

No. 55.

WILLIAM DIXON, Appellant.

MONKLAND CANAL COMPANY, Respondents.

*Condition—Repetition—Judicial Remit.*—Held, 1. (reversing the judgment of the Court of Session), That a Canal Company, who, in order to make their canal navigable for vessels drawing four and a half feet water, were authorized to levy certain increased dues, were not entitled to do so before the canal was so navigable; 2. That they were liable in repetition of the dues exacted prior to the canal being so rendered navigable; and, 3. (affirming the judgment), That a party having acquiesced in a judicial remit to a person of skill, was not thereafter entitled to insist on a proof in regard to facts reported upon by that person.

June 29. 1825.

2<sup>D</sup> DIVISION.  
Lord Reston.

IN 1770, an Act of Parliament was obtained, authorizing certain parties (incorporated by the Act under the name of ‘ the Company of Proprietors of the Monkland Navigation’) ‘ to make and complete a cut or canal of three feet depth of water, ‘ navigable and passable for boats, barges, and other vessels, ‘ from the Monkland collieries in the county of Lanark, beginning at a place called the Sheepford, in the ‘ parish of Old Monkland and county aforesaid, passing by or near the house ‘ of Drumpellier, by or near the Wellhouse bleachfield, to or ‘ near the city of Glasgow, and river Clyde.’ The Company were also empowered to make a waggon-way. The property of the canal was divided into one hundred shares of L.100 each; and the statute bore, ‘ that in consideration of the great ‘ charges and expenses which the said Company of proprietors, ‘ their successors and assigns, will be at in making, maintaining, ‘ and supplying with water the said cut or canal, and road or ‘ waggon-way aforesaid, 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 of proprietors, ‘ their successors and assigns, from time to time, and at all times ‘ hereafter, to ask, demand, take, and recover, to and for their ‘ own proper use and behoof, for tonnage and wharfage, for all ‘ coals, stones, timber, and other goods, wares, merchandises, ‘ commodities, and things whatsoever, which shall be navigated, ‘ carried, and conveyed upon or through the said cut or canal, ‘ such rates and duties as the said Company of proprietors, their ‘ successors and assigns, shall think fit, not exceeding the sum ‘ of 1d. sterling money per mile for every ton of coals, stones,

June 29. 1825.

‘ timber, dung, fuel, and other ‘goods, wares, merchandise, com-  
 ‘ modities, and things whatsoever, which shall be navigated,  
 ‘ carried, and conveyed upon and through the said cut or  
 ‘ canal.’

The canal was made; but the undertaking not being success-  
 ful, the Company entered into an arrangement with the Forth  
 and Clyde Canal Company, and, in 1790, obtained an Act of  
 Parliament, authorizing the Monkland Canal Company ‘ to  
 ‘ make, complete, and maintain a cut or canal, for the purpose  
 ‘ of forming a junction between the upper and lower lands of the  
 ‘ said Monkland Navigation, at or near a certain place called  
 ‘ Blackhill, and to extend the said Monkland Navigation from  
 ‘ the east; and of the same at Sheepford, in a certain line passing  
 ‘ by or near Faskine house to the river Calder, at or near Wood-  
 ‘ hall or Faskine mill; and to erect, build, repair, and main-  
 ‘ tain a sufficient number of locks between the different levels of  
 ‘ the said canal, to render the same navigable and passable for  
 ‘ boats, barges, and other vessels drawing four and a half feet  
 ‘ water along the whole range of the said Monkland Navigation,  
 ‘ and to widen, deepen, and enlarge the same where necessary for  
 ‘ that purpose.’ Power was given to raise L.10,000; and the  
 Act proceeds, ‘ And in consideration of the great charges and  
 ‘ expenses which will necessarily be incurred by the said Com-  
 ‘ pany of proprietors of the said Monkland Navigation, in mak-  
 ‘ ing, maintaining, and supplying with water the said cut or  
 ‘ canal, and works connected therewith, it shall and may be  
 ‘ lawful to and for the said Company of proprietors of the  
 ‘ Monkland Navigation, their successors and assigns, from time  
 ‘ to time, and at all times hereafter, to ask, demand, and recover,  
 ‘ to and for their own proper use and behoof, for tonnage and  
 ‘ wharfage, for all coals, stones, timber, and other goods, wares,  
 ‘ merchandise, commodities, and things whatsoever, which shall  
 ‘ be navigated, carried, and conveyed upon or through the said  
 ‘ cut or canal, such additional rates and duties as the said Com-  
 ‘ pany of proprietors think fit, not exceeding the sum of 1d. ster-  
 ‘ ling money per mile for every ton of coals, stones, timber,  
 ‘ dung, fuel, and other goods, &c.; which said rates and duties  
 ‘ shall be over and above, and in addition to the rates and duties  
 ‘ contained in the Act before recited, passed in the tenth year of  
 ‘ his present Majesty.’

The Company accordingly constructed the necessary locks,  
 and made the cut or conjunction contemplated. In these and  
 other matters essential to the canal they expended large sums,

June 29. 1825. stating that their expenditure above their income, including sums laid out in deepening, amounted to L.30,000, whereas the sum authorized to be raised by the statute, and deemed sufficient to meet the outlays required, was only L.10,000.

Dixon was proprietor of, and engaged in extensive coal and iron-works at the east extremity of the canal; and was in the constant habit of transporting to Glasgow a very large quantity of the produce of his mines by the Monkland Canal. The Company, in process of time, but, as was alleged, before deepening so as to render the canal navigable along the whole range for boats and barges drawing four and a half feet water, made a trifling addition to their charges, which was not challenged or objected to; but, Dixon learning that they had in contemplation to double the duty, raising it from 1d. to 2d. a-ton, still, as he said, without having deepened as directed, protested against the measure; and presented to the Court of Session a suspension and interdict against the exaction of tonnage dues beyond the rate of 1d. per ton per mile, as authorized by the statute 1770. The suspension was passed, but the interdict refused. Dixon then raised an action of declarator, concluding, that ‘ it  
 ‘ should be found and declared, that the said cut or canal not  
 ‘ being navigable or passable for boats and barges drawing  
 ‘ four feet and a half depth of water, the said Company of pro-  
 ‘ prietors, in imposing and levying tonnage duty at the rate of  
 ‘ 2d. per mile, have exceeded the powers conferred on them by  
 ‘ the aforesaid statute, and are acting in direct contravention  
 ‘ thereof; and that they have no right or title to exact from the  
 ‘ pursuer higher duties than at the rate of 1d. per ton for each  
 ‘ mile, for all the goods, &c. navigated or conveyed by them  
 ‘ along the said cut or canal; and the same being so found and  
 ‘ declared, the said Company of proprietors of the Monkland  
 ‘ Navigation ought and should be decerned and ordained, by  
 ‘ decree foresaid, to reduce the duties upon coals, goods, wares,  
 ‘ &c. navigated, carried, and conveyed by the pursuer upon and  
 ‘ through the said cut or canal to 1d. for each ton per mile,  
 ‘ and to cease and desist from imposing or levying from the pur-  
 ‘ suer a higher rate of duty;’ and that the sums unduly levied should be repeated.

