I am therefore for adhering to the interlocutor appealed against.

LORDS DEAS and MURE concurred.

LORD SHAND—I am of the same opinion. The first point is a question of fact, on which both the Sheriff and Sheriff-Substitute are against the appellant, and it would require a very strong case indeed to satisfy me that we ought to interfere with their decision. Indeed, if that were the only point in the case we could scarcely have entertained it.

But the second and more important point raises a question of law. Is professional medical advice and medicine parochial relief in the sense of the statute? I think there is no difference between their position and that of food or clothing. If it had been a case of voluntary giving of medicine, or if the man had gone to a dispensary, there might have been a different question; but here we have a formal application followed by relief, and though the amount is small the principle seems to be none the less clear; and I therefore agree with your Lordships on this point, which I think is the only question of any consequence in the case.

The Court refused the appeal, with expenses.

Counsel for Appellant (City Parish of Glasgow)—Trayner—Pearson. Agents—W. & J. Burness, W.S.

Counsel for Respondent (Parish of Greenock)—J. G. Smith—Jamieson. Agents—Duncan & Black, W.S.

Friday, October 22.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SELKIRK (SERVICE'S TRUSTEE) *v.* SERVICE.

Process—Exhibition and Transumpt—Bankrupt—Trustee—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 90, 91, 93—*Competency.*

A trustee in bankruptcy brought an action against the bankrupt's father, as sole trustee under his own marriage-contract, for exhibition and transumpt of all writs affecting certain properties dealt with under the contract, with the view of ascertaining the bankrupt's interest therein. *Held* that his proper remedy was under the above sections of the Bankruptcy Act, and action *dismissed* as unnecessary.

Observations per Lord President on the proper office of an action of transumpt.

T. L. Selkirk, accountant in Glasgow, trustee on the sequestrated estate of James Service junior, raised an action in the Sheriff Court of Lanarkshire against James Service senior, as sole trustee under the antenuptial contract of marriage between him and the now deceased Sarah Causer or Service, and also as an individual, for a warrant against the defender ordaining him to exhibit and produce in the hands of the Clerk of Court the whole writs, vouchers, and evidents of certain properties dealt with under the said marriage-contract, that they might be judicially transumed and authentic transumpts delivered to the pursuer.

By the said antenuptial contract James Service senior assigned and disponed to himself and the other trustees therein mentioned All and Whole certain heritable subjects, the said trustees to hold the same for the liferent use allenarly of the said Sarah Causer or Service, exclusive of her husband's *jus mariti* and right of administration, whom failing for the liferent use allenarly of the said James Service senior, and for behoof of the children or child to be procreated of the said intended marriage equally in fee, with power to the said trustees to sell the subjects publicly or privately, and to invest the price in the purchase of other heritages or in good heritable securities. There were two children of the marriage, James Service junior and Mrs Sarah Service or Blues. The mother Mrs Service having died, the defender and the other then acting trustees in 1873 disponed the said subjects to the trustees under the Glasgow Improvement Act, receiving therefor a price of £1050, which fell to be re-invested in terms of the said marriage-contract.

By the said antenuptial contract the said Sarah Causer or Service disponed to the defender, in the event of his surviving her, in liferent for his liferent use allenarly, or to the child or children of the said intended marriage in fee, All and Whole certain heritable subjects in Glasgow.

The pursuer raised this action to obtain exhibition and transumpt of the writs and evidents as to the re-investment or deposit in bank of the said sum of £1050, and for exhibition of the titles of the said heritable subjects in Glasgow, to enable him to realise the bankrupt's interest therein.

The defender pleaded, *inter alia*—(1) The action is incompetent. (3) The pursuer's averments are not relevant or sufficient to support the prayer of the petition.

By the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79) it is enacted, section 90—"The Sheriff may at any time, on the application of the trustee, order an examination of the bankrupt's wife and family, clerks, servants, factors, law-agents, and others, who can give information relative to his estate, on oath, and issue his warrant requiring such persons to appear; and if they refuse or neglect to appear when duly summoned, the Sheriff may issue another warrant to apprehend the person so failing to appear." . . .

Section 91 enacts—"The bankrupt and such other persons shall answer all lawful questions relating to the affairs of the bankrupt; and the Sheriff may order such persons to produce for inspection any books of account, papers, deeds, writings, or other documents in their custody relative to the bankrupt's affairs, and cause the same, or copies thereof, to be delivered to the trustee."

Section 93 enacts—"If the bankrupt or any of such other persons shall refuse to be sworn, or to answer to the satisfaction of the Sheriff any lawful question put to him by the Sheriff or trustee, or by any creditor with the sanction of the Sheriff, or without lawful cause shall refuse to sign his examination, or to produce books, deeds, or other

documents in his custody or power relating to the estate, the Sheriff may grant warrant to commit him to prison, there to remain till he comply with the order." . . . .

