payee of the bill) probably never occurred.

LORDS CRAIGHILL and RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for Brown—Mackintosh—H. Johnston. Agents—Mackenzie & Kermack, W.S.

Counsel for Hay & Robertson—R. V. Campbell. Agent—R. W. Wallace, W.S.

Saturday, March 14.

SECOND DIVISION.

[Sheriff Substitute of the Lothians.

SCOTT *v.* JOHNSTON.

Reparation—Issue—Judicial Slander—Privilege—Counter Issue.

A person brought against the law-agent of a person who had presented a petition for *cessio* against him an action of damages, alleging that the defender had in the Sheriff Court, and in the Sheriff's absence, falsely, maliciously, and injuriously, and in the hearing of certain persons, used words concerning him, representing that he had been guilty of an offence under the Debtors Act 1880. He denied these averments, and stated that he had only asked questions pertinent to the cause and to his duty, but did not set forth on record that at the time the words complained of were used the pursuer was under examination in the *cessio* process, and that the question was asked by him in the course of the action. The Court *allowed* the pursuer an issue, and *refused* to allow a counter issue of privilege, but *observed* that if circumstances showing a case of privilege appeared at the trial the Judge would direct the jury accordingly.

Process—Action by Undischarged Bankrupt—Caution for Expenses.

In an action of reparation for slander by a person against whom decree of *cessio bonorum* had been pronounced, and who had not obtained his discharge, the Court *refused* to order him to find caution for expenses.

Patrick Turnbull, Liquidator of the Money Order Bank, Limited, presented a petition for *cessio bonorum* in the Sheriff Court of Edinburgh, against James Gibson Scott. Under an order of the Sheriff-Substitute, pronounced in the process on him to do so, Scott in December 1883 lodged a state of his affairs.

At the diet held for Scott's examination on 24th December 1884 he was examined by Robert Fleming Johnston, W.S., of the firm of Richardson & Johnston, W.S., law-agents for the liquidator.

Scott thereafter raised against Johnston the present action of damages for slander. He averred that the defender on the date above mentioned, in the Sheriff Court Buildings, Edinburgh, in the presence of several persons, and in particular of David Walker, 1 Bellevue Terrace, Edinburgh, and others whose names can be ascertained, "falsely, maliciously, and injuriously used," with reference to the state of affairs, the following words, or others of like meaning, of and concerning him, pursuer—"Are you aware of the consequences under the statute of lodging a state of affairs such as you have done?"

To this averment the defender answered—"The deposition is referred to; and it is explained that defender asked no questions except such as were pertinent to the cause and in the line of his duty."

Walker was the shorthand writer who had been present to take down the examination.

The pursuer's further averments and the defender's answers were as follows—"(Cond. 3) The said words used by the defender were so used when no Court was present, and in the absence of any Sheriff, Sheriff-Substitute, Commissioner, or other Judge, or of any official of Court of any kind; and said words so used, falsely, maliciously, and injuriously represented, and were intended to represent, that the pursuer in lodging said state of affairs had been guilty of a crime and offence under the provisions of the Debtors (Scotland) Act 1880, and the Acts therein referred to, or one or other of them. (Ans. 3) The proceedings are referred to. *Quoad ultra* denied. (Cond. 4) The import of said words was reported in the *Scotsman* and other newspapers of the 25th December 1883; and from the defender using said words, and from said reports thereof, and otherwise, the pursuer has suffered great annoyance, loss of character and credit, and has been greatly damaged in his business and reputation, and has been hurt in his feelings. (Ans. 4) Denied."

The pursuer pleaded that the words libelled having been used falsely, maliciously, and injuriously regarding him, he was entitled to damages.

The defender pleaded—"(1) The pursuer's statements being irrelevant, the defender ought to be assoilzied with expenses. (2) The statement complained of having been made in the course of judicial proceedings, the defender was privileged in making the same, and is not liable in damages."

The Sheriff-Substitute (RUTHERFURD), on the ground that the pursuer offered to prove that the state lodged by him was an honest and full disclosure of his affairs, and that the defender acted maliciously, in the legal sense of the term, by putting the question recklessly and in total disregard of the consequences which the insinuation conveyed might entail on the pursuer, repelled the defender's first plea-in-law and allowed a proof.

The pursuer appealed to the Court of Session for jury trial, and argued his case in person.

He lodged the following issue—"Whether, on or about the 24th day of December 1883, and within the Sheriff Court Buildings, Edinburgh, the defender did, in the presence and hearing of Mr David Walker, Bellevue Terrace, Edinburgh, and others, and one or more of them, say to, of and concerning the pursuer,—'Are you aware of the consequences under the statute of lodging a state of affairs such as you have done?'—referring to a state of affairs dated 18th December 1883, lodged by the pursuer in the hands of the Clerk of Court in compliance with an order of

Sheriff-Substitute Hamilton dated 30th November 1883, in a petition for *cessio* against the pursuer at the instance of Patrick Turnbull, liquidator of the Money Order Bank, Limited; said words, so used, falsely, maliciously, and injuriously represented, and were intended to represent, that the pursuer in lodging said state of affairs had been guilty of a crime and offence under the provisions of the Debtors (Scotland) Act 1880, and the Acts therein referred to, or one or other of them; or did falsely, maliciously, and calumniously use and utter words to that effect, to the loss, injury, and damage of the pursuer? Damages laid at £500 sterling."

