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

upon this fact, it must be understood, that the letter was delivered by the defender to John Renton; and the question is, *quo animo?* As Renton was present at the writing of the letter, it could not have been delivered to him for behoof of Fulton; for, if that was the view, why not deliver it to Fulton himself? The delivery to Renton, then, must have been in order that he might write a minute of sale. If so, the property of the letter was not transferred to Fulton, but remained with the writer, under his own power, so as not to be bound by it more than before the delivery to Renton. No 46.

"The defender was assoilzied."

Fol. Dic. v. 3. p. 393. Sel. Dec. No. 176. p. 239.

*** This case is reported in Faculty Collection, (where it is supposed, contrary to what seems to have been the fact, that the letter had been delivered to Fulton. *See* APPENDIX.)

UPON the 19th June 1760, Johnston subscribed and delivered to Fulton a missive letter, by which he promised and obliged himself to subscribe and deliver to him a valid and formal disposition, with all necessary clauses, of certain lands, houses, and an heritable bond which belonged to him, together with some corns growing upon the lands, and to pay off all public burdens due at and preceding Whitsunday 1760; and the missive contains the following clause: 'You, on the other hand, being obliged to pay, or to grant your bond, 'payable to me at Martinmas next, for the sum of L. 160 Sterling, as the price 'of the hail premisses agreed upon betwixt us; and you are also to relieve me 'of all public burdens payable for the crop and year 1760, and all times there-'after.'

This missive was instantly delivered to Fulton; but he did not subscribe or deliver any obligation on his part, binding himself to implement the contract. About four months thereafter, Fulton brought a process, concluding that Johnston, in terms of the missive, should be decerned to dispone his lands, and other subjects, for the price agreed upon.

Pleaded for Johnston, That, as Fulton had never subscribed or delivered to him any deed or missive, binding himself to implement the bargain, the sale was not completed, and he had *locus pœnitentiæ:* That, in all mutual contracts, the rule is, that both parties must be bound, or neither: That, in the present case, the defender had, indeed, subscribed a missive, binding himself to sell his land at a certain price. Fulton, however, was not bound to stand to the bargain. It was not enough, that he took the defender's missive and put it in his pocket. He might, notwithstanding, have delivered it back, put it in the fire, or refused to stand to the agreement. As that was the case, the defender was not bound. This was undoubtedly a mutual contract; and, therefore, as Fulton was not bound, neither could the defender.

The case may, perhaps, be different in a promise or an offer. These are monolateral obligations, and do not require both parties to bind themselves.

No 46. If a man makes a promise or an offer to another, it is sufficient that the other accepts or pursues upon it. In such cases, if the promise or offer is absolute, the person who makes it has no *locus pœnitentiæ*.

The present case is certainly a mutual contract. It is neither an offer nor a promise; because, the defender binds and obliges himself to sell his lands for a certain price; and there are prestations, on the other hand, incumbent upon the pursuer. Instead of entering into a minute of sale, which is the common way, the parties agreed to exchange missives. The defender subscribed and delivered his; but, as Fulton never subscribed any on his part, it is impossible that the defender can be bound. To this purpose the Court decided in the following cases; 16th December 1626, Byres against Johnston, No. 15 p. 8405.; 28th January 1663, Montgomery against Brown, No. 25. p 8411.; and 6th January 1727, Hope against Cleghorn, No. 21. p. 8409.

Answered for Fulton, If any person binds himself to pay or perform upon another person's likewise performing, this is a mutual contract; and if that other person is bound to perform, the agreement is obligatory. In the present case, the defender is bound to sell, and the pursuer to pay a certain price. This obligation was delivered and accepted of; and, as the pursuer insists for implement, he is undoubtedly bound; and, therefore, the mutual contract is complete.

There is no doubt, that a verbal acceptance of an offer to sell is sufficient to bind the offerer. This was determined in the case of Lord Kilkerran against Paterson, 23d November 1748, No. 43 p. 8440; and 23d December 1709, Lockhart of Carnwath against Bailie of Walston, No. 37. p. 8410. The present case is stronger than either; because, the defender not only offers, but expressly binds and obliges himself to sell. The case Byres against Johnston is not in point; because, there the letter was not delivered; and it appears that this was the reason of the decision. In the case Montgomery against Brown, the words of the missive were too general; and President Gilmour, who collects the decision, does not approve of it. The other case of Hope against Cleghorn can have no influence upon the present question. In mutual contracts, no doubt, where one of the parties is not bound, the other must be free; but, in the present case, the defender bound himself to sell, and the pursuer was bound to pay the price by the missive letter which he accepted.

"THE LORDS sustained the defence, and assoilzied Johnston."

Act. *Walter Stewart.* Alt. *Pat. Murray.* Clerk, *Pringle.*

P. M. *Fac. Coll. No 24. p. 47.*