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-

ment formed between a point near Elcho Pier and an island now called Balhepburn, formerly Incherrey. This embankment was formed in connection with operations for improving the navigation of the Tay, under the superintendence and by authority of the Commissioners appointed by the Act impowering these improvements, although to a considerable extent at the cost of Lord Wemyss, who anticipated benefit to result to his estate from the operation. It was made lawful to make an embankment between the mainland and the island, and to make such arrangements as seem to have been made in this case with adjacent proprietors. Up to and at the time of the construction of the embankment, which was authorised in 1834, the space on which it was constructed formed a portion of one channel or branch of the River Tay, which had existed from time immemorial, and which had been and was navigable and actually used for the passage of sand and salmon barges, passenger-boats, and other small crafts. The embankment was so constructed as only to exclude the river from passing at certain states of the tide; the embankment is submerged at high water, and is mainly useful in confining the whole stream in at the remaining channel, the stage of the receding tide most favourable for the action of the scour upon the river. The former channel is not yet converted into solid ground. It is said to be silting up, but is still under high water at the recurrence of every tide.

The embankment connects two portions of land belonging to the Earl of Wemyss, for he is proprietor of the island, as well as of the point of the south shore of the south channel, at which the embankment commences. He maintains two propositions. He affirms that he is proprietor of the embankment from end to end. He says also that the effect of the construction of the embankment is to transfer a right of salmon-fishing, which formerly belonged to him, along the shore of the south channel to the embankment, which he says must be held to come in place of that shore, and so to reach the fish, which formerly he could have taken, or had right to have taken, if the ground had been suitable for the use of the necessary implements of capture. He refers to the rule that where a river deserts an old and follows a new channel, the owner of the salmon-fishing may follow the stream.

The prayer of the suspension and interdict extends to the whole embankment. The Magistrates are sought to be interdicted from fishing from any point along its entire course. In so far as relates to fishing from the southern portion of the embankment, I do not find that any right to fish upon it was maintained by the Magistrates of Perth, which necessitated or could justify the present application, and no fact of possession is stated in regard to it as having happened since 1847. A peg was put by the Magistrates in at the point of what was believed to be the mid-channel, and the Magistrates neither fished between that point and the south shore, nor set up a right or pretence of right to do so. This is made very clear by the correspondence, before the institution of proceedings, between Lord Wemyss' agents and the agents of the town. In this Court one part of one plea is so expressed as that it might cover such a pretension, but neither before the institution of judicial proceedings nor subsequently in the Court has that pretence of right been set up. No one is entitled to have a process of suspension and interdict against a neighbour who has neither, *de facto*, exercised any act of possession nor maintained any claim to possess the subject as to which interdict is craved. I propose, therefore, that we should refuse the interdict in so far as regards the portion of the embankment between T. and A., from mid-channel to Elcho Pier, as not justified by any act or claim of possession having been set up on the part of the Magistrates at or about the date of the application. I propose to refuse the application, but I propose in that respect varying the Lord Ordinary's interlocutor, that we should, in refusing the interdict, assign the ground on which that refusal is rested. We do not, and in this process we cannot, definitively fix any question of right in reference to the fishing at this part of the embankment. It is a sufficient ground for dismissing the application that it was unnecessary and uncalled for.

There remains the question as to the fishings from Z to B on the plan, or in other words, from the point of the mid-channel of the south branch of the river and the island. The first question to consider is, whether we can take it as established that the suspender is proprietor of the embankment itself. I am not satisfied that the Earl of Wemyss has any right of property in the embankment. The embankment was constructed upon the alveus of a public tidal navigable river. If the maxim *quod solo aedificatum solo cedit* applied here, the embankment would rather belong to the crown, as the proprietor of the alveus built up, than to the subject whose lands may adjoin each extremity. I do not think that such a work as an artificial embankment, performed at once and by force of a special statute, can come under the doctrine of accession by *alluvio*. *Alluvio* is a mode of acquiring property, but its special characteristic is the gradual and imperceptible addition to the land of the proprietor, who thereby has an addition made to his land. "*Per alluvionem id videtur adjici quod ita paulatim adjicitur ut intelligere non possumus quantum quoquo momento temporis adjicitur.* (D. 41, 7, 1.)

If it were otherwise, I confess that I do not see how Lord Wemyss could take benefit, for the one-half of the embankment would seem to form an addition to the island; the other half to the land on the south of the fishings from the northern portion of the embankment would then fall to be considered as fishings from the island itself—a result not very favourable to the suspender.

If the claim of property in the embankment is even doubtful, and, above all, if it is *prima facie* against the suspender, we cannot give effect to it in this summary proceeding. But truly the right of property in the embankment cannot go far in a question as to salmon-fishings, which is a separate right, and involves in it the right to use land necessary for its beneficial exercise to the party having the right of fishing. As the right of fishing in one part is not incompatible with the property of the soil from which the fishing is exercised, the only effect of the property being held to be in the suspender, would be to make it necessary for the Magistrates to justify their use of the embankment by instructing their right of fishing as a pertinent to which they would be entitled to use it.

If the suspender's right of property is not to be assumed, his right to the fishings would require to be made out. This is done, or said to be done, by referring to a right of fishing along the south bank in the former south channel, before the embankment was constructed, and it is said that the effect of the embankment is to transfer the fishings from the south shore to that point. This is certainly by no means clear. What has hap-

pened is, that the power of fishing from the south bank, which was never exercised *de facto*, cannot now for the future be exercised at all.

