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.

This was an action at the instance of Allan Smith, Torniascar, Abernethy, Inverness-shire, against the Lord Advocate as representing the War Department.

The pursuer concluded (1) for declarator that he was entitled to the rank of sergeant in the Royal Regiment of Artillery as from the 20th of November 1861, or from such date as should be determined, until such time as he should be legally discharged from the army, with all the emoluments and privileges accruing therefrom, or (2), alternatively, for declarator that he was entitled to the rank of bombardier from the same date till legally discharged, with all the emoluments and privileges accruing therefrom; and (3) for count and reckoning for all outstanding pay due to him as pertaining to the rank of sergeant, or alternatively to the rank of bombardier, and for payment of £2000 or such sum as should appear to be due to him, or failing count and reckoning, for £2000, and also for payment of £750 as damages.

The pursuer made the following averments:—"(Cond. 2) On 23rd May 1851 the pursuer enlisted in the Royal Regiment of Artillery. In 1857 his battery was ordered to India to assist in the suppression of the Indian Mutiny, and the pursuer accompanied them there. (Cond. 3) On 30th April 1860 the pursuer was tried, on the charge of endeavouring to obtain money on false pretences, by a court-martial at Allahabad, and being found guilty he was reduced from the rank and pay of a bombardier to that of gunner. (Cond. 5) In 1861 the court-martial aforesaid was declared illegal by the Judge-Advocate-General for India, and was cancelled by Sir Hugh Rose, the Commander-in-Chief. He ordered that the pursuer should be reinstated in his position in his battery as a non-commissioned officer, and that he should receive all the pay and other emoluments due to him as such. Captain Jones (the pursuer's commanding officer), however, ignored the Commander-in-Chief's orders. (Cond. 7) On the 26th February 1861 the pursuer was tried by a district court-martial on the charge that he had failed to salute three officers who had, when riding, overtaken him on a day in the previous month. The said officers came up from behind, and the pursuer, who was reading, did not observe them. When one of them addressed him, however, the pursuer at once saluted, and apologised for not having observed them sooner. For this offence the pursuer was sentenced by the said court-martial to four months' imprisonment. In connection with the said charge he suffered imprisonment from 23rd January 1861, when he was placed under arrest, till 27th May 1861. This court-martial, as hereinafter set forth, was subsequently declared illegal and cancelled. (Cond. 8) On 16th August 1861 the pursuer was tried by court-martial on the charge that on 26th July 1861 when off duty he had ridden a horse on the public road. This was a perfectly legal act, but the pursuer was, in respect of it, convicted on the evidence of one witness, and sentenced by the said court-martial to forty-two days' imprisonment. In connection with this charge the pursuer suffered imprisonment from 26th July 1861, when he was arrested, till 7th September 1861. (Cond. 9) Immediately on his release, when the court-martial was promulgated, the pursuer was sent back to the guard-room again a prisoner for appealing to the Commander-in-Chief, Sir Hugh Rose, regarding his case. On 13th January 1862 the pursuer was released without having been tried. He was thus imprisoned from 26th July 1861 to 13th January 1862. (Cond. 10) On or about this date the pursuer was ordered by Sir Hugh Rose to stand reduced as from 30th April 1860, on account of his having been tried by court-martial on 26th February 1861. The latter court-martial was subsequently declared illegal, and the decision of Sir Hugh Rose, as hereinafter set forth, was also declared to be *ultra vires*, and so ineffectual. (Cond. 11) On 7th November 1862 Colonel Christie, who was in command of the Royal Artillery at Benares, made pursuer a prisoner for making a formal claim for arrears of pay due to him as bombardier, in consequence of the court-martial of 30th April 1860 having been cancelled. Pursuer was imprisoned for 72 days, from 7th November 1862 to 17th January 1863, and was not charged with any crime or brought up for trial during that period. (Cond. 12) In all, the pursuer was subjected to wrongous and illegal imprisonment for 369 days. In consequence of this prolonged confinement in a hot climate, his health suffered, and his life was endangered. (Cond. 13) In 1863, in consequence of pursuer's repeated appeals, his case was brought before the Judge-Advocate-General of H.M. Forces in London, who declared that the courts-martial of 30th April 1860 and of 26th February 1861 were illegal; further, that Sir Hugh Rose had no authority to summarily reduce a non-commissioned officer, and that his order, which purported to reduce the pursuer, was ineffective. A copy of said decision will be produced. The Judge-Advocate-General's decision was, in December 1863, confirmed by H.R.H. the Field-Marshal, commanding-in-chief, who cancelled the courts-martial aforesaid, and ordered the pursuer to be relieved of all the consequences entailed by them, in so far as practicable, as if they had never existed. (Cond. 14) Following on the said decision, Major Oldershaw, commanding the 14th Brigade Royal Artillery in India, stated in a letter dated on or about 10th February 1864, and afterwards read to the pursuer in the circumstances hereafter detailed, that the pursuer would in ordinary circumstances have been promoted to the rank of sergeant as from 20th November 1861, as there were no other entries against him but the courts-martial now declared to be illegal. The pursuer avers that but for those illegal proceedings he would have been promoted to the rank of sergeant, and that by them he was prevented from attaining that rank with its attendant emoluments and privileges. (Cond. 15) In May 1864 the pursuer arrived in England

