

Anderson, and the former of whom had taken part in the judgment in the case of *Howard*, had misapprehended the tenor of that judgment. That is an assumption which I am not prepared to make.

The Court answered the fourth question of law in the affirmative.

Counsel for the First Parties—Brown, K.C.—Burnet. Agents—R. Addison Smith & Company, W.S.

Counsel for the Second Party—Gentles, K.C.—Duffes. Agents—Mackenzie & Wyllie, W.S.

Saturday, December 15.

FIRST DIVISION.

[Lord Blackburn, Ordinary.]

RAE v. STRATHERN.

Reparation—Illegal Apprehension—Action against Procurator-Fiscal—Alleged Excess of Jurisdiction—Relevancy—Malice—Want of Probable Cause—Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), sec. 59.

Sheriff—Jurisdiction—Statutory Offence—Neglect of Child—Accused Resident outwith Sherifffdom—Alleged Locus delicti within Sherifffdom—Children Act 1908 (8 Edw. VII, cap. 67), sec. 12—Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65).

A father who resided outside the jurisdiction of the Sheriff Court of Lanark was apprehended and detained in prison for twelve days at the instance of the Procurator-Fiscal of the Lower Ward of that county on a complaint under the Summary Jurisdiction (Scotland) Act 1908, charging him with wilfully neglecting to provide for his child at an address in Glasgow, contrary to section 12 of the Children Act 1908. The Sheriff after hearing evidence found the accused "not guilty." Thereafter the accused brought an action of damages against the procurator-fiscal, averring that the apprehension was illegal and the prosecution wrongful, malicious, and without probable cause in respect (1) that he (pursuer) was not subject to the jurisdiction of the Sheriff of Lanark, (2) that he had been apprehended and detained when a warrant of citation would have ensured his presence at the trial, and (3) that if defender had made proper inquiries before bringing the prosecution he would have discovered that the child was then in the custody of pursuer's wife and was well cared for. *Held* (1) that as the alleged *locus delicti* mentioned in the complaint was within the jurisdiction of the Sheriff the warrant of apprehension was legal, and, accordingly, that the proceedings had been competently taken under the Summary Jurisdiction (Scotland) Act 1908; and (2) that as

malice and want of probable cause, as required by section 59 of that Act, the defender was entitled to the protection conferred by the section, and action *dismissed*.

Opinions reserved as to the meaning and effect of the condition in section 59 of the Summary Jurisdiction (Scotland) Act 1908 that the proceeding complained of shall have been "quashed," and also as to whether the pursuer had suffered "imprisonment" in the sense of the section.

The Summary Jurisdiction (Scotland) Act 1908, sec. 59, enacts—"No judge, clerk of court, or prosecutor in the public interest shall be liable to pay, or be found liable by any court in damages for or in respect of any proceeding taken, act done, or judgment, decree, or sentence pronounced under this Act, unless the person suing has suffered imprisonment in consequence thereof, and such proceeding, act, judgment, decree, or sentence has been quashed, and unless the person suing shall specifically aver and prove that such proceeding, act, judgment, decree, or sentence was taken, done, or pronounced maliciously and without probable cause. . . ."

On 17th August 1922 William Rae, wire worker, 36 Market Street, Musselburgh, brought an action against John Drummond Strathern, Procurator-Fiscal for the Lower Ward of the County of Lanark, in which he concluded for £500 damages in respect of alleged illegal apprehension and malicious prosecution.

The pursuer's averments were as follows:—" (Cond. 2) The pursuer was married to his wife in Musselburgh on 8th April 1921, and there is one child of the marriage, viz., George Rae, who was born on 25th September 1921. The pursuer's wife deserted him on 25th February 1922, having gone to live with her parents at 8 Bellfield Street, Glasgow. When she went to Glasgow as aforesaid she took with her the child of the marriage. On several occasions pursuer endeavoured to induce his wife to return to him but she refused to do so. On his wife declining to return and live with the pursuer he did his utmost to obtain possession of his child, but his wife refused to deliver it to him. (Cond. 3) On 19th June 1922 defender presented in the Sheriff Court of Lanarkshire at Glasgow a complaint under which pursuer was charged at the instance of the defender 'that being the father, and having the custody or care of your child George Rae, age eight months, you did between 25th February 1922 and 17th June 1922, at 8 Bellfield Street, Glasgow, wilfully ill-treat and neglect him in a manner likely to cause him unnecessary suffering or injury to his health by failing to provide him with adequate food, clothing, bedding, and lodging, contrary to the Children Act 1908, section 12.' (Cond. 4) On the above-mentioned complaint the defender applied for a warrant to arrest the pursuer, and on 20th June 1922 Sheriff-Substitute Thomson on the defender's application granted a warrant for the apprehension of the pursuer, and on this warrant the pursuer was apprehended

