

A DISSERTATION upon the peculiar Hardship of the Case of HENRY ERRINGTON, Esq. in regard to his Bond for the Maintenance of Hexham Bridge for Seven Years.

“GIVE me my Bond,” says Shylock; “I will have my Bond.” This, though an ancient legendary tale, has been seized upon by that immortal genius Shakespear, and wrought up in a striking degree, to shew to what manifest injustice human laws are capable of, in particular instances, when carried to a rigorous execution in those cases to which, as unforeseen, they never have been intended to be applied. Had the laws of Venice been rigidly carried into execution in the present case, they would have been looked upon with abhorrence by all succeeding ages; but in the way it was determined, we cannot less admire the ingenuity of the pleader, in finding out a circumstance by which the keen edge of the law was taken off, and strict and equal natural justice rendered to all the parties, than the renowned decision of *Solomon* between the two harlots; or the celebrated decision of *Sancho Pancha* between the cook and the defendant.

What, in this case, do the magistrates of the county of Northumberland pursue Mr. Errington in an English court of justice to obtain? Why, to obtain the payment of 9000l. from a person who never received from them more than 5700l. Do the magistrates then mean to make money of Mr. Errington for the benefit of the county’s purse, merely because they have caught him upon the hip? No; their own honour, jointly as well as severally, will not prompt them to avow this. No; they say that they sue Mr. Errington for the penalty of the bond of 9000l. to force him to re-erect the bridge, and maintain it for seven years in the terms of the contract. But supposing Mr. Errington to pay the 9000l., will any man undertake to erect a bridge for that sum, to maintain it for seven years, giving a bond for the performance, of 9000l.? (It should be 11,000l. to be a strict parallel), without

which they will not stand upon the ground Mr. Errington does, nor the county be any better assured of their having a bridge. Certainly no man will, unless he is mad, or in no degree instructed by the lesson the late fatal experiment has taught. Why then, what is the result, but that the magistrates of Northumberland, taking advantage of a particular turn of the law of this kingdom, mean to force a sum out of the pocket of Mr. Errington that he never received, in order to put it into the county's purse, to enable the county, by a further addition of their own, to lay out a sum of money upon a further and more extensive experiment, far greater than Mr. Errington's contract was to receive.

"But," says Shylock, "it was your business to have considered the consequences before you entered upon the bond. You executed the bond with your *eyes open*, and you must pay the penalty."

But did Mr. Errington enter into this bond with his *eyes open*? Why, no; he certainly did not. Were any other person *now* to enter into a similar bond, it may be said, that he really and truly enters upon it with his eyes open; that is to say, with the necessary degree of information to give him some idea of the extent of the difficulties and hazard that were likely to attend it. The late erection may be considered as a proper experiment to prove the degree of rapidity and violence that the river Tyne is subject to so high up in its course as the parts opposite to Hexham; but, previous to this, there was nothing to furnish an adequate idea, much less a positive proof, of the degree of violence of which this river is at times, under certain circumstances, capable.

A bridge new built opposite Hexham, at the upper or western end of the town, of a construction somewhat similar, though (according to the doctrine of some) more secure, as having piles and strong platforms under all the piers, in the compass of a single night, in the inundation that happened in Nov. 1771, was totally taken down and destroyed, nothing remaining the next morning but the north abutment. This will naturally suggest great violence in the river, or great weakness in the construction of the bridge; but to which the catastrophe was principally to be attributed, does not positively appear: for the bridge being apparently right at darkening, and totally demolished at break of day the next morning, nobody happened to be witness of its destruction, or of the fall that the water had in passing the bridge from the up stream side to the down stream side thereof. All that could be seen next morning (the water being then a good deal subsided) was, that from the marks it had left it had been very uncommonly high, and that it had

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not only taken the south abutment clean away but widened that side of the river by 60 or 70 feet; all which indicate marks of great rapidity and violence, but *what degree* of it by no means appears: for if the water had rose to the same height, and had been stagnant like a mill pond or tide river at high water, no degree of height or depth of water ought to hurt a bridge that is expressly built not to take any damage from mere wet; nor did any thing appear by which a fall even of two feet could be inferred: its failure therefore must appear to be owing not so much to the weakness of the constructed matter of the bridge as to the weakness of the stratum whereon it was founded.