with the intention of seeking the redress denied him in India. He made out a statement of his claims, which was forwarded to Colonel Gibbon, C.B., the officer commanding the 4th Division Depot Brigade, R.A. The latter sent for the pursuer, who was then for the first time apprised of the Field-Marshal's decision set forth in Cond. 13. Colonel Gibbon also read to pursuer Major Oldershaw's letter, which is referred to in Cond. 14. (Cond. 16) The pursuer was offered the rank he held in 1860, but he considered, having regard to the terms of Major Oldershaw's letter, that he was entitled to the rank of sergeant as from 20th November 1861, and he requested Colonel Gibbon to forward an application for promotion accordingly. (Cond. 17) In August 1864 pursuer was asked to re-engage, or take his discharge. He indicated his intention to re-engage, but stated that he was of opinion that he was entitled first to have his claims adjusted. These were referred back to Colonel Gibbon, who merely reported that 'pursuer was a discontented man, and is likely to remain so, and would not make a good non-commissioned officer.' (Cond. 18) On 24th February 1866 pursuer was sent for to the War Office, and the Deputy Adjutant-General, R.A., read a document to him from the Judge Advocate-General, who stated that as the pursuer had suffered legal wrong in several instances he should be made a sergeant. The Deputy Adjutant-General then informed pursuer that if he would re-engage he would be made a corporal at once and would be sent on recruiting service. This compromise the pursuer however declined. (Cond. 19) On 6th April 1866 the pursuer was discharged without settlement of his claims. His discharge is produced herewith and referred to. It is stated therein that the pursuer's conduct was very good, that he possesses three good conduct badges and the Indian Mutiny medal. He also has a clasp for Lucknow. (Cond. 20) . . . The only payments made to the pursuer since his return to England have been two small sums paid in 1866 and 1868 in name of arrears of pay as bombardier. There is still due to him as bombardier a sum of £10, 13s. 9d. or thereby, in name of pay and good conduct pay from 1860 to 1865. (Cond. 21) The pursuer has repeatedly applied to the authorities for settlement of his claims, but has received no satisfaction. He also had questions put in Parliament on the subject, but partly owing to the apparent intricacies of his claims, his efforts were fruitless. Failing to obtain redress by these means, he has been compelled to delay proceedings in Court until he should have saved a small sum to defray the outlays connected with an action."

The pursuer pleaded—"(1) In terms of the decision of H.R.H. The Field-Marshal Commanding-in-Chief, and Major Oldershaw's letter as condescended upon, the pursuer is entitled to decree in terms of the first alternative conclusion of the summons. (2) As the pursuer was entitled to the rank of sergeant in the aforesaid regiment on 20th November 1861, and would have attained the said rank at that date but for the illegal proceedings by court-martial as condescended upon, and as these proceedings have been declared by a competent authority to be null and void, and the pursuer to be entitled to be restored against them as if they never existed, the pursuer is entitled to decree in terms of the first alternative conclusion of the summons. (3) *Alternatively*, the pursuer being entitled in terms of the judgment of the Field-Marshall to be restored against the consequences of the courts-martial which were declared illegal as if they had never existed, he is in any event entitled to be restored to the rank he held before these proceedings, and to obtain decree in terms of the second alternative conclusion of the summons. (4) In the circumstances set forth, the pursuer is entitled to have the defender ordained to hold a just count and reckoning with him, and to obtain decree for the amount which shall be found to be due to the pursuer. (5) Failing count and reckoning, the pursuer is entitled to decree of payment as concluded for. (6) The pursuer having suffered wrongful imprisonment, as set forth, at the hands of officers in the service of the War Department for whom they are responsible, the defender as representing said department is bound to make reparation to the pursuer therefor."

