divested himself of all title to the ground in question.

LORD DEAS—I quite understand your Lordship's view. Whether it infers that these particulur feuars had this or no remains behind.

Agents for Pursuer—Gibson-Craig, Dalziel, & Brodies, W.S.

Agent for Lord Advocate—A. Murray, W.S.

Agents for Kay's Trustees—Lindsay & Paterson, W.S.

Agents for Barrie—Hill, Reid, & Drummond, W.S.

Saturday, June 26.

AITCHISON *v.* THORBURN.

Lawburrows—Suspension—Caution. In a suspension of lawburrows, unless there is *prima facie* some evidence of malice and want of probable cause, the note will only be passed on caution.

This was a suspension and liberation in which the complainer, Aitchison, sought to have a lawburrows (obtained against him by Thorburn, and under which he had been incarcerated) suspended. In the application for lawburrows, which was presented on the 17th May, it was alleged by Thorburn that the complainer Aitchison had threatened his life in the month of February last, and that, on the 15th May, he found him trespassing within his grounds with a loaded gun, when he (Aitchison) threatened to shoot him, and assaulted him by kicking him on the legs and throwing stones at him. In the note of suspension and liberation it was averred by the complainer Aitchison that, on the occasion last referred to, he was assaulted by Thorburn, and that the procurator-fiscal had in consequence raised a criminal prosecution against Thorburn, under which he was convicted and fined by the Sheriff, and that the application for lawburrows was malicious and without probable cause.

The Lord Ordinary on the Bills (LORD MANOR) passed the note, and granted liberation as craved, adding this note:—

"*Note.*—It is an admitted fact in this case that, so lately as the 25th May 1869, the respondent was convicted and fined in the Sheriff-court of Roxburghshire for an assault committed by him upon the person of the complainer on the 15th day of the same month; and it appears that, on the 17th May, just two days after the said assault, the respondent presented a petition to the Justices of Peace of the county, stating that he had just cause to dread harm to himself from the complainer, and setting forth various alleged threats used against him by the complainer in the month of February preceding, and more particularly that the complainer had threatened and assaulted him on the 15th day of May current, referring to the very occasion on which he, the respondent himself, was subsequently convicted of being the assailant and wrongdoer, and converting what had passed on that occasion into a ground of charge against the complainer. On the same day (17th May) the respondent appeared before one of the Justices and made oath to the verity of what was contained in his petition; and thereupon the Justice, without further inquiry, or giving the complainer an opportunity of being heard, proceeded upon this *ex parte* statement and oath to grant warrant for serving the petition on the complainer, and ordering him, within forty-eight hours, to find caution of lawburrows under the penalty of £25; failing which, to imprison him until caution be so found. It is plain that the respondent's petition, in its main and most material allegation, was not only without probable cause, but absolutely false; and the Lord Ordinary is of opinion that, on that ground alone, apart from all the other reasons set forth in the note of suspension, this note ought to be passed, and *interim* liberation granted."

The respondent in the suspension reclaimed.

Solicitor-General (YOUNG, Q.C.,) and STRACHAN for reclaimer.

M'KIE for respondent.

Aitchison objected to the competency of the reclaiming note, on the ground that the Lord Ordinary's interlocutor had been fully implemented by liberation without objection on the part of the reclaimer, and cited *Masson*, 13 S. 367.—Objection repelled.

The reclaimer then maintained that, until the allegations of malice and want of probable cause were established by legal and competent evidence, the lawburrows must be upheld by the incarceration of the complainer, or his finding caution; and that, so far from the conviction establishing the falsehood of the respondent's allegations, it was not in any way inconsistent with their truth. The complainer, after the hearing, offered to find caution of lawburrows to the extent of £10, and the Court accordingly recalled the Lord Ordinary's interlocutor, and remitted to him to pass the note only on such caution being found.

At advising—

LORD PRESIDENT—While we are relieved by the offer of caution now made from determining what is a very nice question, I think it right to say that in no view of the case could I concur with the grounds of judgment stated by the Lord Ordinary, for his Lordship says, "It is plain that the respondent's petition, in its main and most material allegation, was not only without probable cause, but absolutely false;" while, in point of fact, the main and material allegation was not the assault committed in May, which is what his Lordship refers to, but the allegations of threats made in February "that he would do for the petitioner," &c.; and which there is certainly no reason to suppose are false.

But supposing the material allegation to be the fact of the assault which the respondent alleged the complainer committed on him on 15th May, it by no means follows that that allegation is false because he himself was convicted of an assault on the complainer, for it may turn out when the respondent has the benefit of his own evidence that he committed no assault on Aitchison; and therefore I cannot concur with the Lord Ordinary's view that the statement is false merely because of that conviction.

Taking away that ground of judgment then, the only other on which the note can be entertained at all is the allegation that the proceedings are malicious and without probable cause. At present that stands on bare averment, without anything appearing on the face of the record from which the Court can determine whether it be so or not, and I think it consists with the practice of the Court as laid down in many cases, of which the recent case of *Randall* is an example, that unless there is *primâ facie* some evidence of malice and want of probable cause, the note cannot be passed except upon caution for lawburrows.

Looking to the position in life of the party here, I think £10 a fair enough sum.

