

1682. CATHARINE CHARTERIS *against* JOHN CHARTERIS, her Tutor in Law.

January 17.—CATHARINE Charteris, only daughter and child now in life to umquhile Mr Lawrence Charteris, advocate, gives in a bill to the Lords against John Charteris, her uncle and tutor in law, complaining that he pretended to be heir-male to her father, and so sought to debar her, the heir of line, from succeeding; and therefore craving that he might either be ordained to serve her heir of line, or else to be removed as suspect and malversing.

ANSWERED,—*Officium nemini debet esse damnosum*, and he was not bound to prejudge his own right; but he was content to secure her in the £10,000 Scots, provided to her in the contract.

The Lords, finding a competition would arise between the tutor and his pupil, thought it not a just ground of depriving him; but declared that they would elect another tutor to her, only *ad hanc litem* with her tutor.

Vide § ult. *Institut. de Auctoritate Tutor.* and 55, 4, and 11, *Institut. de Excusat. Tutor.* and the Commentators, where it is a cause of excusation of a tutor *si litem moveat pupillo super toto hæreditate vel maxima ejus parte.*

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March 14.—John Charteris's case against his niece (17th Jan. 1682,) is decided. The Lords, upon Pitmedden's report, found the provision to the daughters, in case there were no sons, of a particular tocher, was but a destination, which failed by Mr Lawrence having a son, who was served heir by the same John, his uncle and tutor in law, though he be now dead; and therefore preferred Mr Lawrence's daughter to his brother John, the heir-male, seeing there was no formal tailyie.

The contract-matrimonial was ill drawn; and it was *casus arbitrarius*. Yet certainly judges are to look mainly to the design and meaning of parties; and the taking hold of the naked existence of an heir male, and his service, was *cottici verborum inherere*,—to interpret *quibus deficientibus* only and strictly to mean *quibus non omnino existentibus*: which could scarce be any rational man's meaning, let be a lawyer's. And it was offered to be proven that Mr Lawrence was ever an enemy to his daughters succeeding to all, so that it was *questio voluntatis presumptæ, et controversia inter το ῥητον et την διανοιαν, inter dictum et intellectum*; between the words and the true sense and meaning of the parties; which certainly ought in all contracts to preponder, even to the impropriating the words. The case of the judicial law of Moses, anent Zelophehad's daughters succeeding to their father, was urged against John.

The words of the interlocutor are thus:—The Lords find that the estate controverted is no tailyied estate; and that, the son surviving the father, and being served heir, the sole right did stand in the son's person; and the daughter does succeed to her brother, and excludes the other heirs-male; and that, in respect the clause runs only, *In case that there be no heirs-male procreated of the marriage, then the daughters to get the portions mentioned*: which case did not exist, because there was a son who survived the father, and was served heir.

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