thought that an opportunity should still be given to the defenders to accept a remit.

LORD ARDMILLAN—There are some nuisances so serious—so intolerable—so plainly beyond the reach or hope of removal or diminution—that there is no doubt, and no alternative. The process which, in a situation not protected by prescription or dedication to manufacturing purposes, causes such a nuisance, must be put an end to. The law absolutely forbids it. But sometimes there occurs a case where, in the course of a manufacture, not in itself unlawful, a nuisance has arisen, which, though sufficiently offensive to entitle a neighbour to complain, is not necessarily, and at all times, a nuisance, but to which mitigation or alleviation may be given by the skill and exertions of the manufacturer; and there may well be conceived a case where the ends of justice and the reasonable rights and interests of the complainers would be sufficiently protected by such mitigation reducing the nuisance to a point where the interposition of law is not appropriate.

It is not every slight pollution of a stream, nor every disagreeable odour, that is to be dealt with as a nuisance, and put down by authority of law. The expression "abatement of nuisance" does not necessarily mean the entire and absolute removal of all pollution of stream, and all disagreeable odour, but such diminution of pollution and of smell as to render it such as ought fairly and reasonably to be submitted to.

I agree with the Lord Ordinary in the view which he takes of the evidence. I think that a nuisance to a considerable extent has been proved to be caused by the Farina Manufactory,—both as regards the pollution of the stream and as regards the offensive smell. I think it clear that the stream has not been dedicated to manufacturing purposes, and that there has been no prescription. I do not refer to the details of the evidence. I have read it all carefully, and I have come to the conclusion that both the pollution of the stream and the offensiveness of smell has been sufficiently proved to an extent amounting to nuisance.

There is no prescription to protect against complaint, and neighbourly acquiescence in an increasing annoyance seems to have reached its limit in 1871, when it became (as some of the witnesses say) intolerable.

Many of the remarks made by the defenders' counsel would have great weight if accompanied by a *bona fide* effort to mitigate the nuisance; and any considerable mitigation obtained by earnest endeavour in a friendly spirit, though involving some expense, could not fail to produce a good impression, and, it may be, a favourable result. I do not think that this is such a case of nuisance as would necessarily have required the interposition of law at once to put down the Farina Manufactory, if reasonable mitigation thereof had been proposed. It is by no means a very serious or aggravated case of nuisance. It is not constant, it is only occasionally that it reaches the mansion-house, and it is in certain periods and states of weather so slight as to be within the reach of reasonable forbearance.

It has occurred to me, and I suggested it during the discussion, that a strenuous effort under skilful advice ought to be made to remove the nuisance if possible, or so far to mitigate and alleviate it, both as regards the burn and the smell, as to leave no ground for reasonable complaints.

The defenders, however, have hitherto declined to act on this suggestion.

We are therefore under the necessity of dealing with the case as it stands on the proof.

I am of opinion that a nuisance has been proved of which the pursuer is entitled to complain, and in respect of which the pursuer is entitled to demand its abatement, and accordingly I concur in the Lord Ordinary's judgment, and in the remarks which have been made by your Lordship.

On the separate pleas maintained by the landlord I, am further of opinion that, looking to the terms of the lease to the defender Livingston, and to the pleas maintained, and the course of examination pursued by the landlord, he must remain as a defender, and be dealt with as a defender, and that the Lord Ordinary has rightly dealt with him in this interlocutor.

I give no opinion as to a trifling diversion of the burn for ordinary purposes. But in judging of the plea for the landlord, we must bear in mind that the water of the burn was diverted for the special purpose of working the Farina Mill, which caused the nuisance.

If the other defender, the tenant, is correct in alleging that the nuisance is unavoidable—inseparable from the working of the mill—incapable of mitigation or diminution—then the landlord, who granted the lease, and authorised the working of a mill necessarily creating a nuisance, and who supplied the burn water for the purpose of that working, cannot escape from responsibility.

The Court adhered to both interlocutors of the Lord Ordinary.

Counsel for the Pursuer—The Lord Advocate, Solicitor-General, and Adam. Agents—Adam, Kirk, & Robertson, W.S.

