Tuesday, July 11.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

WILSON *v.* WORDIE & COMPANY.

Reparation — Negligence — Accident — Hiring of Horses — Liability of Party who has Let Horse on Hire for Accident to Member of Public—Alleged Negligence in Sending Horses Unsuitable for Purpose — Relevancy of Averments.

A child was run over and killed in a street by an ammunition waggon belonging to artillery volunteers while being driven by volunteers and drawn by horses hired from a firm of carting contractors.

In an action for damages at the instance of the child's father against the contractors, the pursuer averred that the horses had run off and got beyond the control of the drivers, who were young members of the volunteer corps; that they were unsuited for the purpose for which the defenders had hired them out, being young and restive and untrained to drawing ammunition waggons; that they had never previously been yoked together as a pair or been in an ammunition waggon, and that they were harnessed in a different way from that to which they had been accustomed; and that the defenders were aware of the unsuitability of their horses for the purpose and the danger to the public involved therein.

Held that the pursuer had stated no relevant case of fault against the defenders.

Opinion of the Court that the person hiring out a horse may in certain circumstances (*e.g.*, the horse being notoriously vicious—*per* the Lord Justice-Clerk) be directly liable in damages to a member of the public accidentally injured by the animal, although at the time of the accident it was in charge of the person who took it on hire—*contra, per* Lord Ardwall, Lord Ordinary,

William Brown Wilson, residing at 7 Kemp Place, Edinburgh, brought an action against Wordie & Company, carting contractors, Lothian Road, Edinburgh, in which he sued them for £500 as *solatium* for the death of his daughter.

He averred — "(Cond. 2) On Saturday, 14th March 1903, the pursuer's wife was walking up Lothian Road in the direction of Grindlay Street with her youngest child in a perambulator, and her only daughter Marjory Wilson, who was then six years of age, walking by her side. As they were passing the island platform situated for the accommodation of foot-passengers directly opposite the Lothian Road Board School, an ammunition waggon belonging to the 1st Edinburgh City Royal Garrison Artillery Volunteers, and drawn by two horses hired by them as after mentioned from the defenders, suddenly came from the direction of Grindlay Street at a furious runaway pace. Marjory Wilson accordingly took refuge on the said island platform, but the horses of the said ammunition waggon dashed on to the platform, knocked her down, and so seriously injured her that she died shortly afterwards. The said horses, which were quite unsuited for the purpose of drawing guns and ammunition waggons on account of being untrained and unaccustomed to such work, had run off and got beyond the control of the drivers, who were young members of the Volunteer Corps. (Cond. 3) The said Volunteer Corps, for the purposes of a march out in the public streets of Edinburgh, had entered into a contract of hire with the defenders, under which the defenders undertook to supply a considerable number of horses for the purpose of drawing heavy guns and ammunition waggons along the public streets. It was the duty of the defenders, knowing that the said horses were for use on the public streets, to have supplied quiet and well-trained horses, but they failed to do so, and the death of the pursuer's said daughter was thus caused by the pursuers' fault or negligence. The defenders, knowing that the horses which they used for their business had not been trained or exercised in drawing guns and ammunition waggons, and that their use involved danger to the public, stipulated with the said Volunteer Corps that they should be relieved of any damage which happened to the public while the horses were under their charge. In point of fact the horses so supplied by the defenders, including the horses which ran away, had not been trained or exercised in any way in such work, and such training or exercise was necessary before they could be safely used in the public streets. In particular, the horses attached to the runaway gun waggon already condescended on were young and restive and had never previously been yoked together as a pair, and had never before drawn an ammunition waggon. They were harnessed differently from what they were accustomed to. The defenders were well aware of all these circumstances, and should not have hired out said horses for said purpose. The defenders further were well aware that the horses could not be safely yoked as a pair to the said military waggon. The said horses, in consequence of their not having been trained, resisted violently being yoked at the yard at Lochrin Place, to which they were sent by the defenders to be harnessed to the gun waggons. (Cond. 4) The accident was caused through the fault of the defenders. It was gross negligence on their part to hire out the said untrained horses for use on the public streets of Edinburgh." . . .

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

The defenders pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support his pleas. 3) The said accident not having occurred through any

fault on the part of the defenders they ought to be assoilzied."

The Lord Ordinary (ARDWALL) on 9th June pronounced the following interlocutor —"The Lord Ordinary having heard counsel for the parties on the adjustment of issues and the first plea-in-law for the defenders, sustains the said plea: Disallows the proposed issue for the pursuer, and dismisses the action, and decerns."

