

1774.

(M. 14,272.)

DUKE OF  
ROXBURGH, &c.  
v.  
EARL OF HOME,  
&c.

JOHN DUKE OF ROXBURGH, THOMAS LILLIE,  
Lessee of his Grace's Fishings in the  
River Tweed at Kelso, and WILLIAM  
MITCHELL, Lessee of the Fishings in the  
said river at Mackerstoun, -

} *Appellants;*

ALEXANDER EARL OF HOME and WILLIAM  
TURNET, Lessee of his Lordship's Mill and  
Fishings in the River Tweed at Fairburn,  
and CHARLES EARL OF TANKERVILLE, and  
DAVID ERSKINE, Clerk to the Signet, his  
Attorney, - - -

} *Respondents.*

House of Lords, 6th June 1774.

SALMON FISHING—ACT 1696—JURISDICTION.—Held that the Scotch act 1696, against illegal modes of fishing, applied to the salmon fishing on the river Tweed, reversing the judgment of the Court of Session. Question: When a great river divides two kingdoms, Are there any real dividing line in the stream, which determines the rights of fishing, or is the whole river common to the proprietors on the English and Scotch sides; and how far are these rights of fishing subject to the Scotch statutes and jurisdiction of the Court of Session?

The act 1696, of the Scottish Parliament, regulates the fishings of salmon in Scotland, and, in particular, enacts laws relating to the killing of salmon, and black fish in forbidden time, and the killing the smolt or fry. It also provides, “ in respect that the salmon fishing was much pre-  
“ judged by the height of mill-dams that were carried  
“ through the rivers where salmon were taken, his Majesty,  
“ with consent of the estates of Parliament, ordained a con-  
“ stant slop in the mid stream of each mill-dam; and if the  
“ dyke were settled in several grains of the river, that there  
“ should be a slop in each grain (except in such rivers,  
“ where cruives were settled), and that the said slop should  
“ be as big as conveniently could be allowed; providing  
“ always the said slope prejudice not the going of the mills  
“ situated upon any such rivers;—And his Majesty, with  
“ consent foresaid, discharged all fishing at such mill-dam  
“ dykes, with nets, stented or otherwise, or any other en-  
“ gines whatsoever, under the pains inflicted by that and

“ former acts against killers of black fish, and destroyers of  
 “ the fry of salmon.” 1773.

On the river Tweed, about four miles below Kelso, the  
 respondent, the Earl of Tankerville, owns the lands and  
 castle of Wark, situated on the south side of that river; and  
 the Earl of Home owns the lands and mill of Fairburn, on  
 the opposite, or north side, both having a right to the fish-  
 ings in the river opposite to their respective lands. At this  
 part of the river Tweed there is, and has been for time im-  
 memorial, a cauld or dam dyke erected and standing in the  
 said river, beginning very near the south side, and stretch-  
 ing quite across to the north side, consequently, is partly  
 upon English and partly upon Scotch ground, and was ori-  
 ginally intended for the purpose of conducting the necessary  
 quantity of water to Fairburn mill.

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This dam dyke is of peculiar construction, being six feet  
 high, and quite perpendicular on the lower side, so that it is  
 perfectly impossible for any salmon to get over it, unless in a  
 very high flood. But, to remedy this, and at sametime to  
 give more vent to the superfluous water, there have been,  
 from the beginning, five holes, apertures, or openings, two  
 in the English, and three in the Scotch side of the said  
 dyke, which are placed in the middle altitude thereof, and  
 are about a foot and a half wide each.

These holes, it was alleged, had been for many years past  
 illegally perverted to the purpose of destroying salmon, by  
 the respondents' tenants. This was effected by placing at  
 each hole a pock net, fixed on the upper side, with the  
 mouth downwards, taking in the whole of the opening, and  
 the tail of it stretched up the river fastened by a stone;—  
 on the lower side there was a square barricade or pifold of  
 stones, with an opening on each side, to allow the salmon to  
 pass in; upon each of these openings in the pifolds were  
 fixed, stented, or framed nets, that fall down within two or  
 three inches of the bottom of the river, and the mouth of  
 them towards the inside of the pifold. When salmon  
 came up the river, they passed easily into the pifolds under  
 these nets, which rose up to give them way. If they at-  
 tempted to go up and run through the openings of the dyke,  
 they ran into the pock nets; and if any of them happen-  
 ed to turn back, they were infallibly caught in the framed  
 net.

The Duke of Roxburgh is proprietor of the fishings in

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that river lying above Fairburn mill-dam, and had them let on lease to tenants, who are the other appellants.

