in the position of the defender persecuting the pursuer as he did. And though the jury did not do wrong in marking their sense of his position by awarding him small damages, I think the verdict ought to carry expenses.

LORD DEAS concurred, observing that the defender was not called on to say in public what he thought of the pursuer's conduct.

LORDS ARDMILLAN and KINLOCH concurred.

Agent for Pursuer—W. Spink, S.S.C.

Agent for Defender—R. Wallace, S.S.C.

Saturday, October 24.

SECOND DIVISION.

M'BEAN AND OTHERS *v.* WIGHT AND DEWAR.

Bankruptcy—Recal of Sequestration—Notour Bankruptcy—Absconding. A person in a state of insolvency having left the country a few days before a charge of payment had been given to him, although it was said that he had gone abroad to fill an office to which he had been appointed, and a warrant of imprisonment having been granted, which could not be executed in consequence of his absence from the country, *held* that these facts were sufficient to constitute notour bankruptcy. Petition for recal of a sequestration, on the ground that there was no evidence of notour bankruptcy, *refused.*

This was an application for recal of the sequestration of the estates of Smith, Mair, & Company, engineers in Glasgow, and John Mair a partner of that company. The sequestration was awarded by Lord Barcaple on 6th April 1868, on the petition of the respondent, Peter Dewar, a creditor. The other respondent, John Wight, was trustee in the sequestration.

Various pleas were stated on record in support of the application. It was said (1) that there was no proper citation of parties to the petition for sequestration; (2) that there was no evidence of notour bankruptcy produced to the Lord Ordinary; (3) that there was no estate belonging to Smith, Mair & Company which could be sequestrated: and (4) that the sequestration was unnecessary and inexpedient. The only plea now insisted in was the second.

It appeared that two persons, named Smith and Mair, had carried on business under the firm of Smith, Mair & Company prior to June 1867. In that month they were under the necessity of calling a meeting of their creditors, and an arrangement was made whereby the creditors agreed to accept payment of their debts by bills at 4, 8, and 12 months on the partners agreeing to place some additional capital in the business, and to carry it on under the supervision of a committee of the creditors. Shortly after this arrangement the partners agreed with each other for a dissolution of the copartnery, Smith obliging himself to pay Mair, in respect of his retiring, a sum of £1200, for which he granted bills. The business was thereafter carried on by Smith under the firm of John Smith & Company. On 2d January 1868 the estates of John Smith & Company, and of Smith as sole partner thereof, and also as a partner of the dissolved firm of Smith, Mair & Company were sequestrated on their own petition.

The respondent Peter Dewar was a creditor of Smith, Mair & Company, his ground of debt being a bill for £100, dated 27th April 1867, payable four months after date. This bill was duly protested, and on 30th December 1867, Smith, Mair, & Company, and John Mair, were charged to pay. The charge for the firm was left at their place of business, and that for Mair at his dwelling-house in Glasgow. The charge being expired, a warrant of imprisonment was issued against Mair on 6th January 1868, and on the same day he was searched for in his house, but could not be found. The officer's execution of search was produced.

The following averments were made by the petitioners, who were creditors of Smith, Mair & Company:—"From the date of the dissolution Mr Mair ceased to carry on any business in this country, having turned his attention to obtaining employment abroad. Accordingly, after some time he got the appointment of superintending engineer to the River Parana Steam Navigation Company, Buenos Ayres, South America, and on 22d December 1867 he sailed from the Clyde for South America for the purpose of entering upon the duties of that engagement, which is one of a permanent nature. Mr Mair had given up his house in Glasgow, and his wife went to live with her father in Edinburgh. Before leaving this country, he granted a mandate in favour of his brother, Mr William Mair, Tradeston Saw-mills, dated 13th December 1867, upon the narrative that he was about to go abroad. The fact of his having obtained this appointment, and gone abroad for the purpose of fulfilling it, was generally known in Glasgow, and, in particular, was known to the said Peter Dewar and his agents. Mr Mair had not fled or absconded from the diligence used by Mr Dewar on the said £100 bill,—that charge was given on 30th December 1867. Mr Mair had left this country before that date, openly and notoriously, for South America, to fulfil the duties of a permanent appointment there. He had not gone away in consequence of, or after the charge given on said bill. And that charge was not *followed* by his departure from this country, which departure preceded the charge, and was not occasioned either by that or any other charge or diligence. His absence from what had been his dwelling-house at the date of the execution of search did not imply his *flight from the diligence* upon the £100 bill, which was the only diligence produced or founded on in the petition for sequestration, by way of evidence of notour bankruptcy."

