

No 31.

of Callander, No 7. p. 2941.; and the case cited with that of Graham against Park and Garden, No 23. p. 4226. had not such positive clause as this here is. THE LORDS repelled the defence, and found the wife's right to the half preferable, and decerned. One may think his taking the rights of the houses to himself and his heirs was an alteration of the contract, and disposing of it otherwise; yet the subsequent assignation to his wife, shewed his intention to return to the settlement he had made in his contract of marriage long before. This was so decided, *me referente.*

*Fountainhall, v. 2. p. 355.*

1709. February 4.

WILLIAM FEAD DROVER *against* GEORGE MAXWELL of Dalswinton and Others.

No 32.

A person in his daughter's contract of marriage having assigned to her and her husband, and their heirs of the marriage, whom failing, the wife's heirs and assignees, all goods and gear belonging to the decedent at the time of his decease, the wife was found to be *fiar.*

IN William Fead's contract of marriage with Helen Watson, daughter to John Watson in Dalswinton, John Watson obliged himself to pay to William Fead, his heirs, executors, or assignees, 900 merks of tocher betwixt and a certain term; and further constituted the said future spouses and the heirs of the marriage, which failing, the said Helen, her heirs, or assignees, his assignees to all goods and gear belonging to him the time of his decease. After the death of John and Helen Watsons, William Fead raised a process against John's relict, Dalswinton, and others his debtors, libelling and concluding exhibition, delivery and payment of all John Watson's debts and effects in their hands.

*Alleged* for the defenders; The husband could claim no more than the life-rent, the wife being *fiar*, in so far as the last termination is in favours of her heirs or assignees, and the subject came by her.

*Answered* for the pursuer; According to the opinions of my Lord Stair, Instit. Lib. 3. tit. 5. HEIRS, p. 481. and Dirleton, Doubts, p. 68. and 69. and 184, where there are diverse degrees of substitution of heirs of diverse persons, and a wife and her heirs in the last place, the person whose heirs are provided for in the first place, is understood to be *fiar*, and those *in secundis tabulis*, in a remote degree, to be only heirs of provision failing the former.

THE LORDS found the wife to be *fiar*; not because the substitution did terminate upon her heirs, but because it was in favours of her heirs and assignees, and none but who is *fiar* can assign.

*Fol. Dic. v. 1. p. 300. Forbes, p. 317.*