The Lord Ordinary found, that ‘ the Company are, in the  
 ‘ first instance, entitled to levy the duties asked by them; but  
 ‘ that, in consequence of their doing so, the pursuer is entitled to  
 ‘ reasonable implement of those improvements in the navigation,  
 ‘ in consideration of which the exaction of said duties was autho-

‘ rized by the Legislature ; and, before further answer, grants June 29. 1825.  
 ‘ diligence to both parties for the recovery of written evidence,  
 ‘ with a view to a remit to the Jury Court.’ Both parties repre-  
 ‘ sented, but the Lord Ordinary adhered, ‘ in respect it was not  
 ‘ meant by the interlocutor complained of to enforce specific im-  
 ‘ plement, otherwise than as affecting the right of levying dues,  
 ‘ and that it will be entire, after the facts in the revised condes-  
 ‘ cendences and answers are ascertained by the verdict of a jury,  
 ‘ (to which both parties seem at present averse), or otherwise, to  
 ‘ pronounce what order may be judged proper as to the rates  
 ‘ already levied, or to be levied by the Company.’

The Company, in reclaiming to the Court, endeavoured to make out that they lay under no positive obligation so to deepen the canal ; but latterly they stated by a minute, ‘ That  
 ‘ from the date of passing the statute 1790, to the announce-  
 ‘ ment of the present action, the proprietors had expended upon  
 ‘ the canal upwards of five times the sum allowed to be raised  
 ‘ by the Act of Parliament : that since completing the extension  
 ‘ of the canal to Faskine, and the locks at Blackhill, the pro-  
 ‘ prietors had been gradually deepening the canal along its  
 ‘ whole range ; so that, at the commencement of the present  
 ‘ action, the canal had been deepened to upwards of four feet  
 ‘ six inches : that at present the upper and lower range of the  
 ‘ canal had been deepened to five feet six inches, and the middle  
 ‘ range to at least five feet, and the proprietors were in the  
 ‘ course of continuing to deepen the middle range ; so that during  
 ‘ the present summer the same would be passable for vessels  
 ‘ drawing four feet and a half of water, and which must be held  
 ‘ reasonable implement in terms of the Lord Ordinary’s interlo-  
 ‘ cutor. But to put an end to further discussion regarding this  
 ‘ point, the proprietors were willing to complete the deepening  
 ‘ of the canal, under the inspection of any eminent engineer to  
 ‘ be named by the Court, until the engineer shall report that the  
 ‘ same is navigable along its whole range for vessels drawing four  
 ‘ feet and a half depth of water, in terms of the statute, and for  
 ‘ this purpose to employ such a number of workmen as they  
 ‘ shall be directed by the engineer, so as to complete the same  
 ‘ within such time as the engineer shall report to be reasonable.’

. *Answered by Dixon.*—‘ The statements about expenditure on  
 ‘ the canal were very far from being admitted to be correct ; and  
 ‘ it was in vain for the defenders to have recourse to such state-  
 ‘ ments, so long as they obstinately refuse inspection of their  
 ‘ books to the pursuer. If the defenders mean bona fide to make

June 29. 1825. ‘ and complete the canal in terms of the statute 1790, the pursuers certainly can have no objection that this shall be done, reserving all questions about tonnage dues heretofore unduly exacted. But the offer in the minute is defectively and evasively expressed; plainly for no other purpose than to obtain a pretext for delay, while the defenders are unduly exacting tonnage dues to which they have no right.’

The Court, in respect of this minute, ‘ before answer, ordained the said proprietors to complete the deepening of the canal, under the inspection of Thomas Telford, Esq. engineer; and failing of him, of Robert Stevenson, Esq. engineer; until the engineer so inspecting shall report that the same is navigable along the whole range for vessels drawing four feet and a half depth of water, in terms of the statute; and for this purpose ordained such number of workmen to be employed as such engineer shall direct, so as to complete the same within such reasonable time as to the engineer shall seem to be reasonable; and ordained the said engineer to report thereon to the Court.’

Dixon petitioned; stated that the Company’s offer was evasive, and that the undertaking ought to be in terms of the statute, ‘ to render the same navigable,’ &c.; and prayed to be found entitled ‘ to repayment of all the tonnage dues paid by him above the rate of 1d. per ton per mile since 24th May 1815 to the present time, and to allow an interim decree to that effect to go forth;—to be found liable ‘ for no higher rate of tonnage dues than 1d. per ton per mile on any goods whatsoever, conveyed along the Monkland Canal, till the Company of proprietors thereof shall, under the inspection of the engineer named by the Court, deepen and enlarge the canal in terms of the statute 1790; and to find the petitioner entitled to expenses.’ The Court refused the petition.

Telford, on the 5th November 1819, then made this report:— ‘ Having, in compliance with the Act of the Lords of Council and Session, on the 3d and 5th days of November instant, inspected the whole of the Monkland Canal; and having a vessel loaded to draw 4 feet 6 inches of water along the same, and also carefully taken a variety of measurements,—I beg leave to report, that excepting about 100 yards at the upper extremity, where the feeder comes in, I found the canal navigable and passable for vessels drawing four feet six inches of water, in terms of the statute; and this was when the water stood level with the top of the top bars of the upper locks at Sheepford and Blackhill, and at five feet six inches upon the upper sills of the upper locks, and the

‘ same on the lower sills of the lower locks at both these places. June 29. 1825.  
 ‘ And I may add, that from the state in which I found the ca-  
 ‘ nal, I am of opinion, for a moderate additional expense, it may  
 ‘ be made to admit vessels to navigate and pass, when loaded, to  
 ‘ draw four feet nine inches of water.’