The Lord Ordinary (KINLOCH) found that no sufficient ground had been shown for a recal of the sequestration, and therefore refused the petition with expenses. He added the following

"*Note*—The sequestration sought to be recalled was issued of the estates of Smith, Mair & Co., and of John Mair, one of the partners thereof, as such partner, and as an individual, on 6th April 1868.

"There had been another partner of the company, John Smith, who, after the dissolution of Smith, Mair & Co., had carried on business under the firm of John Smith & Co. On 2d January 1868 a sequestration had issued of the estates of this company, and of 'John Smith, the sole partner thereof, as an individual, and also as partner of the dissolved firm of Smith, Mair & Co.'

"Application is now made for recal of the sequestration of the first-mentioned firm of Smith, Mair & Co.; but, as appears to the Lord Ordinary, the grounds stated are insufficient.

"1. The leading plea maintained is, that Smith, Mair & Co., had not been legally made notour bankrupt. The mode adopted was to raise diligence on a bill of Smith, Mair & Co. for £100, held by the respondent Peter Dewar; to give a charge on that bill to John Mair, one of the partners, by leaving a copy of the charge at his alleged dwelling-house in St George's Road, Glasgow, on 30th December 1867; and, on 6th January thereafter, executing a search for him under a warrant of imprisonment at the same dwelling-house. The objection stirred is, that on 22d December 1867, eight days before the date of the charge, Mr Mair had sailed for South America, in order, as is alleged, to take up the office of engineer under the River Parana Steam Navigation Company,' which,' it is said, 'is one of a permanent nature;' and the effect of this, as is said, was to render the charge and execution of search at an alleged dwelling-house in Glasgow of no validity. The Lord Ordinary cannot accede to this view. It is not disputed that Mair was a domiciled Scotchman, nor that the house in question had been his dwelling-place in which he lived with his family. Nor is it distinctly said that he did not leave his family in the house when he went away, which the respondent alleges that he did. There are no circumstances averred leading to a necessary inference that his Scottish domicile was abandoned or lost. It appears to the Lord Ordinary that a charge given at his dwelling-house within eight days of his alleged departure, and an execution of search seven days after this, were competent legal proceedings, being gone through at what the law will hold the continuing dwelling-place of Mair; and that the objection to the bankruptcy is therefore groundless.

"It was stated by the respondents, as a further answer to the objection, that Smith, the other partner, had, by his sequestration on 2d January 1868, become notour bankrupt 'as partner of the dissolved firm of Smith, Mair & Co.,' and that this was sufficient to sustain the sequestration of this last-mentioned firm on 6th April thereafter. The Lord Ordinary would have difficulty in holding this to be equivalent to making a partner notour bankrupt 'for a company debt.' He doubts whether the allusion to Smith, as a partner of Smith, Mair & Co., is of any further effect than a sequestration of his individual estates would have at any rate without any such allusion. But he thinks the other answer to the objection sufficient.

2. It was further objected to the sequestration that it had issued without sufficient citation to the company of Smith, Mair & Co., and its partners. But on looking to the executions of citation, the Lord Ordinary finds an amount of citation which may be well termed superabundant. There was a citation (1) to the company, by a copy being left within their last place of business; (2) another to the company, by delivery of a copy to Smith the partner on its behalf; (3) a citation to the partner, John Mair, by a copy being left at his dwelling-place aforesaid; (4) another citation to Mair, by a copy being left at the office of the Keeper of Edictal Citations, thereby meeting the contingency of his being held furth of the kingdom; (5) a citation to Smith, the other partner, by a copy being left for him with a servant within his dwelling-place. Add that John Smith appeared in Court to oppose the sequestration going out, and it was issued after hearing his opposition.