The defender pleaded—(1) No jurisdiction. (2) The action is incompetent. (4) The action is barred by *mora*. (5) The pursuer's averments are immaterial and irrelevant. (6) The pursuer's discharge having been legally granted, his claims are untenable. (7) The pursuer never having attained a rank higher than that of bombardier, is not entitled to decree as if he were sergeant or had a right to that rank. (8) The pursuer having been granted his full pay as bombardier until his discharge, has no further claim in respect of his service in that rank. (9) No action can lie against the defender on account of the alleged wrongous imprisonment of the pursuer by his superior officers."

In the Outer House counsel for the pursuer presented the following argument:—1. *Declarator*.—The pursuer was deprived of a status with resulting patrimonial loss. This was done by sentence *ultra vires* of tribunals which pronounced them. Therefore the pursuer was entitled to a remedy like any other subject of the Queen who was wronged, unless by his voluntary act he had relinquished his right of redress, or had in some lawful way subjected himself to the power of others without appeal. It was said that this was a matter of military status merely, and that consequently there was no appeal to the civil courts, but military status carried a right to pension, which was taken away when he was deprived of his military status. This was clearly patrimonial loss, and the Court had jurisdiction to consider the question of military status incidentally — *M'Millan* v. *Free Church*, 22 D. 290, at page 319, I; *Cruikshank* v. *Gordon*, 5 D. 909, at p. 968; *Forbes* v. *Eden*, 4 Macph. 143, at pp. 157, 174. When a tri-

bunal of any kind exceeds its jurisdiction, and acts *ultra vires*, redress was always obtainable in the Court of Session—*Cruikshank* v. *Gordon*, 5 D. 909, pp. 923, 966 (Church of Scotland Case); *M'Millan* v. *Free Church* 22 D. 290, p. 314, and 23 D. 1314, pp. 1330, 1332, 1338, 1340 (Free Church case); *M'Farlane* v. *Mochrum School Board*, 3 R. 88, pp. 98 and 103 (School Board and Board of Education); *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company*, 5 R. 995, at p. 1004 (Railway Commissioners); *Rogerson* v. *Rogerson*, 12 R. 583, pp. 586, 587 (arbiter). The proper defender was called. He represented the War Department—20 and 21 Vict. c. 44. The War Department administered the funds appropriated to the payment of soldiers. See *M'Millan* v. *Free Church*, 24 D. 1282, 1294, 1296. A Department of State was not protected from an action of this kind—*M'Farlane* v. *Mochrum School Board*, 3 R. 88, at p. 98. Count, reckoning, and payment was competent. If declarator was competent, clearly a decree of count, reckoning, and payment was necessary and competent. *Damages.*—1. Magistrates and others acting outwith or in excess of their jurisdiction, if they violate personal rights by arrest and imprisonment, were liable in damages—Manual of Military Law (1894), p. 188; *Crepps* v. *Durden*, 1 Sm. L.C. 632 (10th ed.) 2. So members of a court-martial who try a person for an offence not cognisable by them, or who pass a sentence they have no power to pass, are liable to the person aggrieved—Manual of Military Law, p. 188; *Comyn* v. *Sabine*, quoted Smith L.C. 581, 589; *Keighly* v. *Bell*, 4 F. and F., p. 785, note 3. It was only where there was legal jurisdiction, and the act was within the limits of the authority conferred, that malice need be averred—Manual of Military Law, p. 195; *Keighly* v. *Bell*, 4 F. and F. 763; *Dawkins* v. *Lord Rokeby*, 4 F. and F. 806, L.R., 7 H.L. 744; *Dawkins* v. *Lord F. Paulet*, L.R., 5 Q.B. 94. The officers composing the courts-martial would therefore have been clearly liable here. 3. The War Department was also liable. The officers were in its service and pay. They were the masters, the officers were their servants. 4. A master was responsible in law for (*a*) the negligence of his servant, even if the act complained of had been forbidden; (*b*) a wrongful act intentionally done if within the scope of the servant's employment—Glegg on Reparation, 446; *Bayley* v. *Manchester, Sheffield, and Lincolnshire Railway Company*, L.R., 8 C.P. 148, *per* Kelly, C.B., at page 152. In any event, the War Department had homologated the acts of these officers, and so rendered itself responsible for them.

