his predecessors had done. This commission was regularly recorded in the books of Sederunt, and by an *Act of the Lords of Session he was admitted to the office.* His removal, in these circumstances, would both be unjust to him, and injurious to the public. Besides, the appellant bought his office of principal clerk of the bills, in the full knowledge of existing deputations, terminable only by the respondent's death, and the price paid by him demonstrates that these existing rights entered into the consideration. The appellant may, if he chooses, act and perform duty in the bill-chamber, in any of its departments; but the respondent submits that this cannot be done to the effect of depriving him of any of the fees which he has been accustomed to uplift.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and the interlocutors therein complained of be affirmed, and that the appellant do pay to the respondent £100 costs.

For Appellant, *Al. Wedderburn, Tho. Lockhart.*
For Respondent, *J. Montgomery, Al. Forrester.*

Note.—Unreported in Court of Session Reports. *Vide* M. 16633, for case which followed.

WILLIAM MILNE, Architect in Edinburgh, and ALEXANDER BROWN, Merchant in Edinburgh, and ROBERT MILNE, Architect in London, his Cautioners, } *Appellants;*

The MAGISTRATES and TOWN COUNCIL of Edinburgh, } *Respondents.*

House of Lords, 15*th February* 1770.

ARBITRATION CLAUSE—CONTRACT.—A contract in regard to the execution of the works in building a bridge, contained a clause, referring all differences and disputes to two neutral men of skill, as arbiters to be chosen, and in case of them differing, with power to them to choose an oversman, whose determination was to be final. Held, on a preliminary defence being stated, to a summons raised for failure to implement the contract, founded on this clause, that an agreement to refer all disputes to arbiters, did not bar the present action in this court, and that the plea in this case, was irrelevant and inadmissible.

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MILNE, &c. v. MAGISTRATES OF EDINBURGH, &c.

The question in this case arose out of the building of the North Bridge, over what was then called in Edinburgh, the North Loch, at a time when the Magistrates of Edinburgh obtained an act of Parliament for extending the royalty of the city.

The appellant, Milne, in conformity with an amended plan given in by him, was employed to execute that structure, and Brown and Milne, the other appellants, were his cautioners, and a contract was entered into by them binding them to specific performance according to the plan and stipulations therein specially set forth.

In case of dispute as to the execution of the contract, there was a clause referring the same to arbiters, in the following terms:—" That in case any difference shall arise " betwixt them relative to the execution of the work, or the " meaning or intention of these presents, the same shall be " referred to two neutral persons, who shall be tradesmen, " or artists, conversant in such works, with power to them, " in case of variance, to choose an oversman, whose deter- " mination shall be final therein."

After the whole structure was almost completed, the vaults and side walls of the south abutment gave way on 3d of August 1769; whereupon, and in order to satisfy the public, the respondents acquainted the appellant that they proposed calling Mr. Smeaton, and other persons skilled in such works, to give their opinion upon the sufficiency of the bridge: with this the appellant expressed himself satisfied. Messrs. Smeaton, Adam, and Baxter, accordingly gave in their report, stating, that " all heavy buildings were obnox- " ious to setts; and particularly those, where great weights " are obliged to rest upon small areas of ground; yet we " see buildings stand for ages under these circumstances, " much more in those cases where they can be relieved of the " pressure which originally occasioned those derangements. " *And we must further observe, that though the bridge was to* " *be taken down, and rebuilt with all the skill in Europe, yet* " *it could not be insured but that something of this kind* " *might appear.*"

Notwithstanding this report, the appellant was served with a charge of horning under their contract, purporting to compel them to implement and perform the whole articles prestable by them." A suspension of this charge was brought. And then the respondents brought a summons of declarator, with which the suspension was conjoined. The

appellants stated, among others, the following preliminary defence: that as by the contract, "all differences relative to the execution of the work, or the meaning or intention of the contract, should be referred to neutral persons who shall be tradesmen, or artists conversant in such works, with power to them, in case of variance, to choose an oversman, whose determination was to be final," the present course and action, adopted by the respondents, were incompetent, and a breach of the contract. To this it was answered, that the contract alluded to was now at an end, and the summons now raised concluded to have it declared null and void. Reply, That the conclusion was inconsistent with the first part of the summons, which sets forth, to have it declared, that the appellant had failed to execute his contract, and for £10,000 damages, as a consequence of such failure.

The Lord Ordinary reported the question to the whole Court, who, of this date, pronounced this interlocutor. "In Dec. 16, 1769.
"respect that the present conjoined processes of declarator
"and suspension betwixt the parties does not relate merely
"to the method of executing the work, or the sufficiency of
"the work executed; but also contains a declaratory con-
"clusion for having the contract betwixt the chargers and
"suspenders declared to be totally void and null: There-
"fore, the Lords repel the dilatory defence now pleaded for
"the suspenders, and remit to the Lord Ordinary to pro-
"ceed accordingly."

Of this date, the Lord Ordinary pronounced this interlo- Dec. 21, 1769.
cutor: "Prohibits and discharges the suspenders (i. e. ap-
"pellants) from proceeding in the work of building in ques-
"tion; and, before answer, allows the chargers to prove
"their libel, and facts set forth in their condescendence."

The appellants reclaimed against the interlocutor of the 16th December, praying in their petition, that the respondents were bound to refer their disputes, in terms of the contract, to arbiters, and to ordain them to make choice of an arbiter on their part. On considering this petition, the Court adhered. Jan. 18, 1770.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The spirit of litigation manifested by the city authorities in this affair is somewhat extraordinary. Not content with the ruin of the architect, they now wish to involve in that ruin his cautioners. Every offer made by the appellant, occasioned by the failure of

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the vaults of the south abutment has been rejected. He, three weeks after the accident, offered to repair it, at his own expense, conform to the plan laid down by the respondents' own architects; but this was refused, unless the appellant agreed to build other additional works, not mentioned in the contract, without any further stipulated price for *additional work*. He also desired that this matter in dispute should, in terms of the contract, be submitted to arbitration; and hence the defence which he has been forced to state in bar of this summons of declarator, which in effect shuts out the action.

Pleaded for the Respondents.—The appellants are not now at liberty to resort to a preliminary objection, after having joined issue, by appearing and pleading at three several callings before the Lord Ordinary, on 1st, 5th, and 9th December. But even though this plea could now be competently entered into, in point of fact, it cannot apply to the question at issue. The contract only applies to any disputes that might arise in the course of the work, in regard to the *mode of execution* and payment, and not to the case of the *total failure in performance*, or to a *breach* of the *contract*. The present action is not raised on any dispute arising out of the contract, but for failure to perform it, and for damages as a consequence of that failure. But, *separatim*, an agreement to refer all difficulties to arbiters, does not bar the parties from resorting to courts of justice for relief, in cases which require such interposition: so the Court had decided in the case of the Carron Company *against* Dundas of Fingask.

After hearing counsel, it was

Declared that the plea pleaded on the 14th Dec. last in bar of the action, is irrelevant and inadmissible, *although there had been no conclusion for having the contract adjudged, to be totally null and void:* And it is ordered and adjudged that the appeal be dismissed; and that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *Al. Wedderburn, Thos. Lockhart.*
For Respondents, *Ja. Montgomery, Al. Forrester.*

Note.—Unreported in Court of Session Reports.