

To Mr. Donkin.

Aauthorpe 7th Feb. 1784.

Sir,

As I heard nothing for so long after the sessions, I flattered myself that Mr. Errington's offer had been accepted.

It is, as you observed, now reduced to this, that Mr. Errington must either rebuild or acquit himself by law; but it is well worth very seriously weighing, whether, to avoid the disagreeable uncertainty of a law-suit by rebuilding, Mr. Errington will not as certainly incur the disagreeableness of both rebuilding and a law-suit into the bargain; for it appears to me, from the temper and disposition of his opponents, that they will dispute every step that he takes, and if they so conceive it not to be *strictly* done in conformity with the contract, he will be equally liable to be harassed by an action for non-conformity in part, as for non-conformity in the whole. Let us now, therefore, review the ground on which he will stand upon each of these points.

If he lets the matter go to a jury upon a non-compliance to rebuild, I wish Mr. Errington would be advised by the most able genius in the law upon the point; as to me, it very strongly appears, that were I a jurymen in the cause, I never could consent to a greater sum in damages to the county (notwithstanding the penalty), than the sum he actually received from the county, because, as it will undoubtedly appear sufficiently in evidence, that for the purpose of reinstating the bridge, the materials now upon the place and in their place, are of considerably more value than those Mr. Errington received from the county, notwithstanding their valuation; and if it be true that the law of England is founded in reason, which the law-men strongly contend, that is, in natural justice, it never can be conformable to either justice or reason, that a sum in damage should be given to the county beyond the sum in which the county is really damaged; because in that case the penalty of the bond would be made to operate as a punishment upon a person who has honestly endeavoured to fulfill his contract, and who in fact has once fulfilled it to the full content of the other contracting party, and becomes obnoxious to a penalty for no other reason but because he has been so unfortunate as to have his work destroyed by an act of Providence, which no human foresight could investigate or guard against*.

* In other cases the law does not extend the penalty beyond the damage sustained, for in the case of the common obligation for money borrowed, though the penalty is for double the sum, yet no more is recovered than the sum borrowed and interest. And why so? Because it would be contrary to reason and natural justice to make a man pay more than he borrowed, merely because he failed in doing it at the day. And I am very apprehensive, that there will not be found a determined case *strictly parallel* to the present, where it has been otherwise determined; and if not, this case being a new one, must stand upon the natural ground of the common law, that is, reason and natural justice.

Mr.

Mr. Mylne may talk of the works not having been founded *deep enough*, and that it is uniformly a found gravel, because he found it so on a trial in a place where nobody that had a knowledge of the situation would have doubted it; but though for argument sake, it should be admitted for *the present*, that the gravel was equally compact to an unfathomable depth *quite across* the river, as in the place where he bored, yet we have now the authority of Mr. Mylne to say, that this gravel, though “hard to the touch of” boring, compact to the eye and feeling of instruments, is wonderfully loose and “unconnected in its parts.”—If so, is certainly unable to resist the violence of the floods of the Tyne, which Mr. Mylne very emphatically confirms further, by adding, “inasmuch that the bed of the river Tyne seems to shift and alter its form, extent, and situation with every flood, more or less, and tearing up at one time to a great depth that fair molded and well-laid hollow that the stream laid for itself on some former occasion.” Now this being so, to what purpose to drive piles into a body of gravel, if that body is itself liable to be taken away, into which the piles are driven? It is necessary then that this body of gravel should be prevented from moving by the deposition of some matter more compact than the gravel itself, to be able to resist the violence of the floods, and protect the ground underneath.

This was indeed done by the deposition of rubble stones from Oakwood bank quarry, which deposition of rubble is not only in general the most effectual method my experience has furnished, of protecting a gravel soil from the wash of a violent current, but I esteem the rubble of Oakwood bank quarry of the best quality for this purpose that I have seen. The works were amply guarded with this stone; and so satisfactorily so that I did not think any flood of the Tyne would or could have moved them; and I thought them still the more secure after having resisted the velocity of 900 feet per minute, without the least derangement, but on the contrary, rendered the whole more even and compacted by the interstices being filled up smooth and even with gravel and matter of a lesser size. Had this defence of Oakwood bank quarry rubble laid still there was nothing perishable in the bridge to be any cause of decay; but a flood comes so rapid and sudden that its velocity, amounting to 1000 feet per minute, was sufficient to move the defence of the Oakwood rubble, and so even and equally was it distributed that the failure of all the parts dependent thereon was in a manner together.

Mr. Mylne entertains an idea, that if our works had been founded deeper they would have fared better; and so far I agree with him in opinion, that had they been as deep again, they might have stood an hour longer: but when we know that the river Tyne

is capable on every flood, more or less, of tearing up that *fair moulded hollow* (I suppose he means the channel of the river) to a *great depth*, it perhaps may be very difficult to ascertain what depth will be out of the reach of its action; nor is this difficulty rendered the less by his shifting the resolution of this very difficult question from himself to us. I know a part of this river where the water has gulled away its bed (as well as I remember it, on measure) to the depth of 24 feet below the low state of the water's surface.

I have thought it proper to say thus much by way of obviating those hints and surmises which tend to make it seem as if every thing had not been done that could be done in the situation.

