Counsel for the Petitioners—A. J. Young. Agent—Isaac Fürst, S.S.C.

Counsel for the Respondent—Campbell, K.C. — Graham Stewart. Agent — J. T. Donaldson, Solicitor.

Wednesday, November 30.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

WILSON *v.* MACKAY.

Reparation—Statutory Limitation of Time for Raising Action — Child Killed by Ammunition Waggon on Parade—Action against Person Commandiug Volunteer Regiment—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1.

The parent of a child, who had been killed on a public street by the horses in an ammunition waggon bolting when on parade, brought an action against a regiment of volunteers and against the lieutenant-colonel of the regiment, for himself and as representing the regiment. The averments on which the conclusion against the colonel was based were that he had neglected his duty in not seeing that quiet horses were used, that competent drivers were employed, that the waggons were driven according to military regulations, and that the harnessing of the horses and the parading them on the street were properly superintended. The action was not raised within six months after the date of the act complained of.

The Lord Ordinary (Kyllachy) dismissed the action as presented against the regiment and against the colonel as representing the same, on the ground that the funds of the regiment belonged to the Crown, and the Crown could not be liable for damages in respect of the wrongful acts of its officers, but he found that the claim for damages might be pursued against the colonel as an individual. The defenders reclaimed against this judgment.

Held (*rev.* judgment of Lord Ordinary) that in respect the alleged neglect on the part of the colonel was solely a neglect of duties lying on him in his public capacity as commander of a regiment of volunteers, the action against him was excluded by section 1 of the Public Authorities Protection Act 1893.

The Public Authorities Protection Act 1893 (56 and 57 Vict. c. 61), sec. 1, enacts—"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage within six months next after the ceasing thereof."

On 27th November 1903 William Brown Wilson, tramway inspector, brought this action against the 1st Edinburgh City Royal Garrison Artillery Volunteers, having their office and headquarters at 28 York Place, Edinburgh, and James Francis Mackay, Lieutenant-Colonel of that regiment, as officer commanding the regiment, for himself and as representing the said regiment, concluding for £500 in name of damages.

The pursuer averred that the 1st Edinburgh City Royal Garrison Artillery Volunteers was a volunteer regiment, and that the defender Mackay was the commanding officer of that corps, and as such represented it. He was also, in terms of the Volunteer Regulations and section 25 of the Volunteer Act of 1863 (26 and 27 Vict. cap. 45), vested in its whole property. On 14th March 1903 an ammunition waggon belonging to the defenders, and drawn by two horses hired by them, came along the street at a furious pace and entirely uncontrolled, with the result that the pursuer's daughter Marjory, six years of age, was, while standing on an island platform opposite the Lothian Road Board School, knocked down and so seriously injured that she died shortly afterwards. The parade of the regiment on that day was not a parade for military purposes, but a "march-out," *i.e.*, a parade of the guns, &c., on the public streets merely for the purpose of attracting public attention and securing recruits.

The pursuer further averred (Cond. 3) that Colonel Mackay gave orders to his subordinates for the parade of certain guns and waggons on the public streets of Edinburgh on that date. "(Cond. 4) It was the duty of said defender to take special precautions for the public safety. In particular, it was said defender's duty to see (1) that quiet horses suitable for such work should be used; (2) that experienced and competent drivers able to control the horses drawing the guns and ammunition waggons were employed; and (3) that the arrangements for harnessing the horses to the guns and waggons and parading them on the streets should be superintended by a commissioned officer of experience familiar with such work. But these duties the said defender disregarded, as, having issued his orders for the 'march-out,' which his subordinates were bound to carry out, he left the entire control to the non-commissioned officers and men of the volunteer regiment. (Cond. 5) The horses which the said defender instructed to be used were wholly unaccustomed to such work, and had never been previously engaged in it. The said defender took no steps to ascertain the suitability of the horses or their fitness to be harnessed with the special harness necessary for drawing the guns and ammunition waggons. (Cond. 6) The horses were young and restive and unused to the said wag-

