

condition of the house which are complained of as making it filthy, and to what extent and effect alteration of these is called for. The statute, in its use of the words "as the case may require," appears to contemplate specification in the notice, and it seems reasonable and proper that it should be given to the occupier so that he may have practical guidance as to what he must do in order to make due compliance and avoid penalty. And the Local Authority before issuing a notice ought always to have such particular knowledge of the state of the house as will enable them to give such specification. I agree, however, with what your Lordship in the chair has said to the effect that the requirements in a notice should not be so framed as to trench unduly on the freedom of the occupier to elect between alternative means open to him of effectively securing the ends required.

The Court answered the question of law in the affirmative.

Counsel for the appellants—T. Graham Robertson. Agent—A. G. G. Asher, W.S.

Counsel for the Respondent—Ingram. Agent—George M. Leys, solicitor.

COURT OF SESSION.

Tuesday, July 20.

SECOND DIVISION.

[Lord Sands, Ordinary.]

WALKER v. BRANDER.

(Vide ante, p. 134.)

Reparation — Apprehension (Wrongous — Dogs Act — Summary Proceedings — "Accused") — Statutory Protection against Claim for Damages—Dogs Act 1871 (34 and 35 Vict. cap. 56), sec. 2—Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), secs. 33 (3) and 59.

A woman was cited to appear in the Sheriff Court to answer a complaint under section 2 of the Dogs Act 1871 in which she was charged with being the owner or person in charge of a dog which was dangerous and not kept under proper control. On her failing to appear the procurator-fiscal procured and put in force a warrant for her apprehension. Thereafter the woman brought an action of damages against the procurator-fiscal in which she pleaded, *inter alia*, that she was not an "accused" within the meaning of section 33 (3) of the Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), and the procurator-fiscal pleaded, *inter alia*, that the action was excluded by section 59 of the same Act. The Court *assolized* the defender, holding (1) that the pursuer was an "accused" within the meaning of section 33 (3), and (2) that the action was excluded by section 59 in respect that the acts com-

plained of were acts done "under this Act."

The Dogs Act 1871 (34 and 35 Vict. cap. 56), section 2, enacts—"Any court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous and not kept under proper control, and if it appears to the court having cognisance of such complaint that such dog is dangerous, the court may make an order in a summary way directing the dog to be kept by the owner under proper control or destroyed, and any person failing to comply with such order shall be liable to a penalty not exceeding twenty shillings for every day during which he fails to comply with such order."

The Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), enacts—Section 33—"Accused failing to appear.—Where the accused fails to appear at any diet of which he has received intimation, or to which he has been cited, the following provisions shall apply:—(3) The Court may grant warrant to apprehend the accused." Section 59—"Actions of damages against judges, etc.—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; provided that no such liability shall be incurred or found where such judge, clerk of court, or prosecutor shall establish that the person suing was guilty of the offence in respect whereof he had been convicted, or on account of which he had been apprehended or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence; and every such action shall, unless a shorter period is fixed by the special statute under which proceedings may be taken, be commenced within two months after the proceeding, act, judgment, decree, or sentence founded on. In this section 'judge' shall not include 'sheriff,' and the provisions of this section shall be without prejudice to the privileges and immunities at present possessed by sheriffs."

Mrs Helen Cowie or Walker, widow, residing at Burial Braes, Anstruther Easter, Fife, *pursuer*, brought an action for damages for illegal apprehension against George Brander, Procurator-Fiscal of the Sheriff Court of Fife and Kinross, at Cupar, *defender*.

