

1747. February 11.

ELIZABETH MAXWELL, *alias* HAIRSTONES, *against* The NEAREST of KIN of Her CHILDREN.

No. 281.
Sum fixed,
which a tutor
might expend
upon the or-
dinary ali-
ment of the
pupil, with-
out a parti-
cular account
thereof.

William Maxwell of Preston intermarried with Elizabeth Maxwell in 1739; and as his estate at that time consisted mostly in trade, and plantations in Jamaica, which at all times, especially in time of war, are uncertain, he made his settlements only of the estate he had brought over to Scotland, so that the provisions were very moderate in proportion to the estate he came to have at his death, which happened suddenly in 1741. All that his wife was provided to was £.80 Sterling of annuity; and he left an estate in land and effects, computed to about £.10,000 Sterling, to descend to two daughters, infants.

Elizabeth, their mother, who had been appointed tutrix to her children, in conjunction with other two who had not accepted, was advised to bring a process, wherein she called the nearest of kin of her children, in order to have an aliment modified by the Lords, to prevent the hazard of questions, to which she might be exposed, at the instance of their nearest of kin, in case of their decease.

And there being no opposition, the Lords, after reasoning the matter among themselves, by their interlocutor of the 31st January last, modified £.80 Sterling yearly to each of the daughters, in order to enable the mother to live in town with them, until the same should be recalled by the Court; the sum to be disposed of by her for the said purpose, and she to take credit for it in