Counsel for the Defender Mr Stewart—Shand and Moncrieff. Agents—Mitchell & Baxter, W.S.

Counsel for the Defender Mr Livingston—Miller and Hunter. Agents—Skene & Peacock, W.S.

Friday, December 6.

FIRST DIVISION.

(Before seven Judges.)

NICHOLSON *v.* WRIGHT.

Arrestment—Preference—Sequestration.

A executes a trust-deed for behoof of creditors within sixty days of notour bankruptcy, and subsequently is sequestrated more than four months after the date of notour bankruptcy. Arrestments duly used by non-acceeding creditors in the hands of the private trustee *held* to give a preferable claim in the sequestration.

The estates of Joseph Gracie, grocer, Dumfries, were sequestrated on 18th April 1871. On 22d May 1871 Johnston & Wright lodged a claim to be ranked preferably for the sum of £48, 15s. 10d. The grounds of the claim were these:—On 22d November 1870 the bankrupt Gracie had executed a trust-disposition *omnium bonorum* for behoof of his creditors in favour of William Gordon as trustee. Gordon accepted office and proceeded to wind up. On 26th November and 5th December 1870, arrestments were laid on by Johnston & Wright (two creditors who, it was admitted, had not ac-

quiesced in the private trust-deed) in the hands of Gordon, the trustee and of Wilson, solicitor, Dumfries. These arrestments were respectively for the sum of £15, due on a bill drawn by the arresters upon and accepted by Gracie, and £50 on the dependence of an action between them and Gracie in the Sheriff Court at Dumfries. The bankrupt having been charged on an extract registered protest and decree, and having failed to make payment, on 3d December 1870 a search was made for him under a warrant of imprisonment, but he was not found. The execution of this search was admitted to be, in the circumstances, sufficient to create notour bankruptcy. On 19th December 1870 the bankrupt was incarcerated. On 2d March 1871 the arresters raised a summons of forthcoming before the Sheriff of Dumfries.

On May 30th 1871 the Sheriff pronounced the following interlocutor in the foresaid action of forthcoming:—"Finds that the estates of the said Joseph Gracie were sequestrated on 18th April 1871, and that a trustee has been appointed on the sequestrated estates: Finds in law (1) That under the 102 section of the Bankruptcy (Scotland) Act 1856. the moveable estate and effects of the bankrupt, wherever situated, so far as attachable for debt, have been transferred and vested in the said trustee for behoof of the creditors. (2) That therefore any moveable estate or effects belonging to the said Joseph Gracie which may have been arrested in the hands of the defenders Robert Wilson and William Gordon are now vested in the trustee in the sequestration; and (3) That any claim which the pursuers may have against the common debtor by virtue of their diligence above set forth, must be prosecuted by way of affidavit and claim in the sequestration: Therefore dismisses the action *quoad* the merits, and decerns; and *quoad* the question of expenses, sists the process until the pursuer's claim in the sequestration has been finally disposed of."

On September 1st 1871 the trustee in the sequestration issued the following deliverance on the foresaid claim:—"The trustee admits this claim to the extent of £38, 5s. 1d. as an ordinary debt. The arrestments used by the claimants in the hands of William Gordon and Robert Wilson being inept; and not having attached any funds belonging to the bankrupt in their hands, the balance of their claim, amounting to £10, 10s. 9d., is not chargeable against the estate. The arrestee William Gordon at the date of these arrestments was not debtor to the bankrupt and held no funds of his, but held the trust-estate of the bankrupt under a disposition in his favour *qua* trustee for behoof of the bankrupt's creditors, and was therefore accountable to them alone and not to the bankrupt. The arrestee Robert Wilson, at the date of the arrestments, held no funds belonging to the bankrupt, and was not debtor to him. Alternatively, the trustee holds that the claimants, subsequent to using the arrestments, acquiesced in that trust-deed, and from their *mora* in raising the action of forthcoming are barred from acquiring a preference over the other creditors."