at Musselburgh on 26th June. He was detained in the police cells at Musselburgh that night, and on the following day was taken to Glasgow by a police constable and detained in the police cells at Glasgow until 28th June, when he was brought before the said Sheriff-Substitute. Pursuer pleaded not guilty to the charge, and the Court adjourned the diet to 8th July and ordered pursuer to be detained in prison until that date. (Cond. 5) On said 8th July pursuer was brought before Sheriff-Substitute Lyell. The only witness examined for the prosecution was pursuer's wife, whose evidence was to the effect that she had been staying in Glasgow with the child since February 1922, and that she had received nothing from her husband in name of aliment either for herself or the child. Sheriff Lyell elicited from the witness that it was she who had left pursuer and not pursuer who had left her, and he suggested that the Children Act was not designed for the purpose of compelling payment of aliment in circumstances such as had been disclosed. The Procurator-Fiscal Depute agreed and the pursuer was found not guilty. (Cond. 6) The pursuer was not subject to the jurisdiction of the Sheriff of Lanarkshire in Glasgow, and the defender's application for said warrant of apprehension was improper and wrongful, and the warrant obtained by him was illegal. It was *ultra vires* of the said Sheriff to issue said warrant, which was done in consequence of the wrongful and illegal application of the defender as condescended on. (Cond. 7) Moreover, the said application was nimious, oppressive, and unjust. The defender knew or ought to have known that not only was the pursuer innocent of any ill-treatment or neglect of his child, but that he had been wrongfully deprived of its possession and custody, and that he had done and was doing all in his power to obtain possession of it and exercise his paternal rights over it and on its behalf. The pursuer is unaware whether any complaint against him was presented to the defender by his wife, but if defender had made any inquiry, as he was bound but neglected to do, he would have learned that it was the pursuer's wife who was in desertion, and that the pretended necessity for aliment for the said child was a pretext for obtaining money for herself to enable her to continue in resistance to the pursuer's demands for her return to him, and also for the delivery of his child into his care and keeping. The defender is called upon to state specifically the nature of the charge laid before him and who made it. (Cond. 8) Further, if the defender had made any due inquiry he would have ascertained that the said child was well nourished and cared for. He was or ought to have been aware that the pursuer was in regular employment in Musselburgh and was resident at 36 Market Street there, and was ready to answer to any citation. In those circumstances, even if there had been jurisdiction in the Sheriff at Glasgow, the proceedings condescended on constituted a gross abuse of the provisions of the Children Act upon which the said complaint was founded, and the appli-

cation for a warrant of apprehension and the proceedings following thereon were wrongful and malicious on the part of the defender and without probable cause."

The pursuer pleaded, *inter alia*—"1. The said warrant of apprehension being illegal and having been wrongfully obtained by the defender, to the loss, injury, and damage of the pursuer, the defender is liable in reparation therefor. 2. The said prosecution at the instance of the defender being wrongful, malicious, and without probable cause, the defender is liable in damages."

The defender pleaded, *inter alia*—"1. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 3. The defender having acted throughout the proceedings complained of in the *bona fide* execution of his duty as Procurator-Fiscal without malice and without probable cause, should be assoilzied. 4. The warrant of apprehension complained of having been formally and regularly applied for and granted by the Court in a competent process, the defender is entitled to absolvitor. 5. The action is excluded by section 59 of the Summary Jurisdiction (Scotland) Act 1908, in respect that the proceedings complained of (a) have not been quashed, and (b) were not taken maliciously and without probable cause."

