

but no determination is yet given, the parties having a view of an amicable accommodation.

THE LORDS found, that Sir John Gordon was not barred from claiming the estate of Halcraig, upon his yet assuming the name and arms of Hamilton of Halcraig.

*Fol. Dic. v. 3. p. 338. D. Falconer, v. 1. No. 281. p. 376.*

No 96.

1749. July 18. CHARTERIS of Amisfield against The KING'S ADVOCATE.

COLONEL FRANCIS CHARTERIS of Amisfield disposed his whole estate, which he should have at his death, to his grandson, Francis Wemyss, afterwards called Charteris, second son to the Earl of Wemyss, burdened with L. 10,000 Sterling, to the Lord Elcho, the Earl's eldest son; which he appointed at the said term to be laid out for purchasing the most preferable debts due by the family of Wemyss, the rights of which to be taken in favour of the said Lord Elcho, and his heirs in the honour and estate of Wemyss, descended of the Colonel's body. He also named tutors and curators to his heir, and appointed four of them, to wit, Mrs Helen Swinton, his spouse, the Duke of Argyle, Earl of Islay, and Sir Robert Walpole, or any three of them, his Lady *sine qua non*, to have the sole direction and ordering of his education; or of that of any other of his grandchildren who might succeed to him in his estate; and the appointing of with whom they should reside, or travel; and that neither the Earl of Wemyss, nor any of their tutors or curators, except those named, nor any other person, should have any power or voice therein: And in case the Earl of Wemyss should interpose and endeavour to hinder the same, that the Lord Elcho should have no right to the said sum. And in another place, that in case the Earl, or any other person, should claim any power or voice in the education of his said heirs, or should interpose and hinder the same, that the Lord Elcho should lose any right or title to the said sum. He also appointed certain sums to be annually allowed for the aliment and education of his heirs of tailzie, which he proportioned to the age they should be of, increasing as they advanced in it.

Colonel Charteris died, leaving his heir in minority; during which the money was paid by his tutors and curators, part of it upon a decret of the Court of Session, and properly applied for purchasing in the family debts. In corroboration of which, the Earl granted to Lord Elcho an heritable bond for L. 10,000.

Lord Elcho engaged in the late rebellion, and was attainted; and Mr Charteris, within four years after his majority, revoked the payment, and raised a reduction thereof; and on Elcho's estate being surveyed, entered his claim therefor, at least, that he was creditor upon it for the sums paid; for that the

No 97.

A gentleman conveyed his estate to the second son of a relation, with the burden of a sum to the eldest son, provided the father did not interfere in the education of the second. Upon the forfeiture of the estate of the eldest for rebellion, the second claimed the sum from the Crown, as having become his, in consequence of his father having incurred the irritancy of interfering in his education. The claim was dismissed.

No 97.

Earl of Wemyss had claimed voice and power in his education, and in appointing with whom he should reside and travel; or had interposed and hindered his education, residence, and travelling, as directed by the trustees; at least Lord Elcho, or some other person, had done so; whereby the said sums were forfeited, and returned to him.

*Answered, 1st,* The condition was *contra bonas mores* to exclude a father from interposing in the education of his son, to which he was in duty bound; and therefore ought to be held as not adjected.

*Replied,* To have forbid the Earl from interposing in his son's education, and to have made no provision for it, would have been a condition which could less have been justified; but as the Colonel suspected his Lordship not to be a fit person to be intrusted with the education of his heir, and knew that by law he could not exclude him from it, he left a sum of money to his family, to be forfeited in case he interposed; and at the same time, laid down a method by which he should be well educated; so that the complying with the condition being attended with no breach of parental duty on the part of the Earl, the sum, which was entirely a gratuity from the Colonel, must be forfeited on the failure thereof. Though supposing no method had been laid down for the pupil's education, yet even in that case, he would have been under the tuition of the law, and would by it, upon application, have been put under proper direction.

*Answered, 2d,* The persons to whom the education was committed, did not accept of the trust, nor give any directions therein. There is no pretence that any person meddled except the Earl of Islay, who petitioned the Chancellor, on the suggestion that the claimant was neglected; upon which his Lordship referred to a master to consider of a proper method for the care of his person and education, and therein to have regard to any proposal to be made by the Earl of Islay; which being done, the Chancellor approved the master's report, and ordered accordingly: Thus, the Earl declined giving any directions, and put the claimant under the tuition of the law; or if he should be understood to have acted, yet it was not under the powers committed by the Colonel's will; for these were to a quorum, with a *sine qua non*, which having failed, no authority was competent to any one of the nomination; and therefore the condition could not exist, which was the Earl of Wemyss hindering by himself and others the nominees to superintend the claimant's education. If even the power given to a quorum should be interpreted as competent, on failure thereof, to any of the nomination, this would be an extension as in a favourable case; but the irritancy would not be extended, that case being odious.

*Reply,* A nomination of tutors and curators, with a quorum, has been often found to empower any one of them to act, on the failure or not acceptance of the rest; and the Earl of Islay's application to the Chancellor was a direct taking upon him the trust.

*Answer 3d*, There is no proof that the Earl of Wemyss claimed any power or voice, or hindered at all the nominees in their procedure: The clause of other persons interposing, must be understood of the Earl's doing it by their means; for it were absurd every bad advice a boy might get, should infer a forfeiture against him and his family; and it seems Mr Charteris did get bad advice, for he run away from his governor, Doctor Ramsay, whom the Chancellor had put about him; but the Earl had no hand in this. Afterwards, he went abroad in company with Doctor Alexander Mackenzie, who had been Lord Elcho's governor; but neither was this by interposition of the Earl of Wemyss, or by whomsoever it was, he had then thrown off Doctor Ramsay. The nominees were taking no further concern, and he was in a condition exposed to all the dangers of youth and opulence, if no care was taken of him.

*Reply*, The Earl's interposal was, during its whole continuance, concealed as much as possible, as he was sensible of the hazard; but that he had a hand in his son's elopement, is plain from his having expressed his satisfaction at it to a confidant, as not thinking Doctor Ramsay a proper governor, and declared that he had recommended Doctor Mackenzie, who was much fitter; all which is proved. As also, that he had recommended to his son, and used pains to make him take another gentleman, in which he did not succeed; and when Lord Elcho, who was the Earl's agent, prevailed with his brother to accept of Doctor Mackenzie, he communicated it to his ordinary doer, ordering him to inform the Doctor, and hasten him to Hornby Castle, where the claimant then was; and this step was contrary to the Earl of Islay's inclination, who would not see the Doctor.

*Answer 4th*, The condition is suspensive of the payment of the money; which being paid, especially after the alleged infraction, cannot be repeated.

*Reply*, It is resolute, and otherwise could not have been effectual, as the money was payable at the Colonel's death; which, it is supposed in the deed, might have happened in the infancy of his heir, after which the infringement could only happen; and the payments were made in minority, revoked *intra annos utiles*, and a reduction of them raised, which was all the claimant could do, as he could not enter his claim till the estate was surveyed.

*Answer 5th*, Irritancies cannot be declared after a forfeiture, if not insisted on before.

*Reply*, All debts are preserved to creditors on forfeited estates, which claims upon irritancies are; and several were sustained after the rebellion in 1715: And in this case, the claimant was minor till 21st October 1744, and *intra annos utiles*, till after the forfeiture.

THE LORDS, 3d July, dismissed the claim; and this day refused a bill, and adhered.

Act. R. Craigie, Ferguson & Lockhart.

Alt. Advoc. Sollic. & A. Pringle.

D. Falconer, v. 2. No 88. p. 94.