The defender's argument sufficiently appears from the interlocutor of the Lord Ordinary.

On 21st May the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor—"Finds that no sufficient grounds have been stated in fact or pleaded in law to support the conclusions: Therefore assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses," &c.

Opinion.—"The action which the pursuer has been advised to bring raises questions relating to a somewhat unfamiliar province of law, and was anxiously and ably debated. It appears, however, to present no real difficulty, and I cannot doubt that the averments are irrelevant, and that the conclusions are unprecedented and indeed extravagant. The pursuer's misfortunes, indeed, may fairly appeal to sympathy, but I regret, on account of the expense to him, that he has raised the action, by which he can, in my opinion, take no benefit.

"The pursuer is at present a crofter, and has been a soldier. He enlisted in the Royal Regiment of Artillery in 1851, and he was discharged on the completion of his engagement on 6th April 1866. His discharge bears that his conduct had been very good, and that he was in possession of good conduct badges and of the Indian Mutiny medal.

"The pursuer avers that he was on three occasions tried by courts-martial, convicted, and imprisoned; that on other occasions he was imprisoned without trial; and that he had suffered imprisonment for 369 days in all. He avers that these convictions were illegal, and had been set aside as such by the higher military authorities; and that, in particular, in December 1863, the Commander-in-Chief 'cancelled the courts-martial, and ordered the pursuer to be relieved of all the consequences entailed by them so far as practicable, as if they had never existed.'

"The pursuer further makes averments to the effect that in certain official documents it had been stated that he had suffered legal wrong, and that he should be made a sergeant. These averments are somewhat unconnected, and not very intelligible. I have not succeeded in understanding what authority or weight, if any, the documents referred to possessed, or what their precise bearing is on the conclusions of the action.

"If the pursuer's statements be true—and they are to a considerable extent admitted—he has been, no doubt, extremely unfortunate, and has reason to complain of the treatment he has received at the hands of his military superiors. Thirty years, however, have now elapsed since his discharge. I suppose that his wrongs are now past all redress, and I have no doubt that none can be obtained through the medium of this action.

"The action is directed against the Lord Advocate as representing the War Department. It seems vitiated throughout by the false assumption that the pursuer has never been discharged; but he sets forth his discharge himself, and does not say that there was any irregularity about it.

"The first conclusion is for declarator that 'the pursuer is entitled to the rank of sergeant in the Royal Regiment of Artillery until such time as he shall be discharged from the army, with all the emoluments and privileges accruing therefrom.' This

conclusion is open to various obvious and unanswerable objections. It is not averred that the pursuer was ever appointed a sergeant, and I am disposed to think that the defender's plea of 'no jurisdiction' is well founded as applicable to this conclusion. Non-commissioned officers are appointed under the statutes and regulations relating to the Army, and it was never heard of that any civil court could make such appointments or find that they ought to be made. Such appointments are entirely within the discretion of the military authorities, to whom they are entrusted. I was referred by the defender to a passage in Clode's Treatise on the Military Forces of the Crown, vol. ii., p. 123, to the effect that non-commissioned officers are, by long custom in the service, appointed by the colonel in command of the regiment, and nothing was advanced to the contrary by the counsel for the pursuer. Courts of law have uniformly declined to interfere with the sentences of military courts where the question brought before them regarded military rank. If an officer or soldier conceives that he has been unjustly reduced or deprived of his rank, his remedy is by appeal to the superior military authorities, or to the Crown, and not to civil courts—see *Mansergh*, 30 L.J., Q.B. 296; *Tuffnell*, 3 L.R., Ch. Div. 164.

