

1688. *June.* Sir DAVID THOIRS *against* TOLQUHON.

No 118.

IN a reduction of a disposition intended upon minority and lesion, it was *alleged* for the defender, That he, besides the price mentioned in the disposition, was obliged, for his own security, to buy in a debt, whereon inhibition had been served against the disponent.

Answered, The lesion must be considered with relation to the price, and no subsequent right or debt can be conjoined to hinder the reduction; besides, the pursuer offers to purge the ground of the inhibition.

THE LORDS reduced.

Harcarse, (MINORITY.) No 720. p. 203.

1698. *February 24.*

CARMICHAEL of Maulsley and his LADY *against* The LADY CASTLEHILL and JOHN SINCLAIR of Stevenson, Younger, her Husband.

SIR GEORGE LOCKHART having granted a bond of provision to his daughter for L. 5000 Sterling, she is married to her cousin, James Lockhart, younger of Castlehill, and with the advice of friends there is a contract of marriage framed, by which she assigns her portion, then extending with the annualrents to 110,000 or 115,000 merks, and, in lieu thereof, she is provided with a jointure out of the lands, said to be worth L. 500 Sterling per annum. Castlehill, her husband, dying abroad, and she being now married to my Lord Carmichael's son, the Laird of Maulsley, and being still minor, she revokes her first contract of marriage with young Castlehill, and raises a reduction of it against Stevenson and his Lady, on these reasons, *imo*, That it is null, being entered into by a minor wanting curators, and her husband could not authorise her, especially in a post-contract drawn up after the marriage; for that were to make him *aucior in rem suam*; *2do*, She was enormly lesed in disposing away the fee of a vast tocher, without any clause of return of the whole, or a part, in case the marriage dissolved without children by his death, which event had existed, and had got nothing but a liferent of lands not worth 7000 merks per annum, which was but the annualrent of her own portion; so, in effect, she had nothing from Castlehill; and many other inequalities in the terms and conditions of the contract were insisted on to evince her lesion.—*Answered* to the first, Women-minors are by no law restrained to marry, nor to enter into contracts of marriage; and a wife who is major, entering into such a contract, is destitute of authority, seeing her husband can no more authorise her than a minor *in rem suam*; so that a minor can plead no nullity of her contract, except she qualify lesion, which brings all to the second reason of reducing; and there can be no

No 119.
A Lady, minor, found lesed by her contract of marriage.

No 119. definition of enorm lesion, where there is no fixed *norma*, there cannot be an enormity ; but so it is, contracts of marriage and provisions have no standard, save the estate of the husband, and the various humours and inclinations of the parties contracting ; so that if there be any *casus arbitrarius* in law, this is one. Now, if we consider Castlehill's estate, which was about L. 1000 per annum, the jointure given her is far beyond a *rationalibus tertia*, being a just half of the whole ; and whereas the 8000 merks provided to the daughters is complained of, as far below their mother's tocher, and so urged as an evidence of the unequal terms in which the contract was drawn up, yet if that case of the daughters had existed, with the Lady's jointure, the heir would not have had so much behind as would have served him for an aliment ; so the conditions were rather exorbitant than mean. And as for tochers, how great soever they are, settled *eo animo* by parents on their children *ut alienentur*, and that they may be assigned by them to their husbands in their contracts matrimonial, and the clause of return of such tochers, is unusual and extraordinary ; and that Sir George Lockhart, her father, in his second contract with my Lord Wharton's daughter, notwithstanding his own vast estate, and a great tocher, secured her only in L. 600 Sterling per annum ; and the Lady Salton, who brought more than 100,000 merks of portion, got only 7000 merks by year. And President Spottiswood, in his Decisions, *voce* HUSBAND and WIFE, 28th February 1635, Sluman *contra* Ker, No 332. p. 6117. shows, where a minor wife was provided only to the liferent of her tocher, yet the Lords found it no lesion ; and at most, the Lords sustain the reason of minority and lesion, not to reduce the contract *in toto*, but only to rectify and supply its deficiency and shortcoming, as was found, 22d November 1664, M'Gill *contra* Ruthven of Gairn, No 77. p. 5696. *voce* HOMOLOGATION. And in Montgomery, No 43. p. 5803. a transaction was sustained, made by his Lady's curators, when minor, settling a locality in place of the courtesy, which never existed ; and the like was done in Aberlady's case with his curators, who bought the Lady's jointure at six years purchase, and yet she died within a year after the transaction, and was alleged to have a cancer in her breast at the time ; even as it was contended in the former case of Mr Francis Montgomery's, that the Lady Leven was known by physicians to be unfit for procreation of children, and so there never could be a curiality ; yet both transactions were sustained as rational.—*Replied* for Mautsley, Though minors are reputed majors, in so far as concerns the entering into marriage, yet as to the terms and conditions, they are altogether incapable ; and the Lords annulled the Dutchess of Monmouth's contract of marriage, because it provided the fee of her lands to his heirs, though of another marriage.* And 7th March 1623, Lord Bargeny *contra* his Son, *voce* PERSONAL and TRANSMISSIBLE, a contract is likewise reduced on minority and lesion. And the Roman law is very plain, that restitution *in integrum* is granted to minors, where they are lesed *per immediam dotem et donationem*, *tit. Cod. Si adversus dot. restitutio postulat. et si adversus donationem* ; and by Justinian's Novels, there was a precise equality introduced.