Lord DEAS—I am of the same opinion. The ground on which the Lord Ordinary has proceeded is that the material allegations on which the lawburrows was obtained are not only without probable cause, but absolutely false. I am clearly of opinion that we have nothing before us to show that this is the case, and we are not entitled to take it for granted. I quite concur with your Lordship that the conviction does not entitle us to say that the respondent's allegations are false. It does not even afford a *primâ facie* ground for presuming it. The occurrence took place on Saturday the 15th May, and on the Monday following—the earliest possible day—the respondent presents an application for lawburrows, and it is only on the following day that the complaint is made against him to the fiscal. The inference from this is, not that the lawburrows was applied for in revenge for the complaint, but that it was the cause of bringing about the conviction. The Lord Ordinary overlooks the material allegations by the reclaimer. These are the threats said to have been used in February. Who is right or wrong as to what took place in May does not show that these allegations are false. It certainly does not show that the respondent did not threaten the reclaimer's life in February. I cannot, therefore, concur with the Lord Ordinary. The averment of malice and want of probable cause is not to be taken for truth. If a bare statement were sufficient, the diligence of the law would be an absurdity and useless. The allegation must be proved; and it is only reasonable that, until this is done, the respondent should be bound under a suitable penalty to keep the peace towards the reclaimer.

The other Judges concurred.

Agent for Reclaimer—A. Beveridge, S.S.C.

Agent for Respondent—A. Cassels, W.S.

Saturday, June 26.

SECOND DIVISION.

DONALD CATTANACH'S TRUSTEE *v.* JOHN CATTANACH'S TRUSTEE.

Bankrupt—Stock—Disputed Ownership. Circumstances in which the Court decided the ownership of a bankrupt stock that was disputed.

The pursuer in this action was trustee on the sequestrated estate of Donald Cattanach jun., lately merchant in Newtonmore and Kingussie.

The defender was trustee on the sequestrated estate of John Cattanach, brother of Donald. The summons concluded to have it found and declared that Donald was tenant of a shop for the sale of draperies and other goods in Kingussie; that the stock and furnishings of that shop belonged exclusively to him; and that the defender should be decerned and ordained to deliver up the stock so far as undisposed of, and to hand over the proceeds and prices thereof so far as sold.

After a lengthened proof, the Lord Ordinary (BARCAPLE) found, decerned, and declared in terms of the declaratory conclusions of the libel, and decerned the defender to concur with the pursuer in uplifting a sum deposited in bank, which the parties had agreed to hold as the proceeds of the goods sold, and found the pursuer entitled to expenses.

His Lordship added the following—

"*Note.*—The evidence is extremely conflicting, and the question at issue in regard to the ownership of the goods in the shop at Kingussie is left in much obscurity. But, on a review of the whole evidence, the Lord Ordinary is led to the conclusion that they belonged to Donald Cattanach.

"The parties concur in maintaining that they were not joint or partnership property. The question is, therefore, to which brother are they to be held to have belonged? It was strongly urged for the defender that, John Cattanach being bankrupt, he and his father and brother have no interest in the matter. This may be so; but the Lord Ordinary can only say that he entirely disbelieves their evidence. There are, however, facts not resting upon their testimony which tend to support the case of the defender. The most important of these is the undoubted existence of a firm of J. & D. Cattanach at Dingwall, which ceased to exist about the beginning of January 1868, when the Kingussie shop was opened, part of the goods from Dingwall being taken there. There is no evidence except that of the Cattanachs as to the respective interests of the brothers in that firm, or the arrangement made when it came to an end. There is the evidence of Mr Edmonstone of Aberdeen that he received and executed an order for goods to the value of £12, 9s. 3d. for the Kingussie shop from John Cattanach in his own name, though he has mislaid the letter. There is the fact that the license was taken in name of John Cattanach. And, lastly, there is the evidence of William Cumming that he was desired by Donald to furnish a sign-board with 'J. & D. Cattanach,' and that afterwards he was desired by Donald, in the presence of John, to put on only 'J. Cattanach.' It is remarkable that, though the order was given in January, the article was not furnished when Donald absconded in June.

"These are undoubtedly very important facts, tending to the conclusion that the shop was carried on by John, and that the goods belonged to him. But the Lord Ordinary thinks they are more than counterbalanced by the evidence on the other side. It goes to show that Donald was the party who ostensibly carried on the business, and with whom all parties contracted in regard to it, John being only recognised as shopman. Donald was undoubtedly the tenant of the shop, which he first took up to May 1868, and afterwards retook from that term, in his own name, and without any reference to John. The pass-books of customers bore the name of Donald Cattanach, written in his own hand, as the party to whom they were indebted. This must have been known to John, who made entries and signed receipts in these books. Donald gave orders in his own name to customers for goods which he happened not to have in the shop at the time, and these orders were implemented solely on his credit. There is strong evidence that the understanding of the place was that the shop was his, and that John was only shopman. With the single exception of Edmonstone, who supplied one parcel of goods on the order of John, Donald alone dealt with the merchants who furnished goods for the shop, even when they visited Kingussie; and they understood the shop to be his, and made the furnishings on his credit.

"Holding, as he does, the evidence of the Cattanachs to be altogether unworthy of credit, the Lord Ordinary thinks that the proof preponderates in favour of the pursuer."

The defender reclaimed.

SHAND and RUTHERFURD for him.