The pursuer *averred, inter alia*—" (Cond. 2) Towards the end of August 1919 the pursuer was cited to appear personally on 1st September 1919 at the Sheriff Court, Cupar, to answer a pretended complaint under the Dogs Act 1871, section 2, as amended by the Dogs Act 1906, section 1, and the Summary Jurisdiction (Scotland) Act 1908. The complaint was taken at the instance of the

defender, and was in the following terms— 'Helen Cowie or Walker, widow, residing at Burial Braes, Anstruther Easter, Fifeshire, you are charged at the instance of the complainer that you being the owner or person in charge of a dog which is dangerous and not kept under proper control, and which on 6th August 1918 in Shore Street, Anstruther Easter aforesaid, did bite Thomas Arthur Watt, schoolboy, presently residing at 10 Rustic Place, Anstruther, contrary to the Dogs Act 1871, section 2, as amended by the Dogs Act 1906, section 1, whereby you are liable to be ordered to keep said dog under proper control or to destroy it.' The said complaint was framed by and issued with the authority of the defender, and the pretended warrant of citation thereon was taken out and put in operation at his instance. (Cond. 3) The said pretended complaint was unintelligible. On receiving said complaint the pursuer was unable to master its contents owing to its obscure wording and unintelligibility. Further, the citation was written on the back of the service copy of the complaint, which was folded up, and that portion containing the citation was unnoticed by pursuer. She accordingly did not appear at the said diet on 1st September 1919. Any application by way of complaint under the Dogs Act 1871 with a view to such an order as was suggested in said complaint, is entirely a civil proceeding, and there is no obligation upon any party thereto to compare personally in Court. . . . (Cond. 4) A diet in the said pretended complaint was called on 1st September 1919. The pursuer did not appear and was not represented. The defender forthwith, without any notice to the pursuer, and without moving for any adjournment of the diet, applied for and obtained a warrant to apprehend the pursuer, whom he represented to the judge as being 'the accused,' whereas in such application no accusation is made and no crime or offence exists in relation to which any such designation is appropriate or competent. It is believed and averred that the defender made said application to the Court representing to it without any or due attention having been called to the civil nature of the proceedings or to the facts above alleged, that the pursuer was one who lay under a criminal complaint, and as the accused thereunder was legally compellable to appear and against whom compulsors appropriate only to the criminal law fell to be used. This warrant was by the defender communicated to the police in Anstruther with the intention and accompanied by the instructions that they should act upon it by apprehending the pursuer to compel her attendance at future diets. One of the officers of police called upon pursuer some days afterwards and informed her she would require to appear before the Sheriff at Cupar on 10th September 1919. The said officer, whether by the defender's instructions or not is unknown to the pursuer, did not show the alleged warrant to apprehend the pursuer or inform her of its import, and at this time she remained in ignorance that the defender had acted as aforesaid . . .

(Cond. 5) Although not in the least understanding the complaint and these unwarrantable proceedings, the pursuer became alarmed by the said visit from the police, and immediately called upon Messrs Guthrie & Maxwell, solicitors, Anstruther, and explained to Mr Maxwell of the said firm what she knew of the affair. Mr Maxwell having read the pretended complaint and considered the proceedings, advised pursuer that what she was alleged to be charged with was a purely civil matter, and that he would ask his Court correspondent in Cupar to attend the next diet of the Court on her behalf. This arrangement Mr Maxwell duly carried out. His correspondent in Cupar received his instructions on 8th September 1919, and on the same day notified the defender that he had the case in hand. Mr Maxwell was not aware when pursuer consulted him that any warrant had been granted for her apprehension, and the pursuer herself was entirely ignorant of that fact. (Cond. 6) After her visit to Mr Maxwell, the pursuer's mind was set completely at rest by his assurance that the case would be attended to on her behalf. On the night of 9th September 1919, however, as she was leaving her work at the Murray Library about the hour of 11 o'clock p.m. she was seized by Sergeant M'Lean and Constable Morrison of the Anstruther Police, and conducted with considerable violence through the streets of Anstruther to the police station, where she was locked up after having her pockets searched and her boots removed. (Cond. 7) The news of pursuer's said apprehension at once reached the ears of her family and caused them acute distress. One of her daughters immediately went to the residence of her agent Mr Maxwell, and begged his services in securing her mother's immediate release. Mr Maxwell got in touch with the police by telephone and protested against the outrage to which pursuer had been subjected. He further informed the police that a solicitor in Cupar had already been employed to appear on pursuer's behalf, and insisted that in these circumstances it was unnecessary for pursuer to attend in person, but the police were obdurate and informed him that in accordance with their instructions from the defender in his capacity of procurator-fiscal they intended keeping pursuer in custody all night and taking her to Cupar on the morrow. An hour later pursuer's daughter, who was by this time in great distress, again called on Mr Maxwell and urged him to make a further endeavour to get pursuer released. After making very great difficulty in the matter the police agreed to release pursuer. They did so about 1 a.m. on the morning of 10th September, but only after exacting a condition that pursuer would proceed from Anstruther to Cupar that day and undertake to appear personally at the next diet of the case. This they did in consequence of the instructions of the defender, who illegally and recklessly and with malice against the pursuer had determined to frighten or compel her to appear personally as an accused at the bar of the

