husband's side, as obliging himself to lay as much for-gainst the tocher, when in reality he has it not to secure her in it. Specious prestations may be stipulated where there is no subject to make it effectual, but only to be a sham *color quæsitus* to amuse and defraud the wife, and it was really so here; for his 6000 merks was an imaginary provision no where to be found but in Eutopia; neither is this doctrine new, for on such inequalities did the Lords rectify and reduce the Lady Castlehill's contract, at the instance of Carmichael of Maulsly, her second husband, in 1697, *voce* MINOR; and lately, on the 28th July 1708, Anna Byres *contra* Reid, No 249. p. 6045., they reponed the wife to her own lands, the husband being *obæratus* and fled the country. No 265.

THE LORDS repelled the first reason, and found it no donation; but sustained the second of enorm lesion, and therefore admitted her to liferent the lands she brought with her: but whether the fee of them would belong to her children, or to her husband's creditors after her death, was not decided; though the Lords seemed to think the last would have the best right thereto.

Fountainhall, v. 2. p. 586.

*** The following case is the sequel of the above.

1714. *December* 14

The Lord GRAY, and other CREDITORS of the deceased DAVID LYON of BANCHRY *against* Mr WALTER STEWART.

No 266.
A wife may revoke her contract of marriage made in minority, altho' the revocation has not been made *intra annos utiles*.

MY Lord Gray, and other creditors of David Lyon, having led an adjudication against his heirs, pursue a mails and duties, with a conclusion of declarator, that the lands of Banchry, disponed to the said David Lyon by Jean Chalmers his wife, in their contract of marriage, did belong to the said creditors adjudgers, as in his place.

Compearance was made for Mr Walter Stewart, second husband to the said Jean Chalmers, who produced a disposition to the same lands granted by his wife to him her second husband; and *alleged*, that the first contract was entered into by her in her minority to her enorm lesion, in so far as she disponed the fee of her estate, without reserving her own liferent, in favours of her first husband, who had no estate whereby to make her any suitable remuneratory provision.

It was *answered*; That a minor may lawfully enter into a contract of marriage, wherein if they be enormly lesed, they have the common benefit of restitution, but with the ordinary condition of revocation and reduction *intra annos utiles*, which she did not use, but continued satisfied with her contract till she was long past 25 years of age, and could not now impugn the contract, in prejudice of her husband's just and lawful creditors.

No 266. It was *replied*; A minor may doubtless enter into a contract of marriage upon just and equal terms; but, in case of enorm lesion, has always the power of revocation, because, whatever deeds are done in favour of a husband, he, nor any in his right, can never object the want of revocation *intra annos utiles*, a married wife being *sub cura mariti*; but how soon the marriage dissolved, the wife being very sensible of her lesion, revoked and raised reduction within two months, before the diligence of any creditor; and, on this consideration, the Lords have already restored her to the liferent of her own lands by a decreet *in foro* extracted, she having thought fit *primo loco* to crave restitution as to her liferent; but the same ground of law, that she obtained revocation as to her liferent *post annos utiles*, entitles her to be restored as to the fee, unless the creditors could allege, as they cannot, that her husband had any means whereby he could effectually provide her to a suitable remuneration.

It was *duplied*; 1*mo*, If wives contracting in minority could revoke *post annos utiles*, then they could be restored after 50 or 60 years; because, so long as the marriage subsists, the wife continues still *sub cura*, and then there might be 40 years craved for obtaining restitution after dissolution of the marriage; which would bar all commerce with a husband, without any necessity; because, if the wife were lesed, there is a remedy competent during the marriage, by revocation, which may be done without the consent of the husband; and the Lords would, of course, give her a curator *ad litem* to pursue the reduction. 2*do*, No parity betwixt the life and fee, because it was a fraud in the husband to have denuded his wife of the liferent; but the fee of portions go usually to the husband, and lands come in place of the portion.

It was *triplied*; The extraordinary remedy of craving a curator *ad litem*, which is not usually practised where husband and wife live well together, is never considered as any ground to elide the dependence that a wife has upon the husband, the want of proper knowledge in her affairs, or the opportunity of advice; and restitution is as competent with relation to the fee, as the liferent, and upon the same ground in law; for, if it was fraudulent to deprive the wife of the liferent, it was no less so to denude her of the fee, when the husband had nothing to give in place of it.

'THE LORDS found the wife might revoke and reduce after elapsing of the *anni utiles*, upon enorm lesion, as well in relation to the fee as the liferent.'

Fol. Dic. v. 1. *p.* 407. *Dalrymple, No* 128. *p.* 179.

