

[2d March 1840.]

(No. 3.) CHARLES TENNANT and Company, the St. Rollox Shipping Company, and WILLIAM SLOAN, as Agent for the said Shipping Company, as an Individual, and as Agent for other Vessels employed in navigating the Forth and Clyde Canal, Appellants.<sup>1</sup>

[*Pemberton — James Anderson.*]

The COMPANY of PROPRIETORS of the FORTH and CLYDE NAVIGATION, Respondents.

[*Lord Advocate (Rutherford) — Sir W. Follett.*]

*Statutes 8 Geo. 3. c. 63., and other Statutes, to 1 Geo. 4. c. 48. (Forth and Clyde Navigation Acts), Construction of.* — Held, construing the above statutes (affirming the judgment of the Court of Session, adhering to the Lord Ordinary's interlocutor,) that the Canal Company are not bound to deepen and enlarge the Forth and Clyde Canal, or any part of it, to the depth of ten feet, and that they are not bound to alter, enlarge, and deepen that part of the said canal extending from Port Dundas to St. Rollox Works, "so as to be of the same depth and dimensions  
" with the remainder of the collateral cut, and of the  
" other parts of the main canal."

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BY the statute 8 Geo. 3. c. 63. the respondents were incorporated into a company, under the name of "The  
" Company of Proprietors of the Forth and Clyde  
" Navigation." The act proceeds upon the pream-

ble that “ whereas the making a navigable cut or  
 “ canal from the frith or river of Forth, at or near  
 “ the mouth of the river of Carron in the county of  
 “ Stirling, to the frith or river of Clyde at or near a  
 “ place called Dalmuir Burnfoot, in the county of  
 “ Dumbarton, with a collateral cut or canal to the city  
 “ of Glasgow, will open an easy communication be-  
 “ tween the friths of Forth and Clyde, as also  
 “ between the interior parts of the country.” The com-  
 pany were by the 1st section “ authorized and em-  
 “ powered to make and complete a cut or canal of  
 “ seven feet depth of water, navigable and passable for  
 “ boats, barges, and other vessels, from the frith or  
 “ river of Forth, at or near the mouth of the river of  
 “ Carron, passing on the north side of the house and  
 “ offices of Kerse, through or near Bainsford, to or near  
 “ Bønnymill, to or near Bankiermill in the county of  
 “ Stirling, to and through Dollator Bog, to or near  
 “ Inchbelly Bridge, to or near Calder Bridge, passing  
 “ betwixt Kilmardinny-hill and Beauclair, to or near  
 “ Saint Germain’s Loch, and betwixt Clobey-hill, and  
 “ the hill of Bladardy, to or near Three-part-mill-  
 “ dam, and to the frith or river of Clyde at or near  
 “ a place called Dalmuir Burnfoot; and the said col-  
 “ lateral cut of seven feet depth of water from the said  
 “ main canal, at or near a place called Bladardy,  
 “ through or near Partick, across the river Kelvin,  
 “ to the city of Glasgow aforesaid.”

By the 28th section it was enacted that “ to the end  
 “ that the said company of proprietors may be fur-  
 “ ther enabled to carry on so useful an undertaking,”  
 the said company of proprietors, “ their successors  
 “ and assigns, may lawfully raise and contribute

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“ among themselves, and in such proportions as to  
 “ them shall seem meet and convenient, a competent  
 “ sum of money for making and completing the said  
 “ navigable cut or canal and collateral cut, provided  
 “ that the sum does not exceed 150,000*l.* sterling money  
 “ in the whole, except as therein after-mentioned;”  
 and, by the 30th section, that in case the “ said sum  
 “ of 150,000*l.* sterling money, herein-before authorized  
 “ to be raised, shall be found insufficient for the  
 “ making, completing, and maintaining the said navi-  
 “ gable cut or canal and collateral cut, and other the  
 “ works hereby authorized to be made, and all neces-  
 “ sary charges and expenses relating thereto, then and  
 “ in such case it shall and may be lawful to and for the  
 “ said company of proprietors to raise an additional  
 “ sum of 50,000*l.*”

By section 46. it was enacted, that, “ in conside-  
 “ ration of the great charges and expenses which the  
 “ said company, their successors and assigns, will be  
 “ at in making, maintaining, and supplying with water  
 “ the said cut or canal and collateral cut, and in  
 “ making and maintaining all the other works hereby  
 “ authorized to be made and erected, it shall and may  
 “ be lawful to and for the said company, their suc-  
 “ cessors and assigns, from time to time and at all  
 “ times hereafter, to ask, and demand, take, and re-  
 “ cover, to and for their own proper use and behoof,  
 “ for tonnage and wharfage,” “ not exceeding the sum  
 “ of two-pence sterling per mile for every ton of iron,”  
 “ &c., “ and other goods,” &c., “ which shall be navi-  
 “ gated, carried, and conveyed upon and through the  
 “ said cut and canal or collateral cut, and so in pro-  
 “ portion for any greater or less quantity than a ton.”

And by other sections it was declared, that the rates and duties exigible for light boats, and other vessels without a loading or in ballast, should not exceed one penny per mile for every ton burden; and that lime and limestone should not pay more than one fourth, and ironstone more than one half, of the above-mentioned rates of toll; and full powers were granted to the company of proprietors to fix the amount of these rates in the manner therein prescribed, and with a view either to their reduction or subsequent advance, but always with and under the condition that they should not exceed the highest rate therein allowed.

It was provided by section 58, under certain qualifications, that if the distribution among the proprietors out of the profits of the canal should exceed the rate of ten per cent. upon the subscribed capital, then the rates, tolls; and duties should thereafter be made proportionably lower.

In the course of this undertaking, it became advisable to change the original line both of the canal and collateral cut; and the statute 11 Geo. 3. c. 62. was passed, which proceeds upon the preamble, that it would be much more beneficial to discontinue the course or track of the canal and collateral cut authorized and directed by the above-recited statute, and instead thereof, to carry “the said cut or canal  
 “ from Dollator Bog, the summit or point of partition  
 “ aforesaid, to the frith or river of Clyde, at or near  
 “ Dalmuir Burnfoot, by or near Inchbelly Bridge, to  
 “ or near Easter Calder, to or near Calder church, to  
 “ or near Clober-hill, to or near Bladardy-hill, and to  
 “ or near Three-part-mill-dam; and the said collateral  
 “ cut from the said main canal passing by Stocking-

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“ field, to or near a place called Thumblefield, to or  
“ near Cowcaddens, and to or near the townhead of the  
“ city of Glasgow;” and “ authorizes and empowers”  
the company to continue, make, and complete, the  
main canal in the direction above pointed out, and  
“ the collateral cut from the said main canal, passing by  
“ Stockingfield, to or near a place called Thumblefield,  
“ to or near Cowcaddens, and to or near the townhead  
“ of the city of Glasgow.”

