

HOUSE OF LORDS.

Friday, November 19.

[Before Lord Herschell (in the chair) and Lords Watson, Macnaghten, Morris, and Shand.]

HUGH PATON & SONS v. DAVID PAYNE & COMPANY, LIMITED.

Sale—Conditions in Executory Contracts as to Time.

A firm of engineers undertook to supply a printing machine, according to specifications supplied by the purchaser, the machine to be delivered in six weeks. The contract was contained in a series of letters and telegrams. The sellers failed to deliver the machine in the time stipulated. *Held* (by the First Division), on a construction of the terms of the correspondence, that time was not an essential element of the contract, and that the purchasers, although entitled to damages for the breach of the stipulation, were not entitled to reject the machine.

Observations on the case of *Macbride v. Hamilton & Sons*, June 11, 1895, 2 R. 755, as to conditions relating to time in executory contracts.

Sale—Rejection—Timeous Rejection—Whether by Terms of Correspondence Right to Reject Kept Open.

The sellers under an executory contract for the supply of a machine, failed to deliver it within the time stipulated in the contract. The purchaser claimed a right to reject the machine, and relied on certain correspondence as showing that this right had been kept open till the machine was ultimately delivered two months after the date stipulated.

Terms of correspondence which *held* (*aff.* the judgment of the First Division) not to imply that the right to reject, if it existed, had been kept open.

In February and March 1895 Messrs Hugh Paton & Son, printers, Edinburgh, entered into negotiations with Messrs David Payne & Company, Ltd., printers' engineers, Caxton Works, Otley, Yorkshire, for the supply of a two-colour Wharfedale printing machine, to be constructed according to a specification furnished by Messrs Paton, and to include any further improvements known to Messrs Payne & Company. The machine was of exceptionally large size, and of novel construction. After some correspondence, in which nothing was said as to time, Messrs Payne & Co. offered to construct the machine at a certain price, subject to an allowance of £30 for an old "Perfecter" Machine which Messrs Payne & Co. were to remove from Messrs Paton's works. Thereafter the following telegrams and letters passed between the parties:—

1. Telegram, Paton & Sons to Payne & Co., Limited.

"11th March 1895.

"Caxton, Otley.—How soon could you

supply machine? Price for old machine, of course, holds good, although not mentioned by you. PATON."

2. Telegram, Payne & Co., Limited to Paton & Sons.

"11th March 1895.

"Paton, St James Sq., Ed.—Can supply machine six weeks. CAXTON."

3. Letter, Payne & Co., Limited, to Paton & Sons.

"11th March 1895.

"Gentlemen,—On receipt of your telegram this afternoon we wired you as follows: 'Can supply machine six weeks,' which we now beg to confirm, and add that the price of the old Perfecter holds good with us, as per our letter of the 7th inst." . . .

4. Letter, Paton & Sons to Payne & Co., Limited.

"11th March 1895.

"Dear Sirs,—In reply to yours of the 9th we understand that you are prepared to supply a double-colour printing machine, conform to our specification, with the additional improvements that you suggested, and every other improvement that is known to exist upon such a machine, and this at a price of £353 sterling, subject to a discount of 2½ per cent. cash payment when the machine is working to our satisfaction, and further with an allowance of £30 sterling for the old perfecting machine which you saw here. We received your telegram to-day in confirmation of this arrangement, with the explanation that the machine can be supplied in six weeks. Above being correct, we herewith give you the order to proceed.—Yours truly," &c.

5. Letter, Payne & Co., Limited, to Paton & Sons.

"12th March 1895.

"Gentlemen,—We are in receipt of your favour of the 11th, in which you hand us order for quad-royal two-colour printing machine, and thank you for same. We agree to make the machine to your specification of the 22nd ult., except points and moulds mentioned by you in your letter of March 5th (our patent pyramid inking has reciprocating drums), and to add every improvement suggested by us in our correspondence and conversation, or known by us to be beneficial in this class of machine. The price for this machine to be £353 sterling, subject to a discount of 2½ per cent. for cash, on machine running to your satisfaction, and further agree to make you an allowance of £30 sterling for the old Perfecter. We have put the machine in hand, and will use our best endeavours to make this machine the best it is possible to make." . . .

6. Letter, Payne & Co., Limited, to Paton & Sons.

"17th April 1895.