gons and harness employed. Had the defender himself been present, or had he instructed any responsible commissioned officer to attend, he would have seen that it was both improper and dangerous to have permitted the said horses to enter the public streets. But the sergeant to whom the defender entrusted the whole control appointed two inexperienced gunners to drive the said horses. The said gunners were not competent drivers, and had no experience in horses. . . . Since the closing of the record the pursuer has ascertained, and it is the fact, that the ammunition waggons so used were those of the 12-pounder gun, and the said gunners were instructed by the defender Colonel Mackay, or those acting with his authority, to lead the horses through the streets in the manner appropriate to the much heavier waggons of the 4·7 gun. This was contrary to the military regulations, which require 12 pounder ammunition waggons to be driven by drivers seated on horseback, and was dangerous, as a driver leading the horses drawing such a waggon in the manner described has not sufficient control of his horses to enable them to be driven through the streets with due regard to the safety of the public. (Cond. 7) The said accident was thus caused through the fault of the defenders in permitting said ammunition waggons to be drawn through the public streets by young and restive horses unused to such work and in unaccustomed harness, and driven by incompetent drivers. The accident was further caused by the fault of the defender Colonel Mackay in failing to appoint a commissioned officer of experience, delegated with authority to countermand the order which had been given to parade the said ammunition waggons if the horses proved unsuitable and restive. The defenders have been called on to make reparation to the pursuer for the loss, injury, and damage which he has sustained through the death of his daughter, but as they refuse or delay to do so this action has become necessary. The sum sued for in name of damages and *solatium* is reasonable."

The defenders referred to the Volunteer Regulations and the Volunteer Act 1863, under which Act the members of the regiment were constituted a volunteer corps. The corps was bound to conform to the regulations issued by the Secretary of State for War, and the members thereof, to attain efficiency, required to attend the drills and instruction declared requisite under section 11 of said Act of 1863. By section 25 of said Act of 1863 the money, effects, and property of a volunteer corps were vested in the commanding officer for the time being and his successors in office. They were so vested by statute as truly belonging to the Crown. The commanding officer and the whole members of the corps were servants of the Crown in their respective official capacities. Upon the 14th March 1903, when the accident occurred, a parade of the corps had been ordered to take place, and the members of the corps who attended did so in their capacity of volunteers, and in the performance of their duties as such. The parade was an ordinary parade, in conformity with military regulations. The averments of the pursuer imputing fault to the defenders were denied, and in particular it was averred that the waggons were 16-pounder waggons, that the horses were led through the streets in accordance with instructions issued by the defender Colonel Mackay, conform to an order issued by the War Office, and that the said defender did not disregard or neglect any duty which it was incumbent upon him to perform.

The pursuer pleaded, *inter alia*—"(1) The pursuer's daughter having been killed through the fault of the defenders they are liable in reparation."

The defender pleaded, *inter alia*—"(1) The action is excluded by the Act 56 and 57 Vict. cap. 61, sec. 1, and the defenders are entitled to expenses as between agent and client. (2) The action is incompetent—(*a*) As laid against the said corps and the said James Francis Mackay, as commanding officer, for himself and as representing the said corps; (*b*) because an action for damages does not lie against the defenders or all or any of them, as servants of the Crown, in the execution of their duties as such. (3) The pursuer's averments are irrelevant. (6) The defender Colonel Mackay, not being in any way responsible for the accident, is entitled to be assoilzied."

On 2nd November 1904 the Lord Ordinary (KYLLACHY) pronounced this interlocutor —"Finds that the action as laid against the defenders the 1st Edinburgh City Royal Garrison Artillery Volunteers, and James Francis Mackay, as Lieutenant-Colonel of said regiment and officer commanding and representing the same, cannot be sustained; therefore dismisses the same, and decerns: *Quoad ultra* finds that the claim for damages may be pursued against the said James Francis Mackay as an individual; before answer allows to the parties a proof of their averments, and to the pursuer a conjunct probation, reserving expressly in the circumstances the applicability of the Statute 56 and 57 Vict. cap. 61; reserving *hoc statu* all questions of expenses."

Opinion.—"In this case I have come to the conclusion that the action cannot be sustained as against Colonel Mackay as representing the volunteer regiment and as holder and administrator of its funds. These funds belong to the Government—that is to say, the Crown—and it is, I think, an accepted doctrine that the Crown cannot be liable or sued for damages in respect of the 'Torts'—the wrongful act of its officers. I therefore propose to dismiss the action so far as directed against Colonel Mackay as representing the regiment.

"On the other hand, I have come to the conclusion—(1) That the action is sufficiently well laid as against Colonel Mackay as an individual; and (2) that although he is sued in both capacities, the failure of the action as against him in the one capacity—or, if it is preferred to put it, the failure of the action as against the regiment, or as against

the Crown—does not prevent the conclusion for damages—a conclusion which relates to a single wrong—being pursued as against Colonel Mackay individually.

