No 24.

'withſtanding the reduction afterwards brought againſt the right and title of the 'ſaid John Coltrain, upon the latent perſonal obligation, contained in the con- 'tract of marriage entered into, *anno* 1668, betwixt John Stewart, then writer 'in Edinburgh, and Agnes Stewart his ſpouſe, whereby he was bound to ſettle 'the eſtate he ſhould acquire, in favour of the heirs whatſoever of the marriage; 'and, notwithſtanding the decreet obtained in that reduction, ſetting aſide the 'right of the ſaid John Coltrain, which the Lords found could not hurt the ſaid 'onerous liferent ſettlement made to Chriſtian Heron, the purſuer, by her ſaid 'huſband, while he ſtood in the full right of property of the eſtate, conform to 'the infeftments and inveſtitures thereof.'

Pleaded in a reclaiming bill, The right given to the lady is diſconform to the obligation in her contract of marriage, which was to grant her an annuity of 900 merks; whereas there is given her a liferent of a fourth part of the free rents of the eſtate, which cannot be ſupported by the obligation. The tailzie incapacitates the heirs to grant any annuities to their ſpouſes, but ſolely liferent rights to the extent of one-fourth of the eſtate; and the contract itſelf provides, that no clauſe in it ſhould be effectual, that was contrary to the ſanctions of the tailzie, on which account the form of the lady's right has been varied; but then it is not what the huſband bound himſelf to grant; neither is it a right agreeable to his powers by the tailzie, which reſtricted him to the conſtitution of a ſpecial locality, and is in itſelf anomalous, and cannot be ſuſtained, being a liferent of the fourth part of the free rents of the whole lands, and an infeftment in the whole eſtate in ſecurity thereof.

THE LORDS refuſed and adhered.

D. Falconer, v. 2. No 59. p. 61.

1760. *December* 4.

AGNES STEWART of Phiſgill, and JOHN HATHORN her Huſband, *againſt* The CHILDREN and CREDITORS of CAPTAIN JOHN STEWART, *alias* COLTRAIN, of Drummorel.

No 25.
A ſubſequent ſuit aroſe out of the caſe above. The granter of the liferent had, before acquiring the eſtate, afterwards evicted, given ſecurity to a certain extent on another eſtate. To that extent the purſuer of the reduction obtained relief.

JOHN STEWART of Phiſgill, in 1668, ſettled his eſtate, in his contract of marriage, to the heirs of the marriage; and his eldeſt ſon having died without iſſue, the purſuer, Agnes Stewart, only child of Robert, the ſecond ſon, who alſo predeceaſed his father, became the heir of the marriage, entitled to take the eſtate, upon her grandfather's death, under the ſaid contract.

John Stewart, however, in 1719, executed a deed of ſettlement in the form of a ſtrict entail, whereby he diſinherited his grand-daughter Agnes, and provided his eſtate of Phiſgill to his own ſurviving ſons and daughters *ſeriatim*, and their iſſue.

John Stewart ſoon after died; and was ſucceeded, in virtue of this entail, by William, his third ſon; who having likewiſe ſoon after died without iſſue, was

succeeded by his eldeſt ſiſter: and ſhe poſſeſſed the eſtate till her death, in the year 1742. No 25.

During the poſſeſſion of this eldeſt daughter of John Stewart, John Coltrain of Drummorel, eldeſt ſon of the ſecond daughter of John Stewart, and next preſumptive heir in the entail to his aunt, who never was married, entered into a marriage-contract with Mrs Chriſtian Heron; whereby, in conſideration of 9000 merks of tocher, he became bound to infeft her in an annuity of 600 merks, to be uplifted out of his lands of Drummorel: And it was further provided, That in caſe he ſhould, at any time during the marriage, ſucceed to the eſtate of Phiſgill, as heir of tailzie to his aunt, the lands of Drummorel ſhould be diſburdened of the above annuity, and he ſhould be obliged to infeft his ſpouſe in an annuity of 900 merks, payable out of the eſtate of Phiſgill, in caſe of children of the marriage, and 1200 merks in the event of no children.

Upon his aunt's deceaſe, John Coltrain obtained himſelf ſerved heir in the eſtate of Phiſgill, in terms of the tailzie; and having completed his titles by infeftment, he, in 1734, granted a bond of proviſion, upon the recital of his marriage-contract, and of the tailzie of Phiſgill, whereby the heirs were allowed to provide their wives in competent liferents, not exceeding one-fourth of the free rent; and that he was reſolved to provide his ſpouſe in an additional jointure out of his lands of Drummorel, over and above her liferent of the fourth part of the free rent of Phiſgill, his intention being, that ſhe ſhould have a yearly liferent of 1200 merks in caſe of children, and 1500 merks in caſe of none; therefore he provides her to the fourth part of the free liferent of Phiſgill; and further obliges himſelf to infeft her in a yearly liferent of 500 merks, upliftable out of Drummorel, at leaſt ſo much thereof as, with the fourth of the rent of Phiſgill, might completely make up the liferent proviſion to the amount aforeſaid, of 1200 or 1500 merks.

