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sand pounds sterling specified in the policy, but only a sum equal to the damage he sustained by the loss of the ship and her cargo, be, and the same are hereby *reversed:* And it is hereby declared, that the appellant is entitled to recover from the respondents the sums by them severally underwritten, and interest thereof from the date of the decree of the Admiralty Court, and of the sum of £83. 1s. as the expenses of extracting the decree in the said court, under discount of 2 per cent., in terms of the policy, and of £23. 7s. as the acknowledged value of what was recovered from the wreck, and dismisses the cross-appeal.

For Appellant, *Ja. Montgomery, Al. Wedderburn.*
For Respondents, *J. Dunning, Fl. Norton.*

ROBERT ALEXANDER, Esq. - - *Appellant;*
JAMES MONTGOMERY & Co. - *Respondents.*

House of Lords, 19*th February* 1773.

SALE—LOCUS PENITENTIÆ.—Circumstances in which written correspondence, in regard to a sale of coal, was not held to amount to a final and conclusive agreement, the parties having stipulated that their agreement was to be a *written* agreement, and, until this was executed, either might resile; affirming the judgment of the Court of Session.

A proposal was entered into for the sale of coal, on the appellant's part, to the respondents on the other; and the question was, Whether the following letters, which passed from the one to the other, imported a definite and final agreement on the subject of the sale?

The respondents were possessors of the Newton colliery in Ayr: and Mr. Alexander addressed the following letter to Dr. Campbell, one of the partners of that com-

Mar. 12, 1770. pany. "Sir,—My friend, Mr. M'Adam, acquaints me, he "had talked over a proposal which I had desired him to "make to you and partners of the Newton coal work, for "the delivery of a quantity of coals at the harbour from "my brother's estate yearly. Mr. M'Adam informs me that "your company agree to take 25,000 tons yearly, and to "pay for the same, on delivery, 5s. per ton, the agreement "to commence Martinmas next. Mr. M'Adam says nothing "of the endurance of the agreement, but my agreement was "to agree for 21 years. It being understood that, should "the coal work cease for want of coal, or other unavoidable

" obstructions, the agreement shall cease, but otherwise,
" you shall have *all the coals taken out* to the extent you
" agree for, and for any quantity short taken out, we shall
" pay you a penalty equal to what we suppose your profits
" may be, suppose 6d. per ton; and this I now confirm.
" I dare say, as our interests are by this agreegment the same, Mar. 17, 1770.
" you will have no difficulty in allowing a waggon to pass
" through your grounds, on paying damages.—Mr. Beaumont,
" who is to work the coal for my brother, will doubtless call
" on you, and as he is a very skilful and judicious man, I
" doubt not but he may be of use even to your works, and
" that, in all events, you will go on together harmoniously.
" He brings most of our colliers from England. I think a
" missive letter as binding as any other. *But as the agree-*
" *ment is for a long time, it may be convenient to have a deed*
" *on stamped paper. If you will send me a scroll, I shall re-*
" *turn it with my observations*, or extend and sign it if right."

The answer to this letter was as follows:—" Having
" been some days from home, I did not get your letter till
" just now, else I should have answered it in course. I did
" agree with Mr. M'Adam, as he wrote you, to give you 5s.
" per ton for your coal, delivered on the quay, and to take
" 25,000 tons the first year, and 30,000 tons every after year,
" but no more, as I was apprehensive that quantity, with
" what may be expected from the other coal pits, would be
" as much as could possibly, in the present state of our (Ayr)
" harbour, be shipped in 12 months, and more than can be
" shipped at the present wharf; but, as we have an exclusive
" privilege of erecting wharfs on the other side during the
" course of our lease, we can in some measure obviate that
" difficulty. I told Craigengillan, (meaning Mr. M'Adam),
" if our harbour came to be improved, so as to contain more
" shipping, I should have no difficulty in extending the ex-
" port of your coal, as there is no present appearance of
" the markets falling for commodities; we did not agree
" as to time. I did not know how much of our Newton tack
" was to run, and he was not very sure how long you might
" like to engage. *But I must now inform you, that we do not*
" incline to take it longer than till the end of our Newton tack
" of which there is to run 16 years, after Martinmas next.
" As to the bargain being void, upon the coal becoming un-
" workable, it is reasonable and agreed to; as to 6d. a ton
" for what you may fall short while it is wrought, it is more
" than we get by it; and therefore cannot be objected to.—
" As to the waggon way, I cannot speak to that point; I am

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" afraid we have it not in our power, without the consent of " the proprietors, to grant it; neither do I know (as I have " not seen any of them) how far it may be agreeable to the " other gentlemen concerned, if we should get the consent " of the community of Newton; but this I will venture to " say, that there is nothing Mr. Alexander ought to ask, or " we to grant, that will be refused, as I am sure we will " most heartily wish to see a thing of such general concern " fairly on foot. *When I have your answer to this, I shall* " *cause scroll the contract, and send it you.*"

Mar. 19, 1770. To this letter, Mr. Alexander returned the following answer:—" I have your favour of the 17th confirming, on be- " half of the *Newton Company*, the verbal agreement made " with Mr. M'Adam about my brother's coal; by the said " letter, I see you propose to take about 30,000 tons of coals " annually, after the first year, which, accordingly, I engage " for him to deliver to the company, the agreement to last " for 16 years from Martinmas next, the penalty 6d. per ton. " I apprehend our mutual missives sufficiently explicit and " binding; and the only use of a formal contract is, in case " any of the letters being lost, or to enforce summary execu- " tion. *When you send me the scroll*, I shall examine and " return it with my observations. In regard to a waggon- " way, every motive of mutual interest, exclusive of the pub- " lic benefit, will certainly induce you to promote a waggon- " way, which may carry both coals; and we send next week " a gentleman well conversant in these matters, with full " power to transact this; and to prepare for opening the " coal. His name is Mr. John Beaumont. He will be very " ready to give his best advice and assistance, which may be " worth attending to; *you need say nothing to him of the* " *agreement.*"