"3. A third objection to the sequestration was laid on its alleged inexpediency, because it was said all the assets of Smith, Mair & Co. had, after the dissolution of that company, merged in the new company of John Smith & Co., and lay under the sequestration of the last-mentioned company, in which all the creditors of both firms may rank indiscriminately. The Lord Ordinary could not listen to this objection. Admittedly, there was a true and real company of Smith, Mair & Co., with creditors holding its unretired obligations. It was the privilege of any one of these creditors to have the company sequestrated. What amount of assets may be vindicated in order to form the sequestrated estate, is not a question *hujus loci*, or one on the discussion of which the validity of the sequestration can be made to turn.

"This last-mentioned objection to the sequestration was stated by the partner Smith, when he appeared to object to the sequestration going out, and was then overruled."

The petitioners reclaimed.

DEAN OF FACULTY and PATTISON, for them, argued—1. Notour bankruptcy is said here to have been constituted by a charge of payment and Mair's absconding. But under the Bankruptcy Statute, § 7, in order to constitute notour bankruptcy the absconding must *follow* the charge. Here it *preceded* it by eight days. 2. There was here no absconding. Mair went abroad to fulfil a contract of employment which he had entered into, and he did so not to avoid the respondent's diligence, but some days before it was commenced. The petitioners are entitled to a proof of their averments.

SOLICITOR-GENERAL and BURNET in reply:—1. Although the absconding commenced before the diligence, the charge was followed by a continuance of it, and this constituted notour bankruptcy. 2. The execution of search afforded a *presumptio juris* in the question of absconding, and although this presumption might be rebutted, the petitioners' statements were not relevant for that purpose, and should not be admitted to probation. At the time Mair left he was in a state of hopeless insolvency, and he left the country, no matter with what view, without making any provision for payment of his debts.

The following authorities were cited—2 Bell's Comm., pp. 172-3-4; *Davidson*, M. 1092; *Finlays*, M. 1106; *Carron Company*, M. 1110; *Ross*, M. 1111; *Young*, M. 1112; *Spedding*, M. 1113.

The Court adhered.

At advising—

LORD JUSTICE-CLERK—There is here a regular debt constituted by bill which remains unpaid. A charge is regularly given, and the execution of search raises an inference that the debtor had absconded. But it is said that the party left this country to take a situation before the charge was given. It was admitted in the argument that there might be notour bankruptcy if the absconding, although it commenced before the charge was given, continued after it was given; and, looking to the special circumstances of this case, the party's insolvency, and the general state of his affairs, I think the petitioners' statements are not relevant to rebut the presumption afforded by the execution of search.

LORD COWAN—Sequestrations are not to be lightly recalled. There is no doubt whatever that the charge of payment given in this case, although the debtor had left the country a few days before, was perfectly good. This point is settled by the case of *Brown* v. *Blaikie*, 11 D. 474. If a person cannot be found after a search, that is enough

to raise a presumption that he has absconded from diligence; and, although all that is here said were proved, it would not overcome that presumption.

LORD BENHOLME—The question is, have we here legal evidence of absconding? That is the only question. What then are the facts? A partner of a company involved in debt leaves the country voluntarily and permanently. If such an absence is not justified by absolute necessity, we must presume absconding.

LORD NEAVES concurred.

Agent for Petitioners—R. Pasley Stevenson, S.S.C.

Agent for Respondents—William Mason, S.S.C.

Tuesday, October 27.

LANG *v.* LANG.

Husband and Wife—Separation a mensa et thoro—*Maltreatment.* Circumstances in which the Court decerned a husband to live separate from his wife, in respect of his maltreatment of her. Aliment allowed to the wife fixed at one-fourth of husband's income on an average of several years, the aliment of children, though living with the wife, not being taken into account, the husband being separately liable for their maintenance.