"I think I have no jurisdiction to entertain this conclusion; but further, there is not an approach to any relevant averment on record from which such a right could be inferred. All that is said is, that if the pursuer had not been unjustly treated, he would have been made a sergeant; but it does not follow that he had any right to be appointed, and I confess I am unable to imagine any combination of circumstances which could entitle anyone to be made a sergeant. There is and can be no right in the matter. It is left to the discretion of the proper military authorities. The first declaratory conclusion may therefore be set aside as unmaintainable.

"The second and alternative conclusion for declarator, that 'the pursuer is entitled to the rank of bombardier in the aforesaid regiment, from 20th November 1861 till he shall be legally discharged from the army with all the emoluments and privileges accruing therefrom,' is in a somewhat different position. The declarator asked is, as already noticed, inconsistent with the admitted fact that the pursuer was legally discharged in 1866, but perhaps it might be competent, under and within that conclusion, to declare that the pursuer had been a bombardier, and was a bombardier at the date of his discharge. He avers that he was reduced from the rank of bombardier by the sentence of a court-martial and the order of Sir Hugh Rose, as (it is said) Commander-in-Chief in India, and that that conviction and order were afterwards cancelled by due military authority, and it may follow that that cancellation effected the restoration of the pursuer to the rank of bombardier. Probably it did. I am inclined to think that it would not be competent for the Court to declare that. But I do not see clearly that it would be incompetent for this Court to inquire into that as a matter of fact. Possibly it might be conceded as a matter of fact that the pursuer had the rank of a bombardier. But the objection to a declaratory finding to that effect or to any inquiry into that matter of fact, is that, in my opinion, the pursuer could take no benefit from it. He could not, and indeed does not, ask a mere abstract finding on the subject leading to no practical result, but concludes for a finding that he is a bombardier, in order to lead to the conclusion that he is entitled to the emoluments of a bombardier. Accordingly he proceeds to conclude for count and reckoning by the defender for all outstanding emoluments and pay due to him as sergeant or bombardier, and he claims £2000 under this conclusion. He makes this large claim on the footing that he is entitled to be paid as a sergeant; but for that claim, as has been seen, there is no ground whatever. His claim is therefore reduced to the arrears of his pay and emoluments as bombardier, and if he is to be paid as bombardier only, then he avers in condescendence 20 'that there is still due to him as bombardier a sum of £10, 13s. 9d. or thereby in name of pay and good conduct pay.' The pursuer maintains that this claim for arrears of pay is a claim which the Court is bound to entertain, and which makes it competent to the Court to decide whether he was a bombardier and entitled to be paid as such, and whether the amount which he claims in that capacity remains due to him. The pursuer referred to various cases chiefly in regard to ecclesiastical questions for the purpose of showing that the Court will inquire into the status of a pursuer so far as is necessary to ascertain and vindicate his pecuniary rights, and will, in doing so, disregard any proceedings by any Court purporting to affect his pecuniary rights and emoluments, if it could be shown that such proceedings were incompetent or *ultra vires* of the Court. I do not require to go into such analogous cases, because, in the first place, I am of opinion that the averment as to these arrears is quite insufficient and irrelevant. It is only stated that the sum claimed is due for pay and good conduct pay, but it is not explained under what contract or statute the pursuer's right to it arises, or why it is due by the War Department. The pursuer does nothing but aver that that sum is due to him, and his counsel did not at the debate supplement that bald averment by any explanation. It surely could not be maintained that every member of the reserved forces, or, for that matter, every soldier in the army, could be entitled to a proof by making a bare averment in an action that so much pay or emolument was due to him. I would be prepared to hold this averment irrelevant on these grounds. But the defender submitted another, and probably a better answer, which was, as I understood him, that no action at all lies for the pay of a soldier or an officer. The theory seems to be that when money is voted by Parliament for

the payment of the army, it is voted to the Crown, but that it is entirely in the power of the Crown to determine how it shall be applied; and that no individual has a right enforceable in a court of law to any part of it.