Opinion.—"On 14th March 1903 the pursuers' child was run over and killed while on an island platform in Lothian Road by an ammunition waggon belonging to the 1st Edinburgh City Royal Garrison Artillery Volunteers drawn by horses belonging to the defenders, and driven by a young artilleryman. The accident was a sad and deplorable one, but I am of opinion that the pursuer has failed to state a relevant case against the present defenders, and that he is not entitled to an issue. The defenders are carting contractors and use a number of horses in their business. They were applied to by the 1st Edinburgh City Royal Garrison Artillery Volunteers for horses to draw their guns and ammunition-waggons on Saturday, 14th March 1903. They gave them horses which the pursuer states (Cond. 3) 'they used in their own business,' and the pursuer seeks to make them liable as for fault because such horses 'had not been trained or exercised in drawing guns and ammunition waggons.' This is really the whole case, and it seems to me to be irrelevant. No duty lay on the defenders, who were mere carting contractors, and not horse dealers or horse breakers, to train horses for artillery service; indeed, they had not the means of doing so. Further, it cannot be said they were in fault in not refusing to give the artillerymen horses at all; it was not for them but for the artillerymen to judge whether the horses in question were fit for artillery purposes, and could be safely used for drawing guns and ammunition-waggons on the public streets.

"But apart from all this, I am of opinion that the person liable to members of the public for an accident such as this is the person using the horses either by himself or his servants, and not the person who hired out the horses to him, and who has no control of them when they leave his stable. It may be that the person who takes the horses on hire will have an action of relief against the person who hired out the horses, if the accident was due to inherent vice in the horses. But the horse-hirer has in the ordinary case no contract with and no duty to the public, whatever may be his liabilities to the person to whom he has hired out a horse."

The pursuer reclaimed, and argued that there was a relevant case of fault set forth on record against the defenders—*Cotteril* v. *Starkey*, 1839, 8 Carrington & Payne, 691.

The respondents argued—(1) There were no relevant averments of fault. (2) In any event, the pursuer had no title to sue the defenders. The only persons against whom he could have a claim were the persons who had taken the horses out for hire and under whose control they were at the time of the accident. Liability could not arise merely *ex dominio*, and there was no contract between the pursuer and the defenders—*Laugher* v. *Pointer*, 1826, 5 Barn. & Cress. 547.

LORD JUSTICE-CLERK—The question for our decision is whether the pursuer has stated upon record a relevant case entitling him to an issue.

I am far from saying that a person who hires out horses is absolutely exempt from a claim for damages at the instance of a person who has been injured by them merely because he has hired them out to a third party, under whose temporary control they are for the time. I can well conceive a case in which blame might be brought home to him, *e.g.*, supposing he were to hire out without notice or warning a notoriously vicious and dangerous animal. I am not prepared to say that the owner might not in such a case be liable although the horse was at the time of the accident under the control of another.

We have, however, no such case here. There are no averments that the horses were vicious. What is said is that they should not have been hired out to draw these ammunition waggons through the streets. But it is not said that they had never drawn waggons through the streets before, nor is anything stated to show that an ammunition waggon differs in any material respect from any ordinary waggon. It is said that the animals were young and restive, and had never previously been yoked together as a pair. But it is evident that the quietness and safety of horses is a matter of degree. Many horses are more or less addicted to shying and other indications of nervousness or excitability, yet it cannot be said that no such horses are to be used, and that they should all be sent to the knacker. It is all a question of degree. Some horses are restive in the hands of an inexperienced man, while perfectly docile in those of a better rider or driver, and it is a noticeable point in this case that the pursuer himself avers that these horses were put under the control of young members of the Volunteer Corps which would seem to point to fault or incapacity on the part of the drivers selected by the persons who hired them and not the hirers-out. The latter were entitled to assume that their horses would be under the control of competent men. There is no averment that in the hands of such men they would have been dangerous. As to the averment that they had never been in double harness together, it is quite absurd to suggest that a jobmaster is only entitled to send out as a pair horses which have actually been together in harness previously. It is said, too, that they were differently harnessed from what was usual. But there is no indication of any respects in which the military harness was abnormal, nor is it said that the attention of the hirers was drawn to the fact that their animals would be put into anything other than ordinary double harness to which

they were broken. I have alluded to these points as illustrating the general vague and unsatisfactory nature of the averments upon which I have no doubt in holding the pursuer is not entitled to an issue. Subject to the qualification indicated at the commencement of my opinion I agree with the Lord Ordinary.