On appeal, the Sheriff (HOPE) pronounced the following interlocutor and note:—

"*Dumfries, March* 6, 1872—Having considered the note of appeal, with revised minutes for the parties, and the whole process and debate thereon, for the reasons contained in the subjoined note, sustains the appeal, recals the deliverance of the trustee therein complained of, and ordains the trustee to rank the appellants on the sequestrated estate as preferable creditors to the extent of their claim, with interest thereon: Finds the trustee liable in expenses to the appellants: Allows an account thereof to be given in, and remits the same, when lodged, to the Auditor to tax and report, and decerns.

"*Note*—The first question to be considered is, would the debt due to the appellants have been a preferable one on the estate, if there had not been a private trust-deed? The trustee says that it would not, on the plea that 'the estates of the bankrupt having been sequestrated within four months of the date of notour bankruptcy, the appellants cannot claim a preference.' On what this plea is founded the Sheriff-Substitute has been unable to discover. He can neither see reason in it, nor find authority for it. If the arrestments had been within sixty days prior to sequestration, then it might have been pleaded with success that the debt was not preferable, but that was not the case. The next question is, what difference (if any) does the fact of the bankrupt having executed a private trust-deed for behalf of his creditors make?

"The trustee says that as the bankrupt had divested himself of his estate before the arrestments were used, and the trustee under the private deed held funds not belonging to the bankrupt but to the creditors, the arrestments were inept; and further, that 'the appellants having acquiesced in the foresaid trust, or otherwise led the arrestees to believe that they were acceding creditors, and barred from prosecuting separate measures to obtain a preference over the other creditors.' It appears to the Sheriff-Substitute that none of these pleas would have been good before sequestration, and that they cannot be any better now.

"In the first place, the private trust-deed having been granted when the truster was insolvent, and within sixty days of notour bankruptcy, was null and reducible, and therefore could not place the debtor's funds beyond the reach of a non-acceding creditors diligence; and in the second place there is not only no evidence in process of the appellants having acceded, but the averments on the subject are not relevant and sufficient to be sent to proof.

"An action was in dependence in this Court in which these points would have been settled when the arrestees and the bankrupt, or one or other of them, took steps for having the estate sequestrated with the view of defeating the preference which the appellants were endeavouring to secure. If this step has had any result at all, it has been favourable to the appellants, for it immediately put an end to the trust-deed, at least Mr Gordon has acknowledged this by handing over the estate, so far as undisposed of, to the trustee in the sequestration.

"It seems to the Sheriff-Substitute that if the trust-deed has been set aside to some effect, it must be set aside for all purposes; but whether that be so or not, the trustee in the sequestration under sections 10 and 11 of the Bankruptcy Act is entitled to set aside, either by way of action or exception 'all alienations of property by a party insolvent or notour bankrupt which are voidable by statute, or at common law,' and 'in so doing, shall be entitled to the benefit of any presumption which would have been competent to any creditor.' It appears to the Sheriff-Substitute that if a trustee is *entitled* to do this, he is also *bound* to do it in the interests of any creditor who might have done it himself but for the sequestration; and therefore the trustee in this

case ought to have given effect to the appellant's contention, set aside the trust-deed and all its effects by way of exception, and ranked the claim preferably on the estate."

The trustees appealed.

Authorities cited—Bell's Com. ii, pp. 172, 173, 487; *Semper*, M. 744; *Stalker*, M. 745; *Globe Insurance Co.* 11 D. 618; *Sutherland*, M. 1199; *Smee & Co.* M. 1206; *Sinclair*, M. App. ix., p. 1798; *Peters* v. *Speirs*, M. 1218.

At advising—

Lord Benholme—This case arises under the sequestration of Joseph Gracie, a grocer and spirit merchant in Dumfries. It arises in reference to the mode in which certain arrestments, or rather the debts secured by the arrestments, are to be ranked in the sequestration. The trustee held that they are to be ranked only as ordinary debts. The Sheriff-Substitute has found that they are entitled to a preference. The question is, Whether the one decision or the other is the correct one?

