

1706. *February 15.*

ROSE FINCHAM, Relict of James Muirhead of Breadisholm, younger, *against*
 JAMES MUIRHEAD of Breadisholm, her Father-in-law.

No. 245.

A person found liable to his eldest son's relict for the expense of her lying in child-bed of a posthumous child, and for the maintenance of her children since her husband's death, but not for any modification of aliment to them in time coming, in respect he offered to take them home to his own family.

In the process at the instance of the young Lady Breadisholm against James Muirhead of Breadisholm, her father-in-law, for the expense of her lying-in of a posthumous child, and his aliment since he was born, and for the aliment of another child since her husband's decease, and their aliment in time coming, it was alleged for the defender, That no allowance could be given for by-gones, because *nemo alitur de præterito*, and the expense of by-gone aliment is already borne; nor any modification of aliment for the future, since he was content to take his grandchildren home to his own house, and to keep them with his own children, till they were in case to do for themselves.

Replied for the pursuer: That law gives the custody of children to the mother, from the presumption of her tender care and affection, except in the case of a second marriage, or when she is to succeed to the children. And though, by the civil law, the office of tutory was competent to the nearest agnate, the pupil's education was committed to him who *ex affectione conditioneque personæ magis idoneus judicatur*; L. 2. D. Ubi Pupillus educari debet; but never to persons suspected. Therefore, the pursuer's indifference for the poor infants, and unkindness to their parents, is good ground to exclude him from the custody of them, and to oblige him to aliment them with the mother, according to his ability.

Duplied for the defender: If the children had a stock and means of their own, and the contest were only about the custody of them, the pursuer might have some pretence; but when she craves the grandfather to entertain them out of his own fortune, he should be preferred. It is the strangest confidence to pretend to force a grandfather to give the pursuer an aliment to children begot in his son's marriage with her; of which he was never advised. The citations from the civil law are not to the purpose; for no man denies, that the relict, living in widowhood virtuously, is often preferred to the keeping of her own children before the nearest of kin, tutor in law, or tutor dative; but the question here is, where, and by whom, children that have nothing of their own should be alimented? As to the malicious insinuation, that the defender and his wife are persons suspected to have no good designs against the infants, he takes no notice thereof, being confident it would have no impression upon, or credit with, any man who knows him.

The Lords found the pursuer must have allowance for the expense of her lying-in child-birth, and for the maintenance of her two children, since her husband's death, and remitted the modification to the Ordinary; but refused to modify any aliment for the children in time coming, in respect the defender was willing to take them home to his own family; for though infants are not to be taken from the mother during her widowhood, if she offer to keep them *gratis*, yet the grandfather may exclude her from seeking aliment for them, by accepting them into his house.

Forbes, p. 101.