"We are sorry to say that we are meeting with much delay in getting the castings for your machine, but are doing our very best to get it out quickly.—Yours faithfully," &c.

7. Letter, Paton & Sons to Payne & Co.
"18th April 1895.

"Dear Sirs,—In reply to yours of the 17th, we hope you will not disappoint us about the machine being up to the time stated, as our busy season is just about to commence. No doubt you will allow us an extra discount for any delay that may arise, as we will be put to extra expense.—Yours faithfully," &c.

8. Letter, Paton & Sons to Payne & Co.
"6th May 1895.

"Dear Sirs,—You are a very long time behind with our machine, and as our busy time is now on, it is possible that we cannot take it in for about twelve months, and this will be a serious loss to us. We refused another contractor because of the time they asked to make the machine, and depended upon your giving it at the time you stated. In any case we will want a very large deduction and discount if we take the machine at all.—Yours faithfully," &c.

9. Letter, Payne & Co. to Paton & Sons.
"7th May 1895.

"We are now hard at work upon your machine, working until eight and ten o'clock every night. For all this overtime we have to pay time and quarter and time and half. In fact, we are bound to be losers by the bargain as originally made, so we hope you will not act as you say in your letter by requesting considerable reductions. Everything in our works has to stand aside for your machine, and we are doing our utmost to expedite delivery. Our fitter will be with you early next week to remove old machine, and will also bring ground plan and particulars for fixing new one. He is at present in London fixing a special quad-demy two-colour, but is expected home this week. We only ask you to leave your final decision until you have seen the machine, and if you will only do this we have no fear of the result. Assuring you of our particular attention.—We are, yours obediently," &c.

10. Letter, Payne & Co. to Paton & Sons.
"20th March 1895.

"Gentlemen,—

"P.S.—Enclosed we hand you elevation and ground plan of two-colour. Kindly have a stout wood framing made, and keep it together, as this makes a good ground-work for machine. Also please note remarks on tracing, *re* 'having the framing firm under the pedestal of driving wheels.' You will notice from elevation that all the working parts in bottom of machine are each solid in one firm bed-plate.—We are, yours faithfully," &c.

11. Letter, Paton & Sons to Payne & Co.
"4th June 1895.

"In connection with the latter (the two-colour Wharfedale), we have received a very serious complaint from a customer regarding the delay in getting out the work, which has been solely caused through your not having this machine forward when promised. Had we known the time you would take, we certainly would not have entrusted you with the

order, and as we have been put to a very heavy outlay through your negligence, we must look to you to compensate us for the extra expense thus entailed.—Yours truly," &c.

12. Letter, Paton & Sons to Payne & Co.
"21st June 1895.

"Dear Sirs,—It is simply absurd to expect us to wait longer for the machine. We must ask you now what you are willing to allow us for each month that we have to do without it if we accept it when finished? This will require to be arranged now, and failing a satisfactory settlement, we will cancel the machine, and order elsewhere, claiming upon you for the loss. The order was given on the 11th March, and the machine was to be supplied in six weeks, consequently it is now two months late.—Yours truly," &c.

The machine was fitted up in Messrs Paton & Sons' works in July 1895, and disputes then arose between the parties whether Messrs Paton & Sons were entitled to reject the machine and claim damages for a total breach of contract, either (a) on the ground that the machine had not been supplied by Messrs Payne & Co. within the time stipulated in the contract, or (b) on the ground that the machine supplied was defective in construction for the purpose for which it was designed.

These questions were the subject of two cross actions in the Court of Session, which were subsequently conjoined (14th March 1896). The Lord Ordinary (Low), on 24th November 1899, held that Messrs Paton & Sons were not entitled to reject the machine, but that they were entitled to damages (which he assessed at £50) in respect of the failure of Messrs Payne & Co. to supply the machine within the time stipulated. He therefore decreed for the price under deduction of said sum of £50.

It is not necessary to deal with the second ground of action (defective construction), which raised merely a question of fact. The Lord Ordinary's note, so far as dealing with the condition as to time in the contract, was as follows:—

Note.—"It was argued for Payne & Company that it was not part of the contract that they should supply the machine in six weeks, but that they only mentioned that time as an approximate indication of the period within which they hoped to be able to have it ready. I am of opinion that that view is not sound. Mr Paton, before either accepting or rejecting their offer of 9th March, asked how soon they could supply the machine, and they replied unequivocally that they could supply it in six weeks, and it was upon that footing that Mr Paton accepted their offer. I am therefore of opinion that it was a term of the contract that the machine should be supplied in six weeks.

