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DUGUID, &c. v. M'LEISH, &c.

JOHN & WM. DUGUID, Merchants in Glasgow, *Appellants;*
ADAM M'LEISH & Co., Merchants in Port-Glasgow, . . . *Respondents.*

House of Lords, 10th Feb. 1794.

SALE—DAMAGES FOR NON-FULFILMENT.—**Circumstances in which held, that a bargain for the sale of sugars, was not finally completed, and that the seller, taking advantage of a rise in the price in the market, was at liberty to sell to another party.**

The appellant, John Duguid, attended the sample market in Glasgow, for the purpose of buying a quantity of sugars. He saw Mr. Morris there, who had a sample of sugars for sale, which belonged to him and the respondents, Adam M'Leish and Co., amounting in all to 133 casks. The appellant, John Duguid, looked at the sugars, and asked the price, and was told that it was 57s. 6d. per cwt., but thinking the price too high, no offer was made at that time. He also saw, some days thereafter, in the same place, Adam M'Leish endeavouring to sell the same sugars, and they entered into conversation about the sale of the sugars, which ended as before, in the appellant thinking the price too high. Nothing was said about the number of casks, about the weight of them, and the allowance proposed to be made for tare.

Thereafter, and on the 9th of October, the respondents, at Port Glasgow, received from the appellants the following letter:—"We wish to know if you will allow 14 lb. of extra tare on the 130 casks of Tortola sugars you have to sell. "Also please to say the general run of the weights of them, "and to say the lowest price you will take for them." The respondents, of the next day's date, returned the following answer by post:—"I received yours of yesterday by John Scott. "Our lowest price of the 130 casks of Tortola sugars belonging to Mr. Morris and A. M'Leish and Co. is 57s. and 14 lb. "extra tare allowed on all casks from 10 to 12 cwt. The "60 hds., P. & W. are all above 12 cwt. but one or two, "and some of them above 15. The I. H. are of various "weights, from 15 cwt. to 10 cwt.; none of them under "that but one, twice 6—2, but it is a light cask. The one

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Oct. 9, ——

" I. W. are pretty heavy, most about 12 cwt. The E. C. " mark is the lightest, none of them reaches 12 cwt."

This letter must have reached Glasgow on the morning of the next day, *Sunday*, October 10. But although the appellants were in the practice of receiving their letters from the post office on Sundays, yet they did not write the respondents by the post of Monday (morning at 8 o'clock) Oct. 11th.

The price of sugars much fluctuating at this time, owing to the unsettled state of matters between Great Britain and Spain. The post from London, which arrived at Glasgow about nine or ten in the morning, brought advice on the 11th of October that sugars had risen 2s. 6d. per cwt. Upon this the appellants sent the following letter *by express* to the respondents:—" We are favoured with yours of " this morning, *making us an offer* of your and Mr. Morris' " 133 casks of sugar from Tortola, at 57s. per cwt., and to " allow 14 lb. extra tare upon all the casks from 10 to 12 " cwt. As Mr. Morris told us when here that these casks " are lighter than they used to be, we therefore agree to " take these 133 casks sugar at said price of 57s. per cwt., " payable at the usual credit of four months.—When we " want them shipped we will advise you."

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This last letter treats the respondents' first letter of the 9th October as *an offer* for the sugars; and the appellants conceived they had only to intimate their acceptance to close the bargain and sale as to these sugars. After dispatching this letter, John Duguid, one of the appellants, proceeded to the public sample room with a view to prevent a sale of the respondents' sugars, (which their agent, Mr. Alexander, had power to sell), under the pretext that they had made a purchase of them. Mr. Alexander, who had that morning been in terms with one Brown, a dealer for the sugars, came to the sale-room by appointment with Brown; and Brown coming into the sale-room almost at the same time, they entered into conversation, but were interrupted by Duguid, who took Alexander aside, and told him that the sugars were his by transaction, and referred to the above correspondence, and the letter of 9th October from the respondents, which he called an offer, and said he had accepted *that offer*, and thus the sugars were his.

Mr. Alexander stated that the letter did not strike him in the same light, but as he did not know how the respondents might have considered it, he would stop the sale of the sugars, and write for instructions. Mr. Alexander accord-

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ingly wrote and explained his negotiations for a sale of the sugars with Brown, stating he could have got 59s. per cwt. for them, and then concludes thus:—"I wish to know if "when you wrote Mr. Duguid, you considered it as making "him an offer of the sugars, and that you were bound to ac-"cept the offer he says he had wrote you of. It will be a "pity if he gets them. By advices from London this day, "sugars have got up 2s. 6d. per cwt., so that since you were "here, they have advanced them 3s. 6d. per cwt."