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Aug. 19, 1762.

Action was brought by these tenants, Lillie and Mitchell, against Turnet, the Earl of Home's tenant, before the sheriff, complaining of these fishings, as being illegal under the act 1696; in which the sheriff, after hearing a proof, held that the fishings were illegal, and decerned to have them removed forthwith. An advocation was brought of this judgment, at which stage the Duke of Roxburgh appeared as a party. The Lord Ordinary having repelled the reasons of advocation, remitted the case simpliciter to the sheriff. In the proof before the sheriff it was established, that the above engines, or pock nets, were set and kept in the water, on Sundays as well as on other days. That the said Earl of Home sometimes pulled out, or cut these nets. That stented nets had been used at the dam dyke for about five years only. That it was usual for the fishers, when they took out their nets, to stop up the holes or apertures in the dam dyke, when it was not necessary to the going of the mill, to prevent the fish from going up the river. The sheriff again pronounced a special interlocutor, adhering to his former interlocutor, prohibiting and discharging the defenders for the future, to use nets, pinfolds, or other engines, and appointing such to be removed. In terms of these interlocutors, and after intimation thereof to them, a sheriff's officer went, in presence of witnesses, and removed all the net and other engines, and made an opening in the dam dyke of about 6½ feet wide, but these were immediately replaced, and the respondents brought a suspension and also a declarator and reduction. The Lord Ordinary turned the decret charged on into a libel, and conjoined the two processes, and "found

Aug. 30;

Sept. 22, 1764.

that the fishings were illegal, and decerned to have them removed forthwith. An advocation was brought of this judgment, at which stage the Duke of Roxburgh appeared as a party. The Lord Ordinary having repelled the reasons of advocation, remitted the case simpliciter to the sheriff. In the proof before the sheriff it was established, that the above engines, or pock nets, were set and kept in the water, on Sundays as well as on other days. That the said Earl of Home sometimes pulled out, or cut these nets. That stented nets had been used at the dam dyke for about five years only. That it was usual for the fishers, when they took out their nets, to stop up the holes or apertures in the dam dyke, when it was not necessary to the going of the mill, to prevent the fish from going up the river. The sheriff again pronounced a special interlocutor, adhering to his former interlocutor, prohibiting and discharging the defenders for the future, to use nets, pinfolds, or other engines, and appointing such to be removed. In terms of these interlocutors, and after intimation thereof to them, a sheriff's officer went, in presence of witnesses, and removed all the net and other engines, and made an opening in the dam dyke of about 6½ feet wide, but these were immediately replaced, and the respondents brought a suspension and also a declarator and reduction. The Lord Ordinary turned the decret charged on into a libel, and conjoined the two processes, and "found

Feb. 3, 1767.

" that the nets and other engines for taking of fish, placed in the dam dyke of Fairburn mill, and complained of by the original libel, are contrary to law, and that the Earl of Home, and Wm. Turnet his tenant, defender in the original process, are not entitled to use the same in the said dam dyke; and therefore ordained the said defenders to remove the said nets and engines betwixt and the first of March next; and prohibited and discharged them from placing or using them in the said dyke in time coming. And further found, That the said defenders are bound to make and keep open the three holes in the dam dyke described in the libel betwixt the middle of the river and

“ the north bank thereof, and ordained them so to do be- 1774.  
 “ twixt and the said first day of March next. And in case  
 “ the defenders should not remove the said nets and en- DUKE OF  
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 “ gines, and redd and make open the said three holes, be- v.  
 “ twixt and the foresaid day, authorized the Duke of Rox- EARL OF HOME,  
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 “ burgh and his tenants, the original pursuers, to remove  
 “ the said nets and engines, and to red and make open the  
 “ said three holes upon the defenders’ expenses. But in  
 “ respect it appears from the proof that the defenders had  
 “ been in possession for many years past, without legal  
 “ challenge of the method of fishing complained of, assoil-  
 “ zied them from the penalties and damages, and assoilzied  
 “ the Duke of Roxburgh, and the original pursuers, from  
 “ the reduction and declarator, and decerned Found no  
 “ expenses due to either party.” On representations, the  
 Lord Ordinary reported the case to the Court, who found July 22, 1767.  
 that the act 1696 applied to and comprehended the fishings  
 on the river Tweed. But afterwards, and on further argu-  
 ment, they pronounced this interlocutor: “ Found and or- July 25, —  
 “ dained the defenders to remove the nets and engines, and  
 “ appointed the three holes in the dam dyke, betwixt the  
 “ middle of the river and the north bank thereof to be kept  
 “ open.”