*** Bruce reports the same case.

1714. *Nov.* 12. DAVID LYON of Banchrie, having married Jean Chalmers, a minor, she, by a post-nuptial contract, dispones to him and herself, and longest liver of them two, in conjunct fee and liferent, and to the bairns to be procreated betwixt them, their heirs and assignees whatsoever in fee, her lands, &c. and he provides her in a jointure. Upon his breaking and decease, his

creditors having affected the lands, she raises reduction of the foresaid contract of marriage, *ex capite minor-ennitatis et lesionis*, before diligence done by the creditors; wherein she so far prevailed, that the LORDS in July 1710, reduced the contract *quoad* the liferent of her own lands, but continued the cause as to the fee till November thereafter. No 266.

The relict being thereafter married to the said Mr Walter Stewart, dispones to him the said lands, with the burden of her liferent, and L. 100 Sterling to the children of the first marriage, whereupon Mr Walter is infeft.

The first husband's creditors having adjudged these lands, pursue mails and duties against Mr Stewart and the tenants; and he compearing, craves preference and absolvitor.

First, As his wife's assignee, he insists upon her former reduction abovementioned, and contended there was equal reason to restore her to the fee as to the liferent, and that they could scarcely be separate; neither, in this case, could the husband Lyon be *auctor in rem suam.*

Answered for Lyon's creditors, That the case of contracts of marriage was different from the actings of minors in other cases; that as minors might enter into the marriage state, so they might likewise contract with respect to settlements upon that account; and if the provisions were suitable and ordinary, there was no ground of restitution; and with respect to these, she might contract with the husband, who was not therefore *auctor in rem suam*, as in other curatories; and there was no difference whether the contract was prior or posterior to the marriage, being still in contemplation thereof; and that here the provisions were rational and considerable upon the husband's part; and, in general, all this transaction was no other than what persons after majority enter into.

Replied for Stewart, That without noticing whether the contract was rational or not, the alienation of the property of lands could not be legally done by any minor unauthorized: *2do*, The provisions in this contract in favour of the wife, were but imaginary, since the event proved that Lyon had more debt than means; and such a contract was lately reduced by the LORDS, 28th July 1708, Anna Byers *contra* Alexander Reid, her husband, No 249. p 6045. *3tio*, That it did not well appear from the tenor of the clause, that the fee was conveyed to the first husband; and though *potior est conditio masculi*, yet it has been frequently decided, that lands coming by the wife, the presumption runs in her favour, where the clause was any ways dubious; and the disposition here runs in favour of David Lyon, her husband, and herself, and longest liver of them, in liferent and conjunct fee, and to the bairns lawfully to be procreated betwixt them, their heirs and assignees, in fee: Where *1st*, She is joined with the husband in conjunct fee, and therefore the lands being her own, the presumption is for her; *2dly*, There is no termination, failing heirs of the marriage, to the husband's heirs, which is the most useful criterion, when the fee is designed for the husband.

No 266.

Duplied for Lyon's creditors, that the heritage in question being small, and partly liferented, and disponed *nomine dotis*, it was but a competent tocher, and therefore the fee presumed to be transmitted, as appears by the above cited clause in the contract; and this 1*st*, *quia potior est conditio masculi*; 2*dly*, Where lands are disponed in contracts of marriage *nomine dotis*, the fee passes to the husband, as if the tocher had been paid to him in money, as was found 29th January 1639, Graham *contra* Park, No 23. p. 4226. and 12th July 1671, Gairns *contra* Sandilands, No 26. p. 4230,

THE LORDS found, That the first husband was fiar by the conception of the first contract of marriage, but sustained the reason of minority and *enorm lesion*; unless the first husband's creditors would offer to prove, that he had any stock the time of the contract, for securing the wife in a liferent, though afterwards his means failed.

Dec. 14. IN this case, as marked the 12th of November 1714, there having been these two points determined by the Lords, viz. 1*mo*, Whether the husband or the wife was fiar? 2*do*, On supposition that the husband was fiar, Whether the wife could revoke the disposition granted to him, upon the head of minority and lesion, because the provisions made by the husband to her were not implemented? It came now under debate, How far a restitution upon the head of minority and lesion was competent, the wife not having revoked *intra annos utiles?* And it was *alleged* for Stewart, the second husband, That the wife was *non valens agere*, being clothed with a husband during the *quadriennium utile*, and that immediately upon his death she raised reduction, both as to the fee and liferent.

Replied for the Creditors of Lyon the first husband, That she was *valens agere*, because a wife might both revoke and reduce in her own name, even though the husband should not concur; as she may do in all things proper to herself, such as for "aliment, implement of her contract," &c. as was found 16th November 1675, Ronald *contra* Gibson, No 264. p. 6055.

