Friday, May 31.

DAVIS *v.* HEPBURN.

(*Ante*, vol. iii, p. 61.)

Bankruptcy—Sequestration—19 *and* 20 *Vict., cap.* 79, §§ 7 *and* 13—*Notour Bankrupt—Flight from Diligence—Execution of Search.* A petition for sequestration dismissed on the ground of no proof that the debtor was notour bankrupt; and held, on the proof, that an execution of search founded on by the petitioner as proving flight of the debtor from diligence, was no evidence of the alleged flight, the place where the search was made not being the residence of the debtor.

The question in this case was, whether the Court have jurisdiction to sequestrate the estates of the heir-apparent to a property in Scotland, and whether the said estates were liable to sequestration at the instance of a creditor under the Bankruptcy (Scotland) Act 1856, 19 and 20 Vict., cap. 79?

Section 13 of that Act enacts, that

"Sequestration may be awarded of the estate of any person in the following cases:—

"1st, In the case of a living debtor subject to the jurisdiction of the Supreme Courts of Scotland;

"*A.* On his own petition, with the concurrence of a creditor or creditors, qualified as hereinafter provided.

"*B.* On the petition of a creditor or creditors, qualified as hereinafter mentioned, provided the debtor be notour bankrupt, and have, within a year before the date of the presentation of the petition, resided or had a dwelling-house or place of business in Scotland," &c.

Section 7 enacts, that

"Notour bankruptcy shall be constituted by the following circumstances:—

"1st, By sequestration, or by the issuing of an adjudication of bankruptcy in England or Ireland; or,

"2d, By insolvency, concurring either—

(*A.*) With a duly executed charge for payment, followed, where imprisonment is competent, by imprisonment or formal and regular apprehension of the debtor, or by his flight or absconding from diligence," &c.

It appeared from the proof that the respondent was a young man, unmarried, and twenty-five years of age; that he had, from 1859 till 1863, been an officer in the Army; that he had thereafter, with the exception of a few visits to his father's house, lived in England and at different places on the Continent; and that, during the year 1866, he had only resided at his father's house continuously for a fortnight, in the months of April and May.

It also appeared that, on the assumption of his father's house being his residence, a charge of payment was left for him there at the instance of the petitioning creditor, and that upon the expiry of the charge, an execution of search was returned by the messenger, to the effect that the debtor could not be found. It was said that this implied "flying or absconding from diligence" in the sense of the Bankrupt Act, sufficient to constitute the debtor notour bankrupt.

The Lord Ordinary (ORMIDALE) found "that the respondent was not, at the date when the petition was presented, subject to the jurisdiction of the Supreme Courts of Scotland, or a notour bankrupt within the meaning of the 13th section of the Statute 19 and 20 Vict., cap. 79," and dismissed the petition, with expenses. His Lordship added in his note, "The respondent is not the owner of any real estate in Scotland, and jurisdiction has not been constituted nor attempted to be constituted against him by arrestment of funds or moveable estate belonging to him. Nor does it appear that the respondent had been resident in Scotland for forty days preceding the presentation of the petition for sequestration. The contrary, indeed, is established by the proof." His Lordship then stated the import of the proof, as given above, and continued, "In this state of matters, the Lord Ordinary has been unable to satisfy himself that the respondent was, when the present petition for sequestration was presented on 18th July 1866, subject to the jurisdiction of the Courts of Scotland, *ratione domicilii*, and no other ground of jurisdiction has been alleged or attempted to be made out. If this be so, it is for the same reason equally clear that the respondent was not rendered notour bankrupt by service of diligence and search made for him at his father's house in June 1866, where he was not living, and that not being his dwelling-place or residence in any sound or correct sense."

The petitioning creditor reclaimed.

WATSON and TRAYNER for him.

MUNRO in reply.

LORD CURRIEHILL—In this case the Lord Ordinary has found that the respondent was not, at the date when the petition was presented, subject to the jurisdiction of the Supreme Courts of Scotland, or a notour bankrupt within the meaning of the 13th section of the statute 19 and 20 Vict., c. 79. That is reclaimed against, and the question is, whether there are good grounds for altering this interlocutor? The Lord Ordinary has proceeded on two grounds; one is, that the respondent is not subject to the jurisdiction of the Supreme Court; and the second is, that he is not a notour bankrupt. It is not necessary that both of these grounds should be established. As to one of them, I confess to have no doubt, viz., as to the objection that the respondent has not been proved to be notour bankrupt. Now the 13th section of the Bankruptcy Act says [reads section]; and section 7 says [reads section]. Now here, without giving any opinion on the point, I assume that there was a duly executed charge for payment. The petitioner maintains that he has proved flight or absconding from diligence on the part of the debtor. In my opinion he has failed to prove his case. Certainly he has failed to prove it directly; but he says he has proved it by the search of the messenger in the house of the debtor's father, the messenger not being able to find him there. The question is, Is that proof of flight within the meaning of the statute? Many questions might arise as to what was sufficient evidence of that. I don't speculate on imaginary cases, but simply consider whether what is proved here amounts to the statutory requisite. Now, all we have here is proof that in the house of the debtor's father, on a certain day, a messenger searched for the debtor, but didn't find him; but how does that establish flight of the debtor from diligence? In many cases, if it were clear that the search was made in the debtor's proper residence, that might establish a *prima facie* case. But the fatal defect here is, that it is not

