

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SHAND—*Appellant.*

HENDERSON, Clerk and Manager  
for the Aberdeen Canal Com-  
pany, in behalf of the said  
Company - - - - - } *Respondent.*

WHERE a particular jurisdiction is appointed under a canal act to determine all questions that may arise respecting things to be done in pursuance or in execution of the act, if the canal proprietors do any thing in a way not exactly according to the terms of the act, and not strictly within the powers thereby given, the individual conceiving himself aggrieved, in applying for redress, is not limited to the particular jurisdiction; but the complaint is to be entertained by the ordinary jurisdictions, and the wrong to be redressed in the same way as other wrongs; upon the principle, that any thing done not in exact conformity with the provisions of the act, is not a thing done in pursuance and execution of the act, and therefore not confined to the particular jurisdiction.

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*Sentient* Lord Eldon, that though where a party stood looking on while an act not strictly legal was done, having the means, but without taking the proper steps, to prevent it, the remedy by injunction, which he would otherwise have, was gone—yet the Company were trespassers, and would be liable in damages; and that even if they entered on an individual's lands without authority, they were trespassers, and liable at least in nominal damages, because the act was unlawful.

THIS was an action of declarator and damages by the Appellant, *Shand*, Advocate in Aberdeen, against the Respondent, *Henderson*, as representing the Aberdeen Canal Navigation Company. The sum-

Action.—  
1805, or 1806.

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Summons.

Deviation.—  
Not taking  
the previous  
steps required  
by the act.

Judgment of  
Court below.  
Nov. 15, Dec.  
8, 1808.

Appeal.

mons stated, “ that in 1798 the Company had, “ without any legal authority, seized upon, and appropriated to the use of the canal, part of his “ lands of Tanfield, severing and dividing the same “ in a very irregular and awkward manner;” and concluded to have that fact declared, and for damages. The illegality, as it was afterwards alleged, consisted in the Company having unwarrantably deviated from the line prescribed in the act under which they were constituted; and in their not having in the earlier proceedings, in occupying the Appellant’s grounds, and settling the amount of his claims, strictly adhered to the previous steps required by the act. After answers on the merits, the Respondent stated, that a particular jurisdiction had been appointed by the act to settle all differences that might arise between the Company and the individual proprietors, in the execution of the act. After condescendance, the Lord Ordinary allowed a proof; but his interlocutor was altered by the Court, which sustained the defences, and assolizied the Defender; “ reserving to the Pursuer, “ if he shall be so advised, to prosecute his claims in “ terms of the Act of Parliament.” From this judgment the Appellant appealed; contending, that he was entitled to be allowed a proof that the Company had deviated, and taken his grounds without authority; in which case, he contended, the Court of Session, and not the particular jurisdiction, must decide as to the consequential damage.

*Romilly* and *Nolan* for Appellant; *Adam* and *Horner* for Respondent.

*Lord Eldon*, (Chancellor,) after stating the case. Their Lordships would permit him here to mention, that the action was not brought against the Company, but against the Clerk, or Manager; and he did not find any clause authorizing them to sue, or making them liable to be sued, by their Clerk. But if the Court of Session had a practice of its own on this point, he did not say that it ought to be disturbed; but it was quite unknown to them in England.

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Observations  
in Judgment.Point of prac-  
tice.

By these canal acts, large powers were given, and private property largely sacrificed, on the ground of public utility; but when one considered the extent of these powers, in England as well as in Scotland, the necessity of restraining them within the precise limits to which the acts confined them must be obvious. The Court where he sat, if they did exceed them, would restrain them by injunction. If that was not promptly applied for, and the thing not strictly authorized by the act had been actually done, the party could not have that remedy, because the application was too late for that: but he apprehended the Company were trespassers, and liable in damages; and even if they entered on the land when not authorized by the act, the individual was entitled to call on them for nominal damages at least, because the entry was unlawful.

Necessity of  
restraining  
Canal Com-  
panies within  
the powers  
prescribed by  
the acts.

This act, like others of that description, enabled them “to enter into and upon the lands belonging  
“to any person or persons, to survey and take levels  
“of the same, and to set out and ascertain such  
“part or parts thereof as the said Company shall  
“think necessary and proper for the making, com-

Terms of the  
act.

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“ pleting, maintaining, improving, and using the  
 “ said canal:” and to do a variety of other strong  
 acts.

Plan.

But their Lordships knew, that previous to pass-  
 ing these acts, there must be a survey, and a map,  
 or plan, for Parliament to look at, to show the prac-  
 ticability of the object, and the exact line to be fol-  
 lowed; and that this was kept in deposit, that it  
 might be seen whether the terms of the act had  
 been complied with. The act therefore provided,

Deviation.

that the Company should not deviate from the  
 course “ delineated on the said map, or plan, &c.  
 “ without the approbation and consent in writing,  
 “ signed by the person or persons to whom any  
 “ lands, &c. do or shall respectively belong, through  
 “ or over which any deviation is decreed to be  
 “ made,” &c.

Particular ju-  
 risdiction.