Summary Court of Criminal Jurisdiction in Cupar. The pursuer was in great distress at thus being forced to appear in Court. She possessed only one costume, which happened to be away being cleaned, and she had no alternative but to travel in her working clothes. (Cond. 8) In the forenoon of 10th September 1919 the pursuer proceeded to Anstruther Station in accordance with her undertaking in order to join the train for Cupar. She was met at the station by a police officer, and in presence of many travellers and others (including persons with whom pursuer was acquainted) assembled on the railway platform, she was taken charge of and escorted to Cupar. This was also it is believed and averred done by the express instructions of the defender. (Cond. 9) The warrant obtained for pursuer's apprehension was quite incompetent, and it was an unjust, wrongeous, and illegal proceeding on the part of the defender to apply for the said warrant from the Sheriff-Substitute. He did so without notice to the pursuer or her agent, and he did so on statements or representations to the Court which were reckless and untrue. No offence had been either committed by or libelled against the pursuer under the complaint referred to. A deliverance or order of a Court of Summary Jurisdiction of the sort following a complaint under the Dogs Act 1871 is purely a civil proceeding. Such order pronounced against an owner is the necessary preliminary to any duty which may be infringed. The respondent to any such initial complaint is not accused and is not an 'accused.' The complaint can be proceeded with in absence of the person charged, and the proceedings in this case were in fact eventually carried through and the order pronounced in absence. A copy of the record or minutes of procedure is produced herewith. No warrant for the apprehension of any person is competent under such complaint in virtue of the Dogs Act of 1871 and the Dogs Act of 1906 upon which the complaint was founded, nor is such warrant competent under the Summary Jurisdiction (Scotland) Act 1908, unless in cases where a crime or offence has been committed or libelled. The obtaining and putting in force of said warrant was immeasurably aggravated by the warrant being put in force in the manner and circumstances condended on, and that on the defender's special instructions or authority. (Cond. 10) The said warrant was obtained and put into force by the said George Brander without any cause, or at all events without any reasonable or probable cause, to the oppression of and in entire disregard of the rights, reputation, and personal liberties of the pursuer. The defender had not the slightest occasion or excuse for procuring said warrant or putting the same into force. The least inquiry of the pursuer or others, her neighbours or in the Register of Dog Licences, would have satisfied the defender that the pursuer was not the owner of the dog. The nature of the proceedings and the absence of any offence at the then stage thereof had all been judicially ascertained in the case of *White against Main*,

which the defender knew or ought to have known. The procedure adopted by the said George Brander was culpably reckless, oppressive, wholly *ultra vires*, and mischievous in the highest degree. With reference to the explanation in answer, it is admitted that at the diet on 10th September objections were taken to the competency of the complaint on the ground stated, and that the Sheriff repelled the said objection and adjourned the diet to 14th October to hear evidence. Admitted further that the Sheriff found that the dog was a dangerous dog and not kept under proper control, and ordained the pursuer to keep it under proper control or destroy it. Not known and not admitted what evidence was led as to the ownership of the dog or what the Sheriff found with reference thereto, but believed that no evidence to said effect was led, as the defender recklessly and oppressively adopted the view that a person not the owner but being temporarily in charge of the dog was liable to have said duties imposed upon him or her, all contrary to the law. . . . (Cond. 12) The defender has been called upon to make reparation to pursuer, but he refuses to do so, and the present action has been rendered necessary. Denied that this action was raised more than two months after the wrong founded on. The proceedings which injured the pursuer took effect on 9th and 10th September. Denied that the proceedings were affected by the 59th section of said Act. The proceedings and acts complained of were not under the Act in question. The bill of suspension and the answers and relative interlocutor are referred to for their terms. Explained that the Court were unanimous in expressing the view that the complaint was irrelevant although objection to the relevancy was taken at too late a stage to be effective, and also that the finding of the Sheriff was incompetent and required amendment. Further explained that the question of remedy for the wrong done to the pursuer was expressly reserved in their Lordships' opinions. A copy of the opinions delivered at the hearing on the said bill of suspension is produced and referred to."

