1734.

ANDERSONS
v.
ANDERSONS.

THOMAS ANDERSON, the Elder, an Idiot, by William Chatto, Writer, his Curator; and THOMAS ANDERSON, the Younger, Eldest Son of the said THOMAS ANDERSON, Paupers, - - - - - - - - } *Appellants;*

ISABEL ANDERSON and JOHN BULL, her Husband; WILLIAM COUTTS, Husband to the Deceased ELIZABETH ANDERSON, and ROBERT GEDDES, their Assignee, - - } *Respondents.*

13th March, 1734.

PROVISION TO HEIRS AND CHILDREN.—CONSTRUCTION—In a marriage contract, a sum of money being provided to the husband in liferent, and the eldest son of the marriage in fee, and a portion being settled on the daughters, to be paid on their respective marriages,—it was found that the father was obliged to pay the same to the daughters upon becoming due, notwithstanding there would not be left sufficient funds for payment of the provision to the eldest son.

It was found that the son had no interest to dispute this claim, and that he was not entitled to be ranked *pari passu* with the daughters on the funds of the father.

It being provided, that, in the event of there being *three* daughters of the marriage, a certain sum should be paid among them according to specified proportions; and there being born *four* daughters,—it was found that the fourth daughter was not entitled to any share of that sum, although no other provision was made for her.

No. 28. THOMAS ANDERSON, the elder, in his marriage settlement, became bound to secure upon lands or annual rents the sum of 30,000 merks in favour of

himself in liferent, and the eldest son of the marriage in fee, which failing, to himself, his heirs and assignees whatsoever. The deed also contained the following clause: "And in case there should "happen to be only one daughter of the said mar- "riage, he obliged him, his heirs and executors, to "content and pay to her, her heirs and assignees, "the sum of 18,000 merks; if two daughters, the "sum of 20,000 merks, whereof 11,000 to the "eldest, and 9000 to the youngest; and if three "daughters, the sum of 30,000 merks, whereof "12,000 to the eldest, 10,000 to the second, and "8000 to the youngest, payable within year and "day next after their respective marriages."

There was issue of the marriage, two sons and four daughters.

1721. The eldest daughter Isabel having married, an action was brought by her and her husband against her father for 12,000 merks, as her portion under the marriage contract. It was pleaded in defence, that by the marriage contract, only 30,000 merks altogether were to be settled, and there being a son to whom this sum was first provided, the daughters could claim nothing under the contract. The Lords "found that the provisions to the daughters "did take place, and were effectual to them, though "there were sons, one or more of the marriage, "providing the effects of Mr. Thomas Anderson, "the father, were sufficient at the time of the mar- "riage to satisfy both the 30,000 merks provided "to the three daughters, and the 30,000 merks "which he was to secure to himself in liferent and "the eldest son in fee." February 13, 1722.

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Various proceedings followed, which it is unnecessary to detail; and also in similar actions severally brought by the three other daughters.*

Thereafter, Thomas, the younger, who had been a minor during these processes, and no party to them, brought an action of reduction and declarator to have the several decrees pronounced therein reduced, and to have it declared that the sum of 30,000 merks was provided and secured to the eldest son of the marriage, and that the provision to the daughters, as it was made subsequently to that in favour of the son, was not to commence or have effect, but upon failure of issue male.

In defence, it was stated for the daughters, that Thomas, the younger, had no title to quarrel the decrees pronounced in their favour, because the only interest he had by the marriage settlement, was to take 30,000 merks provided to be secured to his father in liferent and himself in fee, to which sum, as it devolved on him only at his father's decease, and was subject to his father's power, he had no pretence of right till after his father's death; and therefore he could not maintain any action to set aside judgments obtained by the daughters for securing por-

* In the action raised by the youngest daughter, for whom no specific provision was made in the marriage contract, it was found (31st July 1729) that she was entitled to a proportional share with her sisters of the 30,000 merks provided to the daughters of the marriage. And by a subsequent interlocutor (18th November 1729,) the Court adhered, and decreed the other sisters to pay back to her the proportion of what they had received, so as to make her share 4500 merks. These judgments were reversed under the present appeal. The decision of the Court of Session upon this point is reported, (Fol. Dict. I. p. 441, Mor. Dict. p. 6590,) but without any notice of the reversal.

tions that fell due many years before. But even supposing that he had a title, he would be excluded by these judgments, which formed so many *res judicatæ*, deciding the question in point.

