

*PACTUM PRIVATUM.*

---

1586. July.

L. KERBECHILL *against* LADY KERBECHILL.

No 1.

**K**ERBECHILL, brother to Kerbechill, being lately deceased, pursued for exhibition and deliverance of the pupil, his brother's son. Compeared the mother, and *alleged*, She was tutrix testamentaria, and ought to have the bairn in her custody. It was *answered*, inierat secundas nuptias. She *answered*, That, in her constitution of tutrix testamentar, it was expressly provided, that, albeit she should happen to marry again, et sic provisio hominis abstulit provisionem legis. It was *answered*, That, upon the contrary, the provision of the law, that was founded and made for the weil and preservation of pupils and their gear, might not be taken away by any special provision of man, as appeared by the express law, and Doctors who write thereupon; Cod. Quando mulier tutelæ officio fungi potest; L. 2. et L. ult. ibid. Found by the LORDS, that, notwithstanding of the said provision, the common law ought to be followed forth, and that her tutory testamentary (fell) per secundas nuptias.

*Fol. Dic. v. 2. p. 24. Colvil, MS. p. 408.*

---

1636. March 8.

STUART *against* HENDERSON.

ONE William Stuart being served and retoured tutor lawful to the bairns of his umquhile brother, Mr Walter Stuart, notary in Perth, pursues Agnes Henderson, relict of his deceased brother, and \_\_\_\_\_, Stuart, now her husband, for exhibition of certain bonds, made to the bairns father, and being in her hands, as tutrix testamentar nominated in her umquhile husband's testament; and she compearing, and *alleging*, That the pursuer's retour to this office of tutory is null, seeing it was deduced before the Bailies of the Canon-

No 2.  
Found in conformity with  
the above.

No 2. gate ; whereas the defunct was indweller, and died in Perth ; and, consequently, he ought to have been served there, and not being done so, the same is null, as done *a non suo iudice, et incompetente*. This exception was repelled ; for the LORDS found, that the brief of tutory being directed out of the Chancery, to any Judges generally, the party might serve the same before any Judge, even as a general brief to serve one general heir to his predecessor is sustained, being done before any ordinary Judge, having jurisdiction. And it being further *alleged*, That the defunct had nominated the defender, his relict, tutrix testamentar to the bairns foresaid, so that there was no place to the pursuer to pursue as tutor lawful, from the which office she cannot be thought to have fallen by her second marriage in respect that the said defunct, her husband, in his said testament, had nominated and appointed her to be still tutrix to the said bairns, during the whole time of their pupillarity, as well after her second marriage, as during the time of her widowhood ; and it being *replied*, That that provision ought not to be sustained, as being against the law, which provides, that no woman can remain tutrix after she has clothed herself with a second husband, whereby she becomes under her husband's government, and so cannot manage the office of governing another ; and this being the inviolable custom and practise of the realm, it cannot be inverted by any private appointment, set down in a testament against law and practise ; in respect of which reply, which the LORDS sustained, the LORDS repelled the said exception ; and, notwithstanding of the provision foresaid of the testament, found the relict had tint her office by her second marriage.—*See TUTOR AND PUPIL.*

*Fol. Dic. v. 2. p. 24. Durie, p. 801.*

1743. July 7.

THOMAS FULLARTON of Gallery, &c. Heritors of the Fishings on the Water of Northesk, Pursuers, *against* HERCULES SCOT of Brotherton, Possessor of the Cruive-Fishing on the said Water, Defender.

No 3.

A paction betwixt private parties, to dispense with the statutory regulations of cruives, is invalid, though acquiesced in for upwards of 40 years.

THESE pursuers brought an action against the defender, for keeping his cruives on the said water, in every article contrary to law, not only with regard to the wideness of the hecks, neglect of the Saturday's slop, and of taking salmon in forbidden time, but also by raising the cruive-dykes to such a height above the water, that the fish could neither get up nor down.

*Pleaded* for the defender, That the pursuers were barred, *personali objectione*, from insisting in this action, their predecessors, or authors, having entered into contracts with his authors, whereby they consented, in consideration of an annual payment to be made by the heritors of the cruives, to allow them to