The height of the flood that occasioned the demolition of the last bridge, was in the middle of the day; and the beginning and progress of its fall witnessed by many persons; and before any derangement had happened, it had been remarked what member of the bridge the water was even with on the up stream side, and what member from the down stream side, which from its known dimensions, amounted to near upon five feet of difference of level; so that the water came down in this flood with so much rapidity and suddenness, that not being able to fill the reaches of the river and vallies below so fast as it came down, it formed there a *breast* of the astonishing height or fall of near five feet perpendicular: and from a fall of less than five feet, that is, of four feet five inches, there necessarily results a rapidity of the torrent, amounting to one thousand feet in a minute; a quantity of fall and rapidity, that *could it have been known* from the destruction of the former bridge, or even had there been found a fall of *half this quantity*, Mr. Smeaton can take upon him to say, it would have deterred him from encouraging Mr. Errington to have had any thing to do with undertaking the proposed bridge: so that it may be fairly said, that neither Mr. Errington, nor any of his advisers, either had or could have that degree of information as to warrant its being said, that Mr. Errington executed the bond with his *eyes open*: but any one now that enters upon a similar obligation must enter into it with his eyes open; because from the late fatal experiment, he will know this *capital and leading maxim*,—that by the sudden melting of snow, accompanied with a violent downfall of rain, pouring from the steep sides of those hills extending to the very sources of two large rivers that join a little above Hexham, there is a capability of the waters coming down with that sudden violence, as that in the situation of the late bridge, the torrent is capable of forming a breast of near five feet, and consequently, of acting with a certain rapidity of at least a thousand feet per minute; and knowing this for a certainty also, drawn from the same experience, that this velocity is capable, not only of tearing up the bed of the river, but of removing all such rough materials of stone as may be deposited for the defence of the regularly constructed works.

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Whoever will therefore now undertake to build a permanent bridge, must be provided with such a design as not only will be proof against all the violence and causes of derangement already ascertained and described, but, as it cannot be known for a certainty that the violence already experienced is the uttermost that Nature is capable of, in this place, he ought to be still more firmly fortified on that account, to resist such further violences as may possibly happen : all which, in Mr. Smeaton's judgment, cannot be expected to be done for a much larger sum than the penalty of Mr. Errington's bond ; much less for the sum of money and value in materials, that Mr. Errington actually received.

Had Mr. Errington drawn the magistrates of Northumberland into the scheme and idea of building a bridge at Hexham, merely to serve his own purposes, and after a very considerable expense to the county, it had ended in the ill-fated catastrophe that has happened ; had Mr. Errington had a view to make a profit of this business ; had he been sparing of any apparently necessary expense for the accomplishment thereof ; had he let it by the great, to be executed by under workmen, and thereby eased himself of the trouble and attention necessary to such a work, and withal put a round sum of money into his own pocket ; had he employed incompetent artists to direct and superintend the work, or advised with such, as to the practicability and mode of accomplishing it, who were not of established reputation in the country for works of the kind ;—in short, had Mr. Errington practised or attempted to practise, any fraud in the conduct of this affair, or acted with any sinister views, in any of these cases it would have been natural for the magistrates, finding themselves cheated, deluded, and disappointed, to have pursued Mr. Errington with the rancour and vindictive spirit they are now doing : but if it shall appear that the very reverse of all these things is the truth ; if it shall appear that the magistrates had entertained this scheme and idea from the suggestions of the late worthy and universally esteemed and respected Sir Walter Blackett, the upshot of which, as respecting him, was the total demolition of the bridge, as already described, in 1771 ; if the disappointment arising from this fatal catastrophe was so great to the magistrates, that, on Sir Walter Blackett's refusal to be concerned with the bridge any further, choosing rather to pay the penalty of a bond that he had entered into with the County, than further embark in so ill-fated, in so apparently uncertain and hazardous an undertaking * : I say, if on this refusal of Sir Walter, the magistrates still remained so eager for a bridge that they actually began to erect another near the same place, and for this purpose engaged an eminent engineer to direct and

* Sir Walter Blackett entered into a bond, the penalty whereof was 3000*l.* the identical sum that he received from the County, towards building a bridge at this place. The bridge certainly cost a far larger sum ; but the voluntary subscriptions of several gentlemen whose estates lay in that neighbourhood, made a part of the extra sum expended, no part of which was refunded by Sir Walter.

