1712. *January* 2.

WILLIAM REOCH, Wright in Edinburgh *against* CATHARINE YOUNG Relict ALEXANDER CRAWFORD Residenter there.

No 22.
A dying person desired her landlady to bring her a napkin, in which there was a L. 20 note, which she meant to give a certain person. When the napkin was brought there was nothing in it. The landlady said she would make it good to the donee. Found liable.

JEAN TELFER Madam Stewart, who lodged in the house of Catharine Young, having, when she was dying, upon Thomas Mackie's coming in to see her, desired Catharine to bring her a napkin, wherein she said there was a L. 20 Sterling bank-note, which she designed to give to Mr Mackie, as a token of her kindness; and seeming to be in a passion, and disturbed to find the napkin brought to contain nothing but a blank piece of paper, Catharine Young said to Mr Mackie, that she would make up the L. 20 to him, in case it was not made up another way. William Reoch, to whom Mr Mackie assigned his claim, pursued Catharine Young for payment of the L. 20, conform to the promise, which was referred to her oath. She acknowledged the above matter of fact, but *alleged*, 1*mo*, The words uttered by her do not amount to an obligatory promise called in law, pollicitation or offer, which doth not bind unless accepted, *L.* 3. *D. De Pollicit. Grotius de Jure Belli*, Lib. 2. C. 11. § 3. & 4; Stair, B. 1. T. 10. § 3., Allan *contra* Collier, No 4. p. 9428., and resolves only in a promise to gift, or to give charity, which cannot produce action; 2*do*, The words spoke by the defender were merely *verba jactantia*, passing words, uttered, not *animo deliberato*, or for any onerous cause, but from a sudden motion of the affections, to prevent the trouble of a dying lodger, which cannot oblige the speaker, otherwise men should be insnared with the words of their lips; 3*tio*, The promise being accessory to the gift or legacy designed for Mr Mackie, and importing only that he should lose nothing through the bank-note's being away; the pursuer who got no right to that bank-note from the defunct, and though it were on the table, could not touch it, as belonging to the defunct's executors, to whom thereafter she conveyed her means, without any express burden of such a legacy, cannot claim L. 20 from the defender, whose accessory obligation falls in consequence with the principal right.

Replied for the pursuer, He is not concerned to inquire into the motives that induced the defender to make this promise, these she herself can best account for. It is enough for him to found on a plain and solemn promise made to a dying woman; and promises made at such times being most serious and binding, are not revockable, Gordon *contra* Pitsligo, No 28. p. 8415.

THE LORDS found the oath proved the promise, and that the defender is liable for the L. 20 Sterling, unless she can instruct that Mackie recovered payment some other way.

Fol. Dic. v. 2. *p.* 16. *Forbes, p.* 568.

*** Fountainhall reports this case :

No 22.

