

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 reputed 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 rest of the lands during his lifetime.—It was *answered*, That by our law there could be no courtesy but where the apparent heir is infest, without which she cannot be an heritrix, unless by a retour or precept of *clarr constat*, whereupon infestment followed, the fee of the estate belonging to the father had been settled in her person.—THE LORDS did sustain the allegiance founded upon the courtesy, and found, that the mother, who was apparent heir, being infest 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 infest 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.

No 17. 1722. July 13. KENNEDY against ARBUTHNOT.

ONE upon death-bed having disposed 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 122. p. 1681.