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superintend the work†, with a resident surveyor of his own choice and recommendation‡; and if after making some progress in the work, this same engineer gave it up as impracticable, on account of the insufficiency of the foundation; if the magistrates notwithstanding still remained unsatisfied, and eager to that degree as even to attempt to draw in the poor working masons of the county to take this great hazard upon them, (after a declared impracticability by an eminent engineer) to the probable ruin of themselves and families; I say, if, after all this ardour for a bridge on the part of the magistrates, Mr. Errington was the unhappy sacrifice delusively taken in by their offers§; then it may be fairly said, that the magistrates have drawn Mr. Errington into a scrape, and not Mr. Errington the magistrates; and that in taking the thorn out of their side he put it into his own; for which act they are now fully bent to punish his ill success by a rigorous exaction of a sum of money that he never received.

True it is that Mr. Errington had a view, he had a *motive* in this business; but if that motive was a laudable one, why punish his want of success with so much rigour? We do not read of any age where men undertook works for the public service, merely for the sake of having the trouble of performing them; mankind in every age had a *moving cause* of action. Did Sir Walter Blackett engage in building a bridge opposite Hexham without any other moving cause than the mere good of the public? Certainly not. Sir Walter Blackett had a very considerable estate opposite the upper or western part of the town of Hexham, and was lord of the manor of the whole. Had Sir Walter Blackett had no moving cause but the mere *public utility*, to fix the destination of the good he intended to mankind, he might have found many other places to promote the building of a bridge in England, and some in Northumberland; but it must be allowed, that the above cir-

† Mr. John Wooler, who was then rebuilding the bridge of Newcastle, overthrown by the same flood, and which was afterwards finished by him.

‡ Mr. Jonathan Pickernell, from London; afterwards made Surveyor of the County Bridges of Northumberland, and recommended by some of the magistrates to Mr. Errington and Mr. Smeaton, to build Hexham Bridge under his direction.

§ Whoever was the least conversant with the public transactions of this county, in the years 1775 and 1776, will well remember an advertisement coming from the magistrates of this county, and appearing in all the three weekly papers of Newcastle, importing their readiness to treat with any person that would engage to build a bridge at Hexham, according to a design or plan for a *superstructure*, lodged for their inspection with the clerk of the peace. The offerer to be at liberty to pursue his own plan or method, of constructing the *foundations* (under water), but to give security for the permanency thereof for seven years. This was the purport, as it occurs to memory; but the masons and working mechanical artificers were too wise to take the risk of such impending ruin; and the consequence was, that after continuing the said advertisement weekly for the greatest part, if not the whole of a year, without any adequate offer, it was Mr. Errington's ill fate to be seduced by those colours so long out.

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circumstances ought not to take from the merit of Sir Walter's fixing his efforts at Hexham, and building the bridge so as to land, on the north side, upon his own estate.

In like manner, Mr. Errington having an estate opposite to the town of Hexham, on the eastern or lower part of the town, being also desirous to have the bridge to land at the north end upon his estate, the benefit that was likely to accrue thereto was a sufficient inducement to him to engage in that very great scene of trouble and attention that must necessarily arise in the building of a bridge in such a situation, and of such a magnitude, without the least prospect of any profit, or other advantage by the building; on the contrary, it was Mr. Errington's professed declaration to Mr. Smeaton, when he applied to engage his advice, opinion, and assistance, that so far from meaning to be a gainer by the undertaking, he should not be disappointed if he were 2 or 300l. out of pocket; and which, it will be proved, actually turned out to be the case.