The defender averred, *inter alia*—"(*Ans.* 10) . . . On said 14th October evidence was led showing that the pursuer was owner of the dog in question, and the Sheriff so found. He further found that the dog was a dangerous dog and not kept under proper control, and ordained the pursuer to keep it under proper control or to destroy it. (*Ans.* 12) . . . The present action was not raised until 5th November 1919, more than two months after the date of the warrant of 1st September 1919 complained of. The pursuer on 7th November 1919 brought a bill of suspension of the order pronounced by the Sheriff-Substitute upon the said complaint dated 14th October 1919. Prints of the said bill of suspension and of the answers thereto lodged by the respondent (the present defender) are produced herewith and referred to. The said bill of suspension was heard before the High Court of Justiciary on 11th December 1919, when the following interlocutor was pronounced:—

‘Edinburgh, 11th December 1919. — The Lord Justice-General and Lords Commissioners of Justiciary having considered this bill and heard counsel for the parties—Find that the order of the Inferior Court dated 14th October 1919 should be amended by inserting the words “found that the respondent was the owner of the said dog” after the word “control” on line 2 of said order: Confirm the order so amended: Refuse the bill; and decern.—STRATHCLYDE, I.P.D.’ The opinions of the Judges who pronounced said interlocutor are referred to for their terms.”

The pursuer pleaded—“1. The defender having wrongfully and illegally procured and put in operation against the pursuer a warrant for pursuer’s apprehension, and thereby caused her apprehension and deprivation of personal liberty, and having by his instructions under said warrant to the police wrongfully exposed her to public contumely, the pursuer is entitled to reparation therefor. 2. The pursuer having suffered injury through the reckless, oppressive, and illegal conduct of the defender as descended upon is entitled to damages therefor. 3. The pursuer having been injured in her feelings and reputation through the wrongful and illegal actings of the defender is entitled to decree as craved. 4. The sum sued for being in the circumstances fair and reasonable, decree should be pronounced therefor. 5. The defences, except in so far as relating to amount of damages, being irrelevant the pleas of the defender should be repelled.”

The defender pleaded—“1. The pursuer’s averments being irrelevant and insufficient in law to support the conclusions of the summons the action should be dismissed. 2. The question of the ownership of the said dog being *res judicata*, the statements of the pursuer thereanent ought not to be remitted to probation. 3. The statements of the pursuer, so far as material, being unfounded in fact, the defender should be assolizied. 4. The defender having acted throughout the proceedings complained of in the *bona fide* execution of his duty as Procurator-Fiscal without malice and with probable cause should be assolizied. 5. 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. 6. The action is excluded by section 59 of the Summary Jurisdiction (Scotland) Act 1908, in respect that (a) it has not been raised within two months after the date of granting the warrant complained of; (b) the pursuer has not suffered imprisonment in consequence thereof; (c) the proceedings have not been quashed; and (d) the proceedings complained of were not taken maliciously and without probable cause. 7. In any event the sum sued for in name of damages is excessive.”

On 27th February 1920 the Lord Ordinary (SANDS) sustained the first and fifth pleas-in-law for the defender and assolizied the defender.