I come now to consider what ground Mr. Errington stands upon in case of rebuilding; and here it strikes me, that not only Mr. Mylne, but every one else also, has considered this matter in the same light as if it had never been done, that is, considering how Mr. Errington was to acquit himself of the whole agreement: whereas the bridge has been built complete, and to the entire satisfaction of all the contracting parties, according to the agreement, and so certified by two magistrates as therein appointed: had, therefore, the last covenant been omitted, which obliges Mr. Errington to *maintain and uphold* for seven years after the magistrates' certificate, he would most certainly have stood acquitted as having fully performed his contract. It would, therefore, seem to me, that what remains obligatory in the contract is what remains so in force of the last clause, and it would further seem to me, that in an unfortunate case, like the present, where the thing has once been satisfactorily done, that a liberality of construction of this last clause cannot be extended in disfavor of Mr. Errington, but rather, as far as the nature of the thing will reasonably admit, in his favour.

I should therefore wish that the following queries were submitted to some genius in the law.

1st, As a considerable part of the bridge is left standing and unhurt, whether, if more favourable in point of construction to Mr. Errington, this may not be placed under the idea of an obligation to *repair* in contradistinction to that of *rebuilding*?

2dly, Whether the words of the contract *uphold, support, repair, maintain, and keep in good and substantial repair* the said bridge, will oblige Mr. Errington to make the bridge exactly

exactly what it was before, or strictly conformable to the design annexed to the contract, and to which it refers, notwithstanding that from the nature of the accident, the ground of the site is so altered that an exact restitution is now impracticable?

3dly, Whether Mr. Errington (having once acquitted himself in point of satisfactory construction) is obliged (further than he may think necessary for his own security) to make any additional defences, or to be at greater expenses in rendering the foundation more secure than it was before, but may do the work in the same way it was before, where that can be done; and where change of circumstances has rendered that impracticable, in any other equivalent way, in the judgment of Mr. Smeaton, to whom the whole matter by the agreement has been referred, and confirmed by act of parliament?

4thly, Whether Mr. Errington may not, for his own security, take any other method of rebuilding any of the particular parts deranged, that from change of circumstances shall be, in the judgment of Mr. Smeaton, more likely than the former to render the work permanent?

5thly, Whether the words *good and sufficient repair* are not qualifying words which will enable Mr. Errington to make use of the old materials in the places where they are now at rest though not in the same position in which they were originally built; inasmuch that had the flood turned some of the pillars topsy turvy, whether they may not be made use of in part of the re-erection, provided that, in the judgment of Mr. Smeaton, they are or can be rendered as secure as in the original construction; though in point of position they will not be strictly conformable to the original design referred to, but will be made as safe and effectual for the use of His Majesty's subjects as a bridge, as if every thing were restored to what it was at first?

6thly, Whether, in virtue of the words "good and effectual repair," Mr. Errington may not in this repair omit every expense that is merely ornamental, in case he so chuses?

7thly, As the risk of the bridge's standing after the repair, lies with Mr. Errington for a certain term, in which, if it should fail, he will be obliged to repair *toties quoties*, whether in case he again employs Mr. Smeaton, and Mr. Smeaton will again engage in the concern, whose judgment, by the agreement, is made the *dernier resort*, whether this will not bar all interference and controul of the magistrates as to the modes to be pursued of repair and re-erection of the particular parts that require it?

8thly,

8thly, Whether the certificate of the magistrates, and the acquiescence of the whole body, by paying Mr. Errington the last payment due on such certificate, be not a full bar to the magistrates to any cavil that may be raised now, whether Mr. Errington fulfilled his contract in the erection, which, in reality, he did to the fullest extent, in the judgment of Mr. Smeaton, and which nobody thought of controverting till after the fatal disaster had happened?

9thly, Whether the time that has lapsed by the process of a treaty of composition, which the magistrates have admitted from Mr. Errington, and to which they have never given a final answer till the Christmas quarter sessions held in January 1784, be not to be reckoned in part of the seven years from the time of the certificate, which was at the same time three years before?

10thly, Whether if Mr. Errington, assisted by the judgment of Mr. Smeaton, repair the bridge so as to be in every respect as effectual for use, and as sufficient in point of stability, as the bridge was before the accident, and is so maintained by him to the end of the term to which he is obligated, he will not then be legally discharged from the penalty of the obligation into which he entered?

I beg leave, before I conclude, to declare once more, that, though I never thought it a difficulty to reinstate the bridge upon a principle of permanency equal to what it was at first, yet from the experience of this accident I do not know of any method at any expense within the bounds of Mr. Errington's obligation to reinstate it, so that it shall, in my opinion, have the same prospect of permanency that I thought it had before the accident; yet such a principle of stability as it had before the accident may enable it to stand longer than the lifetime of any man in being, or it may be thrown down again the next year; for as it is out of my power to calculate the uttermost powers that Nature can collect, so it is out of my power to say what will absolutely stand against every possible violence.

Before the accident I thought this bridge had this permanent kind of security; in this, the accident has convinced me that I was mistaken, and that I may be so again: but this I do apprehend, that had there been but one single hour more between the downfall of the snow and rain in the night and the flood's acquiring its greatest violence by the middle of the next day, it would in that time have so filled the reaches of the river below the bridge, as to have moderated its rapidity in passing the bridge from 1000 to 900 feet per minute; so that the bridge would have been standing at this instant, and
all

all those concerned in its erection receiving the praise that the public was pleased to attribute to them for so noble an erection, instead of the disgrace attending the being unsuccessful generals.

I remain, Sir,

Your most humble servant,

J. SMEATON.

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 9000*l.* from a person who never received from them more than 5700*l.* 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 9000*l.* 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 9000*l.*, will any man undertake to erect a bridge for that sum, to maintain it for seven years, giving a bond for the performance, of 9000*l.*? (It should be 11,000*l.* to be a strict parallel), without

all those concerned in its erection receiving the praise that the public was pleased to attribute to them for so noble an erection, instead of the disgrace attending the being unsuccessful generals.

I remain, Sir,

Your most humble servant,

J. SMEATON,