This was an action of separation and aliment at the instance of Elizabeth Pettigrew or Lang, wife of John Lang, tailor and clothier, Glasgow, against her husband. The conclusions of the action were as follows:—"Therefore the Lords of our Council and Session Ought and Should find it proven that the defender has been guilty of grossly abusing and maltreating the pursuer, his wife, and find that the pursuer has full liberty and freedom to live separately from the said defender, her husband: And the defender Ought and Should be Decerned and Ordained, by decree of our said Lords, to separate himself from the pursuer, *a mensa et thoro*, in all time coming; and also to make payment to the pursuer of the sum of £250 sterling yearly, of aliment to her, or such other sum as shall be found reasonable for her support, the said aliment payable at four terms in the year, Lammas, Martinmas, Candlemas, and Whitsunday, by equal portions, beginning the first term's payment thereof at the term of Lammas 1867, for the quarter immediately succeeding, and the next term's payment at Martinmas following, for the quarter immediately succeeding, and so forth quarterly thereafter, and in advance, during the joint lives of the said pursuer and defender, with interest at the rate of five pounds per centum per annum on each quarter's aliment from the term of payment until paid; together with the sum of £50 sterling, or such other sum as shall be found reasonable for the pursuer's support, as for the period from the 24th day of June 1867 to the said term of Lammas 1867, and with interest thereon at the rate of five pounds per centum per annum from the date of signeting hereof until payment."

After a proof, the Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel, and made avizandum, and considered the record, with the proof adduced, and whole process—Finds it proved as matter of fact that the defender has been guilty of grossly abusing and maltreating the pursuer, his wife: Therefore finds that the said pursuer has full liberty and freedom to live separate from the said defender, and decerns and ordains the defender to separate himself from the pursuer, *a mensa et thoro*, in all time coming; and with reference to the conclusions of the summons for aliment, appoints the cause to be enrolled, with a view to further procedure.

"*Note.*—The Lord Ordinary, in pronouncing the present interlocutor, has adopted and followed the form which has for a long period been in use in consistorial causes of the class to which it belongs; and he has done so not only in respect of that usage, but because mere findings of prominent facts in a case of this complexion would altogether fail to convey an adequate or just impression of the real habits and conduct of the parties in their respective relations as husband and wife, and it would, therefore, still be necessary to have resort to an examination of the whole evidence in detail.

"The Lord Ordinary heard that evidence, with a minor exception, and he has since considered the case with anxiety, increased by the feeling that, comparing the proof adduced on the part of the pursuer with the statements on record, which were admitted to probation, there appears to be a certain amount of exaggeration and high colouring in the latter which tends to lower the estimate of their value.

"Still, the Lord Ordinary cannot but feel that the conduct of the defender to his wife, as proved in evidence, was on many occasions such as no person in her position could be bound to submit to. A blow might be pardoned if given in sudden heat and without premeditation. But, as the evidence strikes the Lord Ordinary, there is proof of a considerable course and amount of actual maltreatment, accompanied by conduct of that contumelious and overbearing character which, more than a sudden blow in passion, is calculated deeply to wound the feelings of the pursuer, or of any other female of ordinary sensibility.

"The Lord Ordinary assumes that, without proof of actual violence, the pursuer cannot prevail here. But in judging of the weight to be attributed to the acts proved, the Lord Ordinary is of opinion that he is entitled and bound to have regard to the whole history of the daily life of the parties, as disclosed in the evidence.

"A suggestion of some plausibility was made in course of argument on the part of the defender, as affording, in his view, an explanation of the conduct of the pursuer in now insisting in this action, to which it may be right that the Lord Ordinary should shortly advert.

"This was founded upon the fact, as spoken to by Robert Lang, the eldest son of the defender, that the pursuer, Janet, and John Lang, are now residing with him, and it is said that this action is truly the result of a design on the part of Robert to obtain means from his father to keep up a separate residence. The Lord Ordinary is not inclined to adopt this view. But his impression is rather that the fact referred to did open up to the pursuer a prospect of escape from the treatment she had received from the defender, and so may have encouraged her to seek redress. But if the facts be truly such as to support the action, the circumstance that she now lives with her son will not operate further than as a circumstance in the case which is to be taken along with the other incidents in their history, which tend to throw light on the motives and conduct of the parties."

The defender reclaimed, but the Court adhered.