On 9th February 1923 the Lord Ordinary (BLACKBURN) sustained the fifth plea-in-law for the defender and dismissed the action.

Opinion.—The pursuer is a wire worker residing in Musselburgh, and the defender is the Procurator-Fiscal for the Lower Ward of Lanarkshire. On 19th June 1922 the defender presented a complaint against the pursuer in the Sheriff Court of Glasgow, the terms of which are narrated in condescendence 3, charging him with the wilful neglect of his child by failing to provide him with food, clothing, &c., contrary to the Children Act 1908, sec. 12. Following on the complaint the defender obtained a warrant for the pursuer's arrest, on which the pursuer was apprehended on 26th June, and after spending one night in the police cells in Musselburgh and another in the police cells in Glasgow was brought before the Sheriff there on 28th June. He pleaded not guilty, and the Court adjourned the diet to 8th July and ordered the pursuer to be detained in prison until that date. On the later date the only witness examined before the Sheriff was the pursuer's wife, who stated that she had been living in Glasgow since February 1922, and that she had received no aliment either for herself or the child. It appeared from her evidence that owing to some difference between the pursuer and herself they were living apart, and the Sheriff then indicated that the Children Act 1908 was not designed for the purpose of compelling payment of aliment under such circumstances. The defender agreed in this expression of opinion, and the Sheriff accordingly found the pursuer 'not guilty.' In this action the pursuer concludes against the defender for £500 damages, and pleads that the warrant of apprehension was illegal and wrongfully

obtained by the defender, and that the prosecution was wrongful, malicious, and without probable cause.

“As the complaint was presented under the Summary Jurisdiction Act 1908, it seems to me that a complete defence to this action is provided by section 59 of the Act. That section provides that no prosecutor shall be liable in damages in respect of any proceeding taken under the Act unless the person suing has suffered imprisonment in consequence thereof and such proceeding has been quashed, and unless the person suing shall specifically aver and prove that the proceeding was taken maliciously and without probable cause.

“Dealing with the first of these conditions which are requisite to justify an action of damages, and assuming in the pursuer's favour that he has suffered imprisonment within the meaning of the section, as to which I entertain serious doubts, it is at least clear that the proceedings before the Sheriff have not been quashed, and accordingly that this condition is unfulfilled. Dealing next with the condition that the pursuer must specifically aver that the proceedings were taken maliciously, there are no facts or circumstances averred in the present action from which I think it would be possible to infer that the complaint was presented from malicious motives and not from a sense of duty. In an action against a public officer for a wrongous official act a mere averment of malice in general terms is not sufficient to make the action relevant.—*Beaton v. Ivory*, 14 R. 1057, per Lord President Inglis at p. 1061. There are averments in this action which might justify an issue of want of probable cause, but this even if established would not in itself be sufficient to entitle the pursuer to proceed with this action of damages, although proof of want of probable cause might strengthen the evidence as to malice. The pursuer maintained that the defender was not entitled to rely on the provisions of section 59 in respect that he had no jurisdiction over the pursuer. This was supported by the argument that failure to provide for a child is an act of omission and not of commission, and that therefore the offence, if any, was committed at Musselburgh where the pursuer resided, and not in Glasgow where the child was. I entertain no doubt that the procurator-fiscal who obtains information that a child is living in his jurisdiction in a state of desertion within the meaning of the Children Act is entitled to bring a complaint before the Sheriff of his district and to obtain a warrant for the arrest of the person responsible wherever he or she may be found. I shall accordingly dismiss the action, with expenses.”

