LORD KINNEAR and LORD TRAYNER concurred.

The Court made the rule absolute, set aside the verdict, and granted a new trial.

Counsel for the Pursuer—Guthrie Smith—G. Watt. Agent—J. F. Edwards, Solicitor.

Counsel for the Defenders — Comrie Thomson—Cooper. Agents—Millar, Robson, & Innes, S.S.C.

Saturday, November 8.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

SELBIE *v.* SAINT.

Reparation — Slander in Judicial Pleadings — Relevancy — Bankrupt — Caution for Expenses.

A landlord ejected from premises a caretaker appointed by a tenant, and in an action of damages at their instance he averred they had commenced to clear the premises with the evident intention of defrauding him of his right of hypothec for rent, and that the caretaker was seldom sober during the time he was in the premises. The caretaker then sued the landlord for damages for slander, but the Court *dismissed* the action as irrelevant, on the ground that the averments complained of being relevant and pertinent to the issue, the pursuer was bound to aver facts and circumstances from which malice could reasonably be inferred.

James Selbie, messenger-at-arms, Peterhead, sued George Saint, grocer there, for £50 as damages for slander, alleged to have been uttered under these circumstances:—John Penny occupied a shop in Peterhead, belonging to the defender, from Whitsunday 1889 to Whitsunday 1890. Penny left the country in October 1889 without paying his rent, and as the pursuer alleged authorised him to take charge of his business. On 11th October 1889 the defender ejected the pursuer from the shop. Penny, and Selbie as his mandatory, then raised an action of damages (which was ultimately withdrawn) against the defender, whose defences contained, *inter alia*, the following statement—"The pursuer (Penny) and Selbie commenced to clear the premises with the evident intention of defrauding defender of his right of hypothec for his rent, but he obtained a warrant from the Court and sequestrated in security some effects which pursuer or Selbie did not manage to remove. Selbie was seldom sober during the time he was on the premises." These statements were the ground of the present action.

The defender alleged that the pursuer was notour bankrupt, and produced in evidence thereof an extract decree for expenses against pursuer and expired charges thereon.

The defender pleaded—"(3) The expressions founded are under the special circumstances not actionable. (4) The pursuer ought to be ordained to find caution for expenses."

Upon 26th June 1890 the Sheriff-Substitute (BROWN) found the action relevant and ordered proof.

Upon 19th July the Sheriff (GUTHRIE SMITH) upon appeal ordained the pursuer within eight days to find caution for the past and future expenses, and on the defender's failure so to do, dismissed the action.

The pursuer appealed, and argued—Caution was unnecessary. Mere impecuniosity was not a sufficient ground. The pursuer in an action of damages for slander was in a specially privileged position, as the action was to vindicate his character. It was averred that the pursuer was notour bankrupt, but that was only in the sense of the Debtors Act 1890, and not of the 7th section of the Bankruptcy Act 1856. It had been decided that such bankruptcy did not necessarily imply that a pursuer must find caution as a condition of suing his action—*Macrae* v. *Sutherland*, February 9, 1889, 16 R. 476. *On the merits*—The words complained of by the pursuer were actionable even although they were part of the record in a judicial proceeding. There was no absolute privilege given to a litigant as there was to other parties called into the case necessarily as witnesses, counsel, or judges. It must be shown that the words used were both pertinent and relevant to the issue. The words complained of here were neither relevant nor pertinent; even if relevant and pertinent, there was enough in the averments to show malice and want of probable cause on the part of the pursuer—*Gordon* v. *British and Foreign Metaline Company*, November 16, 1886, 14 R. 75; *Mackellar* v. *Duke of Sutherland*, June 14, 1859, 21 D. 222, and June 18, 1862, 24 D. 1124; *Munster* v. *Lamb*, July 5, 1883, L.R., 11 Q.B.D. 588.

The respondent argued—No doubt the matter was in the discretion of the Court, but the pursuer ought to be made to find caution for expenses, as this was only one of a series of actions which the pursuer had brought, and which he had either withdrawn or lost. The statements complained of, whether true or false, were at least pertinent and relevant to the issue. If they were pertinent, then no facts and circumstances had been stated from which the Court might infer malice on the part of the defender, and it was decided that that was necessary when the occasion was privileged, as this was, the statements complained of being part of a record in a proceeding in a court of justice—*Williamson* v. *Umphray*, June 11, 1890, 17 R. 905; *Farquhar* v. *Neish*, March 19, 1890, 17 R. 716.

