

the rule of law which gives *locus penitentiae* to either party, applies with its utmost force to this case, where that contract was never followed up. Whatever might be the form of agreement necessary in such a case was immaterial, so as this was fixed, that the parties having agreed to a particular mode of contract on stamped paper, could not depart from that mode, and, until this was completed, there was *locus penitentiae*. But, independently of this, the letters do not contain a final agreement. They were indefinite in a great many essential and important points, in such a transaction. Nothing was fixed about preventing the appellant from afterwards opening other coal works, and bringing them into Ayr, and so competing with him. Nor was the penalty properly fixed. Nor was it stated whether the ton was to be *measured* at Ayr, or to be *weighed*, as is customary, in Ireland. Nor was the time of delivery of the coal fixed, or any thing specified, whether it was to be delivered daily or weekly, as it should be dug out of the mine. As the parties differed about these things, the presumption is, that no concluded bargain was entered into by the letters, and it does not affect the question in the least, that the appellant has been so rash, as in the face of these differences, to open the ground in question.

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RUTHERGLEN  
*v.*  
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After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be, and the same are hereby affirmed.

For the Appellants, *E. Thurlow, Ja. Montgomery.*

For the Respondents, *Al. Wedderburn, Ar. Macdonald.*

*Note.*—Not reported in Court of Session. The judges in House of Lords seem to have been as much divided in this case as the judges in the Court of Session. After the debate, the votes of the Lords were equal—four for reversing, and four for affirming, whereupon it was determined that the interlocutor should not be reversed. It would seem from this, that the lay lords joined in the voting.

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The MAGISTRATES and TOWN COUNCIL of the	}	<i>Appellants ;</i>
Burgh of Rutherglen, - - -		
JAMES CULLEN, Wright at Whitehills, JAMES	}	<i>Respondents.</i>
WEIR of Hill, and SAMUEL STEIL of Town-		
head, - - - - -		

House of Lords, 12th March 1773.

CONTRACT—ERROR IN ESSENTIALS.—A contract specified for the building of a bridge from Rutherglen across the river Clyde, and

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enumerated the height of abutments, and dimensions otherwise, and referred to a plan. But omitted to mention any thing about the depth of the foundation below the bed of the river, which, from the nature of the bed, turned out to require a considerable depth of foundation, strongly piled. Held, that there was no binding contract on the builder to build, this having been omitted, and that he was free. Also held, as to the abutments built on the level of the bed of the river, that he was entitled to take away the materials so erected and built—he repaying to his employers the partial payments made towards the contract price.

The appellants, as Magistrates and Town Council of the burgh of Rutherglen, having employed James Cullen, a mason builder, to build a bridge across the river Clyde, opposite to the burgh of Rutherglen, a regular contract was entered into, whereby James Cullen was taken bound to build a bridge of 380 feet in length, 20 feet in breadth, (18 feet within the parapets) *conform to a plan* thereof, marked and signed on the back, to be laid with chingle (gravel) 18 inches deep, and to contain 5 bows or arches, whereof the middle bow of 70 feet wide, the two bows next thereto, each thereof 65 feet wide, and the southmost and northmost bows, each 60 feet wide; the walls within the arches 4 feet thick, the pillars and ledging all of ashler work, the stones one foot broad in the bed, and head stones two feet in length; the pend stones of the 70 feet arch, three feet; the wall without the land breast, *i. e.* abutments, three feet thick, and the ledges  $3\frac{1}{2}$  feet in height.

A plan of the intended bridge was signed by the parties, as relative to the contract. In the elevations exhibited by this plan, all the pillars and abutments are represented as having their tops and bases upon the same level of masonry or hewn work, rising 15 feet in height, but neither here nor in the contract, was any thing stated about the depth of the foundation below the bed of the river, or whether any wooden stakes were to be driven in below that foundation, both of which were essential to the contract, and the sufficiency of the bridge.

The respondent not having proceeded to build the bridge, by sinking such a foundation, the appellants, conceiving that he was not only not working the work in a sufficient manner, but also deviating from the contract and plan, in so far as laying the foundation of the abutments was concerned, protested, and thereafter charged him to perform his contract.

After various proceedings before the Lord Ordinary, who remitted to men of skill to report; and particularly to Mr.

Dec, 19, 1771. Laurie; and a fresh action being raised, with which the pre-

sent was conjoined, the Lord Ordinary ordered the respondent to amend and repair the north pillar, and to take down and *found* anew two abutments insufficiently founded, all to be done in the manner pointed out by Mr. Laurie.

On reclaiming petition, the Court altered this interlocutor, and found, 1st, “ That the bridge in question, must be executed not only according to the contract, but according to the plan to which the contract refers, and which is agreed by both parties, in so far as there is no contradiction betwixt the two, which there is not with respect to the foundations of the abutments and pillars, concerning which the dispute principally is ; but finds that James Cullen, the undertaker, is not bound to do any thing not contained either in the contract or plan. 2d, That it is proven, not only by the report of Alexander Laurie, a person named by the Lord Ordinary, and wholly unconnected with either party ; but also by the report of other men of skill, formerly appointed to inspect the work, so far as it has proceeded hitherto, is insufficient and disconform to the contract and plan. 3d, That it is improper to allow a proof at large in this case, where the question is not concerning a matter of fact, but a matter of art, of which artists are the only judges, more especially as it appears from the former proceedings in the cause, that when such proof was proposed by the Town, it was opposed by James Cullen. Therefore refuses the desire of the representation, and adheres to the former interlocutor, approving of Laurie’s report.”