Opinion. — “It has been found by the

Court of Justiciary that the proceedings, in the course of which the warrant here complained of was granted, were a ‘complaint’ competently brought under the Summary Jurisdiction (Scotland) Act 1908. Under section 33 of that Act, where the accused fails to appear at any diet to which he has been cited, (3) ‘the Court may grant warrant to apprehend the accused.’ In the present case the pursuer failed to appear at a diet to which she had been cited, and the warrant complained of was granted for her apprehension. The only question therefore, as it appears to me, is whether the pursuer was ‘the accused’ within the meaning of the section. It is argued on her behalf that as no offence was charged, and as the proceedings though under a criminal procedure statute were of a civil character, she was not ‘the accused,’ and that accordingly the provision in regard to apprehension did not apply to her.

“It appears to me, however, upon a perusal of the statute that the term ‘the accused’ means simply the person against whom the complaint is directed, and that any narrower interpretation would render the statute unworkable as regards a complaint of the kind here in question. Reference may be made, for example, to section 21. That complaints such as the present were intended to be brought under the statute, and to be governed by the statutory procedure, is clear from Schedule C.

“I shall accordingly sustain the first and fifth pleas-in-law for the defender, and grant absolvitor with expenses.”

The pursuer reclaimed, and argued — Although disobedience to an order which had been obtained under the Dogs Act 1871 (34 and 35 Vict. cap. 56) was an “offence” — Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), section 2 — the order itself was purely administrative, and the obtaining of the order was a purely civil proceeding which did not entitle the procurator-fiscal to obtain a warrant to apprehend — *Walker v. Brander*, (1919) 57 S.L.R. 134, per Lord Mackenzie at 137; *White v. Main*, (1897) 2 A. 348, 24 R. (J.) 90, 35 S.L.R. 10; *Maitland v. Douglas*, (1861) 24 D. 193, per Lord Kinloch (Ordinary) cap. 193. Sections 20 (2) and 33 (3) of the Summary (Jurisdiction) Scotland Act 1908 (*cit. sup.*) did not apply because the pursuer was not an accused person. To “accuse” meant to charge with crime or fault or to blame — Stormonth’s English Dictionary, 1895 ed., p. 9; *Reg. v. Tomlinson*, [1895] 1 Q.B. 706. *Esto* that the interpretation of that Act which the appellant sought would render parts of it unworkable as regards a complaint of the kind here in question, the following sections made it plain that there were parts of the Act which were limited to criminal cases falling within it, viz., sections 26, 27, 28, and 54. Since the defender in obtaining the warrant to apprehend had not acted under any powers conferred by the Summary Jurisdiction (Scotland) Act 1908, he could not claim the protection of section 59 — *M. Ternan v. Bennett*, (1898) 1 F. 333, 36 S.L.R. 239, per Lord Justice-Clerk (Macdonald) at 1 F. 338, 36 S.L.R. 242; *Sutherland v. Magistrates of Aberdeen*, (1894)

22 R. 95, 32 S.L.R. 81; *Mitchell v. Magistrates of Aberdeen*, (1893) 20 R. 253, 30 S.L.R. 351; *Bell v. Black & Morrison*, (1865) 3 Macph. 1026, per Lord Justice-Clerk (Inglis) at 1029; *M'Crone v. Sawers*, (1035) 13 S. 443; *Gibson v. Murdoch & Eaton*, F.C., 18th June 1817. Protective clauses in favour of a public official must be strictly construed.

Argued for the respondent—The defender was entitled to obtain a warrant to apprehend under section 20 and also under section 33 of the Summary Jurisdiction (Scotland) Act 1908 (*cit.*). The word "accused" did not necessarily mean a person who had committed a crime—*Reg. v. Tomlinson (cit.)*. It was merely the equivalent of the word "respondent." The word was used in sections of the Act where its meaning could not be restricted to the case of persons charged with a criminal offence, e.g., sections 21, 24, 29, 33, 39, and 47. A witness who failed to appear after citation might be apprehended—section 22. In any event the defender was protected by section 59 of the Act. An action would only lie against a procurator-fiscal if it could be shown that his actings were so gross as to take them outside the law altogether—*Hastings v. Henderson*, (1890) 17 R. 1130, 27 S.L.R. 874; *Kennedy v. Wise*, (1890) 17 R. 1036, 27 S.L.R. 813; *Ferguson v. M'Nab*, (1885) 12 R. 1083, 22 S.L.R. 717, per Lord President (Inglis) at 12 R. 1089, 22 S.L.R. 721; *Murray v. Allan*, (1872) 11 Macph. 147, per Lord Ardmillan at 153, 10 S.L.R. 85; *Melvin v. Wilson*, (1847) 9 D. 1129; *Russell v. Lang*, (1845) 7 D. 919, per Lord Fullarton at 925; *Gilchrist v. Anderson*, (1838) 1 D. 37. In the present case it could not be said that the defender had gone extravagantly wrong. It was the Sheriff who granted the warrant to apprehend.