The defender objected to the relevancy of the action, and argued—It was no doubt the case that when the question was put the Sheriff-Substitute had temporarily left the Court-room, but the examination was going on judicially when the question was put. He was willing to amend the record in order to make a statement to that effect. In such circumstances it was not enough merely to use the word "maliciously." There was here privilege, and pursuer must make averments of facts and circumstances from which it could be inferred that the question was put maliciously —*Scott* v. *Turnbull*, June 28, 1884, 11 R. 1131. But even should the action be found relevant, the defender being an undischarged bankrupt should be ordered to find caution for expenses as a condition of going on with the case—*Clarke* v. *Muller*, January 16, 1884, 11 R. 418. He (defender) was, if the action were allowed to proceed, also in that case entitled to a counter issue of privilege, though no doubt such a counter issue was not essential—*Ramsay* v. *Nairn*, July 25, 1833, 11 S. 1031; *Donald* v. *Clyde Navigation Trustees*, June 12, 1875, 2 R. 813.

At advising—

Lord Young—If we were to allow the defender the counter-issue which he asks, the record would require to be amended, for there is no statement that the words were used by the defender in such circumstances as to raise a question of privilege. If there were such a statement the counter-issue might be allowed. On the other hand, I repeat what I said during the argument, that if we were to allow the pursuer an issue, it will be on the footing that he undertakes to prove that the words were used on an occasion raising no question of privilege. It may appear that the words, if they were used at all, were used on such an occasion, and that will induce the Judge at the trial to give proper directions in point of law, but on this record there is no such statement by the defender as to give a foundation for a counter-issue, and it is fortunate for him that the present practice entitles the Judge to take notice of such a plea when the evidence at the trial may disclose it.

I understand it to be the opinion of the Court that this extraordinary case cannot be explicated except by sending it to trial in the usual way, and if it is to go to trial the less said at present the better.

On the question of caution my opinion is that we ought not in this case to order the pursuer to find caution. I have not been able to examine the authorities, but I agree with the Lord President in the case to which we were referred that the question whether or not a bankrupt pursuer should be ordained to find caution for expenses is always one for the discretion of the Court. I should not, however, have been prepared to say that the general rule is to order the bankrupt to find caution, but rather that in an action of damages for defamation of character or bodily injury the Court in its discretion may or may not order the pursuer when he is bankrupt to find caution. The ground on which I should have thought it not according to the ordinary rule to exercise that discretion by ordering caution is that a claim of damages for slander or bodily injury is not part of the estate which passes to the trustee on the sequestrated estate of the slandered or injured person. We had the general question as to the finding of caution by a person who is without funds raised in the case of *Macdonald* v. *Simpson* in 1882, 9 R. 696, where there was no sequestration—that is to say, no divestiture of her estate by the pursuer of the action, she having no estate of which to be divested. She was a widow who was in receipt of parochial relief, and she brought an action for *solatium* and damages on account of her husband's death against his employers. That case therefore was not within any exceptional rule on the ground of its being an action of damages for injury to the pursuer's character, or for his or her bodily injury, but I think it is all the stronger on that account. The ground on which the Court were asked to ordain the pursuer to find caution was simply that she was a pauper, and that it would be a denial of justice to the defenders to allow her to litigate without finding caution. But I see that in that case I made these observations in expressing my concurrence with the Lord Justice-Clerk—"In a sense it is always in the discretion of the Court to order a party to find caution, whether defender or pursuer; and that discretion will be exercised whenever it may appear that justice requires it. This, however, will only occur in exceptional circumstances. It is the practice to apply this discretion where a party seeks to raise an action who has been divested of his property, the reason being that he is usually seeking to recover something for himself which is included in his conveyance to another. I remember the late Lord Mackenzie pointing out, however, that absolute impecuniosity will never be taken as the sole ground for making a party find caution. I certainly entertained some hesitation at one time of the debate as to whether by receiving 1s. 6d. a-week there was not an implied assignation to the parochial board. But I dismiss this, because after all the allowance must be a casual one, and the pursuer is probably under no obligation to repay even if he should succeed in the present action. It may perhaps be a hard thing for one party to have to litigate with another who has no funds, but after all there are innumerable instances of it, and I repeat, it is no ground to order the pursuer here to find caution." Then, with reference to the case of *Hunter* v. *Clark*, which my brother Lord Rutherfurd Clark thought hard to distinguish from the case we were then dealing with, I observed that we must "hold that the Court were there in possession of certain circumstances which led them to exercise their discretion in the way they did." Lord Craighill thought that the case was distinguishable from *Hunter* v. *Clark*, and Lord Rutherfurd Clark was of an

opposite opinion as to that matter, but nevertheless he also concurred in the judgment. But dealing with the present case as a question of discretion merely, I do not think we should exercise our discretion to the effect of ordering the pursuer here to find caution.