The Sheriff-Substitute (ERSKINE MURRAY) pronounced an interlocutor containing these findings —"Finds (2) that pursuer has, *ex facie* of the documents produced, an interest in the said writs, and that neither party asks for a proof: Finds (3) that therefore pursuer is entitled to exhibition and transumpt as craved: Therefore repels the defences, and ordains defender to exhibit and produce in the hands of the Clerk of Court the whole writs, vouchers, and evidents." . . . .

The Sheriff (CLARK) on appeal pronounced an interlocutor in which he "Finds that the pursuer has not set forth grounds sufficiently relevant to warrant the prosecution of the present action of transumpt: Therefore sustains the third plea-in-law for the defender, and dismisses the action and decerns." He added this note:—

"*Note.*—The action of transumpt is of very rare occurrence in modern practice, the reason no doubt being that other and more effective modes of procedure are in general available for its purposes. The present case is brought at the instance of a trustee on a bankrupt estate, and is directed against the father of the bankrupt. The averments on record, in so far as they refer to the right of obtaining exhibition for transumpt, are very loose, though probably they are as strongly made as the circumstances of the case warrant. The documents referred to are apparently of two classes. The first are those which have been placed on record, and they therefore can be obtained inspection of and certified copies taken in the ordinary way. The second are such as can be reached under sections 90 and 91 of the Bankruptcy Act of 1856. It is therefore difficult to see what end will be served by allowing the present action to proceed. On looking into the authorities as regards an action of transumpt, I did not find any case, nor could any case be indicated, in which the action of transumpt was used for the expiscation of matters arising in a sequestration. Upon these grounds it seems to me that the present action falls to be dismissed."

The pursuer appealed to the Court of Session, and argued—The truster had been of opinion, perhaps wrongly, that the sections of the Bankruptcy Act did not apply here; but even admitting that, he might as well, or even more properly, have proceeded under those sections; the present action was equally competent to him, and having been carried so far should not now be thrown out on a question of form.

Authority—*Webster* v. *Reid's Trustees*, Nov. 24, 1857, 20 D. 83.

The respondent was not called on.

At advising—

LORD PRESIDENT—I do not think there is any doubt as to the proper office of an action of transumpt, though it is one which is not often seen now-a-days. It is stated very clearly by Erskine (iv. 1, 53)—"An action of transumpt, which is also accessory, is competent to any person who has a partial interest in a writing, or immediate use for it to support his titles or defences in other actions, against him in whose custody the writing lies, to exhibit it, that so a transumpt thereof may be judicially made out and delivered to the pursuer." And he says a little further on—"The pursuer's title to it is most commonly an obligation signed by the defender to grant transumpts; but though there should be no such obligation, the action lies if the pursuer can prove that he has an interest in the writings, *e.g.*, that they make part of the title-deeds of his lands; but in that case he must bear the whole expense of transuming." Now, the only question here is, whether that action is a proper proceeding for a trustee in a sequestration to resort to, where his object is to investigate the affairs of the bankrupt, and see whether a certain interest under the provisions of a marriage-contract has vested in the bankrupt, and can be made available for the benefit of his creditors? and I am clearly of opinion with the Sheriff that it is not a proper course. A trustee is armed under the Bankruptcy Statute with very large powers, and especially by sections 90, 91, and 93 he has the means of obtaining exhibition of the whole documents which he seeks in this action by summoning the bankrupt and his father and sister, the only persons interested in this property, and examining them all—in short, of obtaining the whole information in that form, and exhibition of the whole writings here asked for, in the most summary form and at the smallest possible expense. I think it is quite out of the way of a trustee's duty to resort to such a proceeding as this, and I am for adhering to the Sheriff's interlocutor.

If the trustee were to persist in the present action, and were allowed to do so, the first thing he would require to do would be to prove his interest in the writings, which would just be to enter on the merits of the whole case.

LORD DEAS concurred.

LORD MURE—I concur with the Sheriff in thinking that what the pursuer wants to get by means of this action can be got by other and simpler means. It is plain that the documents called for could be reached under the provisions of the Bankrupt Act. I think the action is in the circumstances incompetent, though I am not prepared to concur with the Sheriff to the extent of saying that the pursuer's averments are not relevant. He avers that the bankrupt has an interest to the extent of one-half in the fee of certain property, that the property was sold and a price got for it, and that he cannot find out whether or how it has been invested. Now, I am not prepared to say that these are irrelevant grounds, but I think this form of action is a more expensive process, and I concur with the result arrived at by the Sheriff.

LORD SHAND—I am of the same opinion, and I very much agree with the remarks which have just fallen from Lord Mure. I am not prepared to say that the trustee has no right to the exhibition and copies of these documents; he probably has; and if this had occurred before sequestration, and the question had been one between James Service junior and his father as sole trustee, to get access to these writings, I think the action might have been quite competent. The trustee

must prove an interest in the documents, but even assuming that he has done so, he had under the statute a shorter and cheaper remedy. The statute enables bankrupt estates to be wound up without unnecessary litigation, and it is the duty of trustees to avoid that as far as possible. I concur with the grounds of judgment stated in the Sheriff's note.