The pursuer reclaimed, and argued—As accused lived in Musselburgh, the offence of neglecting his child must have been committed there if anywhere. Consequently the Sheriff Court at Glasgow was not the *forum* of the *locus delicti*. Accordingly the proceedings being bad *ab initio*, they were not proceedings taken under the Summary Jurisdiction (Scotland) Act 1908, and

the pursuer therefore did not require to aver malice and want of probable cause, as prescribed by section 59 of that Act. In any event they had been relevantly averred. The following authorities were referred to:—Macdonald's Criminal Law of Scotland (3rd ed.), p. 7; Trotter on the Summary Jurisdiction (Scotland) Act 1908, p. 7; *M'Crone v. Sawers*, 1835, 13 S. 443; *Bell v. Black and Morrison*, 1885, 3 Macph. 1026, per Lord Justice-Clerk (Inglis) at p. 1029; *M'Creddie v. Thomson*, 1907 S.C. 1176, 44 S.L.R. 783; *Shields v. Shearer*, 1913 S.C. 1012, 50 S.L.R. 794, 1914 S.C. (H.L.) 33, per Lord Haldane, L.C., and p. 34 and Lord Dunedin at p. 35, 51 S.L.R. 403; *Wilson v. Glasgow Tramways Company*, 5 R. 981, 15 S.L.R. 658; *Barnet v. Whyte*, 1849, 11 D. 666; the Oxford Dictionary, s.v. “Quash”; Cooper on Defamation, p. 197; *Callendar v. Milligan*, 11 D. 1174, per Lord Mackenzie at p. 1176; *Sutton v. Johnstone*, (1786) 1 Term Rep. 493, per Lord Mansfield at p. 545; *Arbuckle v. Taylor*, 1815, 3 Dow's App. 160, per Lord Eldon, L.C., at p. 180.

Counsel for defender were not called upon.

At advising—

LORD SKERRINGTON—The first point which the claimer's counsel tried to establish was that the warrants for his apprehension and detention issued by the Sheriff of Lanarkshire in Glasgow were illegal and *ultra vires* in respect that the *locus delicti* was Musselburgh and not Glasgow. It followed, according to the argument, that the defender acted wrongfully and illegally when he applied for and caused to be executed warrants which the Sheriff had no power to grant. There is no substance in this contention. The complaint mentions “36 Market Street, Musselburgh,” as part of the designation of the accused and not as the place where the offence was committed. It is plainly stated to have been committed at 8 Bellfield Street, Glasgow. The Procurator-Fiscal (who is the defender in this action) failed to prove his case before the Sheriff, with the result that the accused (the present pursuer) was found to be not guilty. That circumstance, however, does not suggest, much less prove, that the Sheriff of Lanarkshire had no jurisdiction to adjudicate upon the complaint. The pursuer's first plea is therefore bad in law, and if the case is relevant malice and want of probable cause must be put in the issue. In other words, the proceedings complained of by the pursuer were (as they purported to be) taken under the Summary Jurisdiction (Scotland) Act 1908, and the defender is entitled to the protection of section 59 of that statute.

The next question is whether the pursuer has relevantly averred that the defender acted maliciously in regard to the proceedings complained of. The pursuer's grievance is twofold. He avers (a) that being a law-abiding citizen with a known address he was apprehended and detained in prison when a warrant of citation would have ensured his presence at the trial, and (b) that if the Procurator-Fiscal had made proper inquiries before bringing the prose-

cution he would have discovered that the child was not in the custody of the pursuer but in the custody of the pursuer's wife at the time when the offence was alleged to have been committed. It is a sufficient answer for the defender to point out that in the matters complained of he acted within the scope of his official duties as a procurator-fiscal, that there is a strong presumption that he acted from a proper motive, viz., the desire to do his duty, and that the pursuer has failed to allege any facts and circumstances which if proved would rebut that presumption. It would be difficult, if not impossible, to carry on the administration of justice if a procurator-fiscal was to be hampered in the discharge of his duties by having to consider at every stage whether he could justify to a jury the manner in which he proposed to exercise the difficult and delicate discretionary powers which the law has committed to him. The authorities, and in particular the cases of *Beaton v. Ivory* (14 R. 1057) and *M'Pherson v. M'Lennan* (14 R. 1063), show that in the ordinary case an issue will not be allowed against a public official unless the pursuer alleges facts and circumstances, in addition to the act of which he complains, from which a jury may reasonably infer that the defender acted maliciously.

In the view which I take of this case it is not necessary to consider whether, and if so to what effect, the condition in section 59 of the Summary Jurisdiction Act 1908, to the effect that no prosecutor in the public interest shall be found liable in damages in respect of any proceeding under that Act unless such proceeding "has been quashed," applies to a prosecution which ended in the accused being acquitted.