It was answered, that nothing determined by these decrees could be looked on as *res judicata* against him, who had been no party to the suits, and likewise a minor at the time. And as the provision for the eldest son of the marriage would be entirely disappointed, he ought not to be concluded thereby; especially since it was certain that at the time of the decrees, the fund of payment was only sufficient to answer one sum of 30,000 merks, so that the eldest son of the marriage would have nothing.

It was replied, that Thomas, the son, could not properly have been a party to these actions. Thomas, the father, was the only person bound by the marriage contract, and against him alone could the claim have been brought. The decrees, therefore, which were regularly obtained, would have operated as *res judicatæ* against him were he endeavouring to set them aside, and they must have the same operation against every other person who will make use of any argument that was competent to him, and contend that the obligation on him was not so extensive as the Court has found it to be.

The Lords found "that Thomas, the son, had a "title to insist in the reduction, reserving to their "determination the exception of *res judicata*." July 13, 1731.

They afterwards found, "that he was barred "from quarrelling the decree in favour of his eldest "sister, and Robert Geddes her assignee *exceptione* "*rei judicatæ*." December 1, 1731.

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In a petition against this interlocutor, it was pleaded, that it being manifest that the interest of the heir male of the marriage was as much intended to be secured as that of the daughters, and it being certain that the funds could *now* answer no more than 30,000 merks, equity required that he and the daughters should have alike, and that the daughters ought to be decreed to restrict their demands to one half of the 30,000 merks, so that room might be left to him to recover at least one half of what had been provided to him.

As the father was only bound to provide one specific sum of 30,000 merks, it is evident that the provisions to the daughters were only intended in case of failure of issue male. But even supposing that *two* sums of that amount had been payable by the marriage contract, it could never be the intention that in any case the daughters should be paid their whole portions, while the son, who was the person principally in view in making the contract, should have nothing. The supposition is, that the father was at the time of the marriage in possession of an estate of 60,000 merks; but as this estate has, before these provisions became payable, been diminished by one half, it is clear that the sums due to the children ought to be diminished respectively according to their original proportions, and not one class be preferred for their whole provision to the entire exclusion of the other. Neither should the decrees obtained by the daughters bar the infant son, since they can affect thereby only the proportions due to them.

To this it was answered, that the provisions were in very different circumstances; those to the daughters were payable at particular days, long since elapsed; and they were entitled at these days to all action and execution against their father for making them effectual; whereas that to the son was not exigible till the father's death; and could be taken then only by way of succession, if the father had so much property free of debts; so that, the father being still alive, it was not competent for the son to make any demand against the daughters for contribution.

But supposing the son was a creditor for this provision, and that it was not pendant either on the death or deeds of his father, still he and the daughters would be at best only *personal* creditors for separate and distinct sums. None of them are a real lien on the father's estate, which is only subject to be affected by proper diligence, and the daughters having used such, while the son has not, they have thereby established a legal and equitable preference. In consequence of this and of the former decrees, these portions have become the subject of marriage settlements, and other onerous transactions, which would be entirely frustrated if the present claim were to be sustained.

The Lords found "that it was competent for "Thomas, the son, to claim a share *pari passu* "with his sisters, but found the diligence used by "the sisters gives them a preference." January 22, 1732.

A petition against the last part of this interlocutor was refused. June 30.

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Entered
Jan. 31, 1734.

The appeal was brought from the interlocutors of the 13th February, 14th July, and 13th November 1722; the 31st July 1725, the 24th January 1728; 31st July, 18th November 1729; 1st December 1731, the 22d January, and 30th June 1732.

Judgment
March 13,
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After hearing counsel, "it is ordered and adjudged, &c. that the latter part of the said interlocutor of the 13th February 1722, in these words *(videlicet)*, 'providing the effects of the 'said Thomas Anderson, the elder, were at the 'time sufficient to answer and satisfy both the '30,000 merks provided to the daughters, and 'the 30,000 merks which he was to provide and 'secure to himself in liferent, and the eldest son 'in fee;' as also the said interlocutors or decrees of the 31st July, and 18th November 1729; the interlocutor of 13th July 1731, finding 'that 'Thomas Anderson, the son, had a title to insist 'in the reduction;' and the interlocutor of the 22d January 1732, finding it competent to the said Thomas to claim a share *pari passu* with his sisters, be, and the same are hereby reversed; and it is further ordered and adjudged, that so much of the said interlocutor of the 13th February, as is not hereby reversed, and the several subsequent interlocutors or decrees not hereby reversed or varied, be, and the same are hereby affirmed."

For Appellants, *D. Ryder, A. Hume Campbell.*
For Respondents, *Dun. Forbes, Ro. Dundas, W. Murray.*