In regard to the competency of Mr. Smeaton, to form a judgment of and properly execute such undertaking, this may be separately discussed; but it will certainly exculpate Mr. Errington in having employed him, when it is recollected, that at *that time* Mr. Smeaton had had *no bridge fallen*, had been employed in the full scope of business in his profession no less than 25 years, and at that time had given proofs of his abilities by a constant success in executing the most difficult works, in almost every part of Great Britain, without *then* the failure of a *single subject*.

If therefore Mr. Errington acted the part of a wife, a prudent, an upright, and a disinterested man, willing to promote the public good, along with his own; if in a laudable attempt towards this end he has failed, from causes that could not in their *own nature* be foreseen; it must be allowed to be *hard*, nay *very hard* indeed, that Mr. Errington not only cannot be excused in his failure, but he must be actually positively *punished*. Does the law admit no remedy? The law-men say of *none*; nay it is not even in the power of the magistrates to remit any part or title of the *penalty of the bond*! so says the *written law* of England!

But what says *natural justice* in the case? that law which is written in the breast of every rational man, and is properly deemed the law of *equity* and of *good conscience*; does this agree in the same determination? No, it revolts from the idea, and says, that to exact the full penalty of the bond in the present case, would be the most shocking injustice to Mr. Errington. Is no one then in a legislative sense, in possession of the executive part of this law of equity, and good conscience? Yes, reason answers, every man in quality of
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a *British juryman* possesses it, and has the administration of it in his power; he alone can draw the line of right and wrong, in the *particular case* before him, where the written general law of the kingdom can (from the nature of the thing) draw none; and it is a wise provision of the general law, to leave the decision of particular cases to the *breast* of a jury; where the law itself has not, nor can fix the limits of right with an adequate degree of precision. For this reason, a juryman's determination is *upon oath*; the purport of which oath is to the effect, that he will use his judgment according to his conscience; for there is no need of an oath, if it is to be supposed that a juryman is previously and externally fixed to a point; that is, that he is to judge, without having the use of his judgment.

When a juryman has heard all parties and persons who have any thing to say in the question; he is asked by the judge, whether he finds for the plaintiff or the defendant? that is to say, if the right is for the plaintiff or the defendant? if for the plaintiff, what are the damages? Now is it possible that any juryman can lay his hand upon his breast and say the plaintiffs are damaged to the amount of 9000*l.*, when it is fully proved, that the value of every thing that the defendant received from the plaintiffs, inclusive of the road that still remains, was but 6100*l.*, and in this 6100*l.* they are damaged no more, than upon a fair estimate it would cost to reinstate the building as agreed for*; for the magistrates cannot be allowed to say, that to reinstate the building as it was agreed for, will not now be likely to answer our end in point of permanency; he shall either build a *better bridge*, or *give us money* wherewith to do it; this certainly cannot now be admitted from the plaintiffs *in foro conscientia*; because it is the light drawn from the experiment made by Mr. Errington, that alone makes the magistrates now to see the necessity of building upon a more extensive plan; and since it was they themselves that practised the delusion, in order to draw any unwary person they could into the scheme (which unfortunately for himself, happened to be Mr. Errington), they certainly ought not to be *gainers* by this delusion. If Mr. Errington pays them back what upon a fair estimate it is likely to cost, to restore it to what it was; even this puts the magistrates in a *better situation*, than they would have been, if by the combination of natural causes, this flood had been no more violent than common, and which this bridge had withstood before; in which

* The contract was, to be paid 5700*l.* in money by instalments as the work advanced, for the bridge, and 400*l.* to Mr. Donkin for making a road, in the whole 6100*l.*; also Mr. Errington was to receive all such materials of timber, stone and iron, as the magistrates themselves had provided during their efforts to get a contract; — these materials were valued by the magistrates to Mr. Errington at 2000*l.*, though in reality they never were of 1000*l.* value to him; and as the road still remains, and there is much more value now upon the premises towards a bridge, than Mr. Errington received, the magistrates in receiving the present materials from Mr. Errington towards a bridge, will be gainers upon what he received from them.

case it would have now been left upstanding; because they are aware, in attempting to reinstate it, that such powers of resistance are *now* required, of which before its downfall they could not possibly have formed any conception; which knowledge will be of most *important use* to any one who finds courage to become a future builder and guarantee for the upstanding thereof.

