the Panel Committee and the Insurance Committee had acted in any way in excess of their powers this would be a proper question to submit to the decision of the Commissioners. It may well be that their confirmation of proceedings which were *ultra vires* would not necessarily prevent the pursuer from afterwards challenging the decision to which they came, but at all events we cannot assume that the Commissioners would exceed their statutory jurisdiction, and to my mind it is obvious that the questions which the pursuer raises are much more appropriate for discussion before such a tribunal than before a court of law. I am therefore prepared to sustain the second branch of the second plea-in-law for the defenders on the grounds set forth in the opinion of Lord President Dunedin in the case of *The Caledonian Railway Company* v. *The Glasgow Corporation*, 7 F. 1020. The Lord President there says (it being a case where an appeal was provided to the Sheriff)—"Now if the register so far departs from its proper function, as the pursuer says, we cannot assume that the Sheriff will not correct it, and it seems to me that to reduce it *de plano* would be to make that assumption. It is true that the Sheriff might go wrong on such a question, but I am entitled to assume that he would take the correct view of the Act. . . . If he applies that view his determination will render any such action as this unnecessary." I think these observations apply with peculiar force to the present case, and that, following this decision, we are bound to sustain the second branch of the second plea for the defenders.

Plea 5 for the defenders ought I think also to be sustained, and indeed I do not dissent from the view that it is sufficient for the disposal of this action to hold that it is excluded by the Public Authorities Protection Act 1893, section 1. The act

complained of is the decision of the Insurance Committee arrived at on 6th September 1916, and immediately intimated to the pursuer. I cannot doubt that that decision was come to by the Committee in the intended execution of their statutory duties. The action however was not raised for more than six months thereafter. If the proceedings had been entirely without warrant no doubt this Act would not have been a bar to a reduction, but the pursuer's averments amount to no more than an irregularity. Many cases were cited to us, of which those of *Mitchell*, 20 R. 253, and *M'Ternan*, 1 F. 333, may be treated as typical. There is no analogy between these cases and the present. The defenders there admittedly did not act in execution of their duty but in deliberate violation of it. In *Mitchell's* case before they were entitled to remove a fever patient from his own home against the will of himself or his guardians the statute provided that the local authority must obtain a warrant from a sheriff or justice of the peace proceeding on a certificate signed by a qualified medical practitioner. No such warrant was obtained, and therefore their whole proceedings were outwith their statutory powers. In short, they fell to be treated as individuals who must answer at common law for their own wrongs. To make the facts in *Mitchell's* case analogous to those here averred one might figure the case of a warrant having been obtained from the Sheriff on a medical certificate, but it being averred that a duly qualified doctor had not in fact signed the certificate or had any means of knowledge entitling him to do so. Although the procedure therefore would have been irregular it would in form have been within the statute, and the Public Authorities Protection Act would in my opinion have applied so as to exclude the action if not raised within six months. The pursuer however attempts to elide the provisions of the statute by maintaining (1) that the act of retaining money that belonged to him constituted a continuing wrong, and (2) that the defenders are barred from pleading the statute in respect that the action was delayed owing to the refusal of the clerk to the Panel Committee, acting it is said in concert with the Insurance Committee, to supply the names of the individual members of the Panel Committee. Both these propositions are so obviously untenable that I do not think they require to be dealt with in detail.

The only other matter that requires to be noticed is raised by the pursuer's third plea-in-law, which is to the effect that it was incompetent for the Insurance Committee to direct that the sum of £244 in respect of alleged excessive prescribings by the pursuer in the year 1915 should be deducted from the amount due to him for the year 1916. I am unable to understand why the Lord Ordinary did not deal with this plea before allowing a proof. If it were well founded the pursuer would be entitled to have the decision of the Insurance Committee reduced, and in a case of such a plain excess of power perhaps it would not be necessary to relegate him first to his appeal to the National Commissioners. In my opinion the plea is not sound. Article 37 of the Regulations provides that the panel doctors are to be paid quarterly, and even in advance, and that the balance of their remuneration for a given year is to be paid as soon as may be after the expiration of the year. There is no provision in article 40 that the deduction must be made from the remuneration of the year to which it applies, although if a panel doctor were paid in full and happened to die shortly after receiving payment there would be no funds payable to him which could be surcharged, and the remedy of surcharging might be lost. I think, however, it would be very unfortunate for medical practitioners if the pursuer's view were sustained, because it would mean that the Insurance Committee could not pay his remuneration at the expiration of the year, but would have to keep a sum in hand in order to satisfy possible surcharges of this kind. On the other hand it must be a matter of indifference to the practitioner whether he is surcharged in respect of the remuneration of one year rather than another, and looking to the Regulations as a whole there seems to me to be nothing to support the pursuer's argument on this head.

LORD GUTHRIE—Many questions were argued before us dealing with the rights and duties of the Panel Committee of the Burgh of Aberdeen, who along with the Scottish Insurance Commissioners are called for their interest in this action. But it was admitted that if plea 5 for the only defenders to the action, namely, the Insurance Committee for the Burgh of Aberdeen, is well founded, none of these questions relating to the proceedings of the Panel Committee arises, subject to the qualification that in considering the defenders' fifth plea and the pursuer's answer to it in law, it may be necessary to have regard to the pursuer's averments concerning the actings of the Panel Committee.

