

a process in which the obliger will be declared free, unless the obligee does so to his mind.

“ Found the defender bound by the missive letter, to dispoise 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.

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, intituled, 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 allegiance, 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 poenitentiae* 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

An  
writing  
unstamped  
paper, with  
an address to  
a writer sub-  
joined, to  
draw an agree-  
ment in form,  
was sustained.

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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,