Dixon objected to this report, alleging that he was not permitted to be present, although the Company’s overseer was, and that the people in their service were employed in the survey,—that the Company had flooded the canal with water to give an increased depth and facility to the progress of the boat,—that the boat was prepared for the experiment,—and that he had tried to navigate the usual kind of boat, drawing four feet six inches, but that the canal was substantially not navigable for that draught of water, being both too narrow and too shallow; and therefore prayed the Court either to allow a proof by commission, or send to the Jury Court the questions, 1st, Whether the Monkland Canal is at present fairly, in terms of the statute, navigable and passable for boats drawing four feet and a half water? and, 2dly, At what date this improvement took place, if it have taken place? The Court (17th February 1820) again remitted to Mr Telford to consider the objections made, and to be made to his report, with answers, and report his opinion thereon, with such remarks as he may think proper, in an additional report to the Court; and, in respect of this order, found certain interrogatories required by Dixon to be put to Telford to be unnecessary. Thereafter Telford reported, (April 1820), ‘ 1. That  
 ‘ the whole arrangements respecting the survey were made under  
 ‘ my direction, both as regards the keeping up the water and the  
 ‘ sort of boat to be employed; and I objected to either of the  
 ‘ parties being present in the survey, as being in my opinion  
 ‘ totally unnecessary for ascertaining the objects to which my  
 ‘ attention was directed. The keeping the lock-gates shut was  
 ‘ the simplest and most certain means of ascertaining what  
 ‘ height of water the canal banks would contain. 2. Although  
 ‘ the Company’s servant, John Finlay, attended by my desire to  
 ‘ answer such questions as I found it necessary to put to him,  
 ‘ my assistant in taking the dimensions of the canal was Thomas  
 ‘ Wilson, a boat-builder, who is no servant to, nor, as I am in-  
 ‘ formed, has ever been employed by the Company, though he  
 ‘ has of course by the traders. He is merely a tenant upon a  
 ‘ twenty-one years’ lease of a piece of ground belonging to the  
 ‘ Canal Company; and I myself carefully examined and noted  
 ‘ each dimension which was taken. 3. The canal banks were

June 29. 1825. ‘ found capable of holding up water when navigated by boats  
 ‘ drawing four and a half feet water; and it is the interest of the  
 ‘ Company to preserve the canal to the full height. But in the  
 ‘ state I found it, it will admit of a couple of inches being drawn  
 ‘ down, by a number of boats passing the locks in immediate  
 ‘ succession, and still remain navigable for boats drawing four  
 ‘ and a half feet water. 4. The boat I selected, and had loaded  
 ‘ and navigated along the canal, drawing four and a half feet  
 ‘ water, was a regular trader, eleven feet two inches in width,  
 ‘ which is, I understand, above the general width; and these may  
 ‘ in general, and even larger, pass each other; and where nar-  
 ‘ rower places occasionally occur, (as happens in most canals),  
 ‘ passing-places are formed adjacent, as directed by a clause in  
 ‘ the Act. 5. Upon the whole, the Canal Company have, in  
 ‘ my opinion, fairly implemented the terms of the statute.’

Some further procedure took place, and Dixon persisting in the inaccuracy of Telford’s reports, the Court allowed a condescence and answers of what he (Dixon) averred and offered to prove to be the state of the Monkland Canal. Thereafter the Court, ‘ in respect there appears to be now sufficient imple-  
 ‘ ment, on the part of the proprietors of the Monkland Naviga-  
 ‘ tion, of the completion of the canal in terms of the statute,’ in the suspension found the letters orderly proceeded, and in the declarator sustained the defences, and decerned. Dixon reclaimed, and accompanied his petition with a condescence of what he offered to prove before a jury, or under a commission, and prayed, 1st, To be found ‘ in hoc statu entitled to repetition  
 ‘ of the tonnage dues authorized to be imposed by Act 1790,  
 ‘ from May 1815 down to the date of Mr Telford’s first report,  
 ‘ reserving the petitioner’s claims quoad ultra;’ and, 2d, To allow a proof of the facts as to the state of the canal, &c. The Court (16th November 1821) adhered, and found Dixon liable in expenses.\*

Dixon appealed.

*Appellant.*—1. The respondents had no right to the double tonnage dues until they could give the corresponding accommodation,—that was the consideration for the increased rates. The statute does not authorize the reading put upon it by the respondents; the appellant is therefore clearly entitled to repetition of the excess which he has been illegally forced to pay. 2. Even now, the canal has not been enlarged in terms of the statute

\* See 1. Shaw and Ball. No. 176.

1790. This the appellant offered to prove by a jury or a commission, but was refused. June 29. 1825.

*Respondents.*—1. The Act 1790 gives the respondents right to levy an additional tonnage ‘at all times hereafter;’ and this is not made to depend on the execution of any operation whatever on the navigation. 2. Several of the most expensive operations have been long ago completed. The deepening was to proceed at such seasons as were most convenient; and accordingly has proceeded. 3. The Act allows the additional rate to be levied in the first instance, it being the view of the Legislature, that the sums so levied should be the sums employed in the execution of the authorized improvements. 4. There has been reasonable implement of the obligations imposed on the Company, the expenditure on the canals amounting to three times the sum allowed by the Act to be raised for the improvement of the navigation. The appellant did not conclude that the respondents should deepen the canal, &c.; but, overlooking that irrelevancy, 5. There is evidence in Telford’s report that the canal has actually been deepened to be passable by vessels drawing four and a half feet of water. He reports, that, ‘upon the whole, the Company have, in my opinion, fairly implemented the terms of the statute.’ The objection to the remit to Telford, or the application for a new proof, comes much too late.

The House of Lords found, ‘That the respondents were not entitled to demand any additional rates or duties for tonnage of goods conveyed upon the cut or canal in the said interlocutors mentioned, under and by virtue of the statute made and passed in the 30th year of the reign of his late Majesty, until the said cut or canal had been rendered navigable and passable for boats, barges, and other vessels drawing four feet and one-half depth of water. And the Lords further find, that, with the acquiescence of the appellant, the Lords of Session directed the deepening of the said cut or canal should be completed by the proprietors, under the inspection of Thomas Telford, Esq. engineer, and failing of him, of Robert Stevenson, Esq. engineer, until the engineer so inspecting should report the same was navigable along the whole range for vessels drawing four and a half feet depth of water, in terms of the statute. And the Lords further find, that from the report of the said Thomas Telford, so appointed as aforesaid, dated 5th November 1819, and from his additional report, dated 17th April 1820, it appears that in his judgment the said cut or canal was navigable and passable for vessels drawing four feet



June 29. 1825. ‘ six inches of water, in terms of the statute, and that the Canal  
 ‘ Company had fairly implemented the terms of the statute. And  
 ‘ the Lords further find, that under the circumstances the ap-  
 ‘ pellant is entitled to a repetition of the additional rates and  
 ‘ duties demanded from and paid by him from the 24th May  
 ‘ 1815 to the 5th November 1819, the date of Mr Telford’s first  
 ‘ report. . . And it is ordered and adjudged, that the interlocutors  
 ‘ complained of, so far as they are inconsistent with these findings,  
 ‘ be reversed. And it is further ordered, that the cause be re-  
 ‘ mitted back to the Court of Session, to do in the conjoined pro-  
 ‘ cesses as shall be consistent with this judgment, and as shall be just.’