The Court recalled the Sheriff's interlocutor, and of new dismissed the action as unnecessary.

Counsel for Pursuer (Appellant)—Pearson—Ure. Agent—J. Gillon Fergusson, W.S.

Counsel for Defender (Respondent)—Dean of Faculty (Fraser, Q.C).—Rhind. Agent—Wm. Officer, S.S.C.

Friday, October 22.

SECOND DIVISION.

[Sheriff of Lanarkshire.

THOMSON *v.* DENHOLM.

Reparation—Privilege—Recklessness amounting to Malice.

In an action of damages raised against a defender for having made to the police a *bona fide* charge of theft, which the pursuer alleged to be false, and in consequence of which was publicly taken into custody and conducted through the public streets to the police station—*held* that recklessness amounting to malice sufficient to found such action had been made out by the pursuer.

Hugh Thomson, the pursuer in this action, was a moulder and pigeon-fancier by trade, and occupied a dwelling-house in Fleming Street, Glasgow, in the loft of which tenement he erected, with the consent of his landlord, certain wood-fittings and pigeon-houses. This property was bought by the defender George Denholm, residing at Findlay Drive, Dennistoun, Glasgow, in November 1876. The pursuer was removing from the said property at Whitsunday to a house situated in Parkhead, and in order to have the loft of the latter property made suitable for his pigeons, he on the evening of Friday 16th April, between the hours of eight and ten, proceeded to remove some of the said wood-fittings from the house in Fleming Street to Parkhead, carrying them away in a barrow. While so engaged he was accosted by the defender, who in the presence of numerous witnesses accused him of taking what did not belong to him, and violently threatened him at the same time with being given into custody on a charge of theft. On the pursuer stating that the fittings were his the defender called him a thief and gave him into custody of the police on a formal charge of theft for stealing the wood, and on this charge the pursuer was walked along the public streets of Glasgow in custody of the police, and in the presence of a large crowd of people brought to the police-station, where the charge of theft was reiterated by the defender. Ultimately the charge was not persevered in, and the pursuer in order to be released agreed to return the wood. Thereupon the pursuer raised an action of damages in the Sheriff Court against the defender for the sum of £50, pleading that his character, reputation, and feelings had been severely damaged by this grossly calumnious charge. The defender, on the other hand, pleaded privilege and probable cause. The Sheriff-Substitute (Spens) found that the defender in preferring the charge had acted with a recklessness amounting to malice in the legal sense, and that the charge was made without probable cause, and that therefore he was liable in the damages sued for by the pursuer.

The following note was appended to his interlocutor:—"The slander is lost in the greater offence of a criminal charge preferred maliciously and without probable cause; for I have arrived at the conclusion that pursuer's contention on this head has been proved. There is no question that the defender is entitled to plead privilege, and this infers that the pursuer must prove that defender acted, in preferring the charge, maliciously and without probable cause. In cases of privilege the question of malice is said to be one for the jury, and the want of probable cause a question for the consideration of the Judge. In the Sheriff Court, however, this distinction does not properly arise, for there the Judge disposes of a case both as Judge and jury. Although, however, the question of malice is one supposed to be a jury question, yet it is subject to the direction of the Judge as to what constitutes malice. Of course, malice, in the usual and ordinary sense of the word, implies preconceived ill-will; and I may say here, that while some portion at least of the proof was taken up in attempting to establish malice in the above specified sense, I cannot hold that this has been proved. I do not intend to enter into any minuter details in reference to this question of fact, for I do not think it is open to argument on the part of the pursuer that malice of this description has been proved. To break down the plea of privilege, however, it is settled law that malice in this sense need not be proved. Even although a person making a charge of theft acts in good faith in the sense that he believes the man whom he charges to be guilty of the crime, he must not do so unreasoningly. If he does so without reasonable grounds for his so doing—at all events, if the grounds for so doing are so flimsy that ordinary common sense negatives their reasonableness—such a charge must come under the category of a grossly reckless one; and of a grossly reckless charge the law says, in the legal sense, that it must be held to be a malicious charge. I have come to the conclusion that the charge preferred was of this description. . . . . There is no doubt that for a respectable man to be marched through the streets to the police office on a groundless criminal charge is a gross indignity."

The defender appealed, and argued—No malice had been proved. The defender on receiving no explanation from the pursuer was only asserting his rights of property in giving him into custody of the police.

Authority—*Thomson* v. *Adam*, Nov. 14, 1865, 4 Macph. 29.

At advising—

Lord Justice-Clerk—I am quite satisfied with the views expressed by the Sheriff, and the most