* See No 8. p. 2369.

inter dotem et donationem propter nuptias; and whatever majors, who are *rei sue arbitri*, may yield in their contracts, that is no rule to minors, but their standards must be what majors, well advised, and acting on rational grounds and considerations, would do in such a case.—THE LORDS found the Lady Maulesley lesed by her first contract of marriage; but reserved to themselves to consider, if this should import a total restitution against the articles of it, or only a rectification, to bring up the terms to an equality and equilibrium.

Fountainhall, v. 1. p. 827.

No 119.

1705. July 14.

PATRICK M'DOUGALL, Merchant in Edinburgh, *against* MR JOHN MARSHALL.

MR JOHN having taken off mournings from the said Patrick for the funerals of his father, to the value of L. 96 Scots, he raises reduction thereof, on this head, That he was minor, and had *debito tempore* revoked, and was clearly lesed, they not being for himself, but for his brother and sister, whom he was not bound to furnish, he now discovering his father's estate to be overburdened with debts.—*Answered*, He sent for the merchant, and was the sole off-taker and engager for their payment; Mr. M'Dougall knew not for whom they were, nor bargained he with any but him; he saw him by the habit of his body to be of a man's growth, and if he was minor, he could not want much of twenty-one; neither did he signify to him his minority, and so *dolose* by his silence induced him to trust him, *et non debet ex sua fraude lucrari*. Likeas, he was a master of arts, and took off cloaths to his brother and sister, (which the merchant was not concerned to know) it was *debitum naturale et officium pietatis* in him, and he can retain it out of their patrimonies at counting.—THE LORDS repelled the reason of minority in this case, and found him liable; though the furnishings were not to himself, but to his brother and sisters, reserving his action for repayment against them as accords.

Fol. Dic. v. 1. p. 580. Fountainhall, v. 2. p. 284.

* * Forbes's report of this case is No 59. p. 421. *voce* ALIMENT.

No 120.

A minor, who was a master of arts, and in appearance adult, found liable for furnishings bespoke by himself, although not for himself, but for his brother and sisters, whom he was not bound to aliment in consequence of any succession acquired by their father, whose estate had been overburdened with debt.

1708. July 28.

BYRES *against* REID.

No 121.

IN a reduction at the instance of a wife upon minority and lesion, in a competition with the husband's creditors, libelling upon her disposing in her contract of marriage, at the age of seventeen, all her heritage, and the husband binding for a suitable jointure; yet that soon after the marriage, it appeared that he was worth nothing, having first retired to the Abbey, and then to Flanders to be a soldier; and his creditors having seized on his whole estate, she