"I also consider, having regard to the pursuer's averments, particularly his averment in the last paragraph of condescendence 1, and the additional statement now introduced at the close of condescendence 6, that I cannot *de plano* hold the action excluded by the statute of 56 and 57 Vict. (Public Authorities Act) founded on by the defenders. I think it is necessary that before dealing with that question the exact facts should be ascertained. Accordingly, not being prepared to hold either that the action is excluded by the statute or that its averments as against Colonel Mackay as an individual are plainly irrelevant, I propose to allow a proof before answer, reserving expressly the question as to the applicability of the statute, and also reserving the question of expenses."

The defenders reclaimed, and argued—The action was incompetent, in respect that it concluded for damages against an accumulation of defenders against whom different grounds of action were alleged—*Sinclair* v. *Caithness Flagstone Co., Limited*, March 4, 1898, 25 R. 703, 35 S.L.R. 541; *Barr* v. *Neilson's Trs.*, March 20, 1868, 6 Macph. 651; *Milne* v. *Smith*, November 23, 1892, 20 R. 95, 30 S.L.R. 105. The action had been dismissed by the Lord Ordinary as against one set of defenders, and allowed to proceed against another, thereby changing the liability of the defender who remained in the action from a *pro rata* liability to a liability *in solidum*. (2) The action was excluded by the Public Authorities Protection Act 1893, sec. 1, the defenders being at the time of the accident persons acting in the intended execution of a public duty, and the action not having been commenced within six months after the act complained—*Christie* v. *Glasgow Corporation*, May 31, 1879, 36 S.L.R. 694; *Spittal* v. *Glasgow Corporation*, June 17, 1904, 41 S.L.R. 629; *Conolly* v. *Managers of Stranraer Reformatory*, February 4, 1904, 11 S.L.T. 638; *Cree* v. *St Pancras Vestry* [1899], 1 Q.B. 693; *Mackay* v. *Tolworth Hospital Board* [1900], 2 Q.B. 454. The defenders were protected as being servants of the Crown engaged in the execution of their duties—Militia Act (52 Geo. III, c. 38.)

Argued for the pursuer and respondent—The principle of *Barr* v. *Neilson's Trs., sup.*, and the other cases referred to by the reclaimers had no application here. In these cases the claim of damages was founded on separate delicts which had no connection with one another, whereas in the present case there was only one delict. (2) It was alleged here that the defenders were at the time acting contrary to their duty, and in that position they were outside the protection of the Public Authorities Protection Act 1893 — *M'Ternan* v. *Bennett*, Dec. 21, 1898, 1 F. 333, 36 S.L.R. 239; *Sharpington* v. *Fulham Board of Guardians*, July 6, 1904, 20 T.L.R. 643; *Marks* v. *Frogley* [1898], 1 Q.B. 888; *Bell* v. *Black & Morrison*, June 28, 1865, 3 Macph. 1026. (3) The provisions of the Militia Act had no bearing on whether there was a relevant action against Mackay as an individual, and the Lord Ordinary was right in holding that the action was well laid against him individually, even though it failed against him as colonel of a volunteer regiment.

LORD PRESIDENT—The important question which we have to decide here is, whether the case stated on record does or does not fall within the restrictions imposed by the Public Authorities Protection Act 1893 (56 and 57 Vict. c. 61). The first section of that Act provides—[*His Lordship quoted the section*].

In reading this Act it is necessary to note that it applies not only to acts done in pursuance or execution of any public duty or authority, but covers intended execution also. Of course if the person can show he was not in fault the action would fall independently of the statute, but here fault is averred, and what we have to decide is whether that fault is covered by the provisions of the statute, in respect that it was committed in pursuance or execution or intended execution of a public duty or authority.

The Lord Ordinary has found that the action cannot be sustained as against the volunteers or against Colonel Mackay as commanding officer and as representing the regiment. So as far as the volunteers and Colonel Mackay were performing military duty the finding of the Lord Ordinary gives them the protection of the statute, but he finds that the action may be pursued against Colonel Mackay as an individual. Now, if the record showed that the Colonel had done something as an individual and not as Colonel of the regiment, I could agree with this view. But if on an examination of the record we find that he is not alleged to have done anything as an individual, but only in his military capacity and in the discharge of a public duty or authority, this provision of the Act will apply.

Upon a careful consideration of the record I am unable to find that the pursuer has well alleged that anything was done by Colonel Mackay except in pursuance of his duty as commanding officer of the corps.