Before the above letter was received, *that* which the appellants had taken care to send by express in the morning of the same day, had reached; and the following answer immediately returned:—

"Gentlemen, *Port Glasgow*, 11 *Oct.* 7 o'clock Evng.

"I received yours of this day's date, and agree to let "you have Mr. Morris' and A. M'L. & Co.'s 133 casks sugar "ex Tortola, at 57s., with an allowance of 14 lb. extra "tare on all casks from 10 to 12 cwt.; *but providing that "Mr. Morris or his agent Mr. John Alexander, has not al-"ready sold them,* and you will apply to Mr. Alexander im-"mediately, to know whether or not he has already dispos-"ed of these sugars.—I am," &c.

The above letter, it was maintained, proved that there was previously no bargain between the parties.

To Mr. Alexander's letter writing for instructions, which reached the respondents on the 12th Oct., they wrote for answer, that the appellants' letter of the 8th only sought for information, and that they had answered it in the usual style of giving information; and that if they had stopped the sale to Brown it was not fair.

In these circumstances, the respondents sold the sugars to another party; and the appellants raised the present action, concluding for payment of £1000, "as the amount of loss "and damage sustained, or which might be sustained, "through failing to fulfil the bargain and disposing of the "sugars."

The Lord Ordinary (Dreghorn) pronounced this interlocutor:—"Finds from the correspondence that the sale "libelled was a complete bargain; and therefore finds the "defenders liable in damages to the pursuers, and allows a "condescendence thereof to be given in; but, in respect of "the circumstances, finds no expenses due." On representation, the Lord Ordinary adhered. But, on a reclaiming

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petition, the Court altered the interlocutors of the Lord Ordinary, assoilzied the respondents, and decerned; and found the appellants liable in expenses.

Against this interlocutor of the whole Lords the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The respondents have insinuated that the transaction was not fair, and have imputed fraud to the appellants. But, suppose that Mr. Duguid had known that the price of sugars either had risen, or was likely to rise, and had really hurried to conclude a bargain which he foresaw was likely to be a good one, is it possible to maintain that he is guilty of any fraud in so doing? Messrs. Duguid practised no imposition upon M'Leish; they gave him no false information, hung out to him no false lights; if the market rose during the course of the transaction, they had a right to the advantage; a fair prospect of gain is a very proper reason for hastening the conclusion of a bargain which is likely to turn out profitable; and a knowledge of the present or future state of the markets in other places is not only one of the greatest, but one of the fairest and most legitimate sources of mercantile profit. The question then comes to be, Was there, as between the vendor and vendee, a completed bargain in this case? And the appellants contend that M'Leish's letter of the 9th Oct. can be viewed in no other light than as an offer and consent to sell the sugars at the price therein mentioned, provided it was accepted by the appellants. The question asked, What will you take for your sugars? He replies, 57s. Is not this a consent to take that sum, and an offer to sell at it? To argue otherwise, would be to suppose the letters written to gratify idle curiosity merely. If this letter contained an offer, it cannot be denied that Messrs. Duguid's answer contained an acceptance of that offer, and that by it the bargain became complete.

Suppose that the day, or the very hour after Messrs. Duguid had signified their consent to accept of the sugars at 57s. the price had fallen 20 per cent., can it be contended that they would not have been bound to accept the sugars at that price, and to stand to the loss? and if so, are they not equally entitled to the profit? since the only ground upon which they could have been liable to the former is, that the bargain was complete; and if it was so upon the one side, it must have been so upon the other.

Supposing, however, the appellants' letter of the 11th

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October accepting the offer is not to be looked upon as finishing the transaction, yet it cannot be disputed but that Mr. M'Leish's answer of the 11th is a complete acceptance of the terms of the appellants' letter, with only a proviso that the sugars were still under the power of M'Leish—a proviso which it seems to have been almost unnecessary to add; and as the sugars were not sold prior to the receipt of that letter, it follows, that immediately upon its receipt, they became the property of the appellants. No doubt an attempt is made to show, that but for Mr. Duguid's representations that he had purchased the sugars, they would have been sold to another party, but which sale was prevented by his interference. But the appellants maintain that there was no unfairness, or attempt at imposition in this. Mr. Duguid concealed nothing—misrepresented nothing. He showed Mr. Alexander the letters with M'Leish, and allowed him to judge for himself.