LORD GIFFORD.—My Lords, There is a case which stands for judgment, in which a gentleman of the name of John Dixon, Esq. is the appellant, and the Company of Proprietors of the Monkland Navigation are the respondents. The questions brought before your Lordships for consideration are two:—First, Whether, under the terms of an Act of Parliament, (which I shall presently have occasion to state), this Company of proprietors of the Monkland Navigation were entitled, in the year 1815, under that statute which passed in the year 1790, to increase the rates and tolls that had been previously payable upon this navigable canal? And next, if they were not so entitled, whether, under the circumstances which took place in this cause, there was a period at which it was ascertained, by a report of a gentleman of the name of Telford, that the canal was in that state that the Act required, and which would, under that construction of the Act, entitle the Company of proprietors to exact this increased toll from the appellant?

My Lords,—Having stated the questions which arise in this case, I will now call shortly your Lordships’ attention to the facts of the case. It appears that in 1770 an Act of Parliament passed to authorize persons to make a navigable canal in the county of Lanark, from a place called Sheepford on the east, to the neighbourhood of the city of Glasgow on the west; and the Act of Parliament authorized this Company ‘ to make and complete a cut or canal of three feet depth of  
 ‘ water, navigable and passable for boats, barges, and other vessels, from  
 ‘ the Monkland collieries in the county of Lanark, beginning at the  
 ‘ place called Sheepford, in the parish of Old Monkland and county  
 ‘ aforesaid, by or near the house of Drumpellier, by or near the Well-  
 ‘ house bleachfield, to or near the city of Glasgow and river of Clyde.’ My Lords, that Act of Parliament enabled the Company to raise the sum of money necessary for that purpose, which is mentioned in the pleadings, and it also authorized them to levy tolls upon goods carried upon the canal. The enactment that allows the tolls to be taken is in these words: ‘ That in consideration of the great charges and expenses  
 ‘ that the said Company of proprietors, their successors and assigns,  
 ‘ will be at in making, maintaining, and supplying with water the said

June 29. 1825.

‘ cut or canal, and road and waggon-way aforesaid, 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 of  
 ‘ proprietors, their successors and assigns, from time to time, and at all  
 ‘ times hereafter, to ask, demand, take, and recover, to and for their  
 ‘ own proper use and behoof, for tonnage and wharfage, for all coals,  
 ‘ stones, timber, and other goods, wares, and merchandises, commodi-  
 ‘ ties, and things whatsoever, which shall be navigated, carried, and  
 ‘ conveyed upon or through the said cut or canal, such rates and du-  
 ‘ ties as the said Company of proprietors, their successors and assigns,  
 ‘ shall think fit, not exceeding the sum of one penny sterling money  
 ‘ per mile, for every ton of coals, stones, timber, and other goods,  
 ‘ wares, merchandises, commodities, and things whatsoever, which  
 ‘ shall be navigated, carried, and conveyed upon or through the said  
 ‘ cut or canal.’

My Lords,—This canal, it appears, was made, but proved unsuccess-  
 ful; and in the year 1790, the proprietors of this canal thought it  
 would be advantageous for them to make some communication from  
 this with another canal called the Forth and Clyde Canal, and that it  
 would be advantageous for them to make the whole canal navigable to  
 Glasgow, for all boats and other vessels drawing four feet and a half  
 of water, along the whole range of the Monkland Navigation, and to  
 widen, deepen, and enlarge the same where necessary for that pur-  
 pose. The original Act of Parliament only required them to make a  
 cut or canal of three feet of depth; but this Act of Parliament enabled  
 them to enlarge the canal to make it passable for boats drawing four  
 feet and a half of water; and by the 17th section of the second Act of  
 Parliament, the proprietors of the Monkland Navigation are authorized  
 ‘ to make, complete, and maintain a cut or canal for the purpose of  
 ‘ forming a junction between the upper and lower levels of the said  
 ‘ Monkland Navigation, at or near a certain place called Blackhill, and  
 ‘ to extend the said Monkland Navigation from the east end of the  
 ‘ same to Sheepford, in a certain line passing by or near Faskine house  
 ‘ to the river Calder, at or near Woodhall or Faskine mill; and to erect,  
 ‘ build, repair, and maintain a sufficient number of locks between the  
 ‘ different levels of the said canal, to render the same navigable and pas-  
 ‘ sable for boats, barges, and other vessels drawing four feet and a half  
 ‘ water, along the whole range of the said Monkland Navigation, and to  
 ‘ widen, deepen, and enlarge the same where necessary for that pur-  
 ‘ pose.’ Then it bears, that the provisions of the former Act are in  
 force so far as they can apply to this enlargement. Then there is  
 another clause enabling them to raise the requisite sums of money for  
 carrying into execution these works; and then, my Lords, by the  
 20th section, it is enacted, ‘ That in consideration of the great charges  
 ‘ and expenses which will necessarily be incurred by the said Company  
 ‘ of proprietors of the said Monkland Navigation, in making, maintain-  
 ‘ ing, and supplying with water the said cut or canal, and works con-

June 29. 1825.

‘ nected therewith, it shall and may be lawful to and for the said  
 ‘ Company of proprietors of the Monkland Navigation, their successors  
 ‘ and assigns, from time to time, and at all times hereafter, to ask, de-  
 ‘ mand, take, and recover, to and for their own proper use and behoof,  
 ‘ for tonnage and wharfage, for all coals, stones, timber, and other  
 ‘ goods, wares, merchandises, commodities, and things whatsoever,  
 ‘ which shall be navigated, carried, or conveyed upon and through the  
 ‘ said cut or canal, such additional rates and duties as the said Com-  
 ‘ pany of proprietors, their successors and assigns, shall, at a general  
 ‘ meeting of the said Company of proprietors, think fit, not exceeding  
 ‘ the sum of 1d. per mile for every ton of coals, stones, timber, dung,  
 ‘ fuel, and other goods; which said rates shall be over and above, and  
 ‘ in addition to, the rates and duties contained in the Act before re-  
 ‘ cited, passed in the tenth year of his present Majesty.’

My Lords,—In consequence of this Act, and with the view of carrying into execution this plan, the Company constructed the necessary locks at Blackhill to let down the canal to the level of the Forth and Clyde Canal. In the year 1804 they made a regulation with respect to these tolls, the effect of which was to produce some increase of tolls; but no objection was made by any person at that time to that increase, such as it was, and things remained in that state till 1815. My Lords, the appellant, Mr Dixon, it appears, was in the habit of using this canal for conveying coals; and in the year 1815, (at which time the whole concern of this Company was vested in three individuals, gentlemen of the name of Stirling), the proprietors called a meeting under this Act of Parliament, for the purpose of raising the tolls. Mr Dixon protested at that time against the raising of the toll. However, in 1815 they passed a resolution, by which they raised the tonnage duty to 2d. per ton per mile. My Lords, the appellant being dissatisfied with this, conceiving they had not completed the canal according to this Act of Parliament, by which it was to be made navigable for boats drawing four feet and a half of water, he presented to the Court of Session a bill of suspension and interdict, praying that it should be found that he was not liable to pay this increased duty, because the Canal Company had not made this canal navigable for boats drawing four feet and a half water. He also raised an action of declarator in the Court of Session, which has been joined with this bill of suspension and interdict; by which action of declarator he sought to have it declared, ‘ that the said cut or canal not being navigable and passable  
 ‘ for boats and barges drawing four feet and one-half depth of water,  
 ‘ the said Company of proprietors, in imposing and levying tonnage  
 ‘ duties at the rate of 2d. per mile, have exceeded the powers conferred  
 ‘ on them by the foresaid statutes, and are acting in direct contraven-  
 ‘ tion thereof; and that they have no right or title to exact from the  
 ‘ pursuer higher duties than at the rate of 1d. per ton per mile;’ that is, the rate mentioned in the first Act; and he concluded his summons by insisting, that he ought to be repaid the tolls that had been unduly

levied since 1815, he having protested against that advance, and paid it under a reservation of his right to have those sums repaid, in case it should appear that they were unduly levied. June 29. 1825.