The respondents reclaimed, and at this stage the Earl of Tankerville was admitted a party in the cause, who contended that the Scotch act 1696, or Scotch laws could not extend to the English side of the river.

The Court then “ Found, in the special circumstances of  
 “ this case, the act of Parliament 1696 does not extend to July 27, 1768.  
 “ the fishing in question, and remitted to the Lord Ordinary  
 “ to proceed accordingly.”

On reclaiming petition the Court adhered, and the Lord Ordinary pronounced an interlocutor, in terms of the remit made to him, suspending the letters and reducing the de- Nov. 25, —  
 cree of the sheriff.

Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellants.*—That the act 1696 is general, and extends to every dam dyke belonging to any mill in Scotland. It is against the unlawful use of this dam dyke that the appellant complains, and the Scotch act refers. It applies to the Fairburn mill, which is on the Scotch, or north side of the river Tweed, and is owned by a Scotch subject; and consequently the regulations of this

1774. act must govern that dam dyke, and exclude all manner of fishing there inconsistent therewith. When a river divides the estates of two proprietors, each has a right to the salmon fishing opposite to his lands, from his own bank to the middle of the stream. In like manner, when a river, like the Tweed, divides two kingdoms, the same rule must govern. If an island is formed in the river, on either side of that middle line, it belongs entirely to the landowner on that side of the river; and if it is formed on both sides of the line, each of the landowners has a share of it. In like manner, if a river changes its course, and leaves the channel dry, that channel falls to be divided in the middle between the two opposite landowners; which doctrine is established by § 22. 23. Just. de acquir. rer. dom. L. 7. § 3. 4. 5. et L. 56. § 1. Feod. tit. To the same effect Grotius de Jure Belli et Pacis, gives his opinion, Lib. secundo, cap. tertio, § 16. 17. et 18. And Voet, in his Commentary ad titulum primum, lib. 41. Pand. § 17. 18. &c., and many other authorities might be quoted, if necessary. The contrary doctrine, that the right of salmon fishing of a proprietor on the banks of a river extends to the opposite bank, would lead to many dilemmas. In the present case, such a view is out of the question, because it necessarily follows, if the *whole* river were to be held the legal boundary between the two kingdoms, that it would be impossible to say, whether that river was within the dominions of the one kingdom or the other, or when the statutes of the one kingdom were to apply and when excluded, or the jurisdiction, whether Scotch or English, that was to be applied or had recourse to in the settlement of disputed rights on the river: Hence, therefore, the apparent expediency and absolute necessity of a line precisely dividing the rights and property of the subjects of the one kingdom from those of the other. The boundary on the river Tweed between England and Scotland is, and always has been, a line drawn along the middle of the river. Whatever happens on the south side of that line must be governed by the laws of England; and whatever is done on the north side of that line must be regulated by the laws of Scotland. The dam dyke in question is a dam dyke which is built from the north side of the river Tweed to the south, though not entirely across to the south bank. Like all dam dykes on the Tweed, it is built on the north side. This dam dyke, therefore, from the north side, to the middle of the

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river, is undoubtedly within the territory of Scotland, and, consequently, must be subject to the jurisdiction of the Court of Session; and as the judgments complained of affect that part of the dam dyke only, the Earl of Tankerville, who has no right to that side of the stream, can have no right to quarrel these judgments. No illegal practice of fishing can be founded on. If the respondent's tenants had been in the practice of fishing in this manner, it was introduced by gradual encroachment, and in violation of the act. And it appears from the Earl of Home's lease to Turnet, that fishing with pock nets was only *sometimes* resorted to, but afterwards, by a combination between the tenants of the Earls of Home and Tankerville, in order to make their fishings more valuable, the right had been abused. But this illegal possession cannot be founded on by these Lords, in order to establish a practice of so fishing, which was objected to by the late Earl of Home, and no agreement between them, to hold the fishings in common, can alter the question in the eye of law, because each has granted to his own tenant, by distinct leases, unconsented to by the other, the fishings on his own side of the river. Therefore, and as the dam dyke must be viewed as erected for the use of Fairburn mill, which is on the Scotch side, all illegal use of that dam dyke, in its whole length, though extended beyond the middle of the river, is expressly prohibited by the statute, and the Earl of Home cannot screen himself from the consequences, by any agreement or combination with the Earl of Tankerville, who pleads that he is not subject to the laws of Scotland.