At advising—

LORD JUSTICE-CLERK—This case is before us on an appeal from the judgment of the Sheriff finding that the pursuer must find caution for expenses. I confess that if I

thought that the action was a relevant action which ought to be allowed to proceed—apart from that question of caution for expenses—I should have much difficulty in affirming that judgment in the circumstances.

But the question of the relevancy of the action has been raised and argued, and we are entitled to deal with it, and if our view is adverse to the relevancy it is desirable we should so find this to bring the litigation to an end. The objection to the relevancy is that the pursuer avers a case of slander said to be contained in pleadings by the present defender in another action, in which he had to defend himself against the proceedings at the instance of a person named Penny. I think that the pursuer has not stated any ground upon which we could hold that his action is relevant. It is certain that in the ordinary case an averment by a party to a suit in Court cannot, if only it is relevant or pertinent to the action in which it is made, form a good ground for an action of damages for slander, at all events if it is not averred that it was made without probable cause and with malice, and that in such a way as I shall presently allude to. Now, was this averment which is complained of relevant or pertinent? The present defender was being sued by Penny for damages for having wrongfully turned out of a house of which he is the owner this pursuer Selbie, whom Penny alleged he had left there as a caretaker. His defence there included a statement—being that complained of—that Selbie was seldom sober while so employed; that in consequence the premises were not cared for, and goods which were subject to his (the defender's) hypothec were being removed, and that he was therefore justified in acting as he did.

That was a statement which in my opinion is both relevant and pertinent. But it is sufficient if it was pertinent, and that admits of no shadow of doubt. I have therefore no difficulty at all in holding that the pursuer, who now founds his action upon it, has stated no relevant case. He would further require to allege malice and want of probable cause, and it would not be sufficient merely to aver malice. It would be necessary further to aver specific facts from which the malice might be inferred. The law to that effect is now well settled, and although I cannot say I have ever understood the principle upon which that law is based, I am bound to apply the law as it is.

I think this action must be dismissed as irrelevant.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

The Court recalled the interlocutors of the Sheriffs and dismissed the actions.

Counsel for the Pursuer—Watt—Kemp. Agent—Charles George, S.S.C.

Counsel for the Defender—Ure—MacWatt. Agents—Smith & Mason, S.S.C.

Saturday, November 8.

FIRST DIVISION.

[Junior Lord Ordinary.

DEWAR *v.* DEWAR.

Incapacity — Partial Insanity — Curator Bonis—Appointment on Petition—Necessity of Cognition.

In a petition at the instance of a wife for the appointment of a *curator bonis* to her husband A, who was a medical man of considerable property, and at the time was confined in an asylum under warrant of the Sheriff, it was proved by medical certificates that A had a clear and intelligent comprehension of business matters, and in particular of his own financial affairs, but that he suffered from delusions with regard to spiritualism, and entertained groundless feelings of mistrust regarding members of his own family, which might affect the propriety of his directions respecting the management of his own property. *Held* (1), following the case of *Bryce* v. *Graham*, that the appointment by the Court of a *curator bonis* upon petition was competent; and (2) that it was expedient in the circumstances, with a view to the preservation and management of the estate.

The facts of this case are concisely summarised in the opinion of the Lord Ordinary (KINCAIRNEY) subjoined—

"This petition by Mrs Dewar for the appointment of a *curator bonis* to her husband Dr Dewar, at present an inmate of Saughton Hall Asylum, was presented on 10th June last.

"On 2nd July answers were lodged for Dr Dewar, which are referred to.

"From the petition and answers it appears that Dr Dewar had been removed to Saughton Hall Asylum under warrant of the Sheriff on 3rd April 1890; that on 20th May he was, on the instructions of the petitioner's agents, visited by Dr Grainger Stewart and Dr Heron Watson; on 28th May by Dr George W. Balfour, and on 31st May by Dr Littlejohn, whose certificates are appended to the petition, and that on 28th June he was visited by Dr Clouston and Dr Byrom Bramwell, whose certificate is appended to the answers.

"The certificates of these gentlemen disclose some difference of opinion about Dr Dewar's mental condition. Dr Grainger Stewart and Dr Heron Watson state that they felt it impossible, at the date of their examination on 20th May, to grant a certificate for the appointment of a *curator bonis*. They recommended delay and a further examination after the lapse of a month or six weeks for the purpose of deciding upon the necessity of appointing a curator.

"Drs Balfour and Littlejohn express the opinion in general but unqualified terms that Dr Dewar was of unsound mind, and incapable of managing or of giving directions for the management of his affairs.