The cause came on before Lord Craigie as Lord Ordinary, who pronounced this interlocutor:—‘ The Lord Ordinary having heard Counsel  
 ‘ for the parties on the reasons of suspension and interdict, of con-  
 ‘ sent allows a declarator at the suspender’s instance to be repeated  
 ‘ in the suspension, and conjoins the same herewith; and in the con-  
 ‘ joined actions, before answer, appoints the parties to give in a mu-  
 ‘ tual condescendence in terms of the Act of Sederunt.’ My Lords, various proceedings took place, which it is unnecessary for me to state to your Lordships, in the course of this action, with respect to the production and inspection of the books of the Company, upon which no question now arises. Afterwards, it came before the Lord Ordinary upon the merits, when he pronounced this interlocutor on the 26th of February 1818:—‘ Having heard parties, considered the Acts of Parliament  
 ‘ relative to the Monkland Canal, the mutual condescendence, and  
 ‘ whole process, finds, that the Company are in the first instance en-  
 ‘ titled to levy the duties asked by them; but that, in consequence of  
 ‘ their doing so, the pursuer is entitled to reasonable implement of  
 ‘ those improvements in the navigation, in consideration of which the  
 ‘ exaction of the said duties was authorized by the Legislature; and,  
 ‘ before farther answer, grants diligence to both parties for recovery  
 ‘ of written evidence, with a view to remit to the Jury Court.’ My Lords, there are then some farther proceedings in the case, and another interlocutor was pronounced by the Lord Ordinary, in which he stated,—‘ On considering mutual representations, answers, and whole  
 ‘ process, in respect it was not meant by the interlocutor complained  
 ‘ of to enforce specific implement, otherwise than as affecting the right  
 ‘ of levying dues, and that it will be entire, after the facts in the re-  
 ‘ vised condescendences and answers are ascertained by the verdict of  
 ‘ a jury, to which both parties seem at present averse, or otherwise,  
 ‘ to pronounce what order may be judged proper as to the rates al-  
 ‘ ready levied, or to be levied by the Company; refuses the desire  
 ‘ of both representations, and adheres to the interlocutor represented  
 ‘ against, and prohibits farther representations in this cause.’

The Monkland Canal Company submitted these interlocutors to the review of the Second Division of the Court of Session in a reclaiming petition, which, on the 27th of November 1818, was appointed to be answered. My Lords, in the course of that proceeding an offer was made on behalf of the proprietors of the Navigation, a minute of which appears in the proceedings; and it is necessary for me to state what that representation on the part of the proprietors of the Monkland Navigation was. ‘ That from the date of passing the statute  
 ‘ 1790 to the commencement of the present action, the proprietors  
 ‘ had expended upon the canal upwards of L.10,000, allowed to be  
 ‘ raised by the said Act of Parliament. That since completing the

June 29. 1825.

‘ extension of the canal to Faskine, and the locks at Blackhill, the  
 ‘ proprietors had been gradually deepening the canal along its whole  
 ‘ range, so that at the commencement of the present action the canal  
 ‘ had been deepened to upwards of four feet six inches.’ Now, your  
 Lordships will recollect, that the Act of Parliament requires, not that it  
 should be deepened four feet six inches, but that it should be made  
 navigable for boats drawing four feet six inches; and deepening it to  
 four feet six inches could not enable boats drawing that depth of water  
 to navigate it. ‘ That at present the upper and lower end of the canal  
 ‘ had been deepened to five feet six inches, and the middle range to  
 ‘ at least five feet; and the proprietors were in the course of continuing  
 ‘ to deepen the middle range, so that during the present summer the  
 ‘ same would be also deepened to five feet six inches, being a depth  
 ‘ greater than is sufficient to render the same navigable and passable  
 ‘ for vessels drawing four feet and a half of water, and which must be  
 ‘ held reasonable implement in terms of the Lord Ordinary’s interlo-  
 ‘ cutor. But to put an end to future discussion regarding this point,  
 ‘ the proprietors were willing to complete the deepening of the canal  
 ‘ under the inspection of any eminent engineer to be named by the  
 ‘ Court, until the engineer shall report that the same is navigable along  
 ‘ its whole range for vessels drawing four feet and a half of water, in  
 ‘ terms of the statute; and for this purpose to employ such a number  
 ‘ of workmen as they shall be directed by the engineer, so as to com-  
 ‘ plete the same within such time as the engineer shall report to be  
 ‘ reasonable.’ My Lords, on the part of the pursuer, his Counsel an-  
 swered, ‘ That the statements about expenditure on the canal were very  
 ‘ far from being admitted to be correct, and it was in vain for the de-  
 ‘ fenders to have recourse to such statements so long as they obsti-  
 ‘ nately refused inspection of their books to the pursuer. If the de-  
 ‘ fenders,’ namely, the proprietors of the Monkland Navigation, ‘ mean  
 ‘ bona fide to make and complete the canal in terms of the statute  
 ‘ 1790, the pursuer certainly can have no objection that this shall be  
 ‘ done, reserving all questions about tonnage dues heretofore unduly  
 ‘ exacted. But the offer in the minutes is defectively and evasively  
 ‘ expressed, plainly for no other purpose than to obtain a pretext for  
 ‘ delay, while the defenders are unduly exacting tonnage dues to which  
 ‘ they have no right.’ My Lords, upon this coming before the Court  
 of Session, the Court (as indeed the pursuer had himself stated that he  
 had no objection that the canal should be completed under the direc-  
 tion of an engineer) directed the Company to complete it under the  
 inspection of Thomas Telford, Esq. engineer, or, failing him, of Ro-  
 bert Stevenson, Esq. engineer, until the engineer so inspecting shall  
 report that ‘ the same is navigable along the whole range for vessels  
 ‘ drawing four feet and a half depth of water in terms of the statute,  
 ‘ and for this purpose ordain such a number of workmen to be employ-  
 ‘ ed as such engineer shall direct, so as to complete the same within  
 ‘ such time as the engineer shall report to be reasonable, and the

‘ engineer to report thereon to the Court.’ My Lords, the appellant does not appear to have expressed any dissatisfaction as to the reference to Mr Telford or Mr Stevenson, but he suggested that the Court of Session should not only require that Mr Telford should report the same navigable, but that it should be inserted in the interlocutor, ‘ to render the same navigable and passable for boats, barges, and other vessels drawing four feet and a half depth of water along the whole range of the said Monkland Navigation, and to deepen and enlarge the same where necessary for that purpose.’ The Court of Session, however, seem not to have acceded to the prayer of that petition, as they left it entirely with Mr Telford to report when it was navigable. According to the terms of the statute, it was part of his duty to see that the canal was rendered substantially navigable along the whole range for vessels drawing four feet six inches of water, and therefore it was not necessary to insert any special directions in the interlocutor. June 29. 1825.

