

S E C T. VIII.

Who entitled to the Custody of a Bastard Child.

1758. March 4. WILLIAM BURGES, against MARY HALLIDAY.

IN August 1755, an action was brought by Mary Halliday, against William Burges, whose servant she had been, before the Justices of Peace of the county of Dumfries, for one half of the maintenance of a child, of which she had been delivered two months before.

The Justices found it proved, by the acknowledgment of Burges, that he was father of the child; and found him liable for 20s. claimed as the half of the child-bed expences, and also for the half of the expence of alimenter, clothing, and maintaining the child yearly, till ten years of age; and modified the father's share to 50s. Sterling yearly, payable to the mother at two terms in the year.

Some months after, Mary Halliday was married to Matthew Wilson. Burges, the father of the child, required, under form of instrument, that the child might be delivered to him; declaring, that for the future, neither Mary Halliday nor her husband should be troubled with the child in alimenter or clothing him, but that he would do it upon his own expence.

Mary Halliday and her husband refused to deliver the child; and, at the distance of two years, charged Burges for payment of his part of the aliment. Of which charge he obtained a suspension, and contended, That as he had offered to maintain the child, he could not be obliged to pay any part of the maintenance to the mother, who had refused to give up the custody of the infant; for that he was entitled, as father, to the custody and education of the child: That with regard to legitimate children, it was undoubted, that the father had the sole power of determining where they should be educated, even from their most tender infancy. In the civil law, the father had not only that power during his life; but his directions were regarded after his death, and were never receded from, but on account of very peculiar circumstances; *l. 1. § 1. ff. Ubi. pup. educ. vel. mor. deb.* If the father gave no directions, then the mother seems to have been preferred to the tutor during the infancy of the child; but under this express exception, That if she married a second husband, she was not entrusted with this office; *l. 1. C. Ubi. pup. educ. deb.*

In this country it has been often disputed, after the father's death, Whether the tutor, the superior, or the mother, had right to the custody of the pupil's person? And though the mother has, in many cases, been preferred to the custody till the child was seven years old; yet, where she had married a second husband, the tutor had been preferred, even when the child was under seven years, though the mother offered to alimenter him *gratis*; 28th February 1632, Durie, p. 625. Gordon *contra* Corfan, *voce* TUTOR and PUPIL.

No 17.

The mother of a bastard child, being afterwards married; the father, who had before been decerned to pay an aliment, notified that he would maintain and educate the child himself. The mother was found entitled to the custody of the child, and the father liable to pay the aliment.

No 17.

A father is administrator in law to his natural children in the same manner as to his lawful issue. This was decided 17th March 1624, Tough *: In which case, the Earl of Home had presented a natural son of his, who was under age, to a provost; the son assigned the rents to Tough; but the tenant made payment to the father, as lawful administrator to his son, which he applied to the son's education and aliment. This payment was sustained to the tenant, in competition with the assignee.

The father's right, in preference to the mother, seems therefore established in all cases; but more particularly, where not only the mother has married another husband, but the child is no longer upon the breast, being almost three years old.

Answered, The right of fathers to the custody and education of their lawful issue, does not apply to the case of natural children. Their connection with the mother is the strongest; because, as to her, there is no uncertainty: But the father, from the doubt he must, for the most part, entertain, and his little connection with the child during its infancy, cannot in general be attached to it by the same affection as the mother; and therefore the custom has been to put these children under the care of the mother. The decision 17th March 1624, Tough, related to the case of a gift from the father to his natural son, of which he was no doubt entitled to the administration; and therefore does not apply.

The marriage of the mother makes no alteration in the case of a bastard child. A mother, indeed, who has the keeping of her lawful issue, till a certain age, loses that privilege upon her taking a second husband; because, in that case, there is always some near relation of the child, or some other person whom the law intrusts, ready to undertake the charge; but no person stands in any degree of relation to a natural child, or with whom it has a chance of being so well taken care of as with the mother: And, in the present case, the mother would rather consent to be at the whole expence of maintaining the child than give up the custody.

'THE LORDS repelled the reasons of suspension, and found the letters orderly proceeded.'

For the Suspender, *Johnstone.*

Alt. *Hew Dalrymple.*

W. Johnstone.

Fol. Dic. v. 3. p. 68. Fac. Col. No 106. p. 188.

1765. February 21.

SHORT against DONALD.

No 18.

THE mother was preferred to the custody of a bastard daughter, though claimed by the father, as being past seven years of age, and capable of education, which he said he intended to bestow on her. The father here was married to another woman.

See The particulars of the case, p. 442.

* * * *See GLENDINNING against FLINT, p. 445.*

* *Durie, p. 120. voce TUTOR and PUPIL.*