I think that the Lord Ordinary's interlocutor ought to be affirmed.

LORD CULLEN—I have come to the same conclusion as your Lordship in the chair.

The defender pleads section 59 of the Summary Jurisdiction (Scotland) Act 1908, and the first question is whether he is entitled to do so. The pursuer maintains the negative.

He contends that on his averments the complaint and the proceedings and actings under it were not taken and done under said Act. The ratio of this contention, as stated in argument, was that while the complaint bore to be brought under the said Act it was in truth a lawless proceeding in respect that it was presented to and dealt with by a judge who had no jurisdiction in the matter. I am unable to take that view. Under the complaint the alleged *locus delicti* was in Glasgow, where the child was living. Now it may be the proper legal view, as the pursuer maintains, that *esto* he was neglecting his child, the place where he was neglecting it was Musselburgh—although, to say the least, this is not clear. But I see no sufficient ground for holding that because the defender considered and alleged that the *locus* of the offence was Glasgow, and therefore instituted his complaint in the Sheriff Court there, while there was *ex hypothesi* a good defence available to the

effect that the *locus* of the offence, if offence there was, lay elsewhere, the proceedings were not proceedings taken under the said Act of 1908.

Turning therefore to section 59 one finds that it lays down certain conditions as necessary to the relevancy and success of such an action as the present.

The first is that the person suing has suffered imprisonment in consequence of the proceeding of which he complains. The defender in his pleas does not take any point on this head, and looking to the whole terms of the section I am disposed to think that the pursuer did suffer imprisonment within its meaning, although such imprisonment was not *in pœnam*. I do not think it necessary, however, to express any final opinion on the matter.

I desire also to reserve my opinion as to the application to such a case as the present of the second condition in section 59, viz. that the proceeding, act, &c. complained of shall have been "quashed." It may be that the pursuer is right in so far as he says that his acquittal by the Sheriff-Substitute amounted to a "quashing" of the complaint within the meaning of section 59. But even so it is not quite clear whether the warrants under which the pursuer was detained in prison *pendente processu* can be regarded as having been quashed. This latter topic was not discussed in the argument.

The remaining conditions of section 59 are that the person suing shall specifically aver both malice and want of probable cause. The pursuer's averments under the head of want of probable cause come in substance to this—that the defender before presenting this complaint did not make a sufficiently full inquiry into the facts; that if he had done so, and if he had duly construed the provisions of the Children Act 1908, he would or ought to have been convinced that there was no ground for the complaint in respect (1) that the pursuer's wife had, without his consent and against his desires and efforts to the contrary, left him and remained apart from him, taking and keeping the child with her, and (2) that the child was *de facto* well cared for although not by the pursuer. The latter of these two points seems to be met by section 12 (2) of the Children Act 1908. As regards the former, while the Sheriff-Substitute took the view that on a due construction of the Act the matrimonial situation was such as to relieve the pursuer from the charge of neglect brought against him, I am unable to hold that the contrary view was so obviously wrong that the defender was destitute of any reasonable justification in entertaining and acting on it. It does not seem clear from the point of view of the Act that because a wife deserts her husband, taking a child with her, and refuses against his remonstrances to return or give back the child, the husband and father is thereby necessarily relieved from his parental duty of seeing to and providing for his child's welfare. But in any case I am unable to find any relevant averments of malice on the part of the defender. *Esto* the defender ought to have made fuller

inquiry, and that he did not rightly construe the Children Act 1908, there may be ascribable to him negligence or defect of legal acumen; but I am unable to infer that he acted maliciously—that is to say, that he acted not from the motive, alone proper for him, of fulfilling his public duty, but from some other and improper motive by which he should not have been actuated.

Apart from the institution and carrying on of the complaint the pursuer complains of the defender having obtained and acted on the warrants for his imprisonment *pendente processu*. The granting of these warrants was the act of the Sheriff-Substitute. They were granted on the defender's application, but it is not alleged that the defender obtained them on false information as to the facts or by any other improper means. The only utility of them so far as the defender was concerned was to ensure the pursuer being brought to trial. It may be that it was a case of overdone precaution, so that the procedure was harsher than it need have been. But does this infer malice or improper motive on the part of the defender? On the pursuer's averments I see no sufficient ground for such an inference.