Upon this bond infeftment followed, both in the lands of Phiſgill and Drummorel; and the ſaid John Stewart, *alias* Coltrain, continued in the undiſturbed poſſeſſion of the eſtate of Phiſgill for ſeveral years after.—But Agnes Stewart, the purſuer, having diſcovered that ſhe had a right to that eſtate by her grandfather's contract of marriage, which could not be defeated by any after gratuitous deed, inſiſted in a reduction of the entail, and obtained judgment in her favour upon the 15th July 1743; which was affirmed in the Houſe of Lords.

Upon the death of John Coltrain, a queſtion having enſued between his relict and Agnes Stewart, concerning the validity of her liferent-infeftment upon the eſtate of Phiſgill, No 24. p. 1705. the LORDS, upon the 22d February 1749, 'found, That the obligation entered into by John Coltrain of Drum-'morel, afterwards John Stewart of Phiſgill, in the marriage-ſettlement betwixt 'him and Mrs Chriſtian Herron, the purſuer, whereby he was bound to ſettle 'upon her a liferent proviſion, to the extent of L. 50 Sterling yearly, was oner-'ous on the part of the ſaid Chriſtian Heron, and rational on the part of the 'ſaid John Coltrain, *alias* Stewart; and that he having implemented the ſame,

No 25.

'by granting the liferent-infeftment to that extent, when he was in the right of 'fee and property of the eſtate of Phiſgill, and his right ſubject to no challenge 'from any thing that did or could appear upon the records, that infeftment was 'likewiſe juſt and onerous, and does ſubſiſt in her favour, notwithſtanding of the 'reduction afterwards brought, of the right and title of the ſaid John Coltrain, 'upon the latent perſonal obligation contained in the contract of marriage, en-'tered into in *anno* 1668, betwixt John Stewart, writer in Edinburgh, and Ag-'nes Stewart, his ſpouſe, whereby he was bound to ſettle the eſtate he ſhould ac-'quire, in favour of the heir whatſomever of the marriage; and notwithſtand-'ing the decreet obtained in that reduction, ſetting aſide the right of the ſaid 'John Coltrain, which the Lords found cannot hurt the ſaid onerous liferent-'ſettlement made to Chriſtian Heron, the purſuer, by her ſaid huſband, while 'he ſtood in the full right of property of the eſtate, conform to the infeftments 'and inveſtitures thereof.' This decree was affirmed in the Houſe of Lords; and, in conſequence thereof, the relict continued to draw her liferent, to the extent of L. 50 Sterling, out of the eſtate of Phiſgill, and the remaining 300 merks out of her huſband's paternal eſtate of Drummorel.

Agnes Stewart and her huſband afterwards brought an action againſt John Coltrain's children, and the truſtees for his creditors, concluding, That as he had left a ſeparate eſtate, deſcendible to his heirs at law, and which had been originally burdened with his wife's liferent, the defenders ſhould be obliged to free, relieve, and diſburden the purſuer and her eſtate of Phiſgill, of the aforeſaid liferent-annuity.

Answered for the defenders: The liferent provided by John Coltrain to his widow, was, in every reſpect, rational, and even moderate; neither is there the ſmalleſt appearance of his having had in view to do any wrongful act, to the prejudice of his heirs, who might ſucceed in the eſtate of Phiſgill, or indeed that he had any apprehenſion, that he was to be excluded, by other heirs, from the poſſeſſion of that eſtate. He was the only perſon that could be conſidered as proprietor of the eſtate at the time; and it has already been found by the Court of Seſſion and Houſe of Lords, That the ſecurity granted by him to his wife was an onerous and valid deed. It does not therefore appear, upon what footing he or his heirs can be ſubjected to a claim of damages for granting this deed. Had his relict, in place of getting a liferent-annuity, ſucceeded to a terce of the lands in which he ſtood infeft, by his deceaſe, before the challenge was brought, this terce muſt have been ſuſtained to exclude the purſuer; and, in that caſe, it ſeems plain, that there could have been no pretence to claim relief or repetition of the rents ſo drawn by the relict, againſt any ſeparate eſtate left by the huſband. It is true, the purſuer prevailed in a reduction of the tailzie, upon a perſonal ground of challenge, competent to her by her grandfather's contract of marriage; but this reduction could have no effect *retro*. John Coltrain was the real proprietor of the eſtate by all the inveſtitures, before his right was brought under challenge; and conſequently, every lawful act of adminiſtration performed by him during

that period, muſt have the ſame effect as if the challenge had never been brought. Suppoſe, for example, he had ſet long tacks at the old rent, in terms of the tailzie, and the purſuer, after prevailing in the reduction, had found that ſhe could get double the rent, if the tacks were open; there is no doubt that theſe tacks would have been ſuſtained, and the purſuer thereby deprived of a profit which ſhe might otherwiſe have reaped; and yet it ſeems impoſſible, that this could have founded her in any claim of damages. No 25.