"It does not follow, however, that Mr Paton could refuse to take the machine if it was not ready in six weeks. In the case of *Macbride v. Hamilton & Son* (2 R. 775) the Lord President, dealing with a similar

contract, stated the law thus:—‘If the machinery is good, it would be a very unusual course for the employers to refuse to allow it to be put up in their premises because it was not put up within the time stipulated. Such a course would in general be very inexpedient for both parties. Accordingly it is well understood that if a breach of contract occurs in point of time, that gives rise, not to the rejection of the subject, but to a claim of damages for any loss occasioned by the delay.’

“And that, indeed, seems to have been the view which Mr Paton himself took at the time, because although he complained strongly of the delay which took place, threatened to reject the machine, and intimated that in any case he would claim an abatement from the price, he allowed it to be fitted up in his works when it was ready.”

This judgment was adhered to by the First Division on 19th February 1897.

The following opinions were delivered—*[The portions are omitted which deal with the question of defects in construction]:*—

LORD M'LAREN—Now, it is fair to Messrs Payne to notice that this was to some extent a new machine. Messrs Paton were not content to take one of the machines of which apparently the makers had a considerable number of the parts prepared, and where nothing was required but fitting. But encouraged by the desire of the makers to have a perfect specimen of their art and skill, they wished such a machine as would have to be made from the beginning. I should have thought it would be known to both parties that it was impossible to construct such a machine within so short a period as six weeks, and that in the understanding of both six weeks was only an approximate time. Nevertheless we have to deal with the actual contract as expressed in writing, and I agree with the Lord Ordinary when he says in his note that he considers that the period of six weeks was a term of the contract. Messrs Payne accordingly, by allowing it to be stipulated as a term of the contract, put themselves to a certain extent in the power of the other party, for if they chose to be troublesome in the matter of time, a claim might be made against the makers. Now, when a period of nearly two months had elapsed Messrs Paton began to be impatient about the delay, and wrote several letters, which have been read in the course of the argument, complaining of the delay, and claiming damages or an abatement of the price, but I cannot read any of these letters as amounting to a notice that they claimed the right to reject on the ground that time was of the essence of the contract. There are two considerations which appear to me to make it plain that time was not of the essence of the contract, and that Messrs Paton did not, until after the dispute had arisen, ever claim to reject the printing machine on that ground.

(1) After the machine had been fitted up by Messrs Payne, and was believed to be ready for use, it was found on trial that one of the small cylinders connected with

the inking apparatus was a little too narrow in diameter, and when put in motion would not touch the inking table. Now, no doubt it would be annoying to find a little imperfection of this kind in a machine supposed to be ready for work, and irritated apparently by the long delay Messrs Paton telegraphed on 13th August to Messrs Payne to send a man at once to complete the machine. I hardly think that that was a telegram intelligible to the person receiving it. If Messrs Paton had said that the ductor was too small, or had told what the defect was, I do not doubt that there was every disposition on the part of the makers to meet them and have it put right. On receiving this telegram they replied that they did not understand the telegram, and were ‘writing to-night.’ But without even waiting for Messrs Payne’s letter, which contained their answer, Messrs Paton proceed at once to say that their patience is exhausted, and that they wish the machine to be taken away. That is on the 13th August. I think the facts that up to this time nothing had been said by Messrs Paton to indicate a doubt that they meant to keep the machine, and that they only wrote Messrs Payne to take away the machine at a time when they were irritated by a small imperfection show clearly that there was no fixed purpose in their mind to reject the machine on the ground of delay, and that they had not laid a foundation for a claim of rejection on that ground.

(2) The other circumstance which also weighs with me is, that previous to this rejection Messrs Paton had allowed the printing machine to be fitted up in their premises. Now, surely if the buyers are entitled to reject they must do so with some consideration to the sellers, and so as to avoid loss to them. Notice was given by the makers that the machine was ready, and instructions were given to Messrs Paton to prepare the foundations for it. No hint was given to Messrs Payne that the machine was only to be put up on trial, and I think it is impossible to admit that if the machine was fitted up with Messrs Paton’s consent, they were entitled to reject upon grounds which existed before its departure from Yorkshire.