I accordingly agree with your Lordship in the chair in the view that the pursuer's averments are irrelevant, and that we should adhere to the Lord Ordinary's interlocutor.

LORD SANDS—In this case the pursuer contends that the defender is deprived of the special protection which either by common law or by statute is extended to a public prosecutor by reason of the fact that the proceedings which the defender instituted were absolutely without any warrant of law. The charge it is said was the commission of an offence outwith the boundaries of the jurisdiction of the Sheriff Court of Lanarkshire. But the charge against the pursuer was the commission of an offence at a specified place which is admittedly within the boundaries of the sheriffdom. I have, I confess, difficulty in appreciating how proceedings following upon such a charge can be regarded as proceedings outwith the Summary Jurisdiction (Scotland) Act 1908. The charge may have been altogether groundless, or the offence, if there was an offence, may have been committed in some other sheriffdom. Either proposition, if established, would have been a complete answer to the charge. Pursuer may have remedies in respect of one or other of these considerations. But the charge made was a charge of an offence committed at a place which is admittedly in the sheriffdom of Lanarkshire, and whatever error or wrong may have been committed in the bringing of such a charge, the Sheriff Court of Lanarkshire, as it seems to me, had jurisdiction to entertain it. The case is differentiated from that of *M'Crone v. Sawers*, 13 S. 443. There the charge was an offence alleged to have been committed in a place which was said not to be within the sheriffdom. The present case would have been on all fours

with that case if the charge had been the commission of an offence at "Musselburgh in the county of Lanark." Musselburgh not being in the county of Lanark, or within the jurisdiction, such proceedings would have been *ab initio* null.

It is unnecessary, however, to make this consideration a ground of judgment. The child who was said to be neglected was in Glasgow, and where there is a charge of child neglect it appears to me that the Court of the district within which the child is alleged to have suffered this neglect has jurisdiction to deal with the person charged with responsibility for such neglect.

The pursuer maintains further that *esto* that the proceedings were not unlawful as an excess of jurisdiction, and that the proceedings must be held to have been competently taken under the Summary Jurisdiction (Scotland) Act 1908, he is entitled to damages against the defender in respect that the prosecution was groundless and oppressive.

Under section 59 of the said Act certain conditions are attached to the entertainment of an action against a prosecutor in respect of any proceeding taken, act done, or judgment, decree, or sentence pronounced under this Act—(1) The complainant must have suffered imprisonment; (2) "such proceeding, act, judgment, decree, or sentence" must have been "quashed"; (3) "the person suing shall specifically aver and prove that such proceeding, act, judgment, decree, or sentence was taken, done, or pronounced maliciously and without probable cause."

As regards the first condition, the pursuer was detained in prison before trial, but he suffered no imprisonment under sentence. It might perhaps be open to argument that the statute contemplated only the latter. But I understood that this contention was not advanced by the defender, and it is therefore unnecessary to consider it.

The second condition creates difficulty in view of the fact that it is not in accordance with our practice or understanding to take action after acquittal to quash the previous proceedings, or, after conviction, to quash anything but the conviction and sentence. I reserve my opinion as to the meaning and effect of this condition.

The third condition raises only one possible difficulty as to construction. Does "specifically" mean "definitely" or "categorically," or does it mean with specification of facts and circumstances as contrasted with "generally"? Having regard to the history of the law in the matter, and to the collocation of the word "prove" with the word "aver," I am disposed to think that this latter was in contemplation. But the point does not appear to me to be of importance. Even if the word "specifically" had not been present, and the requirement had been simply "aver and prove malice and want of probable cause," I should have construed this as implying that the malice and want of probable cause must be averred in a manner consistent with the general requirements of the law in such a case.

