SECT. III.

Competent to the Remoter Heir, after the immediate Apparent Heir's decease.

No 15.
The Lords found, that a disposition made *in lecto*, may be reduced, not only at the instance of the apparent heir living at the time, but he dying, at the instance of the heir who succeeds him.

1668. *January* 21. JANET SCHAW *aguinst* MARGART CALDERWOOD.

JANET SCHAW pursues a reduction of a liferent infeftment, granted to Margaret Calderwood by the pursuer's father, as being *in lecto*. The defender *alleged* no process, because the pursuer was not heir the time of the disposition, but another heir apparent, who never entered.

THE LORDS repelled the defence.

The defender *alleged*, That this being a liferent infeftment to her by her husband, and but of a small value, it was valid, and the husband might discharge that natural debt of providing his wife on death-bed, she having no contract of provision before.—The pursuer *answered*, That the defender might take the benefit of her terce, which is her legal provision, beyond which, a deed on death-bed (in prejudice of the heir) is null, and this liferent is of the husband's whole estate; and yet the pursuer is willing it should stand, it being restricted to a third of the rents of the lands.

THE LORDS sustained the infeftment only for a third.

Fol. Dic. v. 1. *p.* 212. *Stair, v.* 1. *p.* 511.

1672. *July* 16.
MARGARET GRAY and her SPOUSE, *against* JOHN GRAY and Others.

No 16.
Found as above.

UMQUHILE MICHAEL GIBSON having but one daughter, married to John Gray, did dispone certain tenements, which were all his heritage, to his daughter, and the said John her husband, the longest liver of them two in conjunct-fee, and to the heirs betwixt them; which failing, to the husband's heirs; and after his daughter's decease, Janet Gray, the only daughter of that marriage, enters heir to Michael Gibson, and with concourse of David Scot her husband, pursues reduction of the disposition granted in favours of her father, as being done by her goodsire on death-bed, to the prejudice of her mother, who was immediate heir, and herself who was subsequent heir.—The defender *alleged* absolvitor, 1*mo*, Because this pursuer was not immediate apparent heir the time of the disposition; and it is only competent to the immediate apparent heirs to quarrel their predecessors deeds on death-bed; 2*do*, The mother, who was immediate apparent heir, homologated and acquiesced in this right, in so far as her husband and

she bruiked the tenements disponed thereby for several years, and she did never reclaim or raise any pursuit in the contrary; and it is certain her naked consent though she was but apparent heir to the disposition *in lecto*, would not only exclude herself, but all other apparent heirs to quarrel the same. No 16.

THE LORDS repelled both these defences, and found that the pursuer, as subsequent apparent heir, had interest to reduce; and that the mother's possession with her husband, did not import homologation or consent.

The defender further *alleged*, That this disposition can only be reducible, in so far as it was prejudicial to the apparent heir, his wife, or this pursuer; *ita est*, that the husband would have had his liferent-right of the tenements, by the courtesy of Scotland, if he had not been infeft in the fee by this disposition; for he would have infeft his wife as heir to her father; and therefore his infeftment must stand, at least *quoad* his liferent, by which the heirs were not prejudged.—It was *answered*, That seeing the husband rested upon his right, and did not actually infeft his wife as heir, he cannot claim his liferent, neither by this infeftment, which is an infeftment of fee, and not of liferent, nor by the courtesy, which is only competent to the husband when his wife is infeft as heir.

THE LORDS ordained the parties to be heard upon this point *in præsentia*.

Fol. Dic. v. 1. p. 212. Stair, v. 2. p. 101.

*** Gosford reports the same case:

IN a reduction pursued at Margaret Gray's instance, of a disposition of lands made by Michael Gibson, the pursuer's goodsire, in favours of her mother and her husband in liferent, and the heirs of the marriage in fee; which failing, in favours of the husband's heirs, upon this reason, that it was made *in lecto ægritudinis* against the husband and his creditors, to whom he had disponed the lands for most onerous causes;—it was *alleged* for the defender, That the pursuer not being apparent heir the time of the disposition made by the goodsire to her mother, who was then alive, could not reduce the same *ex capite lecti*, which is only sustained in favours of apparent heirs for the time.—It was *replied*, That the mother being now dead, the said right did accresce to the pursuer, who was the only apparent heir to the goodsire.——THE LORDS did repell the defence in respect of the reply.

2*d*, It was *alleged*, That the apparent heir had homologated the right made to her husband and herself, in so far as she had suffered him to possess the same during her lifetime, without intimating any reduction of his right.—It was *replied*, That being a naked tolerance in favours of her own husband, could not be interpret a homologation.——THE LORDS did likewise repel the said allegeance, seeing she could not intent action, being clad with a husband, unless he

No 16. had authorised her; and that during her lifetime, the husband, *jure mariti*, would have had the benefit thereof.

3tio, It was *alleged*, That if the reduction should be sustained at the pursuer's instance, yet it can only take effect so far as the mother could not be prejudged thereby, being apparent heir, *quo casu* she ought to be repute to have been heritrix of the said lands, and by the courtesy of Scotland, the husband liferenter thereof: So that his creditors being in *bona fide* to contract with him either as fiar, or at least as having right by the courtesy, they ought not to be prejudged of the rent of the lands during his lifetime.—It was *answered*, That by our law there could be no courtesy but where the apparent heir is infeft, without which she cannot be an heretrix, unless by a retour or precept of *clare constat*, whereupon infeftment followed, the fee of the estate belonging to the father had been settled in her person.——The Lords did sustain the allegeance founded upon the courtesy, and found, that the mother, who was apparent heir, being infeft in liferent conjunctly with her husband, before there were any bairns of the marriage to whom the fee was provided; that the creditors, during the standing of that right, and before reduction, were in *bona fide* to conceive that she and her husband were both conjunct fiars, and so might lend their money in contemplation of that right, which, if it had been quarrelled during his wife's lifetime, she might have been infeft as heir; and therefore, she being dead, the nearest heir, her daughter, ought only to have right as to the fee, but not to deprive the husband, or his creditors, who had the benefit of the courtesy. *See* Husband and Wife.

Gosford, MS. Nos. 509. 510. 511. *p.* 270.

1722. *July* 13. Kennedy *against* Arbuthnot.

No 17.

One upon death-bed having disponed his estate to his infant son, and the heirs of his body; whom failing, to certain extraneous substitutes; and the son, his only child, having died without issue;—in a reduction at the instance of the nearest heir, it was *objected*, That the privilege of death-bed is not competent to a remote apparent heir, where the apparent heir for the time is not lesed. The Lords repelled the objection, and sustained the action at the instance of the remoter heir.

Fol. Dic. v. 1. *p.* 212.

*** *See* This case *voce* Blank Writ, No 22. p. 1681.