Against this interlocutor a reclaiming petition was presented, whereupon the Court pronounced this interlocutor, altering their former judgment, finding, “ in respect it appears from Mr. Laurie’s report, that if the bridge be executed conform to the contract and plan, it will not be a sufficient one ; and that it appears that neither party, when they entered into the contract, had it in their view that it would be necessary to sink the foundation of the bridge considerably under the bed of the river, and to pile with wood below the foundation, which now appears must be done, in order to make a sufficient bridge. Therefore, find that neither party are bound by the contract, and suspend letters, and assoilzie the defenders from the conclusions of the declarator for completing the bridge : but, as the pursuers have advanced to the defender the sum of £633. 6s. 8d. sterling, and that the work, so far as executed by the defender, is neither conform to the contract and plan, nor

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“ such as can be of use for a sufficient bridge ; find that the  
 “ defender and his cautioners are liable, conjunctly and  
 “ severally, to repay that sum to the pursuers, and interest  
 “ thereof from the 18th day of May 1770, when the same was  
 “ advanced ; and find the petitioner entitled against the 1st  
 “ day of July next, to carry off and dispose of the whole ma-  
 “ terials, either already made use of by him, or prepared and  
 “ brought forward for building the bridge, unless betwixt  
 “ and that time the pursuers shall agree to take the materials  
 “ not used off his hands, or to make use of the work already  
 “ wrought ; and in that case, remit to the Lord Ordinary to  
 “ name proper persons to value the said materials and work ;  
 “ and find that, upon the said value being settled, the peti-  
 “ tioner must have allowance thereof, out of the sums above  
 “ mentioned, to be paid by him to the pursuers, and decern  
 “ and declare accordingly.”

Against this interlocutor the present appeal was brought to the House of Lords, on the part of Magistrates and Town Council of Rutherglen.

*Pleaded for the Appellants.*—The contract was entered into by the appellants *optima fide*. They had no skill in bridge building, but they relied on the judgment and capacity of James Cullen, the person who, by the above contract, became bound to build it according to the form specified in the plan, and in a sufficient manner. A contract of this kind necessarily implies, that the undertaker of the work shall perform it in a secure and sufficient manner. One who undertakes to build a bridge, must necessarily be taken bound to build a foundation for it ; and although the contract be silent as to the particular dimensions and depth of the foundation, yet the contract ought not on that account to be rendered void and ineffectual, because it is reasonable to presume, that the man of skill, who undertakes to build a bridge, must necessarily have undertaken to build a suitable foundation for it, as there cannot be the one without the other. Hence, in this view, it was immaterial that nothing on this point was mentioned in the contract, because it was the duty of the respondent, in the very first instance, to have examined the bed of the river, in order to discover the depth to which the pillar or abutments would require to be founded, and what works would be necessary to secure their stability, and the expense attending the whole, before he undertook to contract to build the bridge. And, in these circumstances, it is somewhat irreconcilable to find that the  
 “ work, so far as executed, is neither conform to the contract

nor plan, nor such as can be of use for a sufficient bridge," and yet find the respondent relieved from the obligations of the contract.

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*Pleaded for the Respondent.*—By the plan to which the contract refers, the abutments and pillars of the intended bridge, are each 15 feet from the foundation to the spring of the arch, and all on a level with the bed of the river, at the deepest. Laurie and the other reporters say, that it was necessary to sink the foundation of the pillars 9 feet under the bed of the river, at the lowest part of it; and to fortify it with wooden piles or a causeway, and to make the abutments 5 feet broader than represented in the plan. But nothing of all this is stipulated for in the contract. They are additional works, which it cannot be maintained the respondent is bound to execute under his contract. The respondent is only bound for every thing enumerated in the contract; but for nothing beyond it. He undertook to build a bridge, with abutments rising 15 feet from the lowest bed of the river, for £1900. To build one with a sunk foundation of the nature chalked out by the report, would cost an expense of £5000; and, in the whole circumstances, the appellants have little cause to complain of this interlocutor.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be *affirmed*, with this addition to the interlocutor of the Lords of Session of the 26th November 1772, after the words (when the same are advanced), insert (together with the costs of this suit, except those occasioned by this appeal.)

For Appellants, *Ja. Montgomery, Al. Wedderburn.*

For Respondents, *Al. Forrester, Thos. Lockhart.*

*Note.*—Unreported in Court of Session Reports.

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LIEUT. ANDREW LAWRIE,	- -	<i>Appellant;</i>
CAPTAIN JOHN MACGHIE, and ANNE his	}	<i>Respondents.</i>
Wife, formerly ANNE LAWRIE, and Others,		

House of Lords, 17th March 1773.

**DEVOLUTION CLAUSE.**—Held, where a party takes an entailed estate, on condition of devolving one he already possesses, on the next