OBLIGATION.

SECT. I.

Promise.—Effect upon Heirs?

1623. *January* 6. KINTORE *against* SINCLAIR.

No 1.
A promise found to be obligatory, though but *nudum pactum*, without a preceding cause.

THE relict of one Kintore libelled, that by a verbal submission betwixt one Sinclair in Orkney, and her umquhile husband, decreet-arbitral was pronounced and written, decerning Sinclair to pay to her husband L. 100; and that Sinclair, son to the said Sinclair, against whom that decreet was given, had diverse times promised to her that sum; and albeit Sinclair, defender, *alleged*, That she neither being executrix to her husband, nor he heir nor executor to his father, neither she could crave the sum, nor he heir nor executrix to his father; yet the LORDS sustained the pursuit. I contradicted, because the promise was *nudum pactum*, having no preceding cause, and that promises of that kind are not obligatory; because, if a man had not only promised verbally to pay, but to give his obligation for payment, and had directed the bond to be written, might repent, much more this party might resile, since there was no necessary cause of the promise, neither the pursuer having right to the sum decerned, in case the decreet had had a warrant, nor the defender being a party that could be subject to the decreet; nevertheless the LORDS persisted in their opinion, the pursuer finding caution to relieve the defender at the hands of the heir and executors of the defunct.

Fol. Dic. v. 2. *p.* 15. *Haddington, MS. No* 2716.

1740. *June* 16. GORDON of Ellon *against* Dr CUNNINGHAM.

No 2.
A person sunk a sum with a friend,

WILLIAM LIVINGSTON, intending to retire from business, wrote a letter to Gordon of Ellon his brother-in-law, informing him that he had L. 200 Sterling

No 2. giving an obligation, importing that he should not lose by the transaction. The annuitant's heirs were found not bound by this.

in cash by him, which he would willingly sink for an annuity of 12 *per cent.* during life, in accepting of which, says he, you may both serve yourself and me; and then he adds, "For, if you consider the thing right, I won't have my 'principal and interest in 15 or 16 years; if I die before that time, you'll be a 'gainer, if I live longer, so as to receive above my principal and interest, 'assure yourself, I shall make it good one time or other to some of yours.' In consequence whereof, Mr Gordon accepted the L. 200, and granted his bond to Mr Livingston for the annuity, which he paid regularly during Livingston's life; and, as he lived a considerable time after this bargain, whereby the annuities paid, and interest thereof, amounted to a larger sum than the L. 200, and interest from the time Mr Gordon received it, his heir brought an action against Mr Livingston's successor, upon the above letter, to make up the loss incurred by the advance of the annuity beyond the principal and interest of L. 200 Sterling.

Amongst other defences, it was *pleaded*, That the words of the letter were not capable of being constructed into a legal obligation. Mr Livingston acquaints Mr Gordon, That he had L. 200 which he would willingly sink for an annuity during life. He makes the first offer of this bargain to his friend; if it had been rejected by him, he would probably next have proposed the bargain to a stranger; he sets forth the great probability there is of Mr Gordon's being a gainer, the little chance there is of his being a loser, which showed a bargain of chance was to be undertaken, and no absolute security given to Mr Gordon against any possible loss. Mr Livingston computes, that he would not have his principal and interest in 15 or 16 years; he adds, if I live longer, so as to receive above my principal and interest, assure yourself, I'll make it good one time or other to some of your's. That these words were too general and undetermined for constituting of an obligement which could produce any legal demand; and suppose Livingston had left a legacy to any of Mr Gordon's family, payable at ever so distant a term, or that he had made a present to any of them in his own life, there could be no doubt, that either the one or the other must have been constructed full satisfaction of the purpose here expressed. Mr Livingston could not, by words of this nature, be understood creating any obligation, either on himself or his heirs; all that can be gathered from them is, a kindly purpose and resolution he then had to Mr Gordon's family; but, as they go no further than a resolution, it depended upon an after consideration, whether they were to have any effect or not.

Answered; That the assurance given in the letter was no compliment, but understood by both parties to be obligatory; Mr Livingston, on his part, carefully booked his part of the transaction in his copy-book of letters, where it yet remains; and, of the other part, Mr Gordon wrote on the back of the letter, Mr Livingston's letter, obliging himself, in case I lose by the annuity of the L. 200 Sterling I have received for L. 24 Sterling *per annum*, to make it up

to me and mine. Further, that, in a transaction betwixt merchants, an assurance to make good is of the same import as an obligation binding and obliging among persons versed in stile, of which merchants may be presumed to be altogether ignorant. If Mr Livingston had wrote from London to his brother-in-law to pay such a debt for him, or to make a gift in his name to any relation, and at the same time assured his brother-in-law that he would make the money, so to be advanced, good, it is thought Mr Livingston would have been as much bound to repay the money as if he had bound and obliged himself in way of bond to repay it. And although there is no fixed term for the repayment, it will not from thence follow, that the party so obliged was not debtor at all, and that some time or other imports no time. The plain meaning is, he had a discretionary power as to the time of satisfying the debt he had undertaken; but satisfy it he must some time or other, that is, in his lifetime, or by such deed executed in his lifetime as might make it effectual after his decease. And the words of the letter, some of yours, certainly must be taken for one or other of Mr Gordon's children; so that if the defender could show that Mr Livingston had made good this superadvance to any one of the children, it might operate a discharge of the debt; but this cannot be qualified. No 2.

THE LORDS found, that Mr Livingston was not bound by his missive letter to make good or repeat to Mr Gordon the annuities paid by his father or himself over the principal sum of L. 200 Sterling, and interest thereof.

Fol. Dic. v. 4. p. 23. C. Home, No 153. p. 260.

SECT. II.

In what cases an offer must be accepted.

No 3.
A promise made by one of three cautioners, that he, and another of the cautioners, should bear equal burden with the third, of the sum, altho' in effect not accepted by the third cautioner, in so far as he had caused the creditor charge one of the cautioners for

1610. *July* 12. ANDREW KER *against* CONSTABLE of DUNDEE.

PARBROTH as principal, and the Constable of Dundee and Dalhousie as cautioners, being bound to John Wemyss for 4000 merks, and he making Strakmertoun assignee, Strakmertoun making Dalhousie, and Dalhousie making Andrew Ker assignee to Parbroth's bond, Andrew charged the constable, who suspended, that Andrew could not charge, because, by his missive, he had promised that he and Dalhousie should bear burden for their parts of the sum, the Constable doing the like for his third, as was agreed, by communing betwixt them, and so Andrew could only charge for the third. Andrew *answered*, That his offer could not bind him, not being accepted by the