The facts of the case, as they ultimately appear on the admissions of parties, are very few and simple. This man, Gracie, when in a state of insolvency, executed a trust-deed for the distribution of his estate among his creditors, dated 22d November 1870. This trust-deed fell under the operation of the Act 1696, in respect that the granter was rendered notour bankrupt within sixty days after its date. It was consequently voidable under that statute, and therefore, by the recent statute, its nullity can be pleaded without a process of reduction. The result was, that the private trustee ceased to hold the goods for behoof of the creditors who were intended to be benefited by the trust-deed, and held for the bankrupt and his creditors. The debts of Johnston and Wright are not disputed, and it is quite ascertained that the arrestments were duly used in the hands of the private trustee, one on 26th November, and the other on 5th December. The question, whether in these circumstances they are entitled to a preference, depends upon the date of sequestration in reference to the date of notour bankruptcy. The date of sequestration was 18th April 1871, four months and more after one date of bankruptcy (3d December), and less than four months after the other (19th December). I allude to the contentions of parties in the earlier stages of this litigation. It seems that the bankrupt, after being charged, and after the days of charge had expired, left the country. On 3d December 1870 a sheriff-officer made the usual and necessary search for him without success. Gracie returned after a short time, and was incarcerated on 19th December. The 3d December has ultimately been admitted at the bar as the true date of notour bankruptcy. Had it not been for this admission, there might have been some doubt as to this point, and some proof might have been required—the question being whether the execution of search, taking into consideration the admission that the debtor had left the country, afforded sufficient presumption that he had absconded to avoid the diligence of his creditors. But the matter has been set at rest, for although proof might have been asked to show that there was no absconding, the trustee has not asked to be allowed proof, but has admitted that the date of bankruptcy was 3d December. In consequence of that admission, all doubt is removed, for the sequestration not having followed within four months of notour bankruptcy, it cannot be alleged that there is any arrestment which can compete with those of Johnston and Wright. Although they were used within sixty days of notour bankruptcy, that notour bankruptcy was not within four months of the sequestration. Consequently the equalisation of these arrestments, with the general arrestment effected by the sequestration, did not take place.

Another material point has been admitted, viz., that these creditors had never acquiesced in the private trust-deed, and were therefore not barred from pleading its nullity.

I therefore arrive at the conclusion that the interlocutor of the Sheriff-Substitute is right. His decision is in terms of a provision of the Bankruptcy Statute—that wherever a preference has once been obtained over any part of the bankrupt estate, that part of the estate passes into the hands of the trustee in the sequestration, under burden of that preference.

Lord Cowan—The first point noticed in the Note to the interlocutor of the Sheriff regards the effect of the statutory provision equalising diligences within four months of the sequestration. The solution of this question depends upon the date at which it is to be held the debtor was made notour bankrupt. That he was so by imprisonment on 19th December 1870 is admitted, and if this be the date of the notour bankruptcy, the sequestration on 18th April 1871 was within the four months. But diligence had been used against the debtor, under an extract registered protest and warrant, in virtue whereof a search was made for him on 3d December 1870, conform to execution of search in process. And at the recent debate it was admitted by the counsel for the trustee that the debtor had been thereby effectually made notour bankrupt as at the date of the said execution of search. Hence it follows that the provision of the statute in question has no application, inasmuch as the date of the sequestration was more than four months subsequent to the notour bankruptcy.

That this admission should have been made did not surprise me, having regard to the terms of the execution of search giving rise to the presumption of notour bankruptcy. That execution proceeded on the warrant of the Sheriff's decree, and his *fiat ut petitur* issued in terms of the Personal Diligence Act, and executed by a sheriff officer, which is declared by that Act to have the same effect as if the diligence had been used on letters of horning and caption. This being so, the execution contains all the essential facts to be found in those executions of search on which the Court proceeded in the cases referred to by Mr Bell in his Commentaries (7th edition) vol. ii, p. 162. These executions are now before me, having caused an examination of the Session Papers to be made in order to ascertain their precise terms. And Mr Bell lays down the doctrine established by the decisions in these words—"The messenger's return of execution stating that, after a thorough search, the debtor could not be found, is good evidence, *prima fronte*, that he has absconded; and, unless opposed by contrary evidence, is sufficient proof of bankruptcy." In this case the debtor was notoriously insolvent, having executed a trust-deed for behoof of his creditors; and although, in the record, notour bankruptcy was denied, and it was competent for the trustee to have asked for probation to redargue

the presumption of absconding afforded by the execution, yet if it was found hopeless to attempt any such proof, the prudent and proper course for the trustee to follow was to avoid incurring further expense by admitting the bankruptcy to be sufficiently established by the execution of search.