As in these letters reference is made to the alleged agreement entered into in regard to the sale of the coal, the following letter from Mr. Alexander then followed:—" Sir,— " As you are so good to offer to make enquiry about the sale " of coals, and to see if any of the Air gentlemen would en- " gage and buy my brother's, deliverable at the ship's side " in Air, or on the coal hill, I beg leave to acquaint you " that, having taken all possible information concerning the " coal, we have reason to think it valuable; and as the offers " hitherto made are noways adequate, my brother thinks " of working it himself, at least till such time as the value of " it is better understood. We have in view a man of skill " and abilities, who would work it for my brother's account;

" but, unless the sale could be extended to at least 25 or " 30,000 tons, we could not offer him such an appointment " as would be necessary to engage him; we find the coals " could be delivered on board ship for 5s. per ton good " weight, or 4s. 6d. on the hill; and as we live at such a " distance, and charges must attend the receiving the money, " and making it a staple trade, if men of character could " be found who would take the coals as they are turned out, " which shall be in a good merchantable condition, the " quantity annually as above to be increased in the option " of the buyer, not to exceed 60,000 tons, my brother would " enter into a contract, to commence Martinmas next; and " as the contractor would be put to no advance, and the " present export price is 6s. per ton, or 5s. per ton on the " hill, supposing export sale could be pushed at 5s. 8d., the " difference would be a handsome allowance to the con- " tractor. I beg to hear from you soon on this subject, as " we must decide on something immediately."

No written or stamped agreement followed; but a scroll was made out, and sent by the one to the other, and in the correspondence that attended the alterations thereon, and the terms thereof, the parties finally disagreed.

In the meantime, it was alleged by the appellant, that on the faith of the preliminary agreement, they made a contract with a man of skill, who had proceeded to take measures for opening and working the coal in question. And, conceiving that by the letters above quoted, there was a conclusive binding agreement, the appellant raised action for implement thereof.

The Lord Ordinary, of this date, pronounced this interlocutor, " Having considered the letters of correspondence " exhibited by both parties, finds, in the treaty for entering " into a contract between the parties, several of the material " and essential articles were not adjusted and agreed upon, " and that no finished bargain was concluded so as to be " binding upon the parties, but that either of them may re- " sile from their proposal; therefore dismisses this action, " and assoilzies the defenders, and decerns." June 26, 1771.

On petition, the Court altered, and held that there was a concluded bargain, and that the parties were not entitled to resile. But, on a second reclaiming petition, the Court found—" That no finished bargain was concluded so as to " be binding upon the parties, but either of them may resile. " Therefore assoilzie the defenders and decern." Mar. 6, 1772.

Against this interlocutor of the Court, and that pronounced

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by the Lord Ordinary of the 26th June 1771, the present appeal was brought.

Pleaded for the Appellant.—The question upon the present appeal is, Whether such an agreement is made out by the letters which passed between the parties, supported by acquiescence, as establishes a concluded bargain? The requisites essential in a contract of sale, are, consent of the parties, *certainty* in the *thing* sold, and the *price* paid. In the present case, all these three requisites are present; and if that be fixed, it can afford no solid objection to the efficacy of the contract, that the parties disagree about the *mode* or *manner* of carrying the contract into execution. Hence, in the transaction, there are *termini habiles* to constitute a binding bargain; and, as obligations in respect to land rights may be constituted by letters, *a fortiori* in mercantile transactions, the case must be the same. The want of obligatory words in this correspondence, is no good objection, because Mr. Alexander had engaged to deliver 25 or 30,000 tons per annum; and no *verba solemnia* are necessary to constitute a bargain by letters. The price was fixed at 5s. per ton, to be delivered at the quay of Ayr. The agreement was to endure for 16 years. And it was no objection to this to say, that the parties had agreed, that the articles were afterwards to be reduced into a formal contract, and therefore, that until such contract was prepared and executed, the bargain was incomplete, and the parties entitled to resile; because, although this rule of law was undoubted, yet where, from the tenor of the letters themselves, which clearly shewed that both parties understood themselves bound by these letters, and only bound themselves to enter into a more formal contract for the purpose of summary execution, it was clear that this rule of law did not apply to the circumstances of this case. Nor does it signify that the person who wrote these letters had no power, his brother, the appellant, being the proprietor, and the only party entitled to treat; because the appellant's brother, who wrote these letters while the appellant was on the Continent, had full power, and was authorized to enter into such a contract; and Mr. Campbell was a copartner of the company.

Pleaded for the Respondents.—Both parties, from the beginning of this correspondence, had a contract in contemplation, which appears from the letters themselves. Mr. Alexander even first proposed it, and accordingly a scroll of the contract was written out. This was agreed to; and it was upon descending to particulars in this scroll, that the parties disagreed. A contract, therefore, having been agreed upon,

the rule of law which gives *locus penitentiæ* 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 penitentiæ*. 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.

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.

The MAGISTRATES and TOWN COUNCIL of the Burgh of Rutherglen, - - - } *Appellants;*

JAMES CULLEN, Wright at Whitehills, JAMES WEIR of Hill, and SAMUEL STEIL of Townhead, - - - - - - } *Respondents.*

House of Lords, 12*th March* 1773.

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