Pleaded for the Respondents.—The true question here is, Whether there was a completed bargain, so as to entitle the appellants to insist in the present action? The appellants' action rests on the principle, that one purchasing goods from another, who does not fulfil his contract by delivery, is entitled to recover what he would have made by the goods had they been delivered, or to reparation for the loss he sustains by the want of them; but it is evident that the purchase, to have such consequence, must have been fairly made. The appellants in effect admitted, that at the time they transmitted their offer of purchasing to the respondents, they knew that the market price of sugars had risen; and the mode of transmitting it evidently shows that they wished to conclude the bargain before the respondents had the same intelligence. They even plumed themselves upon it as a proof of superior intelligence and alertness, and justified it upon the practice of merchants. The respondents do not mean to contend, that it is necessary, in commercial dealings, to communicate or disclose intelligence or motives, nor do they mean to deny that it is allowable to take advantage of prior information or superior sagacity; but in all such cases *certi fines sunt, quos ultra, citraque nequit consistere rectum.* Care must be taken not to go beyond these bounds in the least. That the appellants used improper means to overreach the respondents, is apparent from the correspondence and admitted facts. It was improper, when there was, to their knowledge, an agent at Glasgow appoint-

ed to sell the sugars, to apply in the way that was here done, to the respondents themselves, living at a distance. Had it not been that the agent (Mr. Alexander) had the same intelligence as the appellants, the application would have been to him; and had it not been to outstrip the intelligence which it was foreseen the respondents would receive, from their agent or otherwise, by the post of that day, an *express* would not have been sent. It was still more unjustifiable for the appellants to interfere with the sale of the sugars to Brown at the time when they had no interest in or right to them; and their view in so doing was plainly fraudulent, because they could not fail to be sensible that the respondents' answer would, in any event, be qualified, as it actually turned out to be. The respondents having employed Mr. Alexander to sell, and not knowing but a sale had actually taken place, could not signify their acceptance of the appellants' offer without annexing the condition, *if the goods remained unsold.* But, by the appellants' interference, the respondents were deprived of an advantage they were unquestionably entitled to; and that semblance of a concluded bargain which the appellants found on, was obtained by means so unfair, as effectually to destroy it.

But, in point of fact, there was no concluded bargain. The appellants say that the respondents' letter of the 9th October was an offer of the sugars at the price, and on the terms mentioned in it; and that they having signified their acceptance by the EXPRESS letter of the 11th, the bargain was complete, the sugars were theirs, and they had a right to interfere and to prevent the factor selling to another. But this proposition is preposterous. The respondents' letter of the 9th October was an answer to simple questions, which it is usual for one dealer to ask another:—What price they had fixed on for the goods? what was the weight, or the quantity, &c., and the answer did not go a hairbreadth beyond the questions. How, therefore, they have been able to construe this letter into an offer, surpasses all that the respondents can possibly conceive.

But the appellants, in the second place, maintain that, at any rate, the bargain was concluded by the respondents' (vendors) letter of the 11th October accepting the offer made by them in theirs of the same date. But this necessarily assumes that there could be no completed bargain until the appellants had received the respondents' letter of the 11th October, accepting on condition of Mr. Alexander

the agent not having sold the goods;—while Mr. Duguid's interference before that date in stopping a sale to Brown, on the pretext that he had purchased the sugars, would, upon this view of the case, appear the more improper and unwarranted. In these circumstances, it will be evident that through the fault of the appellants, the respondents were deprived of an advantage they were entitled to, and would have secured, but for the falsehood and misrepresentation of Mr. Duguid. Their conduct, therefore, must operate to annul the bargain, or rather, so as to make it be held *that there never was a bargain.*

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *J. Anstruther, Geo. Ferguson.*

For Respondents, *T. Erskine, W. Grant.*

[Mor. 1620.]

Messrs. PATRICK REID, DAVID KING, and Co., Merchants in New York; JAMES WILSON and Co., Merchants in Kilmarnock; and JAMES WILSON and SONS, Merchants there, - - *Appellants;*

ARCHIBALD and JOHN COATS, Merchants in Glasgow, - - - *Respondents.*

House of Lords, 21st Feb. 1794.

BILL—NEGOTIATION—NEGLECT.—A bill was taken in security of a prior bill, it being at same time agreed that the prior endorsers and acceptors should remain bound. The acceptors of the new bill failed, and the bill in security was never recovered. Thereupon action was raised upon the original bill against the acceptors and endorsers thereof, which had been duly protested. Held, that a bill granted in security is not exempted from the strict rules of negotiation, and this having been neglected by the holders of the new bill, that the acceptors and endorsers of the original bill were not liable in payment.

The respondents, Archibald and John Coats, having furnished goods to James Wilson and Sons, merchants in Kil-