A petition was then presented, praying their Lordships to alter the last interlocutor; and, first, To find the petitioner entitled to repayment of all tonnage dues paid by him above the rate of one penny per ton per mile, since the 24th May 1815 to the present time, and to allow an interim decree to that effect to go forth. Secondly, To find the petitioner liable for no higher rate of tonnage dues than one penny per ton per mile on any goods whatever conveyed along the Monkland Canal, till the proprietors shall, under the inspection of the engineer named by the Court, deepen and enlarge the canal in terms of the statute 1790. So that your Lordships see the proposition made was not acquiesced in, and the proprietors were to go on deepening the canal until it should be reported capable of being navigated by vessels of that draught by Mr Telford the engineer. My Lords, the Court of Session refused the desire of the petition; and, in the following month of November, it appears Mr Telford, in obedience to this interlocutor, surveyed this canal and reported to the Court:—‘ In compliance with the Act of the Lords of Council and Session, (dated 18th May last), on the 3d and 5th days of November instant I inspected the whole of the Monkland Canal, and having passed a vessel loaded to draw four feet six inches of water along the same, and also carefully taken a variety of measurements, I beg leave to report, that, excepting about 100 yards at the upper extremity where the feeder comes in, I found the canal navigable and passable for vessels drawing four feet six inches of water, in terms of the statute, and this was when the water stood level with the top of the top bars of the upper locks at Sheepford and Blackhill, and at five feet six inches upon the upper sills of the upper locks, and the same on the lower sills of the lower locks, at both these places; and I may add, that from the state in which I found the canal, I am of opinion, for a moderate additional expense, it may be made to admit vessels to navigate and pass when loaded to draw four feet nine inches of water.’ My Lords,



June 29. 1825. the appellant, not satisfied with this report, made various objections to it, which are stated in the Cases,—a great number of objections, to the amount, I think, of twenty-two,—I am not certain as to the number. The defenders put in answers to these objections, and the appellant required that their Lordships would either allow a proof by commission, or send to the Jury Court the questions, first, Whether the Monkland Canal is at present fairly, in terms of the statute, navigable and passable for boats drawing four feet and a half of water? and, secondly, At what date this improvement took place, if it had taken place? The Court of Session, however, on the 18th of February 1820, pronounced this interlocutor:—‘ The Lords having resumed  
‘ consideration of this cause, and proceedings therein, they, before  
‘ farther answer, again remit to Mr Telford to consider the objections  
‘ put in to his report, with the answers thereto, together with such  
‘ farther objections as Mr Dixon may put in, with the answers to the  
‘ same, and to report his opinion thereon, with such remarks as he  
‘ may think proper, in an additional report to the Court.’ Mr Telford, in consequence of this, made an additional report, and he reported,  
‘ That the whole arrangements respecting the survey were made under  
‘ my direction, both as regards the keeping up the water, and the sort  
‘ of boat to be employed; and I objected to either of the parties being  
‘ present in the survey, as being in my opinion totally unnecessary for  
‘ ascertaining the objects to which my attention was directed. The  
‘ keeping the lock-gates shut was the simplest and most certain means  
‘ of ascertaining what height of water the canal banks would contain.  
‘ Although the Company’s servant, John Finlay, attended, by my  
‘ desire, to answer such questions as I found it necessary to put to  
‘ him, my assistant in taking the dimensions of the canal was Thomas  
‘ Wilson, a boat-builder, who is no servant to, nor, as I am informed,  
‘ has ever been employed by the Company, though he has, of course,  
‘ by the traders. He is merely a tenant upon a twenty-one years’  
‘ lease of a piece of ground belonging to the Canal Company; and  
‘ I myself carefully examined and noted each dimension which was  
‘ taken. The canal banks were found capable of holding up water  
‘ when navigated by boats drawing four and a half feet water, and  
‘ it is the interest of the Company to preserve the canal to the full  
‘ height. But in the state I found it, it will admit of a couple of inches  
‘ being drawn down, by a number of boats passing the locks in imme-  
‘ diate succession, and still remain navigable for boats drawing four  
‘ and a half feet of water. The boat I selected, and had loaded and  
‘ navigated along the canal, drawing four and a half feet of water, was  
‘ a regular trader, eleven feet two inches in width, which is, I under-  
‘ stand, above the general width; and these may in general, and even  
‘ larger, pass each other; and where narrower places occasionally  
‘ occur, (as happens in most canals), passing places are formed adjacent,  
‘ as directed by a clause in the Act. Upon the whole, the Canal  
‘ Company have, in my opinion, fairly implemented the terms of the.

June 29. 1825.

‘statute.’ The appellant again presented a petition to the Court, praying their Lordships to grant an incident diligence at the appellant’s instance, to recover the reports of surveyors on the Monkland Canal; and to allow him to lodge objections to Mr Telford’s additional report, and a condescendence in terms of the Act of Sederunt. The Court, however, thought that petition irregular, and, on the 23d December 1820, they finally pronounced this interlocutor:—‘The Lords having resumed consideration of this cause, they before farther answer appoint Mr Dixon to put in a special condescendence, in terms of the Act of Sederunt, of what he avers and offers to prove as to the state and condition of the Monkland Canal, the said condescendence to be put in on or before the box-day in the ensuing Christmas recess, under an amand of forty shillings sterling; and to allow the other party to put in answers to the said condescendence on or before the first sederunt day in January next.’ After that a condescendence was lodged by the appellant, and answers put in by the defenders. These were not appointed to be revised, but the whole case was advised by their Lordships upon the pleadings as they stood, and this interlocutor was pronounced:—‘The Lords having resumed consideration of this petition, with the answers thereto, report by Mr Telford, and whole proceedings, in respect there appears to be now sufficient implement on the part of the proprietors of the Monkland Navigation of the completion of the canal in terms of the statute, therefore in the suspension repel the reasons of suspension, find the letters orderly proceeded, and decern; and in the declarator sustain the defences, assoilzie the defender, and decern: find the petitioners entitled to expenses, subject to modification, and allow an account thereof to be put in, and remit the same when lodged to the auditor of the Court to tax and report.’ My Lords, there was a reclaiming petition presented against that interlocutor, praying the Court of Session ‘to alter the interlocutor complained of, and first to find the petitioner in hoc statu entitled to repetition of the tonnage dues authorized to be imposed by the Act of 1790, from May 1815 down to the date of Mr Telford’s first report, reserving the petitioner’s claims quoad ultra; and, secondly, to allow a proof of the facts stated by the petitioner in the condescendence now lodged, and thereafter to proceed as to your Lordships may seem just.’ Then he delivered in a statement of facts, which he requested permission to verify by evidence. The Court having advised this petition with the relative condescendence, and answers to both, adhered to the interlocutors reclaimed against, and refused the desire of the petition: and, by another interlocutor, they modified the amount of the expenses to L.250 sterling, and decerned for payment of that sum.

