"They remitted the cause to the Commissaries, with an instruction to allow the pursuer a proof of the facts before answer."

No 197.

Act. *Advocatus & Lockhart*. Alt. *Ferguson, Andrew Pringle, & Elliot*. Reporter, *Prestongrange*.

*B.* *Fac. Col.* No 164. p. 244.

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1771. *January* 29.

PHILIP MILLAR, Oculist in Edinburgh, *against* FRANCIS ANGELO TREMAMONDO, Master of the Academy, Edinburgh.

No 198.
A promise, though alleged to be made *intuitu matrimonii*, not proveable by witnesses.

MILLAR brought an action against Angelo for the performance of certain promises alleged to have been made by him in the view of his marrying his daughter, and craved to be allowed a proof of them *prout de jure*. The defender maintained, that the promises alleged being merely verbal and gratuitous, were not proveable by witnesses. The Lord Ordinary having allowed a proof before answer,

The defender, in a reclaiming petition, *pleaded*;

By the law of Scotland, and the invariable practice of the Court, verbal promises did not admit of a proof by witnesses, and could only be established by writing or oath of party. Mere expressions of intention *de futuro* could of themselves fix no obligation on the pronouncer, but were retractable at pleasure; and though verbal promises were a step higher in the scale of obligations, and were allowed to be established by proof, yet in these a distinction was very properly drawn as to the mode of proof allowed. For as it was impossible exactly to establish the express terms in which a verbal promise was uttered, it being possible that mistaking a single word, or even a variation in the accent or emphasis with which it was pronounced, might totally change the force and import of the obligation, the law had wisely confined these to that mode of proof by which the meaning of parties might explicitly, and with full certainty, be ascertained. Lord Stair, lib. 1. t. 10. § 4.; Lord Bankton, lib. 1. t. 11. § 2; Mr Erskine, b. 3. t. 3. § 8.; Deuchar *contra* Brown, No 192. p. 12386.; 3d July 1668, Donaldson *contra* Harrower, No 190. p. 12385.; June 1764, Maclintosh *contra* Tassie;* which last case was precisely in point, the Court having found, "That Tassie's obligation being founded on a verbal promise, could only be established by his own oath."

The pursuer, in his answer, admitted, That a mere gratuitous promise could not regularly be proved by parole-evidence; for that such a promise made verbally resolved into a *nuda emissio verborum*, and witnesses casually present might no doubt easily mistake the meaning of parties. The present case, however, was very different; for the pursuer did not allege or found on any gratuitous promise, but upon a solemn engagement the defender had come un-

* Not reported. See APPENDIX.

No 198.

der in the view of his daughter's marriage. Every stipulation and engagement *intuitu matrimonii* was considered in law as highly onerous; and as these were always made in a more formal and explicit manner than others of less importance, the proof allowed was not only perfectly safe, but agreeable to the principles of law, and that justice which should be allowed to a party who had fulfilled his part of the mutual agreement. The authorities referred to did not apply to the present case. The decisions quoted were equally inapplicable; and even in opposition to these, it had been determined, that a mutual agreement of this sort, where there was an onerous cause intervening, might be the subject of a proof by witnesses. Voet in tit. de Pact. Dotal. Mascardus, Conclus. 566. No 2.; June 1687, Colquhoun *contra* Rae, No 193. p. 12388.; 7th December 1687, Johnston, No 194. p. 12388.

The Court was much divided. It was admitted, that simple promises could not be proved by witnesses, but that bargains as to moveables might; and several of the Judges thought, that as those, in the present instance, were made *intuitu matrimonii*, they fell to be considered as a bargain for an onerous consideration; but the majority would not admit the distinction, or depart from the general rule; and it was therefore found, that a proof by witnesses, in this case, was not competent. To which judgment, on advising a petition and answers, by a division, however, of but seven to six, the Court adhered.

Lord Ordinary, *Monboddo*. For Millar, *Sol. H. Dundas*.
For Angelo, *H. Erskine*. Clerk, *Campbell*.

*Fac. Col. No 72. p. 211.*

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## SECT. X.

### Nuncupative Legacy.

1610. *November* 9. Russel *against* ——.

No 199.
A nuncupative legacy of 200 merks found relevant to be proved by witnesses, *omni exceptione majores*.

Two hundred merks being sought by an executor, as debt owing to the defunct, conform to the defender's obligation, the same was elided by an exception of compensation of the like sum left in legacy by the defunct to the defender; and the same found relevant to be proved by witnesses *omni exceptione majores*, to wit, two ministers of Santrohueston, and a bailie of the town, albeit there was neither testament nor codicil.

*Fol. Dic. v. 2. p. 228. Haddington, MS. No 1999.*