

(Ex debito naturali.)

1765. February 21.

MARGARET SHORT *against* JOHN DONALD.

No 75.

The mother preferred to the custody of a bastard daughter, though past seven years of age. The father found liable in aliment, till the child was 14 years of age.

MARGARET SHORT bore a bastard daughter in March 1757. John Donald acknowledged himself the father; did public penance, and made some trifling advances for the expences of inlying, and the child's maintenance; but having been afterwards married, he discontinued the aliment. Margaret Short having brought a process against him, before the Court of Session, he offered to take the child into his own family, under protest, that otherwise he should be relieved of the aliment.

THE LORD ORDINARY found the defender liable to the pursuer in L. 3 Sterling, as the expence of her inlying, and in L. 4 Sterling yearly, as the aliment of the child for fourteen years.

Donald reclaimed, and urged his claim to the custody of the child, with the following arguments:—A father has the sole power of directing both the residence and education of his child. This is undoubted, in the case of lawful children; and there appears no solid ground for a distinction between that and the case of illegitimate issue. The father's relation is the same in both cases; and if his sex, or a presumption of the superiority of his rank and character, are the circumstances which give him a preference to the mother in the former case; these surely are no less in his favour in the latter. The brocard that bastards have no father, takes place in questions regarding their succession only: But this is so far from being the case in claims for aliment, that these are founded on filiation; and the pursuer's own libel bars her from saying, the defender is not the father of her child.

In this case, it is an important circumstance, that the child is past seven years of age. Under that age more may be said in favour of the mother's claim to the custody of the child, as women are no doubt better qualified for the care of infants than men. But after seven, children become capable of education. It is then not only the father's right, but his duty, to take care of them. Even justice to the child itself requires it should be under his direction.

Mothers so far from being entitled to, are not allowed the custody of their lawful children after seven. The children are then committed to their tutors. 'Ane minor (says Balfour, p. 337.—KEEPING OF MINORS.) beand past seven zeiris of age, should not be in the keeping of his mother thereafter.' 18th February 1551, Clephan *contra* Laird of Wemyss, (See TUTOR and PUPIL.)—The same found Langhaw *contra* Muir, 4th July 1629, Durie, p. 455. (See TUTOR and PUPIL.)—The same *contra* Oliphant, 22d February 1631. No 17. *supra*—Dury *contra* Dury, 6th February 1666, Stair, v. 1. p. 348. (See TUTOR and PUPIL.)—In the case of Burgess *contra* Halliday, 4th March 1758, Fac. Col. No 106. p. 188. (See BAS-

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TARD.) the mother was indeed found entitled to the custody of her bastard child ; but the child was not three years old.

If this should be thought an arbitrary question, and determinable by circumstances, the light in which it was regarded in the civil law, *L. 5. § 2. De agnosc. et lib.* it must appear highly improper to commit a young girl to the care of one, who, by her own vicious life, has proved herself so unworthy of such a trust. An irregular step of this kind has been found to disqualify a mother from being tutrix to her lawful children, 14th July 1557, *Largo contra Monypenny*, Balfour, (TUTOR.) p. 116. (See TUTOR and PUPIL.) And no wonder it should, when even the lawful act of entering into a second marriage has the same effect, as has been found in a variety of cases.

Answered for the pursuer : The question who should have the custody of children, after their father's death, was arbitrary in the civil law, *l. 1. pr. § 1. ff. ubi perp. id vel more debeat, l. 1. c. eod. tit. Vect. § eod. tit.* And all the lawyers agree, that the mother, unless she marry another husband, ought to have the custody of her child, while under the age of pupillarity : None of them limit it to the child's age of seven.

From the decisions marked in the Fol. Dictionary, *voce* TUTOR and PUPIL. p. 485, 486, it appears, that for a long time past, the same discretionary power has been exercised by the Court of Session. In the case *Finny contra Oliphant*, as well as those mentioned by Balfour upon this head, it appears the mother had married a second husband.

There is no reason for the distinction made by the defender, between children under and above the age of seven. In the case of a female child especially, it were highly improper to take her from her mother, and commit her to a male guardian, just at the time when her mother's instructions and example begin to be of use to her.

But *2do*, Whatever may be the law as to lawful children, the case of illegitimate ones is extremely different. A father, while alive, has no doubt the sole right to the custody of his lawful issue. But the same rule will not hold as to natural children : For, though upon proof of a man's correspondence with the mother, the law will subject him in the expence of maintaining the child, yet in every other question, it is held uncertain, whether he is the father, and in that concerning the custody of the child as well as any other ; for this reason, that from the doubt he must, for the most part, entertain, whether he is the father, and his little connection with the child during its infancy, it is not to be expected he will be very tenderly attached to it. As to the mother there is no uncertainty. The connection with her is the strongest. She therefore has always been preferred to the custody of her bastard child ; and there is no instance of its being limited to the child's age of seven ; nor is there any reason it should, as the father's connection does not then become any stronger than before. The reason why a mother loses the tutorial office, upon entering into a second marriage, is,

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that then she herself becomes under curatory : That therefore can afford no argument in the present question. The case Largo *contra* Monnypenny, 14th July 1557, is but a single one, and probably would not be made a precedent now ; as a mother may no doubt perform the office of tutory, though she has made an irregular step of this kind.

As to the circumstances of this case, the pursuer has produced a certificate that she has lived irreproachably since her unfortunate connection with the defender. The defender still affects to doubt whether he is the father ; and is, besides, married to another woman, who, it is to be feared, might prove to the child one of the worst of stepmothers.

The defender also *contended*, That there was no medium for finding him liable in aliment, so long as till the child was 14 years old. Girls become *puberes* at 12 ; may chuse curators to themselves ; may marry ; may dispose of their persons at pleasure. The mother must then lose all authority over her child. The defender, therefore, cannot be ordained to pay to the mother aliment after that period. In the case Burges *contra* Halliday, aliment was found due till 10 years of age only, and that too upon the father's consent. There is no example of the aliment's being extended beyond seven, in *foro contentioso*. In the case Paterfon *contra* Cochrane, 14th February 1758, Fac. Col. No 97. p. 173. (See TRIENNIAL PRESCRIPTION.) aliment was found due for 14 years ; but there the term was not the point in debate.

Answered for the pursuer : This question does not depend upon the age of puberty. The child must be maintained by the father till it may be supposed capable of acquiring aliment for itself. In this country it seldom happens that girls are able to earn their own maintenance before the age of 14. The decision, Paterfon *contra* Cochrane, is quite express, finding maintenance due till the child was 14 years of age ; and in the other, Burges *contra* Halliday, the only point in debate was with regard to the custody.

THE LORDS adhered to the Lord Ordinary's interlocutor. (See BASTARD.)

Adv. Hay Campbell.

Adv. Geo. Wallace.

Clerk, Kirkpatrick.

Fol. Dic. v. 3. p. 25. Fac. Col. No 12. p. 19.

Rolland.

1778. March 7. ROBERT OLIVER *against* JANET SCOTT.

No 76.

Extent and duration of an aliment due by a day-labourer, for a bastard child.

THE justices of peace of the county of Roxburgh found Oliver, a day-labourer, liable to Janet Scott, a woman of the same rank, by whom he had a bastard child, in the sum of L. 4 Sterling annually, of aliment for the said child, during her continuing to keep and maintain the child.