No 42. LORDS found, " That there was here no *locus pœnitentiæ*, and that the defender was bound to accept of the 7000 merks, with deduction of the third of the *praecipuum*.

Fol. Dic. v. 3. *p.* 395. *Kilkerran*, (LOCUS POENITENTIAE.) *No* 1. *p.* 340.

*** D. Falconer reports this case.

ELIZABETH, Ann and Agnes Moodies, the daughters and heirs portioners of John Moodie of Ardleckie, came to an agreement, that the estate should belong to the one of them who should be the highest offerer at a roup amongst themselves, and the price be equally divided, allowing first a certain *præcipuum* to Elizabeth, as the value of the mansion-house, &c.

It was *alleged*, Ann and Agnes had made a verbal contract, that, to encourage Ann to bid for the lands against Elizabeth, Agnes should accept of 7000 merks for her share, whether the price of the purchase were higher or lower.

Ann accordingly bought the estate, and offering to pay Agnes with 7000 merks, she refused, and *pleaded*, that in bargains of buying of land, there was *locus pœnitentiae* till the compact were completed by writing.

Pleaded for Ann, There can be no *locus pœnitentiæ*, where *res non est integra;* and here the purchaser was induced by this bargain to give more than otherwise she would have done.

THE LORDS, 21st June, " found there was no *locus pœnitentiæ*."

Pleaded in a reclaiming bill, That, by the terms of the libel raised by Ann, the agreement was said to have been notwithstanding of the articles of roup, which implied it to have been subsequent to them; and this which was the only thing that had the appearance of relevancy, as any prior paction was passed from by signing the articles, the petitioner absolutely denied.

A paction prior to the articles, being neither directly acknowledged, nor absolutely denied by this petition; the LORDS adhered in determining the relevancy.

Reporter, *Lord Dun.* Act. *Lockhart.* Alt. *Ferguson.* Clerk, *Hall.*

D. Falconer, v. 1. *p.* 113.

1748. *November* 23.

SIR JAMES FERGUSON of Kilkerran *against* BENJAMIN PATERSON.

No 43.
A promise in writing to dispone land, is binding in law.

BENJAMIN PATERSON wanting to purchase the debts due by his father, and thereby get into possession of his father's estate of Glentig, prevailed upon Sir James Ferguson of Kilkerran to desist from purchasing the same, upon a promise to convey to Sir James the pendicle of Duchary, part of the said estate, which lies interwoven with Sir James's property. This agreement was executed

by a missive letter, delivered by Paterson to Sir James, of the following tenor: Kilkerran, 8th September 1739, 'My Lord, Agreeable to what passed between 'your Lordship and me the other day, at your own house, I hereby assure your 'Lordship, that if I shall have the good fortune to get right to my father's 'debts, which I propose to transact with his creditors, in order to enable me to 'acquire right to his estate, I shall dispone to your Lordship the mailing of 'Duchary, at years purchase of the present rental thereof. I have been 'informed more fully since I saw you, that it is very proper that you should 'have it in with Knockdow; and being so small a matter, I expect more friend-'ship by your Lordship in the country, than the favour of granting this to you 'deserves; and hereby obliges me to make over in your favour the said mail-'ing of Duchary, and all right that I shall acquire in security of your right 'thereto, at the price of years purchase at the present rental. I am,' &c. No 43.

In this letter the price was left blank, it being referred verbally to Crawford of Ardmillan, who, in a communing with Paterson, having fixed the price at twenty years purchase, a postscript was added to the letter, in the following words: Streton, September 18. 1739, 'My Lord, Ardmillan having proposed 'twenty years purchase to be paid by you to me for the above mailing of Du-'chary, I agree thereto, referring to your Lordship if you will give me any 'more. I am,' &c.

Paterson, after purchasing the debts, declined fulfilling his engagements. Sir James brought his action upon the missive letter, concluding, that Paterson should dispone to him the said farm of Duchary, &c. The defence was, that this is a mutual contract where Sir James is not bound, and therefore the defender cannot be bound.

In answer to this it was premised, that the argument fails, unless it can be maintained, that no bargain about land is effectual in law, unless conceived in the form of a mutual contract. This cannot be maintained; for it is a point established by inveterate practice, that bargains about land may be of all the different kinds, as well as bargains about moveables; with this difference only, that a bargain about land must be in writing.