The pursuer, in the first place, alleges that Colonel Mackay is the commanding officer of the corps, and as such represents it, but he maintains that in this instance he was acting in an individual capacity. He avers that this was not a parade for military purposes, that attendance at it was not compulsory, and that it was merely a "march-out" for the purpose of attracting recruits to the corps. Colonel Mackay is not alleged to have done anything except in the performance of what he intended and believed to be his duty as the commanding officer of the regiment. It would be strange indeed if it were held that a recruiting-sergeant is not performing his duty when he is engaged in the important task of obtaining recruits for the army. And if we are asked to hold that this was a private expedition, not a military parade, we would require some averments as to how private unofficial persons came to order

out the guns and ammunition waggons belonging to a military corps and the men of that corps. On this first point, then, I cannot see that the pursuer has made any relevant averment that in what Colonel Mackay did on the occasion in question he was not acting in exercise of his military duty and authority. In Cond. 3 we have the averment that Colonel Mackay gave orders for this parade, and I cannot read this as an averment that he gave these orders otherwise than as the officer commanding the corps. In Cond. 4 there are averments as to his duty with regard to the horses, the drivers, and the appointment of an experienced officer to superintend. These appear to me as clear a definition of the military duties of a commanding officer as could be wished for. It is also averred that he failed to be present himself, and failed to delegate the superintendence of the horses to a responsible officer, but if there was failure in that respect it was failure in a military duty, and just such a failure as the Act was intended to prevent from forming an action at law after the expiry of the specified time. There are also averments that the waggons were not in accordance with regulations, but if there was a breach committed it was a breach of military duty. I think therefore that we must recal the Lord Ordinary's interlocutor in so far as he finds that the claim may still be pursued against Colonel Mackay as an individual, and that this part of the action also should be dismissed.

LORD ADAM—The question in this case can be shortly stated. It is an action brought by the parent of a child, who was killed by two runaway horses, against a regiment of volunteers and the person who is the commanding officer of the regiment. The allegations against the defender Mackay are all found massed up in article 4 of the condescendence. It is there averred that this defender neglected his duty in not seeing (1) that quiet horses suitable for the work were used, (2) that experienced and competent drivers were employed, and (3) that the harnessing of the horses to the guns and waggons and the parading them on the streets was superintended by a commissioned officer experienced in such work. These are the duties which it is averred lay on this defender to see to, and alleged neglect of which forms the ground of action against him. The other averments in the subsequent articles of the condescendence only set forth in detail the particulars of the alleged neglect and the consequences following therefrom.

What, then, is the meaning of these averments of neglect? Was it neglect of duties lying on this defender in his public capacity as commander of volunteers or as a private citizen? It is clear that these duties lay not on Mr Mackay as a citizen but on Lieutenant-Colonel Mackay as commander of the volunteers. Now, the Public Authorities Protection Act 1893, sec. 1, enacts that where an action is commenced against any person for any act done "in pursuance or execution . . . of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such . . . duty or authority," the action shall not lie unless it is commenced within six months after the act, neglect, or default complained of. In my view what is here averred is clearly an accident resulting from an alleged neglect on the part of Lieutenant-Colonel Mackay in the execution of his public duty as commander of volunteers. That is the only question in the case. There is no charge against him of doing anything or neglecting to do anything as an individual. The only charge against him is that of neglect in his capacity of commander of volunteers.

LORD M'LAREN—The Lord Ordinary's interlocutor dismisses the action in so far as directed against Colonel Mackay as representing the volunteer regiment. His Lordship then goes on to consider the application of the Public Authorities Protection Act in relation to the conclusions against Colonel Mackay as an individual. His Lordship's judgment on that point is that he is unable to deal with the question of the applicability of the Act until the facts are ascertained. With all respect it would, I think, be a very inefficient protecting Act which left the protection to stand over until the conclusion of a contested case. The Act declares that no such action "shall be instituted" after the elapse of six months. What we have to consider is whether a competent action has been instituted. That we are able to determine now. I am far from saying that a summons might not be so skilfully drawn as to conceal that it was directed against a defender in respect of an act done in execution of a public duty. Then if it came out at the trial that the action was one in which the defender was entitled to the protection of the Act, the provisions of the Act would be applied and the action dismissed. But in this case the nature of the action is quite clear on the face of the summons, and therefore the defender is entitled to our judgment now. I agree with your Lordships that it is impossible to read the condescendence without seeing that it is an action for neglect or default in the performance of a military duty. The neglect charged is that Colonel Mackay took his responsibility too easily and did not use all the precautions that were necessary for the protection of the public. It is argued that in acting as he did the Colonel was not acting in execution of his duty. But if he did his public work badly that does not convert his acts into private acts. To say that this was individual negligence will not exclude the Act. All negligence is in a sense individual, and the argument we reject would exclude altogether the protection given by the Act to persons performing public duties.