1712. *January* 3.—ONE Madam Stewart being lodged in the house of one Catharine Young, relict of Alexander Crawfurd, and falling sick, she told her landlady, that she had sundry bank-notes and pieces of gold she resolved to distribute among her friends; and amongst the rest, there was a L. 20 Sterling bank-note wrapt up in a napkin; and Thomas Mackie coming in to see her, she called for the napkin that she might give him that note; but when brought, behold the bank-note was not there; at which Madam Stewart turned very angry with Mrs Crawfurd; and she, to pacify her, forbad her to be disturbed, for she would make good the L. 20 Sterling to Mackie, if it were not made up to him another way. Mackie, and William Reoch his assignee, pursue Mrs Crawfurd for payment on her promise, referred to her oath; and she depones, That she did say words to that purpose, that she should make it up if he got not payment of it another way. When this oath came to be advised, it was *alleged* for Mrs Crawfurd, defender, That it was no positive promise, but a mere pollicitation and offer, noways made *animo deliberato*, but by surprise, on a sudden emotion of the affections, to prevent and compose the passion and trouble her dying lodger was in, and so was not obligatory without immediate acceptance, and was never claimed till five or six years after her death; and it was so found 15th June 1664, Allan *contra* Colzier, No 4. p. 9428., where an offer not accepted did not bind. And Stair, B. 1. Tit. 10. § 3. makes a plain difference betwixt a pollicitation and promise; and so does the Roman law, l. 3. De pollicitat. and confirmed by Grotius, De jure belli et pac. lib. 2. cap. 11. and Puffendorff, lib. 3. cap. 5. De jure naturæ et gent. to whom we may add the famous Cujacius. 2*do*, The words were but *verba jactantia* without design to oblige, but only to quiet the lady. And though the canon law says, 'omne verbum de ore fidei prolatum cadit in debitum,' yet that is only *debitum in foro divino*, but has not always the *vinculum juris humani*. How oft in converse will one say, I will warrant the debt to be good, I would take it myself, &c. where there is no serious design to oblige? And *esto* the bank-note were lying there he could not crave it, seeing he cannot prove that she designed it for him; and *esto* he could, it would at best only amount to a nuncupative legacy, which stands only good for L. 100 Scots. *Answered*, That distinction of pollicitations and promises was but a nicety of the Roman law; but here is as positive as could be. And Dirleton observes, that on the 12th of November 1674, Gordon *contra* Pitsligo, No 28. p. 8415, the LORDS found, that though there was *locus pœnitentiæ* in synallagmas, yet there was none in simple and absolute promises; and as to the quality adjected, they of consent found it relevant to assoilzie her, if she could prove he got payment *aliunde*. And though she pretended there was no onerous cause for so binding herself but only to pacify the lady, this was one of the arguments that proved too

much; for this would liberate all cautioners, and annul hundreds of deeds given for love and favour; besides her negligence in letting it be lost in her house, on the edict *nautæ caupones*. Neither is it of any weight, that it is only a verbal legacy; for that restriction only holds where it is left payable after their death; but here the bank-note was called for to have been instantly delivered in her lifetime; and her promise needed no present acceptance; for they may be made to infants, idiots or absent, and yet bind; and it is a mere quibble to say he did not declare his acceptance; for who in his right wits would reject and repudiate such an express offer? THE LORDS found the promise obligatory, and sufficiently proved by her oath; but allowed her yet to instruct he was *aliunde* paid, if she would burden herself therewith. No 22.

Fountainhall, *v.* 2. *p.* 697.

1717. *July* 10. PATERSON *against* INGLIS. No 23.

A DEBTOR'S relict having written in the postscript of a letter, not to the creditor, but to a third party, these words: 'Shew such a person that if I were 'come, &c. she shall be paid, &c. if it be His holy will to spare me;' the LORDS found that these words not only imported a resolution, but an obligation. See APPENDIX.

Fol. Dic. v. 2. *p.* 16.

1723. *January* 2. KENNEDY *against* KENNEDY. No 24.

HUGH KENNEDY disponed his estate upon death-bed in favour of his son, and failing him, to Sir John Kennedy. After the son's death, this deed being called in question by Hugh Kennedy of London, a remote heir, Sir John Kennedy *alleged*, That the son, apparent heir at the time, had homologated the deed, which made it unquarrellable by any remoter heir; and he produced a missive letter in these words: 'Depend on it, I shall adhere to that right my 'father made failing me in your favour; and that you may give the more 'credit to what I here aver, I have made no other title to my estate, but have 'used the same as my evident.' It was *pleaded*, That this did only import a resolution, but no direct ratification or homologation; which accordingly the LORDS found. See APPENDIX.

Fol. Dic. v. 2. *p.* 16.

No 25.
Found that a bond for an onerous cause, bearing, that, in case it was

1737. *January* 28. PATRICK ROBERTSON *against* MACKENZIE of Fraserdale.

THE deceased Lord Prestonhall, *anno* 1710, granted a bond to Agnes Cockburn, his servant, bearing, That he was justly resting and owing her the sum of