I therefore come to the conclusion that Messrs Paton were not justified in rejecting on the ground of delay. But I may say that it would only be in a very extreme case that the remedy of rejection would be open to a purchaser under an executory contract because of delay in executing the contract. Looking to the very distinct and authoritative exposition given of the law in *Macbride’s* case, I should think that even if Messrs Paton had written in good time they would have been going beyond their legal rights in claiming to reject a machine which had been made to their order, and where no reasons had been given for attaching very great importance to the period of six weeks allowed for its completion.

LORD KINNEAR—I agree. I do not think it doubtful that there was a bargain that the machine should be made and delivered

within a period of six weeks from 11th March, and that a breach of that stipulation on the part of the makers would give rise to a claim of damages to the purchaser. But then I think that that stipulation was not of the essence of the contract for the construction and sale of the machine. It was a subsidiary stipulation, the breach of which entitles to damages, but not absolutely to reject the machine. That is a question which depends upon the construction of the contract. But in reading a series of letters such as we have here, forming a contract for making and selling a new machine, we must have regard both to the subject-matter of the contract and also to the principles of law and to the practice expounded by the Lord President in *Macbride's* case. I agree with what Lord M'Laren has said upon that case, and I have therefore come with him and the Lord Ordinary to think that the defenders' remedy is not to reject the machine but to claim damages for delay. I also agree with Lord M'Laren that if that point were doubtful, the purchasers have a duty to the makers which prevents their rejection if they treat the makers as the defenders did, because I think they plainly allowed the machine to be delivered and put up in their premises, and the whole course of the correspondence appears to me to show that the position that they took up was this, that they were entitled to have an abatement from the price, or, in other words, that they were not claiming to reject the machine itself, and I think that position was reserved when they brought their action in this Court. As to the amount of damages, and indeed as to the liability for damages, the parties are agreed that the Lord Ordinary's judgment must stand, and therefore it is unnecessary to consider that point further.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

Messrs Paton & Sons appealed against this judgment to the House of Lords.

The following authorities were cited by the appellants in the House of Lords:—Sale of Goods Act 1896 (56 and 57 Vict. c. 71), sec. 10, sub-sec. 1; sec. 11, sub-sec. 2; and secs. 53 and 62; *Whitson v. Nelson*, 6 S. 579; *Colvin v. Short*, 19 D. 890; *Turnbull v. M'Lean*, 1 R. 730; *Grieve, Son, & Company v. Konig, &c.*, 7 R. 521; *Bowes v. Shand*, 2 App. Cas. 455; *Roberts & Company v. Yule*, 23 R. 855.

The respondents were not called upon. In their printed case they cited *MacBride v. Hamilton & Son*, 2 R. 775, per Lord President, p. 780; and *Dick & Stevenson v. Woodside Steel and Iron Company*, 16 R. 242, per Lord Rutherford Clark, p. 245.

At delivering judgment—

LORD HERSHELL—There is only one question which has been raised in this action now on appeal to your Lordships, although that may be said to divide itself into two parts.

A contract was entered into between the

appellants and respondents by which the respondents were to manufacture a certain machine for the appellants. After the negotiation had proceeded for a considerable time, and the terms which the appellants had made known they were willing to concede had been practically assented to by the respondents, although no order for the machine had been given, the appellants telegraphed to the respondents "How soon could you supply machine?" to which the respondents telegraphed in reply, "Can supply machine in six weeks," and on the same day, the 11th of March, they wrote a letter confirming their telegram. Thereupon the appellants wrote to the respondents setting out the terms on which the machine was to be made and erected, and adding these words—"We received your telegram to-day in confirmation of this arrangement, with the explanation that the machine can be supplied in six weeks. Above being correct, we herewith give you the order to proceed."

The machine was not supplied in six weeks, and on the 6th of May the appellants wrote to the respondents—"You are a very long time behind with our machine, and as our busy time is now on, it is possible that we cannot take it in for about twelve months, and this will be a serious loss to us. We refused another contractor because of the time they asked to make the machine, and depended upon your giving it at the time you stated. In any case we will want a very large deduction and discount if we take the machine at all." Now, at that time the period of six weeks had elapsed, and assuming that the non-delivery within the period named gave a right to the appellant to reject the machine and decline any further to carry out the contract on their part, the time had then arrived when they were entitled to do so.