The next question regards the effect of the arrestments used by the arresting creditors on 26th November and 3d December 1870. Is it to be held that their effect could be destroyed by the prior execution of the private trust-deed for behoof of the whole creditors on 22d November 1870? It is now admitted that there was no accession to the private trust by the arresting creditors. And this being so, their diligence was perfectly legal. But, assuming that the private trust-deed took full effect, and that the trustee had obtained possession of the debtor's estate, an arrestment used by a non-acceding creditor in his hands subsequent thereto must have the effect only of attaching whatever residue should remain with the trustee after full payment to the other creditors. This result, however, is obviated by the debtor in this case having been made notour bankrupt, as aforesaid, on 3d December 1870. The effect of this notour bankruptcy was to render reducible the trust-deed under the Act 1696, as a voluntary deed within sixty days. A reduction at the instance of the arresting creditors might therefore have been at any time instituted to the effect of setting aside the private trust, so as to enable them to make effectual their arrestments.

The arresting creditors have not instituted a reduction. The necessity for their doing so has been superseded by the sequestration of the debtor's estate in April 1871. The effect of that proceeding is, as regards the administration of the debtor's estate, to transfer it entirely to the statutory trustee, and to render void the private trust-deed under the 10th section of the Act. The private trust has been thereby brought to an end; and the whole effects of the debtor remaining in the hands of the private trustee now belong to the statutory trustee, and have been transferred to him. But, in asserting his right to these effects he can take them only subject to such preferences as have been created over them by lawful diligence. And in this case the arresting creditors have attached, by their diligence in the hands of the private trustee, the effects of their debtor which he held at the date of their diligence, and which the statutory trustee is now entitled to have delivered to him.

This result appears to me to flow necessarily from the various decisions which were referred to in the debate, and which culminated in that of *Johnston*, 1779, D., App., "Bankrupt," No. 5.

On these grounds I concur in the opinion of Lord Benholme.

Lord Deas—It appears that on the 22d November 1872 the debtor, who is no party to this case, granted a trust-deed for the benefit of the whole of his creditors equally. This deed was approved of by nearly all the creditors; was advertised in the newspapers; was allowed to be acted on; and dividends were paid by the trustee. Arrestments were used on the 26th November, and again on 6th December, by the creditors. On 3d December a search was made for the bankrupt, but he was not found, and he was not arrested till the 19th. Sequestration was awarded on 18th April 1871. If notour bankruptcy did not take place till 19th December, the 12th section of the Bankruptcy Act does not apply.

It thus becomes a vital matter whether notour bankruptcy took place on 3d December. The only proof offered is the execution of search by the sheriff-officer. There is no doubt that such an execution raises *prima facie* evidence that the debtor has absconded. But the execution here bears that the officer went to the debtor's dwelling-house, between eleven and twelve o'clock in the forenoon, and looked through the house, and did not find him. The proper form is given in Darling's execution of an officer, pp. 179 and 180—"Upon the day of one thousand eight hundred and years, and between the hours of and afternoon, by virtue of letters of caption, dated , and signeted , raised at the instance of A.D., merchant in E., against E.F., grocer in G. I, A.B., messenger-at-arms, passed to the dwelling-house occupied by the said E.F., and to the shops warehouse occupied by him in , and then and there, at each of the said places, having my blazon displayed upon my breast, and holding the letters of caption and my wand of peace in my hands, in Her Majesty's name and authority, made diligent and strict search for the said E.F., by looking and searching carefully and attentively in and through every part, corner, and apartment of each of the said dwelling-house, shop, warehouse, and cellars capable of containing a man, and where it was possible the said E.F. might be concealed, in order to apprehend and incarcerate his person in terms of said letters. But, notwithstanding the most strict, diligent, and minute search at each of the said places, as said is, he, the said E.F., could not be found, he having absconded, as I believe, for his personal safety. All this I did before and in presence of Y.Z., residenter in , witness and assistant at the whole premises, and hereto with me subscribing."

