

1707. *March* 5.

JAMES PURDIE Merchant in Edinburgh *against* DAVID ROSS Merchant there.

No 31.

A husband was obliged to provide the conquest to himself and his wife in conjunct fee and liferent, and to the children to be procreated betwixt them; whom failing, the one half to himself and his heirs, &c. and the other half to the wife's heirs, &c. There being no children, the husband's heir was ordained to procure himself infest in the conquest, and to dispone the half with warrandice from fact and deed to the wife's assignee, tho' the husband was fiar.

IT being provided by contract of marriage betwixt the deceased David Young merchant in Edinburgh, and Katharine Mitchell, that all lands, heritages, annualrent, sums of money, and others to be conquest during the marriage, should accresce and pertain to them and the longest liver, and the bairns to be procreated betwixt them; and failing these, the just and equal half should pertain to the said David Young, his heirs, executors, and assignees, and the other half to the wife's heirs, executors, and assignees; and the said David being obliged to take the securities of the foresaid conquest in the terms above written, Katharine Mitchell, after her husband's decease, without heirs of the marriage, obtained a decret before the Bailies of Edinburgh against David Ross merchant there, as heir to the said David Young, decerning him to infest himself in the lands therein mentioned, and to dispone the equal half, with warrandice from fact and deed, to the said Katharine Mitchell, her heirs and assignees, in the terms of her contract of marriage. This decret, with the whole clauses in the contract in her favours, being disposed by her in the 80th year of her age, to James Purdie merchant in Edinburgh, for love and favour, and, as was alleged, in contemplation of marriage; he thereupon charged David Ross with horning, who suspended upon this ground, that Katharine Mitchell by the conception of the clause of conquest had only a liferent right, and the husband was fiar; seeing the provision, that failing children of the marriage, the one half of the conquest should belong to the husband's heirs, and the other to the wife's, did only make her heirs of line, heirs of provision to the husband in the one half; January 29th 1639, Graham *contra* Garden, No 23. p. 4226; December 1st and 21st 1680, Anderson against Bruce, No 3. p. 607. & No 27. p. 4232.

Answered for the charger; The husband being fiar, the suspender is liable as representing him, to perform his obligation in favours of the wife, her heirs and assignees, which was not performed by himself. For had the husband, in the terms of the contract, taken the rights of the conquest to him and her in conjunct fee, and the heirs betwixt them; which failing, the one half to his own heirs, and the other half to her's; she surviving would have been liferenter of the whole; and a conditional substitute fiar in the half; in which half she and her heirs might be served heirs of provision to the husband; but since the rights of the conquest were not so taken by the husband, the clause in the contract, in favours of the wife, her heirs and assignees, remained in the terms of a personal obligation, which the suspender, his heir, is obliged to perform.

THE LORDS found the letters orderly proceeded.

Fol. Dic. v. 1. p. 300. Forbes, p. 138.

* * * Fountainhall reports the same case :

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DAVID YOUNG, in his contract of marriage with Katharine Mitchell in 1646; obliges himself to take the securities of all lands, heritages and tenements, that he should purchase and acquire during the standing of the marriage to himself; and his spouse in liferent and conjunct fee, and to the bairns to be procreated in fee; which failing, the just and equal half thereof to his heirs and assignees; and the other half to his wife and her heirs and assignees. During the marriage, he purchases several houses in Edinburgh, but does not take them in terms of the obligation foresaid, contained in his contract of marriage, but to his own heirs and assignees whatsoever. After all this, in 1683, he gives her a general disposition and assignation to all his estate, heritable and moveable; (their children being all then deceased) but adjects 'for her liferent use allenary,' and then follows the clause, that in case of her surviving him, the one half should go to his heirs, and the other to her heirs and assignees. Young, the husband, being the first deceiver, his widow assigns over her right to the half, to James Purdie, whom it was supposed she designed to marry, though she was then very aged; and he pursues David Ross, her husband's nephew, to enter heir to Young his uncle, and infest himself in the lands and houses acquired; and then to denude and dispoise to him, as the wife's assignee, of the equal half, in the terms of the contract of marriage. *Alleged* for Ross, That however these clauses at the first view seemed to import a fee to the wife, yet the *sensus verborum*, and not the *cortex*, is to be adhered to; and although the literal position and grammatical construction may point at a fee, yet our lawyers have ever had that deference to the husband as the *dignior persona*, and the *sexus nobilior*; that they have lodged the fee in the man, and resolved these clauses into a mere liferent *quoad* the wife, judging it unfavourable to make them fiars of the husband's estate to the prejudice of his heirs; and so it was interpreted in the action pursued by Anderson *contra* Bruce, 1st and 21st December 1680, No 3. p. 607. & No 27. p. 4232.; where he having provided a part of the conquest to Helen Biccarton in his first contract, the Lords found, that this could not hinder him to provide it to the bairns of the second marriage, he being fiar and *dominus*, and so had the power of disposal. *Answered* for Purdie, That the principles of law were quite mistaken and misapplied; for he did not assert the wife to be fiar, but only creditor to the husband in a personal obligation, to force the husband's heir to denude; and her heirs of line *quoad* this right would not be heir to her, but behoved to be served substitute-heirs of provision to the husband; and it was uncontroverted, that the husband was fiar, and might have dispoised the tenements to whom he pleased, and so evacuate his wife's right; but not having done it, she had a clear action against his heir to denude of the half; and so it was found betwixt the L. Dumfermline and the E.

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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.