

For Respondent, *W. Murray, Solicitor-General,*  
*Alex. Lockhart.*

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*Note.*—This part of the case is not reported in the Court of Session, but the previous parts are reported in M. 12195 et 12984.

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ALEXANDER RAMSAY IRVINE, - *Appellant.*  
ALEXANDER IRVINE, by his Guardians, *Respondent.*

House of Lords, 10th December 1753.

MARRIAGE ARTICLES, FRAUD—PROOF.—(1) Reduction of marriage articles on the head of imbecility and fraud, sustained by the Court of Session, in respect of the suspicious and unequal nature of the whole transaction, but reversed in the House of Lords, in respect the marriage had followed thereon, and that fraud or imbecility was not proved. (2) The lady's mother was offered as a witness, but objected to on the ground of malice against the appellant. Objection repelled, and proof of reprobators refused. (3) The physician who attended the lady's father, and who was charged with having availed himself of the opportunities which his attendance afforded, to induce the marriage settlement, rejected as a witness in support of the deed.

THE late Alexander Irvine was proprietor of the estate of Saphock. By his marriage articles with Miss Barbara Dundas, he had bound himself to provide the estate of Saphock to himself and the heirs-male of the said marriage; whom failing, to the heirs-female of that marriage, &c.

The only issue of this marriage were two daughters—Margaret, who predeceased her father, and Mary, who survived him.

Of this date he executed an entail, limiting the <sup>June 30,</sup> 1743.

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above estate to himself in fee, and to the heirs-male of his body; whom failing, to his daughter Mary, and the heirs of her body; whom failing to the heirs-female of his own body, &c.; whom failing to the respondent, Alexander Irvine, in tail-male, &c. Reserving power to revoke and alter the said settlement.

December 8,  
1744

His only surviving daughter having been proposed in marriage to the appellant, Alexander Ramsay, nephew, and presumptive heir to Sir Alexander Ramsay, through the influence of a third party, it was agreed between the families of both that marriage articles should be drawn out, to which Mr Irvine and Sir Alexander became parties. Accordingly it was agreed that Mr Irvine should *alter* the destination contained in the above deed of entail, and convey his estates to himself and wife in life-rent, and to his daughter and the heirs-male of her intended marriage with Alexander Ramsay; whom failing to the appellant, the said Alexander Ramsay, in fee, under the condition that he and his heirs succeeding should assume and bear the name and arms of Irvine.

The marriage followed upon the signing of these articles the next day.

Mr Irvine predeceased his daughter. His daughter died soon thereafter without issue of this marriage, whereupon the estate devolved on her husband. The present action of reduction was brought by the heir-at-law and heir substitute of entail of 1743, alleging that the marriage and marriage articles were a fraudulent scheme got up by interested individuals with the sole view of diverting the succession from flowing in the channel in which it had been previously settled,—that in accomplishing this end they took advantage of Mr Irvine's age and

incapacity, when his mental faculties had become sensibly decayed, and his bodily infirmities were notorious, to make this marriage settlement,—the young lady, his daughter, showed an aversion to the whole scheme, advantage was taken of her tender years, being only eleven years of age, and the whole affair was hurriedly gone about,—the articles being signed on Saturday evening,—next day (Sunday) she was proclaimed, and on the same evening married, although she objected to proceed until her father was present.

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In defence the allegations of fraud were denied. Upon which the Lord Ordinary allowed a proof.

In the course of this proof, Lady Saphock, Mr Irvine's widow, and mother of the appellant's wife, was offered as a witness by the respondents, but this was objected to on the part of the appellant, on the ground of partial counsel, and that she bore resentment and malice against him. The resentment was denied; but the objection was repelled, and reprobaters being protested for, on appeal the Lords refused to allow proof of reprobators; and consequently the witness's evidence was taken.

Nov. 22,  
1757.

Dr Donaldson was next adduced as witness for the appellant, to whose testimony the respondent objected:—*1st*, That being physician to Mr Irvine he had gained a great ascendancy over him: *2d*, That he had used these opportunities and his influence to prevail with Mr Irvine to consent to his daughter's marriage: *3d*, That many years before Sir Alexander Ramsay had presented him to the professorship of Oriental languages in the College of Aberdeen: and, *4th*, That as the Doctor was an active agent in bringing about the marriage on Ramsay's behalf, he must be suspected, and therefore an incompetent witness

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for the appellant. His evidence the Court refused to be taken.

It was proved by the respondents that Dr Donaldson availed himself of the opportunities which his attendance on Mr Irvine afforded, in concerting the marriage, while the latter was in a state of bodily infirmity and decay; while, on the other hand, it was proved from letters written by Mr Irvine at the time, seemingly with great accuracy and judgment, that he was of sound mind, and continued in this state for some months after the marriage; that he managed his own affairs with prudence and discretion; and that his daughter and son-in-law, after the marriage, had lived on terms of much harmony with him.

Nov. 15, 1752. Of this date, the Court first found the reasons of reduction *not proven*; but on reclaiming petition

Mar. 2, 1753. “ Found the reasons of reduction relevant and proven, and therefore reduced, decerned, and declared “ accordingly.”