There must be proof of flight or absconding, and it is a question whether the execution at the dwelling-house raises any such presumption, especially as at the time when the search was executed it was to be expected that the debtor would be at his shop or warehouse, and not in his dwelling-house. Mr Bell (Com. ii, p. 172 and p. 173) says "Two questions may arise concerning absconding—(1) The messenger's return of execution, stating that after a thorough search the debtor could not be found, is good evidence, *prima fronte*, that he had absconded; and, unless opposed by contrary evidence, is sufficient proof of bankruptcy. But what facts will entitle a messenger to return such an execution. In a man of good credit mere absence from home is nothing, but in a debtor notoriously insolvent such absence is more suspicious, and, indeed, has been found to infer *presumptione juris* an absconding under the Statute 1696. It seems reasonable, however, to require some other circumstance than mere absence—as the lateness of the hour, or the apparent concealment or ignorance of the domestics of what has become of the debtor. From such circumstances absconding may fairly be inferred." I have always understood that to be sound law. Some other circumstance besides absence from home is required to infer that the debtor has absconded. It is by no means clear from the statements of the creditors that he did abscond, for we find from the statements on the record that he went to Liverpool and returned on the 19th.

But the counsel for the trustee has admitted that notour bankruptcy did take place on 3d

December. I agree with Lord Cowan that if we are to take any such admission from the trustee, it ought to have been made in writing. A private individual may be entitled to make any concession in law, but I would hesitate to take such an admission from a trustee for creditors.

Lord Neaves—I concur.

Lord Ardmillan—I have felt not a little difficulty in regard to this case, which is now presented in a very different manner from what it was when before the First Division. If it had not been for the admission now made at the Bar by the counsel for the trustee, but not previously made, I should have had difficulty in holding that the 3d of December 1870, when a search was made for the common debtor Gracie, was the date of notour bankruptcy. There is no proof of absconding except what the search affords. Mere absence from home when sought for is not sufficient, and the execution of search does not state, as a fact, and does not contain, materials for clearly inferring that the debtor absconded. The trustee on the record has distinctly denied that Gracie, the debtor, had absconded, or did, on that occasion, abscond from diligence. The execution of search does not bear that he had absconded; and there is no real evidence from facts and circumstances indicating that he did abscond, or even mean to abscond.

He was not apprehended till the 19th December, and the sequestration was on 18th April 1871, within four months of the date of that apprehension, which, if he did not abscond, was the date of notour bankruptcy. Taking these two dates as the date of notour bankruptcy, and the date of sequestration, a question of importance, and not free from difficulty in regard to the effect of the sequestration on the arrestments, would have arisen. It is enough for me now to say, that, taking the dates according to that state of the facts, and as the case was argued in the First Division, and is presented on the record by the trustee who denied the absconding, I felt difficulty on that question of the effect of the sequestration on the arrestment, and I do not now venture to express any opinion on it.

I understand it to be now admitted on the part of the trustee, though it was formerly denied, that Gracie had absconded when the search was made; and that therefore the 3d of December 1870 is the date of notour bankruptcy. That important admission, in regard to the matter of fact, changes the aspect of the case. We could not take an admission in point of law. Taking that view of the fact as it is now admitted, I do not differ from the judgment which is proposed.

