1753.

CRAIK, *v.* CRAIK.

GRIZEL CRAIK, daughter of Adam Craik, and grand-daughter of William Craik, - - } *Appellant.*

JEAN CRAIK, daughter of William Craik, - - - - } *Respondent.*

House of Lords, 21*st May* 1753.

MARRIAGE CONTRACT—POWERS OF FATHER—FIAR—RES JUDICATA.—Held where a father had bound himself by the marriage contract to convey his estate to the heirs male of the marriage, this did not prevent him from making an entail in favour of the heir male and series of substitutes. Circumstances in which points raised were *res judicata*.

No. 101. WILLIAM CRAIK of Duchrae, on his marriage with Grizel Wallace, his first wife, entered into articles

Feb. 1710. of marriage, whereby he bound himself to secure to "himself and the heirs male of that marriage, the "said lands and barony of Duchrae."

Of this marriage there were issue—Adam Craik the appellant's father, and Jean Craik the respondent.

After the death of his first wife, William Craik married a second and third time, but without having issue with either marriage.

In the lifetime of his third wife, he executed a deed in the nature of a tailzie, which proceeds in

1723. implement of his first marriage contract, and conveys "the lands and barony of Duchrae to the said Adam, "his son of the first marriage, and the heirs male "lawfully to be procreated of his body, whom failing, to the heirs male to be procreated of his own "body in their present marriage; which failing, to the "respondent, Jean, his only daughter of the marriage, and the heirs male of her body." Power was

given to the said son to grant reasonable provisions; but the deed set forth "that the heirs of tailzie should "no ways have liberty, or any right, title, or privi- "lege to disappoint his design in favour of the heirs "of tailzie, and course of succession above specified."

Upon this deed the son, Adam, was infeft after his father's death. But afterwards conceiving that the above entail was in contravention of the marriage contract, which conferred on him an unlimited estate, he raised a reduction of it against his sister, Jean, who was then an infant, on the ground that it was granted in fraud of the marriage articles. No appearance was made for the respondent, she being then an infant.

Pending the suit, he got married, and having made up titles to the estate as absolute fiar, had entered into articles of marriage, settling the estate of Duchrae on the heir male of his marriage, which failing, upon the heirs male of his own body in any subsequent marriage; *which failing, upon the heirs female of his present marriage.*

The cause coming to be heard *ex parte*, and the Court considering it *pars judicis* to examine into the relevancy of the grounds of reduction, were unanimously of opinion, that William, the father, notwithstanding the marriage contract, remained fiar of the estate, and could execute the entail in question. Adam Craik acquiesced in this judgment. He died in January 1731, without issue male, but leaving two daughters, Mary and Grizel. The former took possession of the estate. Jan. 1731.

When their father, Adam Craik's sister, Jean, came of age, she, on the ground of having a preferable right to succeed to the estates, raised action of reduction and declarator, to have Mary and Grizel

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Craik's right to the estate set aside, and her own established under the entail executed by her father in 1723, by which she was entitled, on failure of heirs male of her brother, Adam, to succeed as nominatim substitute called to the succession after him. In this action, on report of the Lord Ordinary, the Court "found that the decreet absolvitor 1728 in favour of "the pursuer (the respondent) is *res judicata* against "the defender (appellant), and found that Adam Craik "could not, by his contract of marriage, settle the "succession in favour of his own daughters, prefer-"ably to his sister, the respondent, Jean." And on reclaiming petition, the Court adhered.

21st Jan. 1734.

The daughters of Adam Craik then contended that, as, by the entail, their father was entitled to grant them provisions, the conveyance ought to be sustained to that extent. Thus matters stood when an appeal was taken to the House of Lords on the entire case; but, before discussion, it was referred by submission, and the arbiter had pronounced a judgment precisely in accordance with that of the Court of Session, when Mary, the eldest sister, died; and her sister Grizel, then attaining majority, again raised the question by the present action of reduction, insisting to set aside the tailzie, the two decrees of the Court of Session, along with the decree arbitral, on the ground that the tailzie was in contravention of the marriage articles, setting forth the precise same grounds insisted in the reduction raised by her father. In defence *res judicata* was pleaded among others. And the Lord Ordinary, of this date, found that she could not claim the provision except on condition of homologating her grandfather's deed of tailzie; but that she might repudiate the provision. And on reclaiming petition, the Court adhered.

3d January, 1753.

20th Jan. 1753.

On the other points of the case, the Lord Ordinary afterwards "sustained the defence of *res judicata* "with respect to the reduction and other conclu- "sions of the libel depending thereon, but in terms "of the former interlocutor, found that the pursuer "was entitled to follow any remedy whereby she "might obtain relief against the said two decreets, "and decerned and declared."

It was against the first part of this latter interlocutor that the present appeal was brought. The two previous interlocutors, together with the latter part of the above interlocutor, formed the subject of a cross appeal.

Pleaded for the Appellant:—It is the settled rule of the law of Scotland, that a provision by marriage articles to the heir male of the marriage, vests in such heir male, on the ancestor's death, an estate in fee-simple, with the usual power to dispose of it as he shall see proper. In this case, William Craik expressly bound himself, by his marriage-contract, to convey his estate to the heir male of his marriage, free from all encumbrances except his wife's jointure; and having so bound himself, he could not execute the entail he afterwards executed, and convey to the heir male of the marriage an estate in tail, instead of one in fee. That even supposing he had power to execute the latter deed, yet as by it Adam Craik the son is not thereby disabled from making onerous deeds, but only gratuitous deeds, he was entitled to make the marriage-contract, which was a deed onerous in its nature, and provided certain provisions to his family.

Pleaded by the Respondent:—William Craik was unlimited proprietor of his estate previous to his marriage-contract, and, notwithstanding that deed,

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and having due regard to the destination therein, he continued to be unlimited proprietor after he executed the same. This being the case, he had full power to dispose of his estate under such limitations as he thought fit, in so far as he did not disappoint the heir-male of the marriage, to whom he bound himself in his marriage-contract to convey. But the obligation to convey to the heir male of the marriage was substantially complied with in the disposition and deed of tailzie which he afterwards executed, and which he had full power to execute. The right conferred on the heir male of the marriage was a mere *spes successionis*, which left the father full power to regulate the succession by any subsequent deed; and in effect, instead of the tailzie being in fraud or contravention of the marriage-contract, it was in implement thereof.

After hearing counsel, it was

Ordered and adjudged that the said original appeal, and the said cross appeal, be, and the same are hereby dismissed this House; and that the said several interlocutors and parts of interlocutors therein complained of be, and the same are hereby affirmed. And it is hereby further ordered that liberty be reserved to the said Grizel Craik, the appellant in the original appeal, to take her proper remedy in the Court of Session, for a reasonable provision out of the estate in question, either pursuant to the power contained in the settlement of the 19*th February* 1723, *or otherwise, in such manner as may be competent to her, and as shall be just.*

For Appellant, *Wm. Grant, A. Hume Campbell, J. Taylor.*

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

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.

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

House of Lords, 10*th 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 June 30, 1743.