The learned Judges in the Court below have held that in this case time was not of the essence of the contract, and that non-delivery within the stipulated time did not give a right to reject. In the view which I believe all your Lordships take, it is unnecessary to pronounce any decision upon that point, and I propose to say nothing upon it, although I must not be understood as dissenting from the view taken by the Court below.

The contention of the appellants is, that although they did not then reject the machine, and although the machine was afterwards erected and the contract in all respects carried out with the respondents, they were nevertheless, when the contract had been completely performed so far as the erection and supply of the machine by the respondents was concerned, entitled to refuse to carry out their part of the contract and to pay for it, and were entitled to say: We repudiate all liability on our part—we put an end to the contract because there has been a breach of the stipulation as to time. Now, whatever is clear I take it this is clear, that when the 6th of May had arrived they were entitled to reject, supposing them to have that right at all, then and there, or to determine

that they would take the machine and claim damages under the contract when it was taken. But they could not keep open their right to reject and say: The time has elapsed, we will consider and make up our minds hereafter whether we will reject it or not. They were bound to reject then if they intended to reject at all, and if after that time they permitted the respondents to go on doing the work, completing the machine and erecting it in their premises, their right to reject would be absolutely and entirely gone, and it is admitted as I understand by the learned counsel for the appellants that it was gone, unless by reason of the letter which the respondents wrote in answer to that letter of the 6th of May which I have just read, it was agreed between the parties that, notwithstanding that they did not then reject the machine, notwithstanding that the machine was to be erected conformably to the contract, it was to be open to them, even when it was finished, and when the whole of the contract, so far as regards its supply and erection, had been completed, to reject it at that time if they chose.

That depends of course upon the words of the answer. What the appellants set up seems to me, I may say at the outset, an agreement improbable upon the face of it, because it amounts to this—The respondents are supposed to say: We will go on and complete this machine, putting aside, as they say they were doing, other work for that purpose; we will bring the machine to your premises and erect it there, and put it into a state in which it will be completely ready for working, and then, although the machine is just what you agreed to buy, and there is no reasonable complaint to be made of it, you shall be entitled to say at that time of your own motion with or without reason: Take this machine down and undo all the work you have been doing in putting it up—take it back to your premises, rid us of it, and get nothing except our claim for damages! Now, I say that that is an improbable contract for the makers of this machine to have entered into. Of course, if in terms they did enter into it, they must be held to their bargain; but not only do I not think that that is the intention reasonably to be gathered from the language of their letter, but also the correspondence which followed on the part of the appellants is conclusive to my mind that they did not so understand the letter upon which reliance is placed.

In the letter of the 6th of May, which I have already read, the appellants write—“In any case we will want a very large deduction and discount if we take the machine at all.” On the 7th of May the respondents reply regretting the delay, and explaining how it has arisen out of a dispute with workmen, and saying they were working at it as hard as they could—that everything in their works was standing aside for the machine, and that they were doing their utmost to expedite the delivery of it. And then they go on to say—“We only ask you to leave your final

decision until you have seen the machine, and if you will only do this we have no fear of the result.” Now, I do not think it is reasonable to attach to this the meaning—We are willing to go on and complete the machine and erect it upon your premises, and the decision that we are willing to leave open is not as to what allowance shall be made from the price for the loss of time, but the decision whether, when we have done all, you are not to be at liberty to reject it because it was not delivered within the stipulated time. Let us see whether it was so understood or not. On the 4th of June the appellants write thus—they say they “have received a very serious complaint from a customer regarding the delay in getting out the work, which has been solely caused through your not having this machine forward when promised;” and they go on, “Had we known the time you would take, we certainly would not have entrusted you with the order, and as we have been put to a very heavy outlay through your negligence, we must look to you to compensate us for the extra expense thus entailed.” What is that? Is it not then and there making a claim or insisting upon the claim in respect of the delay? Well, if the letter of the 7th of May left open anything at all to be determined, not then, but at the time when the machine had been completely erected, it must have left open both matters, namely, whether there was to be any claim for the delay, and whether the appellants were after all to have the right to reject it. It certainly cannot be construed as intending to leave open the right to the appellants to reject when the machine was erected, and not to leave open to be determined at that time the question whether any allowance was to be made by way of deduction from the price in respect of the delay.