Against this interlocutor the present appeal was brought to the House of Lords.

*Pleaded for the Appellant*:—Lady Saphock, on whose testimony the respondent Irvine did principally rely, ought not to have been admitted to give evidence in this cause; as from the reprobator offered to be proved, it evidently appeared that she entertained the most bitter enmity and malice against the appellant, and consequently she could not be considered as an impartial witness, and had sworn to facts that were contradicted by other witnesses. In like manner, Dr Donaldson’s evidence—a gentleman of unblemished character, ought to have been allowed. But even as the case now stands, the reasons of reduction—namely, fraud and circum-

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vention, mental and bodily infirmity—have not been proved. On the contrary, it has been established beyond all doubt that Mr Irvine was of sound memory and judgment, both before the marriage articles, and for many months thereafter; that this marriage and marriage-contract were of his own seeking, his own deliberate choice, and a subject he had much at heart. The particulars of a marriage-contract are always matter of arrangement, just as the parties agree; and whatever be the rights conferred by the one, the marriage is always considered an equivalent on the other; and no marriage-contract can be set aside on the ground of inequality. The respondent had therefore no ground, and no right in law, to question the marriage-articles, because by these articles the tailzie of 1743 (his only claim to the estate) was revoked, in terms of a power reserved therein to alter or revoke.

*Pleaded for the Respondent*:—The respondent has a legal title to question the alleged marriage-contract procured from Mr Irvine, which contains a revocation of his tailzie, by which the respondent was entitled to succeed to the estate. If therefore these marriage articles were obtained by fraud and imposition, from a weak and aged person, the party next entitled to succeed is the respondent, in virtue of the entail. That the marriage articles were procured in this way, is proved from the circumstances,—Mr Irvine is carried from his family to an ale-house to sign the deed, without a friend to advise him; the whole is concluded in the dark; the marriage of an only child, of eleven years of age, to a person who is a mere stranger to her, is determined; and his whole estate is conveyed to this stranger in one night. Next day the marriage was unlawfully hurried over against

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the lady's inclinations, although by the articles a year's time was allowed for reflection and advice; and this was done out of the presence of her father, and while he was labouring under great weakness:—circumstances which clearly establish fraud in the parties who were active agents in the transaction.

After hearing counsel, it was

*Ordered and adjudged, that the said interlocutors of the 26th of June 1752, and the 2d of March 1753, be and the same are hereby reversed. And it is further ordered and adjudged, that the interlocutors of 15th November 1752, whereby the said Lords of Session found the reasons of reduction not proven, and therefore assoilzied and decerned accordingly, be and the same is hereby affirmed: And it is hereby declared, that the objection against the said interlocutor of the 22d November 1751, whereby the said Lords of Session refused to allow a proof of reproba-tor against the testimony of Lady Saphock, having been waived by the appellant's counsel at the bar; and the said interlocutor being now become immaterial; their Lordships do not think fit to enter into the consideration of the merits thereof.*

For Appellant, *W. Murray, C. Yorke.*

For the Respondent, *William Grant, A. Hume Campbell.*

*The Lord Chancellor (Hardwicke).* He offered his opinion with the more freedom, that the question turned not on any particularity of the law of Scotland, but on fraud, which is the same in all countries and all courts. He allowed that the meeting at Gilliebrands looked ill, and justly stirred the attention of the Court of Session, and that the articles there signed appeared

harsh and unequal; but that in all his practice he never saw a total reduction or setting aside of marriage articles, where marriage actually followed; and mentioned one noted case, where that was attempted without success, though there was a strong inclination to give relief to the heir, who was of the poet Wycherley, who had an estate settled on the heir, not alterable, but a power reserved to give a jointure to a wife; and Wycherley being displeased with his heir, married a young woman on his deathbed, on purpose to load his heir with the jointure, by the means or procurement of a young man, who soon after Wycherley's death actually married the widow. Yet Lord Macclesfield, assisted by Lord Chief Justice Pratt and King, with the Master of the Rolls, after solemn hearing, thought they could give no relief."—Elchies "Fraud," vol. ii. p. 168.

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WILLIAM DOUGLAS, Esq. and THOMAS }  
 BELCHES, his Trustee, - } *Appellants.*  
 MRS ISABEL DOUGLAS, - } *Respondent.*

House of Lords, 25th Jan. 1754.

**PRESCRIPTION POSITIVE AND NEGATIVE—CLAUSE OF RETURN.**

—Held affirming the judgment of the Court of Session, that an estate which was conveyed to a party and his heirs-male, failing whom to return to the family of the Earl of Morton (the donor) had become an unlimited fee in the possessor, free of such clause of return, by his possessing for forty years, on a charter giving him the absolute fee thereof.

By charter, 6th April 1595, William Earl of Morton made a grant of the barony of Kirkness to George Douglas, his son, *and the heirs-male of his body*; which failing, *to return to the Earl*, his heirs, successors, and assigns whatsoever. Upon this charter infestment followed.

Thereafter George Douglas, then Sir George, in