The act contained the usual clauses about tolls,  
 &c. and then authority was given to Commissioners  
 in these words:—“ Whereas differences may arise  
 “ between the said Company, &c. and the owners  
 “ of, or persons interested in, the lands, grounds,  
 “ &c. which shall or may be taken, &c.; be it  
 “ therefore enacted, that the Commissioners for the  
 “ land-tax for the time being for the county of  
 “ Aberdeen, &c. the Representatives in Parliament  
 “ for the said county and royal burghs of Aberdeen,  
 “ &c. the Sheriff Depute for the said county, &c.  
 “ are hereby appointed Commissioners for settling,  
 “ determining, or adjusting, all questions, matters,  
 “ and differences, which shall or may arise be-  
 “ tween the said Company and the several proprie-  
 “ tors of, and persons interested in, any lands,

“ grounds, &c. that shall or may be taken, used,  
 “ affected, damaged, or prejudiced, *in pursuance or*  
 “ *in the execution of any of the powers hereby*  
 “ *granted, and for the other purposes in this act*  
 “ *mentioned.*” The authority of the Commissioners  
 then extended only to such matters and differences  
 as might arise from what should be done *in pur-*  
*suance or in execution of the powers thereby*  
*granted.* But the act having required that a parti-  
 cular line should be followed, if that line had not  
 been followed, and the Company had cut through  
 an individual’s grounds without his consent, he ap-  
 prehended that it was impossible to say that they  
 were proceeding in pursuance and in execution of  
 the powers thereby granted. They were only doing  
 so when they proceeded according to the exact  
 terms and provisions of the act. Put it in another  
 view; if the parties could not agree as to the value  
 of the grounds that might be required, and if the  
 Company proceeded without taking the previous  
 steps incumbent upon them to take under the act,  
 he was of opinion that they became trespassers.  
 They must proceed according to the terms of the  
 act, if they meant to say that the jurisdiction con-  
 stituted by the act was the only jurisdiction which  
 ought to deal with the matter.

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Limits of the  
 jurisdiction.

If the Com-  
 pany entered  
 without  
 taking the pre-  
 liminary steps  
 incumbent on  
 them, they  
 were trespass-  
 ers.

One was anxious therefore to point out, that their  
 principle in England was this,—that the Company  
 should not be interfered with if they acted within  
 their powers; but that, for the very reason that such  
 large powers were given, the Court would keep  
 them strictly within the limits of those powers.

Principle on  
 which the  
 Court in Eng-  
 land proceed-  
 ed in questions  
 relative to the  
 powers and  
 acts of canal  
 companies.

Without stating at length all that happened, it

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If a man stood looking on, and did not apply in time, he lost his remedy by injunction; but if operations, or even the entry on the lands, were not authorized, the Company was liable in damages.—The amount of damages would be affected by the conduct of the party.

appeared difficult to say that a regular and strictly legal mode of proceeding had been here adopted. The remedy by injunction was quite out of the question. If a man stood by, and knowingly suffered the operations to be carried on, without taking the proper steps, though he had the means, to prevent them, he ought not to have an injunction. But though he had neglected to apply for that, it did not follow that he should be deprived of his right of action, and his remedy by damages. But, as a general observation, he might say, that the amount of the damages ought to be calculated with a view to the conduct of the individual; and where he stood by, without taking any steps to interfere, a jury would perhaps not give damages worth seeking for. But if the Company did any thing which the law did not authorize them to do, though the damages might be nominal, he did not mean to say that the suit ought not to be entertained.

The conclusion then was this,—the Court did not say but that something might have been done which might be a fair ground of complaint somewhere, and it “reserved to the Pursuer to prosecute his claims in terms of the Act of Parliament;”—meaning, he supposed, that he ought to go to the Commissioners, and that the Court could not deal with the question. That, however, depended on this consideration:—If the acts done were within the powers given, the probability was, that the legislature intended to give a local summary jurisdiction, and not to leave the Company, in every question that might arise, to be dragged before the Court of Session. But if the acts done were not

The particular jurisdiction confined to things done in pursuance and in execution of the act.

within the powers, then redress was to be sought for the wrong in the same manner as for other wrongs. It appeared to him, looking at all the circumstances,—(he did not say what might be his opinion as to the litigiousness of such a proceeding as this, if the case were his own; he had only to look at the legal rights of the parties, in dealing with the cases of others,)—that if these acts were not such as the Act of Parliament authorized, their Lordships had no right to send the Appellant to the Commissioners; and of course the Court of Session had no right to do so. In order to settle the principle, therefore, he proposed that they should declare, that the Commissioners were not authorized by the act to settle, determine, or adjust, any questions, &c. that might arise by reason of any proceeding not conformable to its provisions—such proceeding not being in pursuance, or in the execution, of the powers granted by the act; and that with this declaration the cause should be remitted, for the Court below to give judgment accordingly. (*Vide Agar v. Regent's Canal Company.*)

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Cause remitted, with a declaration of the principle, that the particular jurisdiction was confined to things done according to the act.

Remitted, with the above declaration.

Judgment.

Agent for Appellant, \_\_\_\_\_.  
Agent for Respondent, CHALMER.