

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, *Monbaddo*.  
For Angelo, *H. Erskine*.

For Millar, *Sol. H. Dundas*.  
Clerk, *Campbell*.

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

## 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 majoribus*.

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 Santrohouston, and a bailie of the town, albeit there was neither testament nor codicil.

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