

No 44.

go on with the process, but willing to refer it to a certain gentleman, it was not moved in till July thereafter, so that there was no homologation to bind him.

THE LORDS, 13th January 1748, "found that the pursuer was bound by the agreement."

On bill and answers, wherein all the feuers, except one who was minor, and for whom the rest took burden, offered a formal writing, obliging themselves, in terms of the minute,

THE LORDS adhered, and remitted to the Lord Ordinary to see the feuers accede to the contract.

Act. R. Craigie & G. Pringle.
Reporter, Tinwald.

Alt. W. Grant & Garden.
Clerk, Hall.

Fol. Dic. v. 3. p. 394. D. Falconer, v. 1. No 255. p. 342.

1759. August 10.

JAMES MUIRHEAD against JAMES CHALMERS.

No 45.

An obligation to dispone lands, contained in a missive letter delivered to the buyer, is binding without any written acceptance.

JAMES MUIRHEAD agreed to sell certain houses to James Chalmers. The terms of the bargain were expressed in the following holograph letter written by him, and directed to Chalmers: '26th August 1757.—SIR, I promise and oblige mé, that Thomas Anderson, merchant in Leith, shall dispone to you a tenement of land in the head of the Canongate, Edinburgh, which formerly belonged to me, possessed by James Inglis, merchant in Canongate, and others; and that upon payment to him of L. 190 Sterling, L. 100 Sterling whereof to be paid at Martinmas first to come, and L. 90 Sterling at Candlemas likewise first to come; and that from and after Whitsunday last past, which is to be your entry thereto, you having paid L. 1 Sterling of earnest; and the rights shall be made out at the sight and pleasure of Mr Walter Ferguson, writer in Edinburgh, which I oblige me shall be done at or before Martinmas first.—I am, SIR, Your most humble servant, JAMES MUIRHEAD.'—(Directed) To Mr James Chalmers, Merchant in Leith.

In November 1757, James Muirhead delivered the progress of writings to the purchaser's agent, in order to make out a proper disposition; and there was advanced to him by the purchaser L. 50, for which he granted his bill.

The purchaser, in the mean time, made some repairs on the houses, and set to tenants some of them which fell vacant.

James Muirhead afterwards refused to fulfil the bargain; and insisted, That the missive letter was only an obligation upon one of the parties in this mutual contract; and that, therefore, there was *locus poenitentiae*, until the other party became bound, by a counter missive, which, in this case, never was executed: That he had sold the tenement to Anderson before his treaty with Chalmers; but that Anderson had promised to re-dispone it: That Anderson died before Martinmas 1757, and Muirhead could not obtain a re-disposition from his heirs: That, in every mutual contract, if both parties are not bound,

both must be equally free : That Chalmers was not bound by this letter ; he might have put it in the fire, as Muirhead had no counter obligation to show against him. If the subject had perished by fire, or any other accident, Muirhead could have had no action for the price : That this question had been determined, 21st March 1634, Lady Edenham, No. 18. p. 8408. observed by Spottiswood, where a contract between a single person on the one side, and several parties on the other, being not subscribed by all of them, was found not obligatory on the single person ; and, upon the 28th January 1663, Montgomery, No. 25. p. 8411. it was found, that where a purchaser, after a verbal transaction about lands, had wrote a letter to the seller, bearing, that he was not able to get the money agreed upon ; but adding, ‘ All I can now say is, ‘ I am not to pass from what was spoken betwixt you and me ;’ this did not bar the writer of the letter from resiling, because the other party could not be bound by barely receiving the letter ; and both behoved to be bound, or neither.

Answered, The disposition to Anderson cannot prevent Muirhead from fulfilling his bargain, seeing that disposition is still in his own hands, and never was delivered to Anderson ; nor do his heirs make any claim upon it. There can be no doubt, that a person may bind himself, by a holograph writing, to dispoise lands to another at a certain price, and the other party becomes also bound by his acceptance of the obligation. The opinion of Lord Stair is express, book 1. tit. 10. § 3. ‘ An offer accepted is a contract ; because, it is the ‘ deed of two, the offerer and acceptor.’ The same question was determined in a late case, 23d November 1748, Lord Kilkerran against Benjamin Paterson, No. 43. p. 8440. where Paterson had granted an obligatory holograph letter to his Lordship for the sale of his lands, and afterwards wanted to resile ; but, as it was admitted to have been delivered to Lord Kilkerran at the time of the agreement, the Court found, that no *locus poenitentiae* was competent to Paterson.

The cases referred to do not apply. In that observed by Spottiswood, in 1634, the bargain was executed by a mutual contract, and some of the contractors had not subscribed ; by which, of consequence, the contract was incomplete : And in the other, in 1663, the letter was neither conceived in proper obligatory terms, nor could the other party be considered as having accepted of it, by barely receiving it as a common letter. In the present case, not only is the letter conceived in proper terms, but it was delivered and accepted in consequence of the bargain. Muirhead, the seller, afterwards delivered the progress of writings to the purchaser’s agent, and received part of the price upon his bill ; and the purchaser, on the other hand, entered to the possession of the houses, laid out money upon them, and let some of them to tenants.

No 45. THE LORD ORDINARY repelled the defences; and found Muirhead obliged to fulfil the bargain.

“THE LORDS adhered.”

Act. *Ferguson.*

Alt. *Garden.*

W. J.

Fol. Dic. v. 3. p. 393. Fac. Coll. No 197. p. 351.

1761. February 26.

FULTON against JOHNSTON.

No 46.

A promise in writ to sell land is not binding, unless delivered to the person to whom it is made.

A COMMUNING about the purchase of land, betwixt two neighbours, was perfected by a missive letter in the following words :

‘ MR ALEXANDER FULTON,

19th June 1760.

‘ IN terms of our agreement this day, I hereby promise and oblige myself to subscribe and deliver to you a valid disposition of my houses and land in Coldinghame, containing absolute warrandice, a procuratory of resignation, a precept of sasine, an assignation to the rents payable for crop 1760, and downward : And I bind myself to deliver a sufficient progress, and to purge incumbrances : You, on the other hand, being obliged to pay L. 160 as the price, or to grant bond therefor, payable at Martinmas next, bearing interest from Whitsunday last. And, for avoiding all disputes about the true meaning of these presents, I agree to submit to John Renton, writer in Eyemouth, all differences that may occur thereanent. And I engage to perform the premisses, under the penalty of L. 50 Sterling, beside performance.

‘ I am, &c.

ALEXANDER JOHNSTON.’

Alexander Fulton brought a process before the Court of Session, demanding performance of the promise contained in this missive. And the defender, who had repented of the bargain, insisted that he was not bound by the letter, because the pursuer was not bound by it; urging the maxim, that, in mutual contracts, both parties must be bound, or neither. It was *answered*, That this neither was a mutual contract, nor was intended to be such; that it was a promise, which is binding with respect to land as well as with respect to any other subject; with the following difference only, that a promise to sell land must be in writ.

At the advising of this cause, it was thought a material circumstance to whom the letter was delivered. The writer was not bound while the letter continued in his own hand: But, if it was delivered by him to Alexander Fulton, the delivery transferred the property of the letter to Fulton; which, of course, was a good title in him to claim performance of the promise. As the parties were not aware of the importance of this fact, they had not made any enquiry about it. This only was agreed, that the letter had been in the hands of John Renton, and had been delivered by him to the pursuer. Proceeding