

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.*