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

has been made of the case as argued before us. It is plain that this flooring was put in by the tenant himself for his own purposes. He thought he could remove it, and he was in the act of doing so when the defender interfered and handed him over to the police as taking away what did not belong to him—in other words, on a charge of theft. The evidence of the police officers shows this, and the only question is, Had the pursuer good grounds for action of damages under the circumstances? and I think there is no question that he had. Where privilege is pleaded it is necessary for the party aggrieved to show that the act complained of was maliciously done—in other words, with undue disregard to the rights of persons—and I think that we have here a very strong case of that kind. The defender, no doubt, had what he thought his rights, but he ought to have made inquiries before he took the course he did. He was not entitled to risk the pursuer's character by exposing him to the public gaze in the way he did on such grounds, and therefore I think that we have malice here, and that the Sheriff-Substitute is right. I also think that he has not treated the defender harshly, and there can be little doubt that had the case gone to a jury the penalty to be paid would have been considerably greater.

Lord Gifford—I am of the same opinion. There seems to have been considerable difficulty attending the dispute as to whether the flooring was a fixture proper or only a trade-fixture, and therefore removable by the tenant, but the way to settle it was certainly not to give the pursuer into charge of the police. Here, though there may have been privilege, there was undoubted recklessness in making the charge, and I must say I think that the Sheriff-Substitute in the damages awarded has read the defender a very mild lesson indeed.

Lord Young—It is said in the summons that the defender maliciously and without probable cause gave the pursuer into custody as a thief, and it only remains for us to say whether the evidence supports the charge, and I think it does, and I therefore concur with your Lordships in affirming the interlocutor appealed against. The only criticism I desire to offer on the interlocutor is that I wish the finding had been one of malice and want of probable cause alone without the addition of a partial definition of malice. The malice here no doubt arose from a temper of mind unduly exciting the man to act with an ill-feeling which would not probably in other circumstances have appeared; but I wish to offer this remark to the consideration of Sheriffs, that I think it is not desirable that they should put partial definitions into their interlocutor.

The Court accordingly pronounced the following judgment:—

> "Find that on the occasion libelled the appellant (defender) gave the respondent (pursuer) into the custody of a police officer on a charge of stealing wood, and that the respondent was in consequence conducted in custody through the streets of Glasgow to the police office: Find that in so doing the appellant acted maliciously and without probable cause: Therefore dismiss the appeal and affirm the judgment appealed against, and decern," &c.

Counsel for Appellant — Guthrie Smith — M'Kechnie. Agents—Adamson & Gulland, W.S.
Counsel for Respondent — Rhind. Agent—W. Elliot Armstrong, S.S.C.

Saturday, October 23.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MOSCRIP *v.* O'HARA, SPENCE, & COMPANY.

Agent and Client — Notary-Public — Title to Recover.

> Circumstances in which an agreement that a notary-public employed by a firm to recover their debts was not to claim remuneration for the same was *held* to be proved by evidence *prout de jure.*

O'Hara, Spence, & Company, money lenders and bill discounters in Glasgow, employed George Clement Moscrip, a writer and notary-public, in recovering sums due to them by sundry debtors. After some years they sued him for the sum of £53, 10s., which they said he owed them as having served them in the above capacity. Moscrip resisted payment and raised a counter-action for payment of £230 for professional services and disbursements for and on O'Hara & Company's employment. In the latter action the defenders averred in defence that they had made an agreement with Moscrip with a view to the recovery of debts due to them, by which he was to receive nothing for the work done unless he were successful in recovering the whole or part of the debt sued for; and further, he was employed to recover accounts only, and was not to receive any extra-judicial expenses or to be paid anything for giving his knowledge as to the circumstances of debtors. Moscrip, on the other hand, denied all knowledge of the above agreement, and pleaded that in any view it must be proved by writ or oath of the defenders.

In the proof which was led before the Sheriff-Substitute it appeared that Moscrip kept no books. The nature of the above agreement was deponed to by three of the partners of the firm, and further it appeared that on several occasions the debtors had gone direct to their principals and paid the debt due along with the expenses of recovery.

The Sheriff-Substitute (Lees) found that the pursuer was employed by the defenders to carry on their judicial and other legal business for them, but expressly on the footing that he was not to be paid by them for so doing, and was to look to the opposite parties for payment in the event of success; but he allowed him his outlays so far as *bona fide* incurred by him on the defenders' behalf on the other accounts produced by him. He added the following note:—"It appears the defenders' averments as to the footing on which the pursuer was employed by them are established. He was not a procurator of Court, and therefore not entitled to practise before it; but he and they knew that there would be little