There are three different forms by which men bind themselves to each other, mentioned by Lord Stair and other writers, all of them equally productive of actions at common law; the first is promise, the second offer, the third mutual contract. A promise is defined to be 'that which is simple and pure, and hath 'not implied as a condition the acceptance of another,' Stair's Institute, b. 1. tit. 10. § 3. and 4. But when an offer or tender is made, there is implied (says the author, ibid. § 3.) a condition that, before it become obligatory, the party to whom the offer is made must accept. According to these definitions, there is little or no difference betwixt a promise and an offer where the performance is simple, without implying any thing to be done by the other. But if the promise, or the offer, require any thing to be done by the other, the difference betwixt the two comes to be of importance. If one make an offer to sell a thou-

No 43. sand bolls of wheat at twenty shillings per boll, the offer must be accepted, in order to bind the person to whom it is made; and, before acceptance, the party may withdraw his offer, for this very thing is implied in the nature of an offer; and therefore our author justly assimilates an offer accepted to a mutual contract, both being bound thereby, dict. § 3. But he considers a promise as of a very different nature; the person who promises being bound, and not the person to whom it is made. Thus, if I promise simply and absolutely to deliver a quantity of wheat at twenty shillings per boll, the person to whom the promise is made is not bound to accept the wheat, though he has the other bound to deliver it; and though such a promise requires something to be performed on the other part, yet it differs nothing in its nature from a simple promise to pay or deliver a sum of money without any condition, where the obliger is bound, and the obligee not at all.

To apply these principles to the present case, the bargain in question may be considered either as a promise or as an offer: If it be considered as a promise, the defender is bound thereby; and it is no objection that the pursuer is not bound, because such was the intention of parties; if it be considered as an offer, the pursuer has accepted the same, the letter being written in his presence, and delivered to him, and afterwards the postscript. Nor does our law know of any more solemn form of acceptance than is inferred from receiving delivery of a deed.

And it is trifling to plead, That such a deed may be destroyed, whereby the holder will get free of his obligation. The same may be said of a mutual contract, where there is but one double; and the answer to both is the same, That the thing cannot be done legally; and as to illegal acts, there is no other fence against them, but damages and penalties.

One thing is clear, that this letter must either be null and void altogether, or be effectual without the subscription of the pursuer. It is of no moment that land is the subject of the bargain; for, as observed above, there is nothing in law to confine bargains about land to the form of a mutual contract. It is very true, that a mutual contract must be subscribed by both, or it is binding upon neither: The form of the deed requires the subscription of both; and, till both subscribe, the deed is unfinished and imperfect. But the form of the deed under consideration admits not the subscription of both parties; it was perfected by the subscription of the defender, and therefore must be effectual from the moment of his subscription, or not at all. It will not be disputed, that a bargain in this shape would be effectual as to moveables; yet there is no difference betwixt land and moveables as to this particular, since the obligations are in writing. And instances of sustaining conditional obligations with regard to land, are just as frequent as sustaining them with regard to moveables.

Such conditional obligations may indeed be attended with hardships upon those who are bound, if the obligee should refuse to say, whether he will accept of performance or not. But there is a remedy in equity, if not in strict law, by

a process in which the obliger will be declared free, unless the obligee de[illegible] his mind.

" Found the defender bound by the missive letter, to dispone to the pursuer the lands of Duchary, at the price therein specified."

Fol. Dic. v. 3. *p.* 394. *Rem. Dec. v.* 2. *No* 98. *p.* 175.

1748. *June* 7. MR GIDEON RUTHERFORD *against* The FEUERS of BOWDEN.

An writing unstamped paper, with an address to a writer subjoined, to draw an agreement in form, was sustained.

MR GIDEON RUTHERFORD of Kidheugh, proprietor of the Over Mill of Bowden, to which the Feuers of Bowden were astricted, raised a process against them for abstracted multure, which gave occasion to a meeting, 26th January 1743, betwixt him and four of the principal feuers, where the quantity of the multure was adjusted by a paper, intitled, Articles of Agreement betwixt Mr Gideon Rutherford and the Feuers of Bowden; to which was subjoined a direction, addressed to a certain writer, to extend a formal contract agreeable thereto, signed on the last page by the pursuer, his miller, and the four feuers; and on the first, being the whole number of pages, by the pursuer and one of the feuers.

Mr Rutherford, on an allegeance, that there remained some other articles to be determined, which the feuers, at a subsequent meeting, declined to settle, proceeded in his process, and the feuers defended themselves on the agreement.

Pleaded for the pursuer; The agreement is null, being on unstamped paper, not bearing the name of the writer, nor signed before witnesses, containing several unsigned interlineations and marginal notes, and not subscribed by the whole defenders, and so not binding on both sides; besides, as it was agreed, a formal contract should be executed by all the parties, there is *locus pœnitentiæ* till that be done.

Answered; The agreement was intended to be binding, being signed by the pursuer, his miller, and the four defenders who acted for the rest. There was no need of the solemnities of deeds, as so many subscribers were *contestes* to each others subscriptions; and the whole are now bound, as there was an instrument taken in their name, 21st January, declaring their accession thereto, and they are now taking advantage of, and defending themselves upon it, and have homologated it by paying, as the pursuer has by receiving his multures accordingly, ever since the date. It did not need to be stamped, for though it was intended to bind the parties, yet a more formal writing was intended to be executed; and as the Lords have sustained actions upon missive letters, the address to the writer was in form of a missive.

Replied, The four feuers did not take burden for the rest, but it was intended the whole should subscribe, till which time the contract was imperfect. The miller's taking the multures, when they would pay him no other, could not bring any obligation on the pursuer, who, 26th January, wrote to his agent to