Lord Craighill concurred.

Lord Rutherfurd Clark—I concur in thinking that we should exercise our discretion here by not requiring the pursuer to find caution. I must say I see nothing special in the circumstances of there being a sequestration. No doubt this is an action which the trustee could not sue, but any sum which the pursuer may recover must necessarily pass to the trustee.

The Lord Justice-Clerk was absent.

The Court approved the issue for the pursuer (as the same was amended at the bar), and remitted the cause to Lord Lee (Ordinary) to proceed.

Counsel for Defender (Respondent)—Nevay—M'Kechnie. Agents—Richardson & Johnston, W.S.

Saturday, March 14.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

DAILY *v.* ALLAN AND ANOTHER.

Reparation—Negligence—Relevancy.

A carter while driving his horse through a half-opened gate forming the egress from certain premises to which he had been sent by his employers on lawful business, was killed by the unopened half of the gate, with which one of the wheels had come into contact, falling and knocking him down so that the wheel passed over his body. In an action for compensation by his widow against the owner of the premises, on the ground of fault, she averred that the gate was defective in construction in certain particulars, and that it was the duty of the defenders to have kept it either quite open or quite shut, and that there was no gateman in charge of it. *Held* that there was no relevant averment of fault involving liability for the accident on the part of the defenders.

Elizabeth M'Cardle or Daily, widow of William Daily, carter, raised this action against Alexander M. Allan and John Grieve, the only known partners of the Saracen Pottery Company, carrying on business at 85 Denmark Street, Possilpark, Glasgow, for compensation for the death of her husband, who was killed as after mentioned.

The following facts were averred and admitted —The sagger or refuse from the defender's works was allowed to be removed from their yard by anyone who chose to come for it. On the day of his death, Daily, who was in the service of J. & G. Hamilton, contractors, was sent to the defenders premises to fetch a cartload of sagger from the defenders' yard. The Denmark Street entrance to the yard was by a large arched opening, several yards wide, and was secured by a gate in two separate halves or divisions. Daily entered the yard and loaded his cart with the sagger, which was at the Denmark Street entrance. The gate was then only partly open, and there was no gateman or other person in charge of it. When the horse and cart were passing out through the partly opened gateway one of the cart wheels came against the shut half of the gate, which fell on Daily, knocking him down beside the cart, so that one of the wheels went over his body causing such injuries that he died the same day.

The pursuer further averred—"(Cond. 6) Said gate is, or was at said date, hung or placed in a very unusual, insecure, dangerous, and faulty manner, and but for this the accident after mentioned would not have occurred. In particular, said gate was so hung or placed as to be defective in the following points, viz., (1) It did not run in a groove; (2) There was no sufficient iron bar or frame hanging from above so as to prevent the door falling should the pulley be knocked off the said rail; (3) The said pulley ran on a rail of insufficient height and of defective formation; and (4) The pulley hanger ought to have been continued right down behind the beam on which the pulley rested, which might have prevented the pulley being knocked off said rail. (Cond. 7) In place of both sides or halves of said gate being pushed back or thrown open, so that the whole entrance to said yard might be free, the defenders on said date had the gate only partially open, so that an iron bar hanging from above, and meant to keep the gate in position and prevent it from falling, was rendered ineffectual for the purpose, and said gate being only partially open the width of the entrance was greatly curtailed, and there was no gateman or other person placed at said gate, as there ought to have been, to keep the same either open or shut and secure. Said gate ought to have been either altogether closed or altogether open. It was the custom of defenders only partially to open one-half of said gate, and to keep stored behind this half some crates or other articles belonging to them. (Cond. 10) The said William Daily was injured owing to the recklessness, carelessness, negligence, and fault of the defenders—(1) in omitting to have said gate fully opened or fully closed; (2) having no gateman stationed at the gate to take charge of the same, and regulate the traffic thereat, and the opening and closing of the gate; (3) owing to the insecure, dangerous, and faulty manner in which said gate was hung or placed in its position; (4) owing to the deficiency otherwise of said gate; or he was killed owing to some other fault on the part of the defenders, or those for whom they are responsible."

The defence consisted of a denial of these averments, and of counter-averments that the space left open was sufficient for the egress of the horse and cart, and that if it had not been so Daily should have further opened it, and that the fall of the half of the gate was caused by his horse having run away.

The defenders pleaded that the action was irrelevant.

The Sheriff-Substitute (Spens) allowed a proof.

The pursuer appealed to the Court of Session for jury trial.

The defenders objected that the case was irrelevant in respect there was on record no relevant averment of fault on the part of the defenders.