Lord Mure—I concur with Lord Benholme and the majority of your Lordships; and with reference to the main difficulty which has been raised, viz., the date at which notour bankruptcy took place, I wish to rest my opinion, not so much on any admission which may have been made at the bar, as on the execution of search coupled with the averments and admission made by the trustee on the record, that the bankrupt was absent from Dumfries at the time the search was made. Looking to these facts, and to this further fact, that there has been no proposal made to redargue the execution, I have no difficulty in arriving at the conclusion that the date of notour bankruptcy was the 3d of December. There are several cases in which an execution of search has been held to be at least *prima facie* evidence of absconding, and which are, I think, those referred to by Mr Bell (Comm. ii. 173, 5th ed.) There is the case of the *Carron Company*, July 4, 1775, D. p. 1110, *Ross*, June 25, 1782, D. 1111, and of *Spedding*, Aug. 9, 1785, D. 1113, in all of which an execution of search, in the absence of any evidence to the contrary, was held, in the case of an insolvent party, to afford sufficient evidence of absconding. It is true that all that appears on the face of the execution in this case is, that the debtor could not be found at his house and shop, and it is said that it is possible he may have been in Dumfries. But it is averred on record that he had absconded from diligence, and the trustee admits that the debtor was absent from Dumfries at the time the search was made, and that, when under diligence, he had gone to Liverpool in search of work. No doubt he goes on to deny that the debtor had absconded. But we are here in a concluded cause in which no proof has been asked by either party. And I see no reason why, when the trustee finds that he cannot redargue the presumption of absconding, which is held to arise from the fact that an insolvent party, when under diligence, has left the country, he should not be entitled to say that he does not stand upon that part of his case.

Lord President—I concur in the conclusion arrived at by the majority of your Lordships, and will only add a few words in reference to the proof of notour bankruptcy, upon which point there has been some difference of opinion.

If the notour baukruptcy was on the 19th and not on the 3d December, a question of great importance would arise. For all arrestments within sixty days before, and four months after, notour bankruptcy rank *pari passu*, and if notour bankruptcy occurred on 19th December, the sequestration is within four months after bankruptcy; and if it is an arrestment, ranks *pari passu* with prior arrestments. But I do not think that we are here called upon to decide whether sequestration is an arrestment within the meaning of the statute, for there is no doubt that the bankruptcy was on the 3d and not the 19th December. There was a search for the bankrupt on the 3d of December, and the execution of search raises a presumption of absconding. That presumption may be redargued, but until it is so redargued the execution of search is conclusive proof of absconding. This is established by numerous decisions. It is to be kept in mind that this effect of the execution of search is not a statutory matter. The thing to be established is the absconding, and by common law the execution of search is a proof of absconding. But from this execution it seems to me that the search in this case must have been an unusually strict one, and I cannot agree with Lord Deas in his remarks on that subject.

But it is said that the trustee might have redargued the absconding. No doubt he might, but he had to make an admission which materially hampered him in this respect, viz., the admission that, at the time of the search, the bankrupt had left the kingdom. Having made that admission, I do not feel surprised that the trustee did not attempt to maintain that notour bankruptcy did not take place on 5th December.

It is said that notour bankruptcy is not a matter of fact but of law, and that therefore it is not a matter for the trustee to deal with. Now I don't think so. Notour Bankruptcy is a matter of fact, and a matter of fact with which the trustee is very well fitted to deal. But if it had been a matter of law, could the trustee not have dealt with it? I think he could. It is no reason to exclude the trustee that there are points of law involved, for as is shown, by the fact that when a trustee admits claims, he deals both with fact and law. But I don't think that this matter of notour bankruptcy is a matter of law at all, but purely of fact. And matter of fact, the notour bankruptcy in this case occurred on the 3d December.

I therefore concur with the majority of your Lordships, that we should affirm the interlocutor appealed against.

Counsel for Appellant :— Solicitor-General (Clark) and Harper. Agent — R. P. Stevenson S.S.C.

Counsel for Respondent—Watson and Strachan. Agent—J. Mack, S.S.C.

Saturday, December 7.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

DUNBAR *v.* DUNBAR.

Entail—Provisions to Children—Statute 5 Geo. IV. c. 87 (Aberdeen Act).

Held that the interest upon provisions granted to children by previous heirs, under the 4th section of the Aberdeen Act, forms a deduction in estimating the free annual rental under that section where provisions have been granted by subsequent heirs.