My Lords,—These interlocutors have been brought before your Lordships; and you will perceive, in the first instance, the question brought before the Court of Session was, whether or not the Company of proprietors were entitled to the increased rate of toll until they had made



June 29. 1825. the whole cut or canal navigable for boats drawing four feet and a half of water? My Lords, all that Mr Dixon asked by the action was, that he should not be compelled to pay the additional toll till that was done which was the consideration for which the toll was to be exacted. It was quite indifferent to Mr Dixon whether the canal was constructed within the terms of the Act, because, having been in the habit of using the Monkland Canal with small boats, and still using them, and being only subject to a less toll, it was quite indifferent to him whether the canal was enlarged or not. My Lords, the Lord Ordinary seems to have thought, that although the Company were entitled to exact the additional toll, yet that, in consequence of their doing so, Mr Dixon was entitled to have the canal made navigable for boats drawing four feet six inches: that although he had not asked by his action that that should be done, yet the Lord Ordinary, having first determined that they might levy the dues, held, that if they did that, they must also complete the canal—he determined that the pursuer was entitled to reasonable implement of those improvements in the navigation. And he farther states, ‘ On considering the mutual representations, answers, and whole process, in respect that it was not meant by the interlocutor complained of to enforce specific implement, otherwise than as affecting the right of levying dues, and it will be entire, after the facts in the revised condescence and answers are ascertained by the verdict of a jury, to which both parties seem at present averse, or otherwise, to pronounce what order may be judged proper as to the rates already levied or to be levied by the Company.’ Now, I cannot help thinking, that, in that stage of the case, the question simply was this, whether, in the state of things, the Company of proprietors had a right to demand this toll? If not, Mr Dixon was entitled to his suspension. If they had the right to demand it, then the suspension was to be refused. Mr Dixon did not ask that this canal should be enlarged. It seems to me rather a singular mode of proceeding in this action, which did not ask for an enlargement of the canal, that the enlargement of the canal should be directed. But then, the question afterwards arises, whether, upon the fair construction of this Act of Parliament, and the contract the Company had entered into, they were entitled to demand this toll till they had done what was the consideration for doing it, namely, making this canal (which was then navigable only for boats drawing three feet water) navigable for boats drawing four feet and a half. Now, it is important to consider what the Act is which they have obtained, and what they ask power from the Legislature to do. They come to Parliament and say, that it would be desirable to form this junction between the Monkland Canal Navigation and the Forth and Clyde Canal, and to render the whole range of the Monkland Navigation navigable and passable for boats, barges, and other vessels drawing four feet and a half water. And, my Lords, powers are granted to them under the Act to enable them to make it a canal navigable for boats of that size; also a power is given to them

June 29. 1825.

to raise money for this purpose ; and then comes the clause that enables them to raise the tolls, and that clause is, ‘ that in consideration of the great charges and expenses that will be incurred by the Company in making, maintaining, and supplying with water the said cut or canal, and works connected therewith, it shall and will be lawful to and for the said Company of proprietors *hereafter*’—and that is the only word upon which it is contended they have a right to demand the toll—‘ hereafter to ask, demand, take, and recover, to and for their own proper use and behoof, for tonnage and wharfage, for all coals, stones, timber, and other goods, wares, merchandises, and other things conveyed upon or through the said cut or canal, such additional rates and duties as the said Company of proprietors shall, at a general meeting of the said Company of proprietors, think fit, not exceeding the sum of 1d. sterling a mile for every ton of coals, stones, timber,’ and so on. Now, what the Canal Company contended is, that at any moment after the Act passed—although their conduct forms a strong comment upon what they conceived their power under the Act was—they say, immediately after this Act passed, they had a right to exact from all boats navigating this canal an additional penny per ton, if they chose at a meeting to declare they meant to raise it, although they had not at that time done any thing towards making the canal navigable for large boats ; and although the boats thus navigating could only use the old canal, for which they were to pay a penny, yet, before they could derive any advantage from navigating this canal by boats of increased burden, they say, they were to pay this additional penny a-ton, to enable the Company to widen this canal ; and they say they have that right, because the word ‘ hereafter ’ occurred in the former Act :—‘ That in consideration of the great charges and expenses which the said Company will be at in making the canal and other works, it shall and may be lawful to and for the said Company of proprietors from time to time, and at all times hereafter, to ask, demand, take, and recover the tonnage upon all goods which shall be navigated, carried, and conveyed upon or through the said cut or canal, such rates and duties as the said Company of proprietors shall think fit, not exceeding the sum of one penny per mile, for every ton of coals and other goods which shall be navigated, carried, and conveyed upon or through the said cut or canal.’ Could it be contended, under the first Act of Parliament, that till they had made the canal they could demand the toll ? The toll was to be paid for goods navigating the canal ; they could not pay it till the canal was cut ; but after the passing of this Act, and after the work was done, they would be liable, and so they would be under the second Act. The second Act authorized them to increase the toll, because they were to make the canal navigable for boats of a larger burden ; therefore, upon the construction of this Act of Parliament, upon the agreement I formed a very strong opinion, and I have had an opportunity of considering it since the case was argued ; and it appears to me, that the considera-

June 29. 1825. tion for the increased toll was, the rendering the canal navigable for boats of this description, and till they had done so, they had no right to demand these tolls. The Lord Ordinary's interlocutor is a little singular; he thinks they should make the canal navigable, but he thinks they may demand the toll first. Upon the construction of the Act of Parliament, I am of opinion, and submit to your Lordships, that this is the fair construction of this contract entered into by the Company, strongly strengthened by their own conduct, (if it was necessary to have recourse to it), that they had no right to demand this increased toll till the canal was rendered substantially navigable. It was argued here, that if the House was of that opinion, they would have no right to demand this toll, until the very last spade of earth had been dug to render it completely navigable. But you must look and see whether the substantial part of the contract has been performed on their part. You may put extreme cases on both sides. You may demand the tolls before you begin to work at all; and on the other hand, you may say that you must not take it till the work is complete. I say you must look and see whether the contract has been substantially performed; and my opinion is, that they have no right to demand this increased toll till the canal was substantially completed.