"Mr Clode states the law as follows:—'No suit or action, therefore, can be brought against the Crown or its ministers for the recovery of pay, pension, or other grant for military service. These grants range themselves under that class of obligations described by jurists as imperfect, which want the "*vinculum juris*," although strong in moral equity and conscience. Their performance is to be sought for by petition, memorial, or remonstrance, not by action in any court of law.' That statement of the law seems fully borne out by decisions in England of high authority, which it is sufficient to quote—*Macdonald* v. *Steele*, 1793; Peake's Reports 175; 3 Revised Reports, 680; *Gidley* v. *Palmerston*, 1822; 3 Brod. & Bing., 275, 286; 24 Revised Reports, 668; *Gibson* v. *East India Company*, 5 Bing., N.C., 262, 274, where the ground of the rule and the necessity of it are explained by Tindal, C.J.

"I think, therefore, that the pursuer cannot recover the arrears which he alleges to be due, and, therefore, that no pecuniary or patrimonial interest is involved in the question whether he is or was a bombardier. Assuming that he was, his claim for arrears of pay is, notwithstanding, irrelevant and incompetent. That becomes a mere abstract question, and the rule applies that the Court will not pronounce a declarator which has no bearing on any patrimonial interest.

"There remains the conclusion for £750 as damages for the wrongs which the pursuer has suffered through the illegal convictions of which he complains. Now, on this point, the question does not arise whether this Court could set aside the decrees of the court-martial complained of as *ultra vires* or incompetent. I am disposed to think that it could not. But I am not asked to interfere in that manner, for these illegal proceedings have already been set aside by competent military authorities. The pursuer does not challenge the proceedings of the military authorities, but rather founds on them, and maintains or may maintain that they prove conclusively that he has suffered a legal wrong. He might probably have sued those members of the court-martial who did the wrong, if it could be shown that the proceedings were incompetent or *ultra vires*. But I am unable to see on what principle the War Department can be made liable. There is no authority for the proposition that when a Court falls into error or acts incompetently or exceeds its jurisdiction, any department can be made answerable. There is no reason why there should be such liability for the errors of courts-martial more than for the errors of other civil or criminal courts. It is said that the War Department is liable for the faults of the officers who formed the courts-martial as being the servants of the War Department; the answer is that they were not the servants of the War Department, but the servants of the Crown; and, if it be said that this action, although nominally against the War Department, is really against the Crown, the conclusive answer appears to be that the Crown cannot be sued for wrong done by itself or its servants.

"It is settled, indeed, than an action will not lie against the Crown on a contract entered into by the servants of the Crown, or for breach of contract by the servants of the Crown—*Thomas* v. *The Queen*, 10 L.R. Q.B. 31, 43; *Windsor Ry. Co.* v. *The Queen*, 11 L.R. App. Cas. 607, 614. In these cases it was, I think, clearly recognised that the Crown could not be made liable in damages for wrong or delict or quasi-delict. Nor, it is thought, can it be liable where the damage has arisen from the negligence of the servants of the Crown—*Viscount Canterbury* v. *Attorney General*, 1842, 1 Philip Ch. Cas. 306; *Lord Advocate* v. *Hamilton*, 29 S.L.R. 213. Questions of delicacy may arise in applying this principle, but I am unable to think that there is any doubt that neither the Crown nor any Public Department can be liable for the blunders of a court or of the officers supposing themselves to form a court, or of the Commander-in-Chief of the Forces in India.

"On the whole I am satisfied that the present case cannot be supported in any of its parts, and that the defender is entitled to absolvitor."

The pursuer reclaimed.

The pursuer was not represented by counsel in the Inner House. He appeared in person, and was permitted to read a statement of his case.

Counsel for the defender were not called upon.