proved that this was the place of residence of the respondent at the date of the search. His father's evidence is the evidence brought to establish that it was so, but I do not find any evidence to that effect. The house was not that of the debtor, but of the debtor's father. The debtor was not a lodger in it, nor was he living as a member of his father's family. I am not going over the evidence minutely. I see enough to satisfy my mind in the evidence of the father. And that is the evidence of a witness brought to prove that this was the respondent's place of residence. The other circumstances justify that opinion, and particularly that the respondent was not residing in the house. On that ground I think that in no proper sense has the statutory requisite of flight been established. Having that clear ground, which is enough to dispose of the case, I am not inclined to go farther into the case. I don't say I differ from the Lord Ordinary as to his separate ground of judgment—want of jurisdiction; but as it is not necessary to decide that, I think we should recal the interlocutor; and, in respect of the flight not having been proved, dismiss the petition.

Lord Deas—The requisite of the statute is [reads 7th section]. It is not very clear whether the respondent left before the charge was made or after; but supposing he left after, the question still is, Has he absconded from diligence? It is not necessarily that particular diligence, but did he abscond from any diligence? A messenger's execution of a search at a man's dwelling-house merely raises a presumption that he has absconded from the diligence of his creditors. But it is only on execution that he could not be found in his dwelling-house, and the extent of that must depend on whether the house is one in which, if he hadn't absconded, it was natural to find him, or get some account going to show that he had not absconded. Here the messenger doesn't say that the search was made at the dwelling-house of the party. He says it was made at a certain house now or lately the residence of the respondent. There is nothing to show that that was his residence at the time; and if so, there is no presumption that he had absconded though not found there.

Lord Ardmillan concurred.

Lord President—I agree in holding that the petitioner has failed to establish notour bankruptcy within the meaning of the Act. There appears to be a little misunderstanding as to the effect of an execution of search. An execution of search is not a statutory requisite of notour bankruptcy. It is not a thing which has any statutory weight or authority. It is nothing but a piece of evidence of absconding from diligence, and the weight to which it is entitled will vary according to circumstances. No doubt, in many cases an execution of search is evidence of a man having absconded. When a man has his place of abode in a particular town, and, after being charged, disappears, and the execution bears that the messenger came to his dwelling-house at night, when he was most likely to be at home, and could not find him, or get any account of him, that would be strong evidence of flight. But the present case is different. An execution of search at a place where a man cannot naturally be expected to be, is worth absolutely nothing. If a messenger returns an execution of search that he had failed to find me at a place where I never was, that is of no value in a question of this kind. If, as here, a search is made at a place where *de facto* a person is not residing, and has not been for some time residing—which is not his own residence—I look on that execution of search as proving only this, that on the day when that search was made the respondent was not on a visit to his father. How the inference can be drawn from that, that he was absconding, is quite unintelligible. It may be that the respondent was going about to avoid his creditors, but we have nothing to do with that here. I concur in the proposal to put our refusal of the petition on the single ground of no proof of notour bankruptcy.

Interlocutor recalled; and petition dismissed in respect of notour bankruptcy not being proved.

Agents for Petitioner—Murdoch, Boyd, & Co., S.S.C.

Agents for Respondent—Duncan & Dewar, W.S.

Friday, May 31.

SECOND DIVISION.

EARL OF WEMYSS *v.* MAGISTRATES OF PERTH.

Salmon Fishings—Suspension—Possession—Artificial Embankment. Held that a proprietor of salmon fishings, who had a right to fish from the side of the river, was not entitled to follow the river so as to fish from an artificial embankment which had had the effect of altering the channel of the river, it not being proved that he had exercised his right by possession from the embankment.

This is an action at the instance of the Earl of Wemyss against the Magistrates of Perth, and concludes for interdict against the Magistrates from fishing from an embankment constructed in the Tay, between the right bank close to Elcho Pier and the island of Balhepburn. It was made in 1834 by Commissioners, under statutory powers for the improvement of the navigation of the river, and a great part of the expense was borne by the Earl, who is proprietor of the right bank at that point, and also of the island. The Magistrates have a royal charter, the validity of which has been declared by a decree of the Court of Session, of the fishings round and about the island, and which may at any time pertain to it. The effect of the embankment has been to divert the channel of the river to the other side of the island, but it is still covered at high water. A peg has been fixed in the centre of the embankment indicating the middle of the old channel; and no acts of fishing on the part of the Magistrates are alleged from that point westward to the mainland, and no right is maintained by them as to that portion. The Earl claims to exclude the respondents as being proprietor of the embankment, and also because he is entitled to follow the river, the fishings from the embankment coming in lieu of those from the right bank, which the embankment has destroyed.

The Lord Ordinary (Jerviswoode) decided in favour of the Magistrates.

The Earl of Wemyss reclaimed.

A. R. Clark and Balfour for him.

Fraser and Watson in answer.

At advising—

The Lord Justice-Clerk—This suspension and interdict is brought at the instance of the Earl of Wemyss, as the proprietor of the lands of Elcho and salmon-fishings in the Tay belonging to that estate, and seeks to interdict the Magistrates of Perth from fishing from any part of an embank-