The effect of the shutting up of the branch of the river would seem to be to extinguish these particular fishings, and, it may be, to rear up questions of compensation for their loss. I do not see how the loss of a right to fish along the south shore of the south branch can have the effect of conferring a right to the north end of the new embankment. The case seems to be that the fish used to pass by this channel, and that they will now pass by the main channel, and that a party who had the right in one channel may now fish in the other. If it were so, then the right to fish along the south shore of the island, opposite to the shore in question, into that same channel, must *e pari ratione* be transferred to the south of the embankment, and consequently the Magistrates would have a right as well as the suspender to fish from it. He could not interdict them from fishing from an embankment to which their right rested upon precisely the same ground as his own. Further, Lord Weymss' right of salmon-fishings, as claimed, are fishings off the Mains of Grange of Elcho. The respondents do not, as I understand, dispute his right to fishings along the land margin of the south channel. Such a question in the state of the title before us might perhaps have been raised; but unless we hold that the shore opposite the old south channel is in part or wholly the twenty-four acres of cotland of Elcho, which is not shown and is almost incredible, the title is one by prescriptive possession only. It is said that the prescriptive possession of one portion of the shore will acquire right to the whole salmon-fishings of the shore, the entire estate which has a general right to fishings by possession. It may be so, but the measure of right being the measure of possession, no right disconnected with these special lands can be acquired. When the fishings so acquired cannot be exercised by reason of any physical cause they must cease.

It seems to me, therefore, that Lord Wemyss has not instructed, on his part, any right of property in the embankment, or any right to fish on its northern portion, and that might be enough to dispose of the case. This is not a case of alleged interruption of possession. Lord Wemyss has not fished on the north part of the embankment. It is by virtue of the force of his title alone that he can prevail in the question.

Now, there seems to me not only the want of a clear title in Lord Wemyss, but also something like an express title in the respondents to the fishings in the portion of the river *ex adverso* of the embankment from Z. to B. They have a title of a most comprehensive kind. They have right by charter to the fishings, and a decree of this Court in 1787 affirms their right.

Surely this right conveyed to them the salmon-fishings in the water round the island, not the mere right of dragging nets on the island. Could they not fish with rod in these waters, and fish there exclusively? Suppose a small subsidiary island had sprung up on a portion of the ground which the embankment now occupies near the island, can there be a doubt that under their titles they could have fished from such an island? How could Lord Wemyss have interfered? By what right could he have left his own bank and come to fish at a spot near the island? The locality is described, and if ground coming there naturally would be fished from in terms of the grant, as I think would have been in accordance with its express words, ground formed, artifically formed, in that very place seems to fall under the same condition. If so the statute says that the rights of proprietors of fishings are to be reserved so far as not limited. The effect of the success of Lord Wemyss' contention would be that the Magistrates have lost their right, and he acquired it through the effect of an operation which is expressly declared to have no effect in altering whatever upon subsisting rights.

Lord Cowan concurred, but desired to place his judgment on a somewhat more limited ground. The respondents had right to the fishings from the island which would sweep the ground where the eastern half of the embankment stood. Notwithstanding, if the Earl established a right of property in the embankment, it was possible he might exclude the Magistrates. To do so, however, he required to bring a declarator, calling the Statutory Commissioners. The present was a possessory question, in which the right of property could not be decided.

The other Judges concurred.

Agents for Suspender—Tods, Murray, & Jameson, W.S.

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

---

## *Friday, May* 31.

### M'MASTER *v.* JAMES LINTON.

*Sale — Reference — Valuation.* Circumstances in which held that the documents embodying a reference to arbiters to value a crop, &c., and their deliverance thereon were sufficiently explicit, and that the valuation was binding on the parties.

This was an advocation from the Sheriff-court of Inverness-shire, in the following circumstances:—M'Master, a coach-driver and flesher at Fort William, rented a croft on the Lochiel estate, and being about to give it up at Whitsunday 1863, with a view to going abroad, he entered into an agreement with the incoming tenant, Linton, tenant of a considerable farm in the neighbourhood, by which the latter was to take the stock and crop at a valuation, each party naming an arbiter for the purpose, and the arbiters an oversman, in case of dispute. A written minute of agreement to that effect, in the usual terms, was subscribed by the parties, and the valuation of both stock and crop took place on 28th July 1863. Linton had objected to the valuation being made so early in the season, but afterwards he signed the agreement, and consented to going in. Next day the valuators drew up and signed a document, headed "Valuation of Duncan M'Master's Crop, &c., 29th July 1863," the first two items in which were—"560 stooks, at 1s. 9d., £49; 80 barrels potatoes, at 3s. 6d., £14." The total of the valuation was £121, 18s., and there followed these words:—"The above comprisement is according to our best skill and judgment. Signed," &c. M'Master took no further charge of the crop, which was raised by Linton. The latter, however, declined to pay M'Master the sum at which it had been valued, on the ground that it had yielded only 284 stooks, instead of 560, and 44 barrels of potatoes, instead of 80, making a difference of £32 on the total valuation. He maintained that the intention of the valuators was, that their estimate should be afterwards so corrected by