Then on the 21st of June the appellants write—“It is simply absurd to expect us to wait longer for the machine. We must ask you now what you are willing to allow us for each month that we have to do without it if we accept it when finished? This will require to be arranged now, and failing a satisfactory settlement we will cancel the machine and order elsewhere, claiming upon you for the loss.” That is absolutely and utterly inconsistent with the view now suggested, that these two letters of the 6th and 7th May amounted to an agreement that the whole question of damages or cancellation should be left open to be determined only when the machine had been altogether delivered.

After those letters the appellants make ready their premises for the reception of the machine, receive it there, permit it to be erected without suggesting that they are not going to take it and keep it. Under those circumstances it seems to be hopeless to contend that when that machine had been erected upon their premises according to their contract, they were nevertheless entitled to say they would not pay the price which, upon the performance of that stipulation by the supply of the machine, they were bound to do.

For these reasons I think the judgment appealed from is perfectly correct, and the appeal must be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON—This is in my opinion a very groundless appeal.

I do not think it necessary to consider whether the contract between these parties contained a stipulation with regard to the time of its execution, such as to confer upon the appellants the right to rescind it in the circumstances of the case. I am quite willing to assume for the purposes of argument that such a stipulation did exist, but even if it were so, it is to my mind clear beyond all doubt that that right to rescind was not exercised *tempestive*, and that it was not reserved to the appellants by their communications with the other party to exercise it after the erection of the machine.

LORD MACNAGHTEN—I am of the same opinion.

LORD MORRIS—I also concur.

LORD SHAND—I am of the same opinion, and I have only to add that it appears to me that the correspondence beginning on the 6th of May, at the time when not only the six weeks referred to in the contract had elapsed, but a fortnight more, appears to me in substance to amount to an invitation to the respondents to go on and complete the machine upon the footing that it was not to be rejected, but that a claim for damages would be insisted upon on the part of the appellants in consequence of the delay. That being so, I think the respondents having gone on to complete the machine upon that footing, having sent it to the appellants, and having sent a man and had it fitted up, it was out of the question to say, after that had occurred, that the machine could still be rejected as not having been supplied within the time fixed by the contract.

Ordered that the interlocutors appealed from be affirmed and the appeal dismissed with costs.

Counsel for the Appellants—The Solicitor-General, C. S. Dickson, Q.C. — Wilson. Agents—R. S. Taylor, Son, & Humbert, for Macpherson & Mackay, W.S.

Counsel for the Respondents—Asquith, Q.C.—Chree. Agents—Clarke & Blundell, for John C. Brodie & Sons, W.S.

COURT OF SESSION.

Thursday, November 23.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

SMITH v. LORD ADVOCATE.

Crown — War Department — Jurisdiction of Civil Courts — Liability of War Department for Wrongous Acts of Courts-Martial.

A soldier, who had received his discharge in 1866, brought an action against the Lord Advocate, as representing the War Department, in which he sought decree in terms of the following conclusions:—(1) Declarator that he was entitled to the rank of sergeant in the Royal Regiment of Artillery as from 20th November 1861 till he should be legally discharged from the army, with all the emoluments and privileges accruing therefrom, or (2), alternatively, declarator that he was entitled to the rank of bombardier for the same period; (3) for count and reckoning for the arrears of pay and other emoluments due to him as sergeant, or alternatively as bombardier; and (4) for damages.

The pursuer averred that certain sentences of imprisonment and deprivation of rank had been pronounced against him while in the military service in India, by courts-martial, whose proceedings had afterwards been cancelled as illegal by the higher military authorities; that he was accordingly entitled to the arrears of pay due to him for the period when he had been illegally deprived of his rank, and to reparation for illegal imprisonment. He also claimed that his arrears of pay should be those pertaining to the rank of sergeant, on the ground that but for these illegal sentences he would have been made a sergeant in 1861, and would have re-engaged in the army in that capacity.

Held (1), as regards the declaratory conclusions, that the Court had no jurisdiction; (2) as regards the conclusions for count and reckoning, that no action lay against the War Department for the recovery of pay for military services, and (3) as regards the conclusion for damages, that the War Department were not liable to make reparation for the wrongful acts or illegal proceedings of courts-martial; and (4) generally, that the pursuer was barred by his discharge in 1866 from insisting in the conclusions of the summons so far as dealing with the period subsequent to that date.

Opinion that the individual members of a court-martial might be liable for wrongs done by them while acting in that capacity, and *observations* on the circumstances under which such liability would arise.