*Pleaded for the Respondents.*—The idea of a middle line as a boundary between two rights of property, placed in the middle of the stream of a river, is fanciful and illusory. It is especially so in a great river, which divides two kingdoms, the invariable rule in regard to which, being, that the river is common to both kingdoms, and is the property of the subjects in both states, on each side. The river that divides two kingdoms, as Grotius has it, is the right of neither exclusively, but is common to both. In the civil law, rivers were held to be *res publicæ*, the use of which was common to all. The act 1696, which is silent as to the river Tweed, and imposes regulations only for Scotland, can never be construed to apply to property held in *common* by the subjects of both kingdoms. And, supposing no common property existed, but that the idea of a middle line was correct,

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1774. yet the constant uninterrupted possession here, by both parties, of the fishing over the whole dam dyke. without division, has established in both a common right of property, *pro indiviso*, by which each may fish to the opposite bank. It follows from this, that the river being a common right to both kingdoms, no judgment of the Court of Session in Scotland, could affect the right or interest of the Earl of Tankerville, a subject of England, and no order or decree pronounced there, to new model, or alter this dam dyke at Fairburn Mill, so as materially to prejudice the Earl of Tankerville's fishing in the river, could therefore affect him. The act 1696, consequently, cannot be held to apply to English rights of fishing, or to fishings on the river Tweed, held in common by English and Scotch landowners; but only to the fishings on rivers in Scotland otherwise situated. That the exceptions of the river Tweed, in several statutes regulating the fishing in Scotland, shows this, particularly in 1429, and the act 15th James VI. The exception is again repeated in 11th Act Parliament 16th James VI. After the accession of James to the Crown of England, an act passed in the Parliament of Scotland, which declares the reasons of the above exceptions to have been, "Because the said rivers, "at that time, divided at many parts the bounds of Scotland and England adjacent to them, whereby the forbearance, upon the Scots part, of the slaughter of salmon, in forbidden time, and of kipper smolts, and black fish at all times, would not have made the salmon any more to abound in these waters, if the like order had not been observed upon the English side, which impediment being now removed, by the happy uniting of the two kingdoms in an empire, retreats, and perpetually annuls and abrogates the said exception, of the said waters of Tweed and Annan," which shews that, previously thereto, the river Tweed had been excepted, and, therefore, that the act 1696 cannot be construed to apply to it; and the conduct of the appellant, in applying for the act 1771 to Parliament, in order to regulate these fishings, proves this to a demonstration.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of be *reversed*, and that the cause be remitted back to the Court of Session in Scotland, to give the

proper directions for carrying this judgment into execution.

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For Appellants, *J. Montgomery, Henry Dundas.*  
 For Respondents, *Al. Wedderburn, J. Dunning.*

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ALEXANDER, EARL OF HOME, CHARLES, EARL OF TANKERVILLE, and Others, } *Appellants ;*  
 JOHN, DUKE OF ROXBURGH, and Others, } *Respondents.*

House of Lords, 6th June 1774.

FISHING—ACT 1771—ILLEGAL FISHING.—Held that the Act 1771, against illegal modes of fishing, applied to certain engines and pock nets used in the river Tweed, although the act had no retrospective operation, and the mode of fishing questioned had been for a considerable time practised and established.

Action was raised before the Sheriff in 1771, before the Sheriff of Berwickshire, in name of Thomas Lillie and others, lessees of the salmon fishing in the superior part of the Tweed, against William Turnet, the Earl of Home's lessee of Fairbairn mill, and of his fishing in the river Tweed there, in which action the respondent, the Duke of Roxburgh, and the other proprietors of these fishings, sisted themselves as parties, pursuers, and complainers.

The mode of fishing was by means of the dyke or bulwark across the channel of the river Tweed, in which were inserted the five holes and pock nets described in the previous case. The dyke, it was stated, had likewise immemorially served the purpose of turning the water into the mill lead or aqueduct of Fairburn mill, belonging to the appellant the Earl of Home. The summons set forth:—That by an act passed in the last session of Parliament of Great Britain, Act 1771.  
 “ entitled, an act for regulating and improving the fisheries  
 “ in the river Tweed, and rivers and streams running into  
 “ the same, and also within the mouth or entrance to the  
 “ said river,”—it was enacted, that if, from and after the  
 12th May 1771, any person or persons shall beat the water  
 or place, or set any white object, or any other thing what-  
 ever in the said river Tweed, or on, over, or cross the said  
 river, in order to prevent the said fish from entering the said