In my view the pursuer has failed to aver facts and circumstances from which, if proved, malice can be inferred. There is no averment of any personal animus or of any malicious motive. Doubtless it is not in every case necessary to specify such animus or motive. It may be enough to specify certain reckless and inconsiderate actings, and to aver that they disclose the existence of some personal animus or sinister motive the origin and nature of which are unknown. But I cannot so read the averments in this case. Certain actings are specified which might satisfy the requirement of averment of want of probable cause, and then the word "malicious" is thrown in in an attempt to meet the requirements of the law. It is well settled that malice and want of probable cause are separable. Either may be present without the other. In this case the presence of both is required. It may happen that the facts and circumstances averred as showing want of probable cause may be such that the existence of some unknown and malicious motive may be inferred from them. In the present case, however, no facts and circumstances are averred from which the existence of some unknown malicious motive could reasonably be inferred, nor has the pursuer so framed his pleadings. I am accordingly of opinion that the action fails, and that the interlocutor of the Lord Ordinary ought to be affirmed.

The LORD PRESIDENT did not hear the case.

The Court adhered.

Counsel for Pursuer—Gentles, K.C.—Garrett. Agent—John Anderson, Solicitor.

Counsel for Defender—Fenton, K.C.—Hunter. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, November 30.

FIRST DIVISION.

[Lord Blackburn, Ordinary.]

RAE v. ROYAL SCOTTISH SOCIETY FOR PREVENTION OF CRUELTY TO CHILDREN.

Reparation—Slander—Charge of "Neglecting" Child—Innuendo of Criminal Conduct—Averments—Relevancy—Children Act 1908 (8 Edw. VII, cap. 87), sec. 12 (1) and (2), sec. 38 (2).

In an action of damages brought against a Society for Prevention of Cruelty to Children the pursuer averred that defenders' officer called at his house and said to him in the presence of his mother and brother—"I have come to see what provision you are going to make for the child you are neglecting in Glasgow," meaning thereby that the pursuer was guilty of the criminal neglect of his child, that the same charge of "neglect," innuendoed as before, was

again repeated in the defenders' office in Glasgow by another of their servants, and that these statements were made falsely, maliciously, and without probable cause. *Held* that the action was irrelevant in respect that an imputation of criminal conduct could not, having regard to the circumstances in which the words were used on the two occasions, be reasonably drawn from the use of the word "neglect."

Reparation—Malicious Prosecution—Wrongous Information to Procurator-Fiscal—Privilege—Sufficiency of Averments of Want of Probable Cause—Relevancy—Children Act 1908 (8 Edw. VII, cap. 87), sec. 12 (1) and (2), sec. 38 (2).

Following upon a criminal information lodged by a Society for the Prevention of Cruelty to Children, a father was prosecuted on a charge of neglecting his child, contrary to the Children Act 1908, sec. 12, and found "not guilty." Thereafter in an action of damages at his instance against the society the pursuer averred that at the date when the information was lodged the defender knew or ought to have known (1) that the child was well nourished and cared for, (2) that pursuer had been wrongfully deprived of the child's custody by his wife, and (3) that the pretended necessity for aliment for the child was a pretext on the part of his wife for obtaining money for herself to enable her to continue in resistance to his demand for delivery of the child. *Held* that the pursuer's averments of want of probable cause were insufficient to justify the approval of an issue, and action *dismissed*.

William Rae, wire worker, Musselburgh, brought an action of reparation against the Royal Scottish Society for Prevention of Cruelty to Children, Edinburgh, concluding for £750 damages.

The pursuer made the following averments:—" (Cond. 2) The pursuer is married, the marriage having taken place in Musselburgh on 8th April 1921, and there is one child of the marriage, viz., George Rae, who was born on 25th September 1921. The pursuer's wife left him on or about 25th February 1922 and went to live with her parents at 8 Bellfield Street, Glasgow. When she went to Glasgow as aforesaid she took with her the child of the marriage. On several occasions pursuer endeavoured to induce his wife to return to him but she refused to do so. On his wife's declining to return and live with him the pursuer did his utmost to obtain possession of his child but his wife refused to deliver it to him. Since the month of February 1922 the pursuer's wife has been in desertion, and has refused and still refuses to deliver up the said child to the pursuer. Admitted that on the eve of her desertion the pursuer and his wife had a quarrel. Explained that the quarrel was caused by her violent and jealous temper, and that she assaulted the pursuer and created a disturbance in the house. (Cond. 3) On or about 6th June