Duplied for Steuart, That it appears the brocard is most applicable to the wife in this case, from this, that prescription does not run against a wife's liferent, while the husband lives, as was found 22d June 1675, Gaw *contra* The Earl of Wemyss, *voce* PRESCRIPTION; nor against an obligement to employ a sum for a wife's use, the prescription whereof was found only to run from the husband's death, 5th July 1665, Mackie *contra* Steuart, IBIDEM; the reason whereof is, that she is *sub cura mariti*, and considered as minor; and therefore this much rather holds in rights granted to the husband himself, since the same *reverentia maritalis* that induced her to the deed, restrains from revoking while the husband lives, and much more from reducing. And as to the insisting for aliment, &c,

Answered, that it is not said that a wife is utterly incapable of insisting in such cases, but only that negligence (the main reason that introduces pre-

scriptions) cannot be imputed to her while *vestita viro*; and therefore much less in affairs against himself. No 266.

THE LORDS found the privilege of restitution upon minority and lesion competent to the wife, in regard she was *vestita viro*; and that immediately after dissolution of the marriage she revoked, and intented a reduction, before diligence done at the instance of her husband's creditors.

1715. *Feb.* 16. In this action as marked 14 *Dec.* 1714, where the Lords found, the privilege of restitution upon minority and lesion, was competent to the wife, in regard she was *vestita viro*, and immediately after dissolution of the marriage, revoked and intented reduction, before diligence done at the instance of the husband's creditors, the same point being again to be debated, it was of new alleged for Banchry's Creditors, that the Brocard, *contra non valentem agere &c.* cannot be applied to the case, because there is here no prescription, but a privilege, which if not used within the time allowed, expires: And this it is termed in the former interlocutor, and in the civil law called *beneficium restitutionis:* As also by our lawyers, and viscount of *Stair*, *Lib.* 1. *Tit.* 6. *per Tot.* And that privileges do so expire, appears from the instances of creditors not adjudging within the year and day, the privilege of redemption within the years of the legal &c. 2*do*, Granting the Brocard took place, even with respect to a privilege, yet the wife was *valens agere cum effectu*, by revoking and raising reduction, either of herself, or by the Judges' authority.

Answered for the pursuer, that there was no foundation for the distinction; besides, that by the common law, the *quadriennium* ought for good reasons to be prorogated, as appears from *L.* 3. *C. de Dolo*; moreover, the *quadriennium* is not the privilege, but rather a restraint upon it; for since the privilege arises from common equity, it should run as long as any other right; but since men ought sooner to enquire into the deeds of their non-age, therefore law introduced this restriction. Now a restriction of a privilege plainly falls in with prescription, and is very like to the ten years prescription in tutor-accompts. 2*do*, That there were great reasons in this case to prorogate the time, since restitution was to be implored against the husband himself, she being not only under that *reverentia maritalis* (and the abstaining in effect is like the donation, and the consequence tending to a dissolution of affections, an evil worse than the patrimonial loss,) but also desitute of Counsel, and kept under the ignorance of her affairs; yea, under a just and legal authority, she herself being *sub cura* to carry on the action, which distinguishes the case from restitutions with third parties.

THE LORDS adhered to their former interlocutor, and found the privilege of restitution, minority and lesion, was competent to the wife, to restore her against deeds done to the husband, and others deriving right from him; in

No 266. regard she was *vestita viro*, and immediately after dissolution of the marriage, she revoked and intented a reduction, before diligence done at the instance of her husband's creditors.

Act. *Sir Walter Pringle.* Alt. *Graham.* Clerk, *Gibson.*

Bruce, v. 1. *No* 5. *p.* 7. *No* 18. *p.* 24. and *No* 70. *p.* 85.

SECT. VI.

Husband bound to do diligence to recover his wife's tocher, unless when due by herself.

1625. *June* 24. ERLIE and BURD *against* GORDON.

No 267.

IN a contract of marriage where the husband was obliged to eik so much money to the tocher, and to employ all, &c., the LORDS found, that the husband should be obliged to employ, although the money was no paid, and found his heir debtor therefor, and for the annualrents thereof, from his father's death.

Fol. Dic. v. 1. *p.* 407. *Kerse, MS. p.* 65.

1637. *January* 18. WOLF *against* SCOT.

No 268.
A husband was bound to lay out heritably a tocher payable by a third party. Though the tocher was never received by him, his heirs were found liable, but execution was superseded for a certain time, that in the interim diligence might be used for recovering it.

ONE Wolf relict of umquhile Scot Chamberlain of Innerweik having pursued one Scot, brother to her said umquhile husband, as lawfully charged to enter heir to him, to employ to her in liferent the sum of 500 merks, contained in her contract of marriage, and which her said umquhile husband was obliged to do in the said contract; for therein her father was obliged to pay to her said umquhile husband 1000 pounds in name of tocher, whereto her husband obliged him and his heirs to add 2000 merks, making in the whole 3500 merks, and to employ the same to himself and her, and the longest liver of them two in liferent; and the defender *alledged*, that he could not employ that 1000 pounds conditioned in tocher, except that the same were exhibited and paid to him, that therewith he might employ also both the said sum, and the 2000 merks, whereto he was obliged beside it; and the other answering, that the relict was not obliged to pay that sum, and if the sum be not paid, she ought not to be postponed thereby, for the defender or the