By the statute 13 Geo. 3. c. 104. the company was empowered to borrow a sum not exceeding 70,000*l.* on the credit of the navigation, and to assign the tolls, rates, and duties in security thereof; and it was therein expressly provided, sect. 5., that the money so to be borrowed should be applied “ in making, maintaining, and  
“ completing the navigable cut and canal, and collateral  
“ cut, and other works authorized by the two before-  
“ recited acts to be made, and in carrying the several  
“ powers, provisions, and authorities therein and herein  
“ contained into effectual execution, so far as relate  
“ to the navigable cut or canal from the frith or river  
“ of Forth to the frith or river of Clyde, and to the  
“ collateral cut from the same to the city of Glasgow,  
“ and to no other use or purpose whatsoever.”

In 1775 the main line of the canal was completed from the Forth to or near Stockingfield, and in 1777 the collateral cut was brought past Stockingfield to Hamilton-hill, which is within the liberties of the city of Glasgow, and there a basin was formed, which became the canal harbour of Glasgow till 1790.

The statute 24 Geo. 3. c. 57., passed in the year 1784, set forth, that “ whereas the eastern branch of the said  
“ canal, from the river Forth to a place called the Stock-

“ ingfield, and the collateral cut from thence to the city  
 “ of Glasgow or neighbourhood thereof, were com-  
 “ pleted several years ago;” and after narrating that  
 the sums borrowed by the company had been expended,  
 and that a considerable debt had been contracted,  
 authorized the Barons of Exchequer to advance 50,000*l.*  
 towards completing the works, on condition that, when  
 the debts should be paid off, government should draw  
 dividends along with the proprietors, in proportion to  
 the stock of 50,000*l.* they held in the company.

The statute 27 Geo. 3. c. 55., passed in the year  
 1787, recited the 11 Geo. 3. c. 62., and narrated that the  
 main cut or “ canal has been carried on to Stocking-  
 “ field, and the collateral cut has been finished as far as  
 “ or near to the townhead of the city of Glasgow;” and  
 it enacts, section 2., “ that the said company of pro-  
 “ prietors, their successors and assigns, shall be and they  
 “ are hereby authorized and empowered, by themselves,  
 “ their deputies, agents, officers, workmen, servants, and  
 “ assigns, to make and complete the said main cut or  
 “ canal and collateral cut, as far as the same are  
 “ already finished, of such depth of water as shall be  
 “ equal to eight feet at least in every part thereof,  
 “ navigable and passable for boats, barges, and other  
 “ vessels.” And power and authority is granted to  
 them to raise the banks of that part of the said main  
 canal and collateral cut which has been finished, and  
 otherwise to do and perform what they shall judge  
 necessary to make the same of the depth of water of  
 eight feet at least. The main line as well as the col-  
 lateral cut terminating at Hamilton-hill were accord-  
 ingly made of the depth of eight feet.

With a view to a more adequate supply of water for

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the Forth and Clyde canal, an agreement was entered into betwixt the company of proprietors and the proprietors of the Monkland Canal, (the western extremity of which last was about a mile and a half to the east of the collateral cut,) whereby it was agreed, “that the  
“ company of proprietors of the Great Canal shall, at  
“ their own expense, form a junction of the Monkland  
“ and Great Canals, by a canal of the same size and  
“ depth with the Monkland Canal to join the Great  
“ Canal, in such manner and at such place as to the  
“ proprietors of the Great Canal may appear most  
“ advisable and expedient.”

A joint act of parliament was applied for by the proprietors of the two canals. This new act, the 30 Geo. 3. c. 73., intituled “An Act for forming a junction between the Forth and Clyde Navigation and the Monkland Navigation, and for altering, enlarging, and explaining several former acts passed for making and maintaining the said navigations,” proceeds on the preamble and representation, inter alia, that under the powers conferred by the statute 8 Geo. 3. “the  
“ main line of the Forth and Clyde Navigation is now  
“ nearly finished, and a collateral cut is made from the  
“ same to a place called Hamilton-hill, within the dis-  
“ tance of a mile or thereabouts from the city of  
“ Glasgow:” that the aforesaid two companies were  
“ desirous to have a junction formed between the said  
“ two canals, and that it would be highly beneficial to  
“ the public at large if the company of proprietors of  
“ the Forth and Clyde Navigation were empowered to  
“ carry on their collateral cut from Hamilton-hill to  
“ the west end of the Monkland Canal, at or near the  
“ townhead of the city of Glasgow, and were enabled

“ to purchase lands for the purpose of making an  
 “ harbour and basin at or near a place called Hun-  
 “ dred-acre-hill, and for the purpose of building  
 “ houses and warehouses for the accommodation of  
 “ merchants and others resorting thereto, and were also  
 “ enabled to make and lay out roads, lanes, and pas-  
 “ sages leading from the same to the city of Glasgow.”

It is then enacted, section 1., “ that from and after  
 “ the passing of this act it shall and may be lawful to  
 “ and for the said company of proprietors of the Forth  
 “ and Clyde Navigation, their successors and assigns,  
 “ and they are hereby authorized and empowered, by  
 “ themselves, their deputies, agents, officers, workmen,  
 “ servants, and assigns, to complete and finish the said  
 “ collateral cut or canal of such depth of water as shall  
 “ be equal to eight feet at least in every part thereof,  
 “ navigable and passable for boats, barges, and other  
 “ vessels, from the aforesaid place called Hamilton-hill  
 “ to or near a place called Hundred-acre-hill, and from  
 “ thence by a canal not exceeding the above dimen-  
 “ sions, and navigable and passable as aforesaid, to the  
 “ west end of the Monkland Canal, at or near the  
 “ townhead of the city of Glasgow ;” and by the said  
 section of the statute, all the powers, privileges, and  
 authorities granted by the previous acts were extended  
 to, and were declared to remain in full force and effect,  
 and to be exercised and enjoyed by the said company  
 of proprietors of the Forth and Clyde Navigation, so as  
 “ to complete the said collateral cut or canal, of the  
 “ dimensions aforesaid, by the line herein described,  
 “ from Hamilton-hill aforesaid to the west end of the  
 “ Monkland Canal, or at or near the townhead of the  
 “ city of Glasgow.” Section 2. provides that all the

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powers, privileges, and authorities granted to the Forth and Clyde Navigation Company by the previous acts, in regard to making reservoirs, “levying tolls, and for all “other purposes respecting or in any ways relating to “the main cut or canal or collateral cut therein mentioned, shall be extended to, and shall remain and “be construed to remain in full force and effect, and “shall be exercised and enjoyed by the said company “of proprietors of the Forth and Clyde Navigation, “so far as the same are or may be necessary for “enabling the said company of proprietors of the “Forth and Clyde Navigation to complete the said “collateral cut or canal, of the dimensions aforesaid, by the line herein described, from Hamilton-hill aforesaid to the west end of the Monkland Canal, “at or near the townhead of the city of Glasgow.”

By virtue of the 30 Geo. 3. c. 73. the collateral cut was extended to Hundred-acre-hill (now called Port Dundas), and junction effected by means of a canal continued onwards to the west end of the Monkland Canal.

By the statute 39 Geo. 3. c. 71., which proceeds upon the preamble, “that the said company having “completed the said navigation, whereby a safe and “easy communication is opened from the east to the “west sea, and having discharged all the debts contracted in carrying on their works,” the company were empowered to redeem from the Exchequer the shares held by the government in the canal under the act 24 Geo. 3. c. 57.; and the outlay or sums actually expended by the company were accumulated into a capital stock of 421,525*l*.