LORD KYLLACHY—I concur. I am not prepared to affirm the proposition suggested in the last paragraph of the Lord Ordinary's opinion, namely, that in no circumstances could a horse hirer be liable to members of the public for injuries caused by horses let out by him. Cases I think might well be figured in which it would be very difficult to affirm that proposition. But the position here is that we have no averments raising any question of that nature—no averments of circumstances involving any such responsibility. On the contrary, there is nothing in the pursuer's averments inconsistent with the supposition that the horses were safe and free from vice, and that, as indeed some of the pursuer's averments seem to suggest, the true and proximate cause of the accident was the fact that the persons to whom the horses were let placed them under the charge of young and inexperienced drivers.

LORD KINCAIRNEY—I am entirely of the same opinion. I quite assent to all that has been said, and do not find it necessary to add anything.

LORD STORMONTH DARLING concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer — Dunbar. Agent — R. S. Rutherford, Solicitor.

Counsel for the Defenders and Respondents—G. Watt, K.C.—Horne. Agents — Connell & Campbell, S.S.C.

Wednesday, July 12.

FIRST DIVISION.

[Lord Low, Ordinary.

CATHCART *v.* BROWN.

Reparation—Seduction—Issues—Form of Issue Approved.

In an action of damages for breach of promise and seduction, *held* that the pursuer was not entitled to a simple issue of seduction, but must specify in the issue the method of seduction which was alleged. Form of issue *approved—Forbes* v. *Wilson*, May 16, 1868, 6 Macph. 770, 5 S.L.R. 501, *followed.*

This was a motion by the defender to vary the second of two issues approved by the Lord Ordinary (LOW) in an action of damages for breach of promise and seduction at the instance of Jeanie Cathcart, domestic servant, 40 Linthouse Buildings, Govan, with consent and concurrence of William Cathcart, pit-fireman, Hamilton, her father, as her curator and administrator-in-law, pursuer, against Alexander Brown, warehouseman, Lawmuir, East Kilbride, Lanarkshire, defender.

The first of the issues which had been allowed dealt with the alleged breach of promise, and as to it no question arose. The second dealt with the alleged seduction.

The pursuer made on record averments to the effect that when she was a domestic servant in his father's house the defender, after paying her attention, courting her, and professing affection for her during some months, had in or about the month of April 1904 made her a present of articles of dress and then and there asked her to marry him. "The defender having succeeded in winning the affection and confidence of the pursuer, she agreed. The defender thereupon urged the pursuer to allow him to have carnal connection with her. The pursuer was at first unwilling but was at last overcome, partly by the masterful ascendency he had acquired over her in virtue of his position as the son of her employer, and partly by his solicitations and professions of love, and by his promise to marry her. The pursuer was then seduced by the defender."

The pursuer pleaded—"(2) The defender having seduced the pursuer is liable in reparation therefor."

The defender pleaded—"(1) The averments of the pursuer are irrelevant. (3) The only act of connection which took place between the pursuer and the defender having proceeded on the invitation of the pursuer, and without promise of marriage or proffer of affection, the defender should be assoilzied."

The second issue (being the issue sought to be varied) was as follows:—"(2) Whether, between the month of April and 20th May 1904, the defender seduced the pursuer and prevailed upon her to permit him to have carnal connection with her, to her loss, injury, and damage. Damages laid at £300."

The defender proposed to vary the issue so as to make it read thus—"Whether between the month of April and 20th May 1904 the defender *courted the pursuer and proposed honourable intentions towards her, and promised to marry her, and whether by means of such courtship, and professions, and promise, he seduced the pursuer*," *&c.*

Argued for the defender—A bare issue of mere seduction was not sufficient. The arts employed must be stated. The issue as approved contained no *modus*. The pursuer was bound to specify the means adopted by the defender, *e.g.*, courting, professing honourable intentions, and promising to marry her—these must be put to the jury and ought to be put in issue—Fraser, H. & W. i, 501; *Linning* v. *Hamilton* (1748), M. 13,909; *Stewart* v. *Menzies*, June 27, 1837, 15 S. 1198; *Gray* v. *Miller*, December 17, 1901, 39 S.L.R. 256; *Gray* v. *Brown*, June 19, 1878, 5 R. 971, 15 S.L.R. 639; *Forbes* v. *Wilson*, May 16, 1868, 6 Macph. 770, 5 S.L.R. 501. The popular meaning of the term seduction was different from the legal