The caſe of borrowing money is ſomewhat different. For there it might be ſaid, that the money was ſtill in his hands, and he ought not to be allowed to retain it. But here there is nothing in the hands of John Coltrain, or his heirs, in conſequence of the liferent-infeftment granted to the widow. Nothing has been taken out of the eſtate, which either he or his heirs can be called upon to reſtore. The liferent proviſion was ſuitable to his ſuppoſed circumſtances at the time; and neither he nor his heirs can be ſaid to have profited by it.

Replied, 1*mo*, It ſeems admitted, that if John Coltrain had granted an infeftment upon this eſtate, in ſecurity of borrowed money; though the creditor would have been ſecure, the purſuer would have had good action againſt John Coltrain, and his proper eſtate, to relieve the eſtate of Phiſgill of ſuch incumbrance; becauſe in ſo far he would have profited in his private eſtate and patrimony. Now, upon this very principle, the purſuer falls undoubtedly to be relieved, in ſo far as reſpects the 600 merks originally ſecured upon Drummorel. For it is plain, that John Coltrain, by transferring this original proviſion to the eſtate of Phiſgill, was in ſo far profited in his own private eſtate.—600 merks was agreed to be a ſuitable proviſion out of the eſtate of Drummorel, and in ſo far that eſtate ought ſtill to take the burden, according to the defender's own principles.

2*do*, The purſuer apprehends, ſhe is well-founded in her claim for a total relief. The favour of the law to onerous purchaſers, is, in many caſes, very great, and no leſs juſt: But that a party, who has charged an eſtate which did not of right belong to him, ſhould be entitled to the like favour, in order to keep his proper eſtate *indemnis*, ſeems unreaſonable, and contrary to the eſtabliſhed principles of law. A father who, by his marriage-contract, provides an eſtate to the heir of the marriage, remains fiar, and every ſecurity granted by him to creditors or onerous purchaſers, will be good; but if he has a ſeparate eſtate, the heir of the marriage is entitled to relief. In the ſame way, purchaſers and creditors contracting with an heir of entail, who neglects any of the formalities preſcribed by the act 1685, are ſecure; but the next heir of entail has action of relief againſt the other repreſentatives of that heir, who charged the tailzied lands with his proper contractions. For the ſame reaſon, though John Coltrain's infeftment enabled him to grant an effectual proviſion to his wife, and her own, *bona fides* protected her; yet his title being liable to challenge, and afterwards reduced, his ſeparate eſtate muſt be liable in relief of all incumbrances laid by him on the eſtate of Phiſgill.

No 25.

'THE LORDS found the purſuer entitled to relief of the annuity of 600 merks 'originally contracted to be paid out of the eſtate of Drummorel, and thereaf- 'ter transferred to that of Phiſgill; but not entitled to any relief of the addi- 'tional 300 merks, impoſed on Phiſgill by the contract of marriage.'

Pleaded in a reclaiming bill for the defenders:—It ſeems to have been the intention of the Court, to lay no greater burden upon the lands of Drummorel than the annuity of 600 merks, with which it was originally burdened by the contract of marriage; but as Drummorel at preſent ſtands charged with 300 merks of the lady's annuity, by the bond of proviſion in 1734, the above interlocutor, by transferring 600 merks from Phiſgill to Drummorel, burdens this laſt eſtate with 900 merks of the annuity, and leaves only 300 merks as a burden upon Phiſgill.—The defenders admit, that in ſo far as John Coltrain can be ſaid to have profited in his private eſtate and patrimony, by an incumbrance laid on the eſtate of Phiſgill, he and his heirs are liable in relief to the purſuer.—In ſo far, therefore, as he freed his own eſtate of a jointure to his wife, ſuitable and adequate to the circumſtances of that eſtate, he may be conſidered as a profiter, and may be obliged to relieve the eſtate of Phiſgill; but to no greater extent; becauſe he was in no ſhape *lucratus*, by eſtabliſhing an additional jointure upon the eſtate of Phiſgill, ſuitable to that eſtate, of which he was truly proprietor at the time. The purſuer, therefore, ought not to be entitled to have her lands relieved of any more than 300 merks of the above annuity; which, added to the 300 already paid out of Drummorel, will make a burden upon that eſtate of 600 merks yearly, being the amount of the original annuity.

Answered, By the judgment of the Court in 1749, ſuſtaining the widow's claim to an annuity out of the eſtate of Phiſgill, her claim is not ſuſtained to the full extent of her huſband's poſtnuptial deed, but only in ſo far as it was onerous, viz. to the extent of 900 merks contained in the contract of marriage. It is therefore a point adjudged, that the widow had no title to demand the additional 300 merks out of the eſtate of Phiſgill. This was a voluntary gratuitous deed, which could not be effectual againſt the eſtate, after the title of the granter was reduced; and therefore, in this queſtion, the matter muſt be conſidered as if no additional annuity had been granted.

'THE LORDS, on the 21ſt January 1761, adhered.'

Act. *Garden and Lockhart.* Alt. *Ferguson and Advocatus.*

Fol. Dic. v. 3. p. 92. Fac. Col. No 253. p. 461.