

1629. July 4.

L. LANGSHAW *against* MUIR.

No. 108.

A mother, by her second marriage, loses the right of custody, even of a female child.

A tutor testamentar pursuing the mother for delivery of the pupil to him, as tutor foresaid, and the mother alleging, that the said pupil, being her own daughter, ought to remain with her, to be educated, seeing she offered to maintain her upon her own expenses, and not upon any of the bairn's money or goods; likeas she offered to find caution, to present the bairn again before the Lords at the expiring of the years of tutory (she being then in life) a free person, to choose her curators at her own pleasure; and so she alleged, that the tutor, pursuer, was suspected to have the pupil in his custody, seeing he who was to succeed to the pupil was married to the tutor's sister;—notwithstanding of the which allegiance and offer, the tutor was preferred, and the bairn ordained to be delivered to him, according to the trust of the defunct, who nominated him tutor, and not his wife; and which wife, if she had been tutrix-testamentar nominated by the husband to the bairn, yet she would have tint the office, and keeping of the bairn, she having married a second husband, whose wife she presently was; and the circumstance foresaid was no suspicion against the tutor, neither was the tutor decerned to entertain the pupil upon his own expenses, except he pleased to do so voluntarily; for it was not found necessary of the law, albeit it be doubted, if *vitricus possit esse tutor privigno*; for it would appear he may, if he be left by the father in the testament, yet *non datur a iudice*; and if he were tutor, yet he ought not to have the education of the minor, and consequently not his wife, who is mother to the bairn, and is herself *in potestate viri*.

Clerk, Gibson.

Durie, p. 455.

1629. July 23.

L. HADDO *against* L. LUDQUHARN.

No. 109.

A pursuit for delivery of evidents was sustained at the minor's instance, before his majority, against one of his curators, who was chosen *sine quo non*, without concurrence of any of the rest of the curators to assist the pursuit, being authorized by two advocates, whom he then instantly chose curators at the Bar *ad hanc litem*, which was sustained, he having other curators, who were not removed, nor any of them concurring in the pursuit with him; but the same was sustained, first only for exhibition of writs; and, after exhibition, the Lords declared they would advise what would be done anent the delivery.

Act. Nicolson.

Alt. Stuart.

Clerk, Gibson.

Durie, p. 466.