Then comes the question of what is to be done with this long and expensive proceeding. An offer was made on the part of the Monkland Navigation, to complete the navigation for vessels of four feet and a half. It appears quite evident, the papers shew it, that at the time of the commencement of the action, the canal was not navigable, within the terms of the Act of Parliament, for boats drawing four feet and a half of water; but as the Lord Ordinary had said it ought to be improved to that extent, they offer that it shall be done, that they will be subject to the report of Mr Telford on the subject. Now, did Mr Dixon, or not, acquiesce in that? My Lords, that he acquiesced in the appointment of Mr Telford by the Court, and made no objection at the time, I think is quite clear; but he reserved his right to be repaid his tolls till the canal was completed. He says, I have no objection that it shall be done under the inspection of Mr Telford. My Lords, the whole proceeding at the time shews he had no objection to that remit to Mr Telford; but he thought that in that remit to Mr Telford he should be tied down more particularly than he was as to the manner in which the canal should be constructed. The Court said it should be left to Mr Telford; and he agreed that it should be carried on under the inspection of an engineer, who was to make a report. He only prays, 'That the petitioner shall be found liable for  
' no higher rate of tonnage dues than one penny per ton per mile on  
' any goods whatsoever conveyed along the Monkland Canal, until the  
' Company shall, under the inspection of the engineer named by the  
' Court,'—agreeing, therefore, that it should be done under the inspection of that engineer,—'deepen and enlarge the canal in terms of the  
' Act.' I think, therefore, upon this proceeding, it must be taken,

June 29. 1825.

that Mr Dixon did acquiesce at that time that the canal should be inspected, and the alterations superintended by Mr Telford. Then Mr Telford made his report; and in both reports he was of opinion, that the Company had substantially and fairly, in his judgment, in November 1819, rendered the canal navigable and passable for boats drawing four feet six inches water. He is of opinion, that the Canal Company had fairly implemented the terms of the statute.

My Lords,—In Scotland, as in England, I apprehend, that where parties consent that a thing shall be done on the judgment of a particular individual, he must be bound by that consent; and therefore it appears to me, that Mr Dixon, the appellant, must be bound by the judgment of Mr Telford. I think your Lordships must consider, under the circumstances of this case, from what passed at the time of the proposition on the part of the Monkland Canal Company that Mr Telford, the engineer, should superintend the work, Mr Dixon consenting to abide by any person appointed by the Court,—as no objection was taken to Mr Telford, and as no objection was taken to the proposition that he should inspect and report, that therefore it must be taken that he consented to be bound by it. He has reported, and there seems no fair reason to quarrel with that report, that in the month of November 1819 this canal was navigable for boats within the terms of the Act of Parliament, which, as against Mr Dixon, seems conclusive upon the point. But the Court of Session have done that which, consistently with the opinion I have expressed to your Lordships, I do not think can stand. They have adjudged Mr Dixon to pay all these increased tolls, from the time they were demanded in 1815, without any regard to the period of time at which the canal was rendered navigable; and they have fixed, that Mr Dixon is to pay the expenses of the suit. In my view of it, Mr Dixon was entitled to a suspension when he brought his action; because the canal was not in that state to enable them to demand the increased tolls. They agree to put it in that state, and it is put in that state. At the date of the report the Court were of opinion, that, it being then completed, the Monkland Navigation had a right to all these tolls from Mr Dixon, from 1815 down to the period when they found the canal was completed. This, certainly, is a perplexing case—I mean as to proceedings which have for so long a period taken place in the Court of Session. It is extremely unfortunate that Mr Dixon did not bring that decision of the Lord Ordinary under review of this House; but having acquiesced in the appointment of Mr Telford, it was too late to consider what might have been done by the House in that state of it, if it had been brought before your Lordships under those circumstances. It appears to me, that all your Lordships can do on this occasion is in your judgment to express what your opinion is upon the construction of this Act of Parliament, and your opinion as to the conduct of the appellant with respect to this remit to Mr Telford; and having thus expressed your opinion, that the cause should be remitted to the Court

June 29. 1825. of Session to apply your Lordships' judgment to its proceedings. I should propose to your Lordships to find, ' that the respondents were ' not entitled to demand any additional rates or duties for tonnage of ' goods conveyed upon the cut or canal in the said interlocutors mentioned, under and by virtue of the statute made and passed in the ' thirtieth year of the reign of his late Majesty, until the said cut or ' canal had been rendered navigable and passable for boats, barges, ' and other vessels drawing four feet and one-half depth of water: and ' the Lords farther find, that, with the acquiescence of the appellant, ' the Lords of Session directed the deepening of the said cut or canal ' should be completed by the proprietors, under the inspection of ' Thomas Telford, Esq. engineer, and failing of him, of Robert Stevenson, Esq. engineer, until the engineer so inspecting should report the ' same was navigable along the whole range for vessels drawing four ' and a half feet depth of water, in terms of the statute: and the Lords ' farther find, that from the report of the said Thomas Telford, so appointed as aforesaid, dated the 5th of November 1819, and from his ' additional report, dated the 17th of April 1820, it appears, that in ' his judgment the said cut or canal was navigable and passable for ' vessels drawing four feet six inches of water, in terms of the statute, ' and that the Canal Company had fairly implemented the terms of the ' statute: and the Lords farther find, that, under the circumstances, ' the appellant is entitled to repetition of the additional rates and ' duties demanded from and paid by him, from the 24th day of May ' 1815 to the 5th of November 1819, the date of Mr Telford's first ' report;' to reverse the interlocutors so far as they are inconsistent with this finding, and to remit to the Court of Session to apply this finding to the proceedings. It appears to me, upon the construction of the Act of Parliament, that this arrives at the substantial justice in the case between the parties. I think Mr Dixon entitled to be relieved from the additional toll till Mr Telford reported that the canal was navigable for vessels of this description. As to Mr Dixon and the Canal Company, it appears to me that that is the only mode in which, with reference to the proceedings and the Act of Parliament, your Lordships can properly deal with the case; therefore I should propose to adopt the language I have read to your Lordships, and to remit the cause to the Court of Session, with these findings, to apply them to the case. That places Mr Dixon in this situation, that he would be entitled to call upon the Canal Company for the repayment of those tolls and dues which were improperly taken from him till Mr Telford so reported the canal to be completed.

*Appellant's Authorities.*—1. Com. Dig. voce Parl. B. 7. § 2. 247.; Guild, Dec. 21. 1809, (F. C.)

SPOTTISWOODE and ROBERTSON—J. RICHARDSON,—Solicitors.