At advising—

LORD JUSTICE-CLERK (SCOTT-DICKSON)—The Lord Ordinary has held that this pursuer was an "accused" in the sense of section 33 of the Summary Jurisdiction (Scotland) Act 1908, and it is conceded that if his Lordship is right in this, decree of absolvitor must follow.

It has been held by the Court of Justiciary that the complaint in question was properly brought under the Act of 1908, and that the order complained of fell to be confirmed, subject to an amendment which was made, and the bill of suspension presented by the pursuer was refused.

There is no definition of the word "accused" in the 1908 Act. It must therefore receive its ordinary meaning. In this complaint, which is in the statutory form, the pursuer was "charged" with being the owner of a dangerous dog. But to "charge" a person as was there done is just to accuse that person of that with which he is charged. In Schedule C of the 1908 Act two instances of what may form the subject of a charge are given which may be referred to. One is being the owner of a dangerous dog and another is keeping noisy fowls. The order asked in the former case is the same as what was asked in the complaint in this case. In the other case the order is that the person charged should be ordained to

remove the fowls. I am of opinion that the pursuer was an "accused" in the sense of the statute, and accordingly that the interlocutor reclaimed against is right.

I may add that in my opinion, in view of the decision in the bill of suspension by the Court of Justiciary, the defender's sixth plea would also have afforded a good answer to the present action.

LORD DUNDAS—The pursuer here presents, in my judgment, a hopeless case.

On the aspect of it with which he has dealt, the Lord Ordinary states succinctly and accurately the views which I entertain. I cannot doubt, having regard to the whole purview of the Act of 1908, that the pursuer came within the term "the accused" as used in section 33 (3); and that that term "means simply the person against whom the complaint is directed." This view seems to me to involve no straining of language; the charge made by the complaint was surely of the nature of an accusation. The defender's fifth plea-in-law is therefore, in my judgment, well founded.

I may add, with regard to the other line of defence pleaded, with which the Lord Ordinary did not specifically deal in his opinion, that the defender has, in my judgment, an unanswerable defence to the action in virtue of section 59. I think that any proceeding which he took, or act which he did, was taken or done "under this Act"; and the protective conditions of the section apply.

The interlocutor must, in my judgment, be adhered to.

LORD ORMIDALE—It seems to me that the pursuer's case goes by the board as soon as it is ascertained that the proceedings, in the course of which the warrant to arrest was granted, were properly initiated by way of complaint under the Summary Jurisdiction (Scotland) Act 1908. It has been found that they were, by the Court of Justiciary, on grounds which I think are not open to challenge. That being so the party against whom a complaint is brought is uniformly throughout the Act referred to as the accused. It may not be a very appropriate designation when the proceedings, as here, have not reached the criminal stage but are entirely civil. But there appears to me to be no warrant in the Act for restricting the use or application of the term to those proceedings only which are of a criminal nature. The pursuer was under the statute the accused, and under the statute if the accused fails to appear at any diet to which he has been cited the Court may grant warrant to apprehend him. I agree that the reclaiming note should be refused.

LORD SALVESEN was not present.

The Court adhered.

Counsel for the Reclaimer (Pursuer) — Mackay, K.C. — E. O. Inglis. Agents — Murray & Brydon, S.S.C.

Counsel for the Respondent (Defender) — MacRobert, K.C. — Normand. Agents — Traquair, Dickson, & Maclaren, W.S.