LORD JUSTICE-CLERK—It is matter for regret that an old soldier, who has retired from the army with an excellent character, should have been led to bring forward a claim of this kind. The pursuer concludes in the first place for decree of declarator that he is entitled to the rank of sergeant in the Royal Regiment of Artillery as from the 20th day of November 1861, or from such date as shall be determined, until such time as he shall be legally discharged from the army, with all the emoluments and privileges accruing therefrom. Now, even if we have the power to entertain such a conclusion in any case, it appears to me that in the circumstances averred by the pursuer his demand is an extravagant demand. He says that he left the army so long ago as 1866, when he declined to re-engage on the termination of his original period of service and took his discharge. It appears to me out of the question for this Court to pronounce a decree to the effect that the pursuer is still in the army when he himself says that he has left it. Then he has an alternative conclusion to the effect that if not sergeant during all this time he should be found and declared to be entitled to the rank of bombardier from

20th November 1861 till he should be legally discharged from the army. This conclusion appears to me to be as untenable as the other. It was as bombardier that he was serving when he took his discharge, and it was as bombardier that he declined to serve further. In any case, however, I am of opinion that it is not within the jurisdiction of this Court to pronounce a decree declaring that anyone is serving in the army during a time when he is not in fact serving. Military service involves subjection to discipline and obedience to superior officers, and I am quite unable to see how this Court can pronounce a judgment to the effect that a man was serving in the army during a time when he was subject to no military discipline and owed obedience to no superior officer, but was living the ordinary life of a private citizen.

It is another question whether the War Department is liable for the illegal actings of the courts-martial which tried the pursuer. It is no doubt true that if the members of a court-martial commit illegal and malicious acts, they may be held liable in damages by a court of law to persons who have suffered from the illegal and malicious conduct. It is not enough to show that the court-martial has erred—as any court may err—in the conclusions in fact or in law which it has reached; it must be shown that the members of the court have perverted their office maliciously and to the injury of the person seeking redress. I do not stop to consider whether, if the pursuer had brought his action against the members of the courts-martial which tried him he would have had a relevant action against them on the averments which he makes here, because it is not the members of the courts-martial but the War Office whom he calls to defend this action, and I am very clearly of opinion that the War Office is not liable in damages for the illegal acts of the members of a court-martial, however grossly they may have abused their office. These considerations appear to me to dispose of the conclusion for damages and also of the general conclusion for count and reckoning and for payment of £2000, for that large sum was, I suppose, reached on the footing that the pursuer has been a sergeant, or at least a bombardier, of artillery during all these years. There remains therefore only the question whether the pursuer is entitled to decree against the War Office for the arrears of pay which he says became due to him from 1860 to 1865—that is to say, before his discharge from the army. Now, I rather think that the War Office is not answerable in civil courts for arrears of pay, but however that may be, we are now in 1897, and the arrears claimed amount only to £10 odd, and the long delay in making the claim is quite unaccounted for. I think that the claim comes too late, and in any case that it is a claim which should have been made in a different court from this, and that it is not a claim which can be held to be extant after so long delay. If ever there was a case in which *mora* should bar the claim, that case is the present.

On the whole matter I agree with the Lord Ordinary, and think that his interlocutor should be affirmed.

LORD YOUNG—I am of the same opinion. The summons contains, in the first place, a declaratory conclusion—an alternative conclusion—to the effect that we should declare that the pursuer is entitled to the rank of sergeant in the Royal Regiment of Artillery, with the emoluments and privileges of that rank, from 20th November 1861, or otherwise that he is entitled to the rank of bombardier of artillery with its emoluments and privileges from the same date. Now, the action is directed against a public Department of Her Majesty's Government, and in my opinion there is no rule, either of the statute law or of the common law, which entitles us to pronounce such a decree against a Department of Her Majesty's Government. The next demand is for a count and reckoning—not a conclusion for payment of money alleged to be due, with a condescendence showing how the money was due, but a conclusion for count and reckoning. Now, again, I have to say that there is no rule of the common or statute law of Scotland entitling any person to demand a count and reckoning against any Department of Her Majesty's Government. I do not know—and I do not consider—who the person or persons may be against whom action for money due on account of public service ought to be brought if such money is due. The only thing I have to consider is whether we have any authority entitling us to find the War Department liable to account to a soldier for pay to which he says he is entitled. I give no opinion on the question whether a soldier, like a clerk, may not have an action against the person, whoever he may be, who has improperly withheld money due to the soldier.

There is nothing in the common or statute law of Scotland entitling us to give any of the remedies which we are here asked to give, and on that ground I think that the defences must be sustained.