Nay, such is the utility of the knowledge gained by this experiment, that in the eye of reason, the whole charge thereof certainly should not be solely upon Mr. Errington. The magistrates, if *volens volens* they must have a bridge at Hexham, should contribute to this experiment as well as he; and therefore only a moiety of the sum estimated for reinstating the building, should be reimbursed by Mr. Errington, as his proper share of an unfortunate adventure; and the other half should be allowed by the magistrates for the experience gained: and then upon this fund of money and knowledge, and an adequate sum in addition for its more extensive construction, they may with some degree of prospect hope to possess a permanent bridge at the public expense, without forcing it out of a private man's pocket.

That juries do in other cases exercise this kind of judgment, is manifest. I become bound in the penal sum of 2000*l.*, that *A.B.* shall duly fulfill the trust reposed in him by a certain company, deliver a true account, and all moneys, papers, and writings committed to his care, upon being thereto required. It happens that he absconds, carries off every thing that he had in his charge, and 1000*l.* of the company's cash. The company sue me with an intent to recover 2000*l.* upon the bond; but though he has broken every article for which I became bound, yet unless the company can prove the intrinsic value of the books and writings, and that by the breach of his honesty, they have in fact suffered a real pecuniary loss of more than the real sum of money deficient; will any jury punish me by the payment of 2000*l.* for the delinquency of another, when the whole of their intrinsic loss is no more than 1000*l.*? surely they will not.

Again, in the common case of a bond for repayment of money borrowed; the common condition of the obligation is, that if the obligee pays a certain sum (commonly one half of the penal sum) upon a certain day with lawful interest for the same, *without fraud or further delay*, then the obligation to be null and void, otherwise to remain in full force and virtue. We will suppose the obligee fails in every article, wherein he has been bound; he neither pays the sum nor the interest at the time; he makes many fraudulent promises of payment at a future day, merely to gain time till he can abscond; and makes use of every shuffling pretence, at any rate to *delay* the payment: It may happen, and often does,

does, that for want of the money at the time, the obligor is prevented from fulfilling a purchase that he has made; by which he would have got a profit equal to the sum, and in failure thereof may himself be subject to an action; and after all this he is put to the necessity of prosecuting an action to recover his own; this is *very hard*, but will a jury punish this obligee for his fraud, failure and neglect by finding in damages the whole penalty? No, they will calculate what his principal and interest comes to; allow him that, with expenses of suit, and give damages accordingly. But here we are told, that this dispensing power in the breast of a jury, is limited in consequence of an *act of parliament*, expressly made for this purpose, so that let the penalty be what it will, the obligor can recover no more than the real pecuniary damage.

Very well; but does not the very making of such an act of parliament infer the judicial power of a jury, that subsisted in their *breasts*, before the act was made? and therefore, where there is no act to fix the line of law, that it still rests in the breasts of a jury? the thing speaks for itself. Acts of parliament are not made to remedy an evil that has never existed. It is not to be doubted, but that before this act, it was common for a designing obligor to trump up a detail of the damages he had suffered, by the money not being duly paid according to the obligation of the bond, in order to extort the whole penalty; and though this might sometimes be the case, that the obligor might suffer by the neglect of the obligee, yet it doubtless would be pretended ten times for once, that it really was the case. It might also happen to some juries not to have that accuracy of reason and discernment, but to suppose themselves under an *absolute obligation* to find the full penalty, though an adequate damage might not be so clearly made out, conceiving the penalty to be the proper punishment for non-performance. In order fully to settle these matters upon the best general grounds, an act has been found necessary to restrain the jury's discretion from proceeding beyond a certain line; and nothing can be a stronger proof of the full extent of a jurymen's power of discretion, than this act of parliament, to restrain it in this particular case. It is not therefore to be doubted, but that every jurymen who is fully sensible of what is due to his own character, and the full extent of Mr. Errington's case, will perceive, that as he has the power, he undoubtedly will have the will, to draw the merciless teeth of the lion, and not suffer them to fix unreasonably deep in the flesh of an innocent man; and this even at the expense of his own oath in giving exaggerated damages, where mitigated damages only are due.