This was a reclaiming note against the Lord Ordinary's interlocutor. An action of count, reckoning, and payment was raised by Mrs Dunbar, as guardian, and her three daughters, against Robert Lennox Nugent Dunbar of Machermore, Kirkcudbrightshire, a minor, and the tutors appointed by his father. The estate of Machermore was entailed, in terms of a disposition and deed of tailzie registered July 22, 1762. By bond of provision, dated 27th February 1843, and recorded in the Books of Council and Session 11th May 1846, the late Robert Nugent Dunbar, the elder, grandfather of the defender, then of Machermore, bound and obliged himself, and the heirs succeeding to him in the lands and estate of Machermore, and *subsidiariæ* his heirs and successors whomsoever, to pay to his younger children Antoinetta Nugent Dunbar, William Nugent Dunbar, Catherine Nugent Dunbar, and Arthur Nugent Dunbar, the principal sum of £2500 sterling, equally amongst them, and that at and against the first term of Whitsunday or Martinmas that should happen one year after his death, with penalty and interest as therein mentioned. This provision was made under the 5 Geo. IV. c. 87. Robert Nugent Dunbar, the elder, died March 20, 1846, and was succeeded by the now also deceased Robert Nugent Dunbar, the younger, the father of the defender Robert Lennox Nugent Dunbar, now of Machermore. He was survived by his four younger children. Robert Nugent Dunbar, the younger, granted on 11th May 1847 a disposition in security over Machermore to his brothers and sisters, for the sum of £2283, 12s., being the three years' free rents, to which under the statute the provision was restricted. Of this sum £1141, 16s., or one-half, was paid off in 1863, leaving the remaining half, being the shares of the two sisters, still as a debt over the estate.

Robert Nugent Dunbar was married to Mrs Annette Ellen Atcheson or Nugent Dunbar on 9th July 1856. Four children, the issue of the marriage, now survive. A prenuptial contract of marriage was entered into between the parties, by which Robert Nugent Dunbar bound and obliged himself, and the whole heirs of entail succeeding to him in the entailed estate of Machermore, and *subsidiariæ* his heirs, executors, and successors whomsoever, to make payment of the following provisions to the child or children of his said marriage who should be alive at his death, and should not succeed to the said entailed lands and estate—viz., If one such child, a sum equal to one year's free rent or value of the said entailed lands and estate of Machermore and others, as the same should be at the date of the death of the said Robert Nugent Dunbar; if two such children, the sum of £1000 sterling between them; "and if three or more such children, a sum among them equal to two years' rent or value of the said entailed lands and estate of Machermore and others, and as the same shall be at the death of the said Robert Nugent Dunbar." It was also specially provided that the provisions in favour of the younger children should bear interest from the day of the death of their father, and be payable one year thereafter. Robert Nugent Dunbar, the younger, died on 25th July 1866, and the security over the entailed estate created by the disposition in security executed by him for behoof of his sisters, was thereby extinguished. Antoinetta and Catherine Nugent Dunbar are taking the necessary proceedings, under the Aberdeen Act, to recover payment of their provisions. The only question as to which the parties were not agreed in this case was—Whether in ascertaining the sum to which the pursuers are entitled, not only the £1141, 16s., being the amount remaining undischarged of a provision made by the grandfather of the defender, a former proprietor of the estate, for his children, must be deducted from the three years' free rental of the estate, but also, as contended for by the defender, whether the interest of that sum should not be deducted in estimating the free annual rental? The statute enacts by section 1—"That it shall and may be lawful to every heir of entail in possession of an entailed estate under any entail already made or hereafter to be made in that part of Great Britain called Scotland, under the limitations and conditions after-mentioned, to provide and infeft his wife in a liferent provision out of his entailed lands and estates, by way of annuity," the said annuity not to exceed "one-third part of the free yearly rent of the said lands and estates where the same shall be let, or of the free yearly value thereof where the same shall not be let, after deducting the public burdens, liferent provisions, the yearly interest of debts and provisions, including the interest of provisions to children, hereinafter specified, and the yearly amount of other burdens, of what nature soever, affecting and burdening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or value thereof to such heir of entail