LORD TRAYNER—It is a matter for regret that a man who has served his Queen and country so long as the pursuer seems to have done should at the end of his long services think himself aggrieved by the treatment he has received from his superior officers. I offer no opinion, because I am not at present entitled even to have an opinion, upon the question whether the complaints by the pursuer against his superior officers are well founded; but even if they are not well founded, it is to be regretted that the pursuer should have been subjected to treatment which should have led him to think that while he was serving Her Majesty he had not received justice at the hands of those who were placed over him. I wish to say, in regard to one observation which the pursuer made in his address, that it is not the case that a man who becomes a soldier loses his civil rights. His rights as a citizen remain to him unimpaired, and if the pursuer has any

right as a citizen of this realm to any remedy which we can give him, he will not ask in vain. But I agree that it is impossible to give the pursuer decree under any of the conclusions of this summons.

LORD MONCREIFF—I agree. I think that we have no power to give the pursuer any of the decrees for which he asks.

LORD YOUNG—I omitted to refer to the conclusion for damages. What I have to say upon that is, that while any servant in the public service may have an action for damages against any individual who has done him a wrong, even in connection with military service, I know of no authority for a claim of damages against Her Majesty's Government, or any public Department of Her Majesty's Government. Any individual in the public service may so treat another as to subject himself personally in damages, and the damages may be recovered in a court of law, but there is no authority for an action against the Government or a public Department of the Government, which is the same thing, for all the Departments in the Government just constitute the Government as representing Her Majesty.

The Court adhered.

Counsel for the Pursuer—Party. Agent—Robert D. Ker, W.S.

Counsel for the Defender — Sol.-Gen. Dickson, Q.C.—A. J. Young. Agent—Jas. Campbell Irons, S.S.C.

Thursday, November 25.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

HENDRY & COMPANY *v.* THE LITTLE ORME'S HEAD LIMESTONE COMPANY.

Expenses—Appeal—Where Appeal Withdrawn before it is Put out for Hearing.

An appeal was abandoned after it had been sent to the short roll, but before it had been put out for hearing.

Observations as to the rule to be applied in allowing the respondent the expenses incurred by him in preparation for the discussion.

In October 1896 an action was raised in the Sheriff Court of Lanarkshire by the Little Orme's Head Limestone Company, Limited, against Messrs Hendry & Company, coal and limestone merchants, Great Clyde Street, Glasgow, concluding for payment of £388; and in November a supplementary action was raised against the individual members of the firm. On 8th June 1897 the Sheriff, adhering with a variation to an interlocutor of the Sheriff-Substitute, found the defenders liable to make payment of the sum of £338. The defenders on 20th July 1897 boxed an appeal against this interlocutor to the First Division. On 15th October the appeal was sent to the short roll. On 25th November, before it had been put out for hearing, the appellants put in a note stating that they did not insist in the appeal, and craving the Court to dismiss it. The respondents had in the meantime printed an appendix containing correspondence.

Counsel for the appellants moved that the expenses to be allowed to the respondents should be modified at the sum of £3, 3s. They argued that the rule to follow was that in *Gentles* v. *Beattie*, October 15, 1880, 8 R. 13, where expenses were modified. The respondents had been premature in printing the documents, since the appeal could not be out for hearing for two or three months.

Argued for respondents—They were entitled to full expenses according to the ordinary rule—*Smith Sligo* v. *Knox*, Nov. 2, 1880, 8 R. 41. In *Gentles* v. *Beattie* the appeal had been withdrawn when first appearing in the Single Bills, while here it had been sent to the roll.

LORD PRESIDENT—We must, on the one hand, take care not to discourage the industrious and early preparation of cases for hearing, and again it is perhaps worthy of consideration that there are appeals taken which it is not ultimately contemplated by the appellant should come on for hearing. That is not a class of appeals to be encouraged. Accordingly, without laying down any general rule applicable to all cases, litigants should understand that when once a case has been sent to the roll the Court will not be careful to inquire whether undue alacrity is shown in preparations for hearing, since it may be that, when sent to the roll, the case may be put out for hearing earlier than is expected.

Accordingly, though in this not very complicated case time has certainly been taken by the forelock, I think we should allow expenses.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court dismissed the appeal with full expenses.

Counsel for the Appellants—Sym. Agent—W. J. Lewis, S.S.C.

Counsel for the Respondents—Ramsay. Agents—J. & J. Ross, W.S.