LORD KINNEAR concurred.

The Court sustained the reclaiming-note and dismissed the action.

Counsel for the Pursuer and Respondent

—T. B. Morison—Dunbar. Agent—R. S. Rutherford, Solicitor.

Counsel for the Defenders and Reclaimers—The Solicitor-General (Dundas, K.C.)—Pitman. Agents—Inglis, Orr, & Bruce, W.S.

Wednesday, November 30.

FIRST DIVISION.

BUSBY *v.* CLARK.

Process—Parent and Child—Petition for Custody of Child—Respondent Obstructing the Execution of Service.

Where a petition by a father for the custody of his infant child was ordered to be served on the petitioner's father-in-law, in whose custody it was averred the child was, and where attempts to serve the petition on the respondent, both by registered letter and personally, proved unsuccessful owing to deliberate obstruction by the respondent, the Court *granted* the prayer of the petition.

James Busby, machinist, residing with Peter Buchanan, watchman, 2 Union Place, Dalmuir, Dumbartonshire, presented a petition for the custody of his infant child Thomas Clark Busby.

The petition set forth that on 2nd October 1904 the petitioner's wife Jane Mains Clark or Busby gave birth to a son, the child in question, and on 9th October 1904 she died at 9 Gladstone Place, Dalmuir; that after the death of the petitioner's wife the child was carried off by the petitioner's mother-in-law, and had since been in the custody of the petitioner's father-in-law James Clark, watchman, presently residing at 7 Gladstone Place, Dalmuir; that the petitioner was desirous of having the custody of his child, but the respondent Mr Clark, although he had been asked both by the petitioner and by his agent on four different occasions to hand over the child to the custody of the petitioner, refused to do so.

The petitioner further stated that since his wife's death he had resided in family with his mother and his stepfather, that his wages were 33s. per week, and that his mother and stepfather had intimated their willingness to receive the child into their house and do their best for its welfare.

In these circumstances the petitioner craved the Court to find that he was entitled to the custody of the child Thomas Clark Busby, and to ordain the said James Clark forthwith to deliver up the said child to the petitioner or to any other person having his authority.

On 24th November intimation and service of the petition on the respondent was ordered on eight days' induciæ.

On 30th November counsel for the petitioner, in the Single Bills, stated to the Court that an attempt had been made to serve the petition upon the respondent James Clark by a registered letter, but the letter had been returned by the Post-Office to the clerk of the process marked "Absolutely refused." An attempt had then been made to serve the petition personally on the respondent James Clark through a messenger-at-arms. Counsel read a telegram which had been received from the messenger-at-arms in these terms:—"Have been unable to effect service to-night."

In these circumstances counsel for the petitioner, in respect that there was clearly a deliberate attempt on the part of the respondent to resist service, and that the matter was urgent, moved that the prayer of the petition should be granted at once.

LORD PRESIDENT—In this case the respondent has obstructed and prevented service, and as he has taken no steps to explain or justify his conduct I think that we should grant decree of custody as craved.

LORD ADAM concurred.

LORD M'LAREN—I agree. The obstruction here was directed not only against receiving a registered letter but also against allowing personal service. It seems to me therefore that the respondent was deliberately avoiding service and that decree of custody should therefore be granted.

LORD KINNEAR concurred.

The Court granted the prayer of the petition.

Counsel for the Petitioner—Morton. Agent—W. A. Farquharson, S.S.C.

Saturday, December 3.

SECOND DIVISION.

[Sheriff Court at Dunfermline.

HAMILTON *v.* KERR.

Sheriff—Process—Debts Recovery Act Procedure—Citation—Competency of Objection to Regularity of Citation by Party Appearing—Relation of Debts Recovery to Ordinary Sheriff Court—Debts Recovery (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 96), *sec.* 8—*Sheriff Courts (Scotland) Act* 1876 (39 *and* 40 *Vict. c.* 70), *secs.* 2, 12 (2).

The Sheriff Courts (Scotland) Act 1876, which by section 2 applies only, unless otherwise expressly provided, to "civil proceedings in the ordinary Sheriff Court," enacts—section 12 (2)—that "a party who appears shall not be permitted to state any objection to the regularity of the execution or service as against himself of the petition by which he is convened."

Held (*dub.* Lord Moncreiff) that the section was applicable to an action raised under the Debts Recovery (Scotland) Act 1867, such action being "a civil proceeding in the ordinary Sheriff Court."