The defenders' decision which is sought to be reduced was given on 6th September, and the deduction was made on 4th October 1916, while the summons is dated 20th April of the following year, that is, more than six months after the dates of the decision and the deduction, whichever of these dates be taken. The defenders admit that they cannot found on the 1893 Act if in arriving at their decision they acted in any material matter either contrary to or outwith the statute, from which alone they derive their powers, as, for instance, if they had surcharged when the statute give them no right whatever to surcharge. The question of whether the defenders' proceedings were *funditus* null, and therefore outwith the protection of the 1893 Act, must be determined by a consideration of the pursuer's averments in relation to sub-section (2) of section 40 of the Regulations made under the Act of 1913. Under that sub-section the defenders are empowered to do all they did in this case, provided they have a report from the Panel Committee *ex facie* in terms of the report therein prescribed, unless they

know, or ought to know, that the Panel Committee's report while *ex facie* accurate and regular is in point of fact inaccurate and irregular. *Ex facie* the Panel Committee's report of 16th August 1916 conforms in every respect with the requisites of the 1913 Act.

But it is averred by the pursuer (1) that the statements in that report to the effect that the pursuer and the Pharmaceutical Committee had been heard were not correct. That averment is irrelevant as against the defenders, seeing that it is not averred that the defenders knew or ought to have known that the statements in the report were inaccurate. (2) It is said that the defenders' decision was *funditus* null, because it was their duty to have made an independent investigation. The statute contains no warrant for this contention. (3) It is said that the proceedings were inept, as a basis for the protection of the 1893 Act, in respect that the defenders proceeded on nothing but a comparison between the pursuer's drug charges and the total drug charges, or the average drug charges, of the other panel doctors. But this is negatived by the terms of the decision under reduction, which bears to proceed on a report by the Panel Committee stating that the pursuer and the Pharmaceutical Committee had both been heard. *Ex facie* of the report the defenders were entitled to proceed on the footing that no special circumstances existed to account for what, unexplained, appeared to involve excessive prescribing in quantity or character. (4) The defenders' decision is said to have been *ultra vires*, in respect it purported to decide to make a sum in respect of excessive prescribing by the pursuer in 1915 a deduction from the amount due to him for 1916. I see nothing contrary to the statute in the defenders' proceedings, and I think they acted in the only practicable method by which the statutory provisions can be given effect to.

The pursuer's averments as to bar can be disposed of on the admitted documents on which they are founded. These documents show that the plea is without substance.

I therefore think that this action is excluded in terms of the defenders' fifth plea-in-law.

The Court repelled the third plea-in-law for the pursuer, sustained the fifth and eighth pleas-in-law for the defenders, recalled the interlocutor of the Lord Ordinary, and dismissed the action.

Counsel for the Pursuer and Respondent —Sandeman, K.C.—Scott. Agents—Alex. Morison & Co., W.S.

Counsel for the Defenders and Reclaimers —Constable, K.C.—A. M. Mackay. Agent —H. Bower, S.S.C.

HIGH COURT OF JUSTICIARY.

Thursday, March 21.

(Before the Lord Justice-Clerk, Lord Dundas, and Lord Salvesen.)

M'INTYRE *v.* TUMELTY.

Justiciary Cases — Statutory Offences — Betting and Gaming—Gaming Machines (Scotland) Act 1917 (7 *and* 8 *Geo. V, cap.* 23), *sec.* 1—*Machine Used for a Game in which the Prize or Stake, which was Awarded or Forfeited Contingently upon the Skilful or Unskilful Operation of the Machine, merely Consisted in the Opportunity to Renew the Game without Further Payment.*

A confectioner permitted a halfpenny-in-the-slot machine to be used in her shop. In no case was the halfpenny ever returned to an operator of the machine, but a successful manipulation of the machine was rewarded by a further opportunity to repeat the game free of charge. There was no other prize or stake to be gained or lost and the success or failure of the operator depended entirely upon his skill or want of skill. *Held* that the machine was not prohibited by the Gaming Machines (Scotland) Act 1917.

The Gaming Machines (Scotland) Act 1917 (7 and 8 Geo. V, cap. 23) enacts—Section 1—"(1) It shall not be lawful to permit in any shop, office, room, or place, whether enclosed or not, the use of any machine or mechanical contrivance for the purpose of any game, sport, hazard, or competition, played or participated in by persons resorting to such shop, office, room, or place, in which game, sport, hazard, or competition any prize or stake in money or kind is awarded or forfeited contingently on the result of the operation of such machine or mechanical contrivance, whether such operation is automatic or not. (2) Any person who, being the owner, lessee, occupier, keeper, manager, or person in charge of any shop, office, room, or place, or being the owner, lessee, or person in charge, or having control, of any such machine or mechanical contrivance, contravenes the provisions of this section shall be guilty of an offence, and shall be liable on conviction by a court of summary jurisdiction to a fine not exceeding ten pounds or to imprisonment for a term not exceeding sixty days."

Mrs Grace Mair or Tumelty, *respondent*, was charged in the Northern Police Court, Glasgow, upon a summary complaint at the instance of John J. M'Intyre, procurator-fiscal, *appellant*.

The *complaint* was in the following terms: —"Grace Mair or Tumelty, of 780 Garscube Road, Glasgow, you are charged at the instance of the complainer, that you, being the occupier or person in charge of a confectioner's shop at 780 Garscube Road, Glasgow, did on the 18th day of November 1917 permit in said shop the use of a machine or