proper directions for carrying this judgment into execution.

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

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

ALEXANDER, EARL OF HOME, CHARLES, EARL OF TANKERVILLE, and Others, } *Appellants;*

JOHN, DUKE OF ROXBURGH, and Others, *Respondents.*

House of Lords, 6*th 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 whatever in the said river Tweed, or on, over, or cross the said river, in order to prevent the said fish from entering the said

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river Tweed, or from going up or down the said river, &c. every person so offending, shall, for every offence, forfeit any sum not exceeding five pounds. Nevertheless, the defendant, the Earl of Home's lessee of the Fairburn mill and fishings, had contravened the said act, in so far as, upon the 13th May then last, and upon each of the subsequent days of that month, he had made use of sundry illegal engines, placed in and about the caul or mill dam dyke of Fairburn mill, for fishing the salmon in the said river, and preventing them from going up and down the river, by means of having the dyke so high as to prevent the fish getting over, except in flood tides, and by means of five holes in the dyke, with pock nets fixed therein, and therefore concluding that he be fined in £5. sterling, and that he be ordained to remove the illegal engines, in and about the said caul, in so far as they hinder and obstruct the passage of the fish. In defence, it was contended, that nothing in the above statute 1771 could affect the fishing in question. The sheriff repelled this defence, and allowed a proof of the obstructions. At this stage of the proceedings, the Earls of Home and Tankerville conceived it their duty to appear in the suit, in order to protect their right of property. They presented a bill of advocation of the judgment of the sheriff. It was pleaded against this bill, that the statute had given exclusive jurisdiction to the sheriff to try all offences under it, subject only to appeal to the Justiciary Court. The Lord Ordinary refused the bill, but, on a second bill being presented, both parties agreed to submit to the jurisdiction, and abide by the determination of the Court of Session.

The respondents then contended, that the engines and mode of fishing exercised by the appellants, at their dam dyke, having the direct consequence of preventing the salmon from going up and down the river, the same fell directly within the enacting words of the statute 1771. On the other hand, the appellants, in answer, maintained that the respondents had laid their action improperly; they founded solely upon the statute 1771, which enacts only penalties, yet the respondents prayed that the dam dyke should be taken down and demolished. They further contended, that whatever may have been the views of some of the parties in applying for this act, yet that nothing therein contained did extend or could be construed to affect the mode of fishing exercised by the appellants at this dam dyke. The right of fishing is itself admitted, and this ancient mode of carrying

it on is established. The legislature could not, in natural justice, deprive the appellants of their property without any consideration. That this act only prohibits a certain mode of fishing during *close time;* and, from the title and the preamble of the act, it clearly appeared that this act did not extend beyond this. The fishings, therefore, of the Tweed having been subject to no regulations when this act passed, and it being totally silent as to these, it was to be inferred that every proprietor was to be left to employ every mode and every engine which he could lawfully use before this statute. Besides, the dam dyke, pock nets, &c. used by the appellants in this fishing, are not engines placed to prevent the fish from going up and down the river. The sole and immediate purpose of them is, for taking or killing the fish. And the statute has only relation to engines erected or set up after the date of the act, and not to those previously in use, and established.

The Court pronounced this interlocutor :—" Upon report Mar. 2, 1773.
" of Lord Gardenston, and having advised the memorials
" given in for the parties, the Lords repel the defences pro-
" poned for the defenders, and remit the cause to the she-
" riff."

Against this interlocutor the present appeal was brought.

Pleaded for the Appellants.—The act 1771 neither does, nor was meant to extend to, the mode of fishing exercised by the appellants at their dam dyke. The sole purpose of the statute is to prevent all fishing whatever on the river at certain seasons, when the fish are depositing their spawn, and to preserve the young fry and brood of salmon. The preamble states, " That salmon gilses, salmon trouts, and whit-
" lings, and the spawn or fry thereof, are frequently killed,
" taken, and destroyed at improper seasons in the river Tweed,
" and the rivers and streams which run into the same, and
" also within the mouth or entrance of the said river, *to the*
" *great detriment of the owners and occupiers of the fisheries,*
" *and loss to the public :* For remedy whereof," &c. The sole objects, therefore, of the act were to prevent the taking and destroying these fish at improper seasons, and to improve the fisheries for the benefit of the *owners* and occupiers. But the respondents construe this statute into an entire destruction of all modes of fishing previously established, and, of consequence, to the appellants' mode of fishing, though exercised beyond the memory of man. The clause in the

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statute, upon which the respondents rely, as chiefly operating against the dam dyke, can neither be extended to it in words, nor by construction. In the whole clause dam dykes of any kind are never mentioned, and the clause only inflicts penalties on such as should, after the 12th day of May 1771, use the unfair practice of beating the water, or place or set any white object on the river to frighten the fish from going up the water.

Pleaded for the Respondents.—The mode of fishing complained on the part of the respondents, and the engines therein used, are prohibited both by the laws of England and Scotland; and as they have the direct effect of preventing the fish from going up and down the river, they fall within the intendment and enactment of the late statute of 1771. The practice of driving the salmon out of the pinfolds into the back nets, falls within the *ipsissima verba* of the statute, whereby persons are prohibited to beat the water, which the appellants always do when they observe salmon in the pinfolds.

After hearing counsel, it was
Ordered and adjudged that the interlocutors complained of be affirmed.

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

Not reported in the Court of Session.

(M. 7221.)

JOHN BOYD, - - - *Appellant;*
JAMES STEEL, - - - *Respondent.*

House of Lords, 10*th March* 1775.

ABSOLUTE DISPOSITION—BACK BOND—REDEMPTION—IRRITANCY.

An absolute disposition was granted to lands bearing to be sold for a fair and adequate price then advanced, with a back bond of same date, allowing redemption of the lands within five years of the date thereof. This period expired without repayment. Held, in the Court of Session, that after expiry of the term, though no declarator of irritancy had followed, the lands were to be held irredeemable for