The statute 46 Geo. 3. c. 120., proceeding upon the

preamble that the Forth and Clyde Navigation was then finished, enacts, section 7th, “ that from and after the  
 “ passing of this act the several and respective rates  
 “ and duties granted by the before-recited acts, or any  
 “ of them, on all goods and commodities, and on light  
 “ or empty vessels, navigated or conveyed on the said  
 “ canal and collateral cut, and lying in the harbours  
 “ and basins, and on the quays and wharfs belonging  
 “ thereto, and all exemptions from the said rates and  
 “ duties, shall cease and determine, and be no longer  
 “ paid or payable or allowed, save and except as to  
 “ any arrears of the said several rates and duties which  
 “ may at the passing of this act remain unpaid, or to  
 “ any fine, penalty, or forfeiture relating thereto which  
 “ shall have been previously incurred.” And in lieu  
 of these rates and duties, it was further enacted, section 8., “ that in consideration of the great charge and  
 “ expenses already incurred and to be incurred by  
 “ the said company, their successors and assigns, in  
 “ making, maintaining, and supplying with water the  
 “ said canal and collateral cut, and all the other works  
 “ therewith connected, it shall and may be lawful to  
 “ and for the said company of proprietors, their suc-  
 “ cessors and assigns, from time to time, to ask,  
 “ demand, take, and recover, to and for their own  
 “ proper use and behoof, on all goods and commo-  
 “ dities, and on light or empty vessels navigated or  
 “ conveyed on the said canal and collateral cut, and  
 “ lying in the harbours and basins, and on the quays  
 “ and wharfs belonging thereto, the following rates  
 “ and duties; that is to say, on all goods and com-  
 “ modities whatever, so navigated and conveyed, a duty  
 “ not exceeding four-pence sterling per ton per mile;”

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and also to impose a smaller duty on light vessels, therein particularly set forth.

The depth of the main line and collateral cut, as far as Port Dundas, as originally made, was eight feet, and the rest of the collateral cut, onwards to the Monkland Canal, (and now called the cut of junction,) four and a half feet.

In 1814 the act 54 Geo. 3. c. 195. was obtained, granting to the respondents permission to make certain additions to their works at Port Dundas and Grange-mouth, and also containing the following provision in section 2.: “ And be it further enacted, that the said  
“ company of proprietors shall be and they are hereby  
“ authorized and empowered,” &c. “ to alter, widen,  
“ and enlarge the said canal, collateral cut, and cut of  
“ junction, and the works thereto belonging, and to  
“ raise the banks or sink the bed thereof, in such a  
“ way or manner as the said company of proprietors  
“ or the governor and council shall think fit, for  
“ making the same ten feet depth of water in every  
“ part thereof, navigable and passable for boats, barges,  
“ and other vessels.” The statute also contained the following provision in regard to borrowing money for these operations, section 17., “ That it shall and may be  
“ lawful to and for the said company of proprietors to  
“ borrow and take up at interest, upon the credit of  
“ the rates and duties granted by the said recited acts  
“ and this act, or any or either of them, any sum or  
“ sums of money not exceeding in the whole the sum  
“ of 40,000*l.* sterling, for the purpose of enlarging and  
“ extending the basin, and making new streets and  
“ wharfs at Port Dundas; and of altering, widening,  
“ and enlarging the said canal, collateral cut, and cut

“ of junction with the Monkland Canal, and the works  
 “ thereto belonging, and raising the banks or sinking  
 “ the bed thereof for making the same ten feet depth  
 “ of water in every part thereof, or for any or either of  
 “ such purposes.”

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The respondents, as alleged, expended the whole money borrowed by them under the discretionary powers of the above act, partly in enlarging the harbour Port Dundas, partly in widening and deepening the cut of junction and including it in the harbour, and partly in strengthening and deepening other parts of the canal. The canal and collateral cut, as far as Port Dundas, were made nine feet deep.

The sum which the last-mentioned statute empowered the company to borrow having been expended, the respondents in 1820 obtained power to borrow the additional sum of 80,000*l.*, by statute 1 Geo. 4. c. 48., which proceeds on the preamble or declaration, that the company had “ altered, widened, and enlarged the said  
 “ canal and collateral cut, and increased the depth  
 “ thereof to nine feet, and have enlarged and extended  
 “ the basin, and formed new wharfs at Port Dundas ;  
 “ and in so doing, and in executing other works for  
 “ the improvement of the said navigation, since the  
 “ passing of the said act of the 39th year of the reign  
 “ of his late Majesty, have laid out and expended  
 “ various sums of money, amounting to 98,315*l.*, includ-  
 “ ing the sum of 40,000*l.* borrowed under the authority  
 “ of the said act of the 54th year of his late Majesty’s  
 “ reign ;” and also, “ that it was just and reasonable  
 “ that the said company of proprietors should be fully  
 “ remunerated for all the money then and since ex-  
 “ pended by them in completing and improving the

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“ said great national undertaking, and the works  
“ thereto belonging: And whereas it would be highly  
“ beneficial to the public, if the said company of pro-  
“ prietors were empowered to borrow a farther sum of  
“ money, to enable them to execute and carry into  
“ complete effect the powers of the said last recited act  
“ of the 54th year of the reign of his said late Majesty  
“ Geo. 3. for deepening the said canal, collateral  
“ cut, and cut of junction, to the full depth of ten  
“ feet.”

By that statute all the clauses in the former acts  
restricting either the amount of capital or the amount of  
dividend to be paid upon the capital were repealed;  
and it was provided that the capital stock of the com-  
pany should be 519,840*l.*, and that the proprietors  
should be entitled to receive dividends upon it out of  
the revenues and profit of the said navigation, without  
any limitation or restriction as to amount.

By section 3. the company are authorized and em-  
powered to borrow 80,000*l.* sterling upon the credit of  
the tolls, rates, and duties granted by the foresaid acts,  
“ for making the said canal, collateral cut, and cut of  
“ junction ten feet deep in every part thereof, as autho-  
“ rized by the said last-recited act, and providing addi-  
“ tional supplies of water for that purpose;” and by the  
4th section it is enacted, “ that the money so to be bor-  
“ rowed, and for which such assignment shall be given  
“ and granted, shall be applied for carrying the pur-  
“ poses herein-before mentioned into effectual execution,  
“ and to or for no other use or purpose whatsoever.”

In December 1831 the appellants (who had pre-  
viously paid the dues exacted from them, and whose  
works at St. Rollox are situated on the cut of junction,

and, as alleged by them, near the townhead of Glasgow,) applied for a suspension and interdict against the respondents obtaining payment of dues, and subsequently brought a summons of declarator in aid of the process of suspension; maintaining that they were not bound to pay dues until the canal company—(1), had made that part of the canal called by the respondents the junction cut of the same depth as the rest of the collateral cut; and (2), had made the whole canal, including the collateral cut and cut of junction, ten feet deep.

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The conclusions of the appellants summons were, that the company of proprietors of the Forth and Clyde Navigation are bound to deepen and enlarge every part of the said canal, and to make it ten feet deep in every part thereof, navigable and passable for boats, barges, and other vessels, in the manner prescribed, and in terms of the powers and authority conferred on them, by the above-recited statutes; or, at least, to alter, enlarge, and deepen that part of the said canal extending from Port Dundas to St. Rollox Works at the townhead of Glasgow, so as to be of the same depth and dimensions, and navigable and passable for the same boats, barges, and other vessels, with the remainder of the collateral cut, and of the other parts of the main canal; and that the said canal and collateral cut, not being ten feet in depth in every part thereof, navigable and passable for boats, barges, and other vessels, the said company of proprietors have no right or title to exact the present rate of duties for the goods and commodities conveyed, or for the vessels navigated by them upon or through the said canal, and that they are not entitled to exact any higher rate of duties than those allowed by the statute

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8 Geo. 3. c. 63.; and the same being so found and declared, the said company of proprietors ought and should be decerned and ordained, by decree foresaid, to reduce the duties upon the vessels navigated, and the goods and commodities carried and conveyed upon and through the said cut or canal; and that they should be interdicted, prohibited, and discharged from asking, imposing, levying, or exacting a higher rate of duties than those allowed by the foresaid statute, 8 Geo. 3. c. 63., until it be deepened to the depth of ten feet; and, in particular, that it ought and should be found and declared, by decret foresaid, that the portion of the said canal or collateral cut extending from Port Dundas to St. Rollox Works at the townhead of Glasgow, not being of equal depth and dimensions with the other parts of the said canal or collateral cut, and not being navigable or passable for the same boats, barges, and other vessels which navigate and pass the other parts thereof, the said company of proprietors have no right or title to impose and levy tonnage duties, or to exact the same from the appellants for the vessels navigated, and the goods and commodities carried and conveyed by them, along that portion of the said cut or canal; or, at all events, that they are not entitled to exact any higher rate of duties than those allowed by the statute 8 Geo. 3.; and the same being so found and declared, the said company of proprietors ought and should be interdicted, prohibited, and discharged from asking, imposing, levying, or exacting the duties or tolls now exigible by the present table of rates, or any other duty or toll whatsoever, for the vessels navigated and the goods and commodities conveyed upon or through the said portion of the collateral cut or canal, until it be

enlarged and deepened to the same extent with the other parts of the said canal. And there was also a conclusion for repetition of such sum as should be ascertained to be the amount of tolls and duties illegally levied or to be levied from the appellants.

The defence maintained by the respondents in the suspension and in the declarator which were afterwards conjoined was:—(1.) The history and objects of the canal, as well as the phraseology of the statutes, establish a distinction of depth between that part of the collateral cut which extends to Port Dundas, and that part of it which is now called the cut of junction; and clearly indicate, that it never was the intention of the legislature to make it imperative that the cut of junction should be made of the same depth with the other parts of the canal; while, at the same time, the act 30 Geo. 3. c. 73., which authorizes the formation of the cut of junction, extends the full powers of the previous acts for levying tolls, making them equally applicable to the collateral cut, which is therein described as extending “from Hamilton Hill “aforesaid to the west end of the Monkland Canal.” (2) Although the statute 54 Geo. 3. empowered and permitted the respondents to execute certain operations, and among others to deepen the canal to ten feet, and to borrow certain sums of money for the purpose of executing these operations or either of them, it did not make it imperative on the respondents to avail themselves of these powers, or to execute these improvements, or, in particular, to deepen the canal to ten feet; but, on the application of the canal company, and on the narrative of its being for the benefit of the company to have a power of deepening it, merely bestowed that power upon the company, to be exercised within certain

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limits according to its own discretion. (3.) The dues complained of were not granted as an equivalent for deepening the canal, but are levied under the authority of an act of parliament passed ten years before the operation of deepening was contemplated. Neither were the different legislative augmentations of the capital stock granted as an equivalent for further deepening of the canal, but, on the contrary, were merely declaratory enactments of the amount of the funds actually expended in the undertaking, and expressly granted as a reasonable indemnification for the sums so expended, and for the great loss of interest thereon. (4.) Even supposing it to have been the intention of the legislature to make it imperative on the respondents to deepen the canal to ten feet, it cannot be held to have done so under the sanction of the forfeiture or suspension of the company's right to exact dues, which they had been entitled to exact for a long course of previous years, more especially as the statutes assumed that the payment of these dues was not to be interrupted or suspended, and contained provisions founded on that assumption. (5.) The right to exact those dues having been vested in the respondents by the statute 46 Geo. 3., which has never been repealed or abrogated, either in whole or in part, the respondents could not be deprived of that power by implication, in consequence of the non-implementation of any alleged obligation said to be imposed upon them by a subsequent statute; more especially where that alleged obligation is different from the consideration for which the power to levy the dues in question was granted.

The Lord Ordinary, after ordering cases, (9th July 1836) pronounced the following interlocutor:—“ The Lord Ordinary having considered the revised cases for

“ the parties in these conjoined processes of declarator  
 “ and suspension, and having also considered the various  
 “ statutes referred to, finds that the defenders are not  
 “ bound to deepen and enlarge the Forth and Clyde  
 “ Canal, or any part of it, to the depth of ten feet;  
 “ finds that they are not bound to alter, enlarge, and  
 “ deepen that part of the said canal extending from  
 “ Port Dundas to St. Rollox Works, ‘ so as to be of  
 “ ‘ the same depth and dimensions with the remainder  
 “ ‘ of the collateral cut, and of the other parts of the  
 “ main canal;’ and therefore, and in respect that the  
 “ whole other declaratory conclusions of the libel, as  
 “ well as the reasons of suspension, are founded on the  
 “ affirmative of the two preceding propositions, sustains  
 “ the defences, and assoilzies the defenders from the  
 “ whole conclusions of the declaratory action; and in  
 “ the suspension, repels the reasons of suspension, re-  
 “ fuses the interdict, and decerns; finds the defenders  
 “ and respondents entitled to expenses; allows an ac-  
 “ count thereof to be given in, and when lodged, remits  
 “ the same to the auditor to be taxed, and to report.”  
 His Lordship added the subjoined note.<sup>1</sup>

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<sup>1</sup> “ *Note.*—In this case, as in many others in which a series of statutes  
 “ have been successively passed for modifying, altering, or extending the  
 “ limits and the administration of a great public undertaking, it has  
 “ happened that the expressions used in the various enactments are not  
 “ so accurately suited to each other as altogether to exclude questions of  
 “ construction founded upon nice verbal criticism; but on the present  
 “ occasion, and even giving the pursuers full benefit of all the cavils  
 “ which can be raised on the occasional inaccuracy or apparent incon-  
 “ sistency of expression in those different enactments, it does not appear  
 “ to the Lord Ordinary that there are any grounds for either of the  
 “ propositions maintained by them.

“ The first in the order of the argument in the cases, though forming  
 “ the second conclusion of the libel, is that which relates to the deepening  
 “ of that part of the canal from Port Dundas to St. Rollox Works to the

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The appellants reclaimed against the Lord Ordinary's interlocutor, whereupon the Lords of the First Division

“ general statutory depth of the canal. The pursuers argument on this  
“ point is founded, 1st, on the original statutes of the 8th and 11th Geo. 3.  
“ c. 62. and 63., enacting that the collateral cut should extend to the city  
“ of Glasgow, or to a point at or near ‘ to the townhead of Glasgow ;’  
“ and, 2dly, on the assumption that the ‘ townhead of Glasgow ’ denotes  
“ a point locally situate at or near St. Rollox Works, and farther to the  
“ eastward than Hundred-acre Hill or Port Dundas, at which the canal,  
“ of the general statutory depth, now terminates.

“ Looking at the terms of the various statutes, the Lord Ordinary  
“ considers this proposition to be utterly untenable. The main object of  
“ the line of navigation was to connect the Forth and Clyde, and with  
“ that was combined the communication between that line and the city  
“ of Glasgow, by what was termed a collateral cut, both being of the  
“ depth of seven feet. By the act of the 11th Geo. 3. in some respects  
“ altering the statute of 8th Geo. 3. originally authorizing the canal, the  
“ collateral cut was to be made ‘ from the said main canal, passing by  
“ ‘ Stockingfield, to or near a place called Thimblefield, to or near Cow-  
“ ‘ caddens, and to or near the townhead of the city of Glasgow.’ The  
“ sense attached to these last expressions appears to the Lord Ordinary  
“ to be sufficiently ascertained, not only by the proceedings of the parties,  
“ but by the subsequent statutes. At first the collateral cut was com-  
“ pleted to a point called Hamilton Hill, where a basin was established  
“ for the trade of Glasgow ; and it seems to have been understood by all  
“ parties concerned, that this was the accomplishment of the collateral  
“ cut, as originally contemplated. Accordingly, the subsequent statutes  
“ of 24 Geo. 3. c. 57. and 27 Geo. 3. c. 55., passed in relation to this  
“ undertaking, expressly bear that the collateral cut from the main canal  
“ to the city of Glasgow has been completed, the expression in the first  
“ statute being, that it had been completed ‘ to the city of Glasgow, or  
“ ‘ neighbourhood thereof,’ and in the latter, that the collateral cut had  
“ been completed ‘ as far as or near to the townhead of the city of Glas-  
“ gow,’ being the very words employed in the former statute of the  
“ 11 Geo. 3. In these circumstances, and considering the nature of the  
“ point in dispute, the Lord Ordinary cannot listen to the averment now  
“ made, at the distance of half a century, that this was all a misrepresen-  
“ tation by the canal proprietors, and that the townhead of Glasgow then  
“ denoted a particular point, totally different from that to which the canal  
“ had, at the passing those statutes, been extended.

“ Next comes the statute of 30 Geo. 3., by which the canal company  
“ were empowered, in the first place, to deepen the whole canal and the  
“ collateral cut connecting it with Glasgow to the depth of eight feet ; to  
“ prolong the collateral cut from Hamilton Hill, its original termination,  
“ to Hundred-acre Hill, now Port Dundas, and from that point to con-  
“ nect the navigation with the Monkland Canal. The latter operation  
“ had been the subject of an agreement between the proprietors of the

pronounced the following judgment:—“ The Lords  
“ having heard counsel for the parties in their own

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“ two canals, by which the proprietors of the Forth and Clyde Canal  
“ bound themselves to join the two ‘by a canal of the same size and depth  
“ ‘ as the Monkland Canal.’ Accordingly, nothing can be clearer than  
“ the distinction made in the statute 30 Geo. 3., passed, in part at least,  
“ for carrying this agreement into effect between the depth of the canal  
“ and collateral cut as far as Hundred-acre Hill or Port Dundas, the  
“ new point of connexion with Glasgow, and the depth of the line  
“ between Hundred-acre Hill and the Monkland Canal. It authorizes  
“ the first to be made ‘of such depth of water as shall be equal to eight  
“ ‘ feet at least,’ and the latter to be by a ‘canal not exceeding the above  
“ ‘ dimensions.’ Accordingly, as far as Hundred-acre Hill, now Port  
“ Dundas, the canal was made eight feet deep, being the depth of the  
“ general line of communication, and the latter four feet and a half,  
“ being the depth at that time of the Monkland Canal, and the depth  
“ stated in the estimate lodged in the Parliament Office previous to the  
“ passing of the statute.

“ Considering all these circumstances—the terms of the statute, and  
“ the practical construction put upon them by all parties concerned—the  
“ proposition of the pursuers, that the collateral cut of the general statu-  
“ tory depth must be extended from Hundred-acre Hill, or Port Dun-  
“ das, to the Monkland Canal, or at least to St. Rollox Works, appears  
“ to the Lord Ordinary to be unwarranted and absolutely untenable.

“ The other part regards the depth of the main line of the canal and  
“ collateral cut connecting it with Glasgow, forming the subject of the  
“ first conclusion of the summons. The canal is confessedly eight feet  
“ deep at least. But it is maintained by the pursuers that the depth  
“ ought to be ten feet, and that while it is not completed to that depth,  
“ they are not bound to pay the statutory dues. From the nature of the  
“ statutes referred to, it is unnecessary to inquire into the question, how  
“ far terms, in expression merely permissive, are to be construed as im-  
“ perative or binding against the proprietors of an undertaking like that  
“ in question, when they are combined in the same statute, with the  
“ power to levy dues to a certain amount. It so happens here, that, by  
“ the statute of 27 Geo. 3., authorizing the deepening of the canal, no  
“ additional canal dues were allowed to be levied; while, on the other  
“ hand, the statute 46 Geo. 3., which did raise the dues, and under which  
“ the dues at present exigible are levied, contains neither an obligation,  
“ nor even a permission, to deepen the canal beyond eight feet, the depth  
“ at which it then stood. So that there are no grounds for construing  
“ the levying of the dues now exigible as conditional on the deepening of  
“ the canal beyond eight feet.

“ The first statute authorizing the depth of ten feet, is that of  
“ 54 Geo. 3. c. 195., which authorizes and empowers the Forth and  
“ Clyde Navigation, 1st, to enlarge and extend the basin at Port Dun-

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“ presence, and having resumed consideration of this  
“ reclaiming note, recal the interlocutor in so far as it

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“ das, and to make various other improvements; 2d, to alter, widen,  
“ and enlarge the said canal, &c., ‘in such way or manner as the said  
“ ‘ company of proprietors, or their governor or council, shall think fit,  
“ ‘ for making the same ten feet depth of water in every part thereof,  
“ ‘ navigable and passable for boats, barges, and other vessels.’ The sta-  
“ tute also empowered the borrowing of a sum of 40,000*l.* sterling, for  
“ the purpose of enlarging and extending the basin at Port Dundas, and  
“ for altering, widening, and enlarging the canal, ‘for making the same  
“ ‘ ten feet depth of water in every part thereof, or for any or either of  
“ ‘ such purposes.’ There appears no ground for construing this statute  
“ as imperative on the matter of deepening the canal. It contains no  
“ counterpart which can be considered as a consideration for such an  
“ obligation. For even as to the borrowing of money, the sums so raised  
“ might be lawfully expended, and, as it is averred by the defenders, were  
“ expended, on the other operations referred to.

“ The only other statement founded on by the pursuers is the 1 Geo. 4.  
“ c. 48., which neither authorizes an increased levy of dues, nor contains  
“ any enactments, either permissive or imperative, in regard to deepening  
“ the canal. It enables the proprietors, indeed, to borrow a sum of  
“ 80,000*l.*, upon the preamble that ‘it would be highly beneficial to the  
“ ‘ public if the company of proprietors were empowered to borrow a  
“ ‘ farther sum of money to enable them to carry into effect’ the powers  
“ of the preceding statute of the 54 Geo. 3. ‘for deepening the said  
“ ‘ canal, collateral cut, and cut of junction, to the full depth of ten feet;’  
“ and it also contains a removal of a limitation within which the profits of  
“ the company were, by former enactments, confined to ten per cent. at  
“ most.

“ In regard to this latter provision, it may be observed, that it proceeds  
“ on a preamble totally unconnected with the deepening of the canal, and  
“ which therefore cannot affect the present question. As to the power  
“ of borrowing money, the parties are at issue on the fact. The pursuers  
“ aver, and the defenders deny, that any money was borrowed under the  
“ authority of that statute. The point certainly admitted of being very  
“ easily ascertained, if the pursuers had been disposed to press it, which,  
“ from some passages in their revised case, it rather appeared to the Lord  
“ Ordinary that they are not. But, at any rate, it appears to him that  
“ the averment is irrelevant to the conclusions of the present action. For  
“ even if the money had been borrowed, and assuming, which he thinks  
“ doubtful, the right of the public to found on the terms in which the  
“ power to borrow is expressed, the utmost extent of the obligation im-  
“ posed by the enactment would be that of expending the sum so bor-  
“ rowed ‘in deepening the canal to the full depth of ten feet.’ It never  
“ could support the conclusion of the present action that the defenders  
“ were bound to make the whole canal of that depth, unless it was coupled

“ finds the defenders and respondents entitled to ex-  
 “ penses: Quoad ultra, adhere to the interlocutor  
 “ reclaimed against, and refuse the desire of the re-  
 “ claiming note: Find no expenses due to either party,  
 “ and decern.”

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The suspenders and pursuers appealed, and the judgment of the Court was affirmed on the grounds stated in the following judgment.

LORD CHANCELLOR.—My Lords, in this case Messrs. Tennant and Company, the proprietors of a manufactory situated on the banks of what is called the Junction Cut of the Forth and Clyde Canal, have instituted proceedings against the company of proprietors of the canal; the object of the suit being to compel the company to make that part of their canal called the collateral cut ten feet deep; it also had for its object to compel the company to make that part which is called the cut of junction ten feet deep. The summons further concluded, that the appellants might be repaid the sums of money they had paid for tolls, on the ground that those tolls were exacted as the consideration of the canal company making the canal in all its parts ten feet deep.

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Various acts of parliament were referred to in the argument, and I apprehend your Lordships will be of

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“ with another averment, which is nowhere made in the record, that the  
 “ sum so borrowed was sufficient to carry that operation into effect.

“ Upon the whole, then, the Lord Ordinary considers the demands of  
 “ the pursuers to be entirely unfounded, and to have been made under  
 “ circumstances which fully warrant him in finding them liable in  
 “ expenses.”

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opinion, that considering the provisions of those acts they conclude the whole question with one exception; that one exception being, whether the act of 1 Geo. 4. imposes an obligation upon the canal company which has not been complied with.

The proposition of the appellants, who failed below, and who have come to your Lordships bar to obtain a reversal of that decision, and to get the relief they prayed against the canal company, assumes, that by the act of parliament the company of the Forth and Clyde Navigation were bound to make what is called the collateral cut ten feet deep. It also assumes, that what the respondents call the junction cut is part of the collateral cut referred to in the earlier acts of parliament; and as a part of their proposition they contend that, by one of the acts of parliament which relates to the junction cut, the company were bound to make that portion of the cut ten feet deep. The questions with respect to the remedies which the appellants pray, namely, how far they are in a situation as against the canal company to compel them to make these portions of the canal ten feet, and how far they are entitled to a repetition of the tolls, can only arise in the event of your Lordships being of opinion that they have made out a right as founded upon the several acts of parliament.

Now, on a careful examination of the acts of parliament, it appears to me that several propositions are very clearly established; and if your Lordships should be of that opinion, it will be unnecessary to consider what remedies the pursuers might have had if they had made out their case. I believe your Lordships will find that by act of parliament it is clearly established,

that the collateral cut is a totally different work from what is called the junction cut, which was a continuation of the collateral cut, although the terms may be sometimes used indiscriminately, without distinguishing between the one and the other. Whether the collateral cut properly so called terminated at Hamilton Hill, and whether that is properly denominated the townhead of Glasgow, is in any view of the case mere speculation, inasmuch as I think it is quite clear that the subsequent acts of parliament treated the termination at Hamilton Hill as the termination of the duty which that act imposed upon the company, of making what is called the collateral cut.

I think it is perfectly clear also, that the junction cut being provided for and to be carried into operation under the authority of a distinct act of parliament, that act did not contain any obligation upon the company to make that portion of the canal ten feet deep. It appears that the collateral cut was completed in its present dimensions many years ago, and it appears likewise that the junction cut was also completed many years ago, as its present dimensions and the subsequent acts recognize the works effected in making the junction cut, without any objection being made to the mode in which those works had been completed. There is therefore a parliamentary recognition of the company having fulfilled the obligation which the prior act imposed upon them.

If this appear to be so on a review of the previous acts of parliament, your Lordships will have to consider how far the 54 Geo. 3., which authorized the company to extend the works so far as to deepen the canal as it respected both the collateral cut and the junction cut,

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imposed upon them the obligation, they having raised the sum of 40,000*l.* authorized by that act to be raised, and whether the provisions of the 1 Geo. 4. imposed a similar duty.

Now, my Lords, the acts of parliament commenced so early as the 8 Geo. 3.; that act clearly authorizes and enables the company to make a collateral cut, and the terminus there is described as the city of Glasgow, It is quite indifferent at what particular point that termination was to take place. The 11 Geo. 3. c. 62. authorizes the company to alter the course of their collateral cut. The second section authorizes the company to make a collateral cut "from the said  
" main canal, passing by Stockingfield, to or near a  
" place called Thimblefield, to or near Cow-caddens,  
" and to or near the townhead of the city of Glas-  
" gow." Now all the expressions to be found in that act of parliament are general and vague; they are "to  
" or near," which is exemplified by the map produced, in which Cow-caddens is to be found; Cow-caddens not being by any means near to the place where the canal passed. It is, however, a general description of a particular locality; and the place pointed out does not appear to me to be material, because I find a subsequent act of parliament, the 27 Geo. 3., taking up the same description and using the same words, clearly recognizes the completion of the works according to the description to be found in the act 11 Geo. 3.

If, in the state of the cause in which the Court of Session came to the decision appealed from, there was any fact necessary for the decision of the right between the parties, which either party might consider it essential to prove, and as to which proof

was denied them, no doubt that would be a just cause of complaint; but if there were facts decisive of the course found and recognized and established by acts of parliament, against which neither party could be permitted to aver and go into evidence in support thereof, it is obvious that the whole case was before the Court of Session, and they were entitled to take the first opportunity of deciding the case between the parties.

A great deal of argument has been employed upon the term, "the townhead of Glasgow." It is supposed to be some particular point going by that name, but there is no evidence, and I have no information upon that subject beyond what is contained in the act of parliament. Looking to the act of parliament, one would suppose that the townhead of Glasgow was rather a district than a point, and that it extended very considerably from east to west, for we find the Monkland Canal described in some acts of parliament as being in the townhead of Glasgow. We certainly find Hamilton Hill described in some acts as in the townhead of Glasgow. They are places not at a very great but at some considerable distance one from the other. All that, however, appears to me to be beside the question, because the acts of parliament have so recognized the transactions of the company as to make it perfectly immaterial whether the townhead of Glasgow be placed in one situation or another.

The act 27 Geo. 3. c. 55. recites the above clauses of the 11 Geo. 3., and states that since the passing of that act "the said main cut or canal had been carried on to " Stockingfield, and the collateral cut had been finished " as far as or near to the townhead of the city of " Glasgow;" the very expression used in the preceding

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act; that which was to be the terminus of the canal under the powers of the preceding act. It is very true that is stated to be finished "as far as or near to," which, it was argued, necessarily implied that it had not reached its terminus; but it had been completed quoad its terminus, otherwise it would not have been correct to say it had been finished "as far as or near to the townhead of the city of Glasgow." The act of parliament had for its object to enable the company to proceed further, not in point of extent, but of depth, because the former act having provided that it should be seven feet deep, the object of that act was to provide that it should be eight feet.

The 30 Geo. 3. c. 73. is the first act which has reference to the junction cut; but I will call your Lordships attention to the 27 Geo. 3. c. 55., which I have just referred to, as affording an answer to the argument, that the collateral cut had not been finished. The 27 Geo. 3. recites, that it had been finished up to the particular place described by the preceding act as the proper terminus. As to the construction of these two acts, the 30 Geo. 3. c. 73. removes all doubt. It recites that the collateral cut had been made from the main canal "to a place called Hamilton Hill, within the distance of a mile or thereabout from the city of Glasgow." It recites the act under which the Monkland Canal Company had made their canal, which last, it is to be recollected, was to be of the depth of three and a half feet. It then recites, "that it would be highly beneficial to the public at large if the Forth and Clyde Company were empowered to carry on their collateral cut from Hamilton Hill to the end of the Monkland Canal, at or near the townhead of the

“ city of Glasgow, and were enabled to purchase lands  
 “ for the purpose of making a harbour or basin at or  
 “ near a place called Hundred-acre Hill.” It then  
 enacts, “ that the company of proprietors shall be autho-  
 “ rized and empowered to complete and finish the said  
 “ collateral cut or canal, of such depth of water as shall  
 “ be equal to eight feet at least in every part thereof,  
 “ from Hamilton Hill to or near a certain place called  
 “ Hundred-acre Hill, and from thence by a canal, not  
 “ exceeding the above dimensions, to the west end of  
 “ the Monkland Canal, at or near the townhead of  
 “ the city of Glasgow.” Then the third section gives  
 anew all the powers of the former acts, and directs that  
 those powers shall be extended to the said collateral  
 cut.

It is very true that that act speaks of continuing the collateral cut, but it is quite clear that the collateral cut intended to be made by the former act had been completed; and it is clear that the same course of navigation was to be continued, but by a work quite distinct from the collateral cut referred to in the preceding act, and to be made under the authority of this act only; for if not, how are the expressions to be accounted for, that the canal company were to be authorized and empowered? According to the argument of the appellants they were bound to do so; and it was a part of the provisions of the earlier acts that the collateral cut, meaning by that expression that referred to in the preceding acts, should be continued to the townhead, which townhead of Glasgow they say was in the neighbourhood of the Monkland Canal.

Now the recitals in and enactments of the 30 Geo. 3. appear to me, first of all, to establish that the work called

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in the former acts the collateral cut had been completed, and that the junction cut was an entirely new cut to be carried into effect under the authority of this act and this act only; and the provision as to that was, that a certain portion of it, namely, so far as the Hundred-acre Hill, was to be not less than eight feet in depth; but the other provision as to the other part, from the Hundred-acre Hill to the Monkland Canal, was that it should not exceed eight feet in depth. There is nothing imperative upon the company to make it eight feet deep, but there is an express provision that they are not to make it more than eight feet. Whether that was for the security of the neighbourhood, or whether it might be more convenient as connected with the navigation of the Monkland Canal, which was then only three and a half deep, which by the 17th section of the act it was provided should be deepened to four and a half feet, it is not necessary to inquire. The provisions of the act are very distinct as to that portion of it between Hamilton Hill and Hundred-acre Hill and the junction of the Monkland Canal.

The next act of parliament is the act of 1806, which recites the act of the 30 Geo. 3., and recites that the Forth and Clyde navigation had been completed at a large expense. Now, whether the expression, “the Forth and Clyde navigation,” could properly include the collateral cut and the junction cut between those two navigations, it is not very material to inquire; but this act authorized the company to raise their tonnage. And the argument of the appellants is, that they had not performed the duties imposed upon them by the preceding acts, and that they were bound, out of the tonnage they were entitled to receive under the former

acts, to deepen their canal to a certain depth throughout the whole extent of the navigation. But this act recognizes that they have duly performed the duties imposed upon them by the former acts, and have incurred a great expense in carrying on those works, and therefore it authorizes them to receive this increased tonnage; and that tonnage imposed or rather authorized to be taken by that act of 1806 is the tonnage, and the whole tonnage, which the company have since taken, or which they are authorized to take.

Then comes the act of 1814, which establishes the same proposition by its recitals and enactments. It recites that it would be beneficial to encourage manufactories on the said canal, collateral cut, and cut of junction with the Monkland canal, speaking of them as totally distinct works. The second section authorizes and empowers the company to alter, widen, and enlarge the said canal, collateral cut, and cut of junction, and the works thereto belonging, and to raise the bank or to sink the bed thereof in such way and manner as they shall think fit for making the same ten feet deep; and then the 17th section authorizes them to borrow 40,000*l*.

It is not necessary to go over the same observations as to the recitals and enactments. With regard to the words it is quite distinct, but upon this act a different argument has been raised from that on the last, namely, that as the canal company were authorized to borrow 40,000*l*., and as the object of borrowing that 40,000*l*. was to deepen and widen the collateral cut and the cut of junction, that, having exercised the powers given to them by that act, they were bound to perform all those works. Certainly this is a very large and startling proposition for all companies who undertake great works,

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under the numerous acts of parliament now passed for that purpose. The argument at the bar was, that whenever any company obtain a parliamentary power to expend a large sum of money, and to reimburse themselves for the money so expended by tolls, they are bound to complete the works they have undertaken; that is to say, that every railway company which obtains an act of parliament, having authority to raise a certain sum of money, which is scarcely ever found adequate to the work, is bound to complete the works which they contemplated. That they are bound to apply the money which they are authorized to raise is true, but it is quite a new proposition that they come under an undertaking to complete the works. If that were so, it would be a very useless law to the community, because, as they are a corporation, you have no remedy against them beyond their corporate property. The existence of the right is a new proposition, and it is one the enforcement of which would produce very serious hardships upon those who undertook these works, on calculations which are found to be inadequate for the purposes intended.

Now it is clear, on consulting the act of parliament, that that 40,000*l.* was employed upon those works, which, however, were not all carried into effect, and for this simple reason, that the funds were not adequate to the purposes intended; but that the sum was raised and employed is clearly established by the recitals of the next act of parliament, the 1 Geo. 4. c. 48. But, independently of this, it is quite obvious that that act did not impose any obligation beyond that which might arise from having raised the 40,000*l.* There is no obligation upon the company to deepen the canal; it only authorizes them to do the same “in such manner

“ as they shall think fit.” Their duty, therefore, and the obligation they entered into with the public under that act of parliament, as I apprehend, was to employ the 40,000*l.*, which they were authorized to raise, in performing those works which were intended to be carried into effect by the provisions of that act.

The next and the last act I shall have occasion to refer to is the 1 Geo. 4. c. 48., and that recites that the whole of the 40,000*l.* had been expended; I am to assume properly expended; and that not only the 40,000*l.*, but a much larger sum had been expended by the company; and it also recites that the company had increased the canal and collateral cut to nine feet deep, making no mention of the cut of junction, for this obvious reason, that that had been deepened under the provisions of the former act. It then recites, “ that it “ would be highly beneficial to the public if the com- “ pany were empowered to borrow money to enable “ them to deepen the canal, collateral cut, and cut of “ junction to the full depth of ten feet.” They have then a power given them to raise 80,000*l.* upon the credit of the tolls, to be applied to the purposes of the act. That act again draws a distinction between the collateral cut and the junction cut; it recites that the collateral cut had been deepened, not to ten feet as intended by the act of 1814, but only to nine feet; it does not take any notice of the cut of junction, but recites that it would be for the benefit of the public, or might be for the benefit of the public, that all should be deepened to ten feet, and authorizes the company therefore to raise 80,000*l.* With regard to that 80,000*l.* there does not appear to be any doubt upon the fact, though there is no clear technical proof that the sum of 80,000*l.* has

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been raised; but it does not appear to me very important to inquire whether it has been raised or not. If it has not been raised, then it is clear that the argument of the appellants entirely fails, because the argument founded upon the decision in the Monkland Canal case<sup>1</sup> must be — inasmuch as you raised the money which you were authorized to raise, you shall not be permitted to receive tolls as a compensation for such expenditure, unless you have performed the works which that expenditure was intended to provide for. If the money was raised there was then the authority to which I have referred, and if it was not raised, they have still the power to raise it. The argument is supposed to apply in the event of the money being raised, but in the event of the money not being raised, the obligation clearly does not exist under the act.

Now I will suppose that the money has been raised; there is no allegation on the part of the appellants that the money raised has been improperly applied. If the money raised has been improperly applied, no doubt there would be a remedy for the public who may be called upon to pay tolls, in order to secure to the company the benefit which the expenditure of that money was intended to meet; but there is no such allegation. The provision of the act of parliament as affecting the application of the tolls (the tolls being raised under the provisions of the act of 1814) was, that the dividends should not exceed ten per cent., and that when they had reached ten per cent. the surplus arising from the tolls should be applied in reducing the tonnage; and the argument on the part of the appellants was this, that

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<sup>1</sup> Dixon v. Monkland Canal Company, 1 W. & S. 636.

this 80,000*l.*, being an additional burden thrown upon the tolls, and the interest on the 80,000*l.* so raised being one of the objects to which the tolls have been applied,—the period has been protracted at which the public would have a right to have the tonnage reduced. Whether such a case, if made and proved, would give a party a title to any relief or not, is quite unnecessary to consider, for there is no such case made; the allegation is quite immaterial to the present purpose; although material in the view the appellants took of the case, it is quite immaterial in the view which the Court of Session took of this case, and which your Lordships are likely to take. The view taken by the appellants is, that the money has been expended, and the allegation in the summons is, that the company ought to have divided among themselves the ten per cent., not upon the capital as provided for by the various acts of parliament, but upon the original capital, that is upon the limited sum which, in the first instance, was taken as the sum sufficient to carry the works into effect; all the subsequent acts having had the effect to increase the capital, and to extend of course the amount of the sum on which dividends were to be paid, and therefore, of course, requiring a much larger annual sum to meet the dividends, whether the dividends were five or six or ten per cent.; but there is no allegation that the money received for tonnage has been sufficient to pay even ten per cent. on the capital, as now existing under the various acts of parliament. The case, therefore, for reducing the duty on the tonnage is not stated upon the pleadings to have arisen; and there can be no doubt, from what appears on both sides, that that case has not at present arisen.

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The result therefore is, in the view I have taken of the acts of parliament, that the company have been under no default; that they have done that which under the acts of parliament they were authorized and compelled to do; that they have completed the collateral cut; that their having done so has been recognized by subsequent acts; that they have completed the cut of junction, and that has been recognized by the subsequent acts; that the 40,000*l.* raised under the 54 Geo. 3. is by the subsequent act recognized as having been properly applied; and that there is no case stated, as to any right arising to the appellants from the last act of parliament, authorizing the company to raise the 80,000*l.*, either that it has not been raised, which there is every probability that it has, from what is stated on the one side and the other, nor is there any case stated of its having been misapplied, or of the appellants having sustained any loss from the mode in which it has been applied.

Under these circumstances, I should advise your Lordships to affirm the interlocutor of the Court of Session. With regard to the costs, I think it is a very wholesome rule in cases in general, and one which I am desirous of following, that those who come to your Lordships bar with a case which they cannot support should pay the costs. Undoubtedly the cases from Scotland very often create a great difficulty in carrying that rule into execution. I am sorry to say, we find more difficulty in that respect in the appeals from that part of the kingdom than from any other; for it does more frequently happen in cases from Scotland, that the judges below are found to have differed in their opinion; and it may be very hard to apply that rule when

that is the case. The suitor finding that the judges were divided in opinion on what he conceived to be his right, some being in favour of that right and some against it, he may very well be supposed to be entitled to come to the place of the last resort to have his rights finally decided; and when that is the case one can hardly say that he ought to be visited with costs, for doing that which the judgment from which he has appealed would rather seem to authorize him to do. Under these circumstances, I am afraid it would be hard upon the appellants in the present case to make them pay the costs of the respondents; therefore I should advise your Lordships to affirm the interlocutor without costs.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

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*Appellant's Authorities.* — Blakemore v. Glamorganshire Canal Company, 1 My. & K. 154; Rex v. Inhabitants of Cumberworth, 3 B. & Ald. 108; Scales v. Vickery, 4 Bing. 448; Stourbridge Canal Company, 2 B. & Ad. 792; Dwarris on Statutes, 712.

*Note.* — See also Lee v. Milner in Exchequer, referred to by Lord Denman, C. J., in Regina v. Eastern Counties Railway, Trinity Term, 2 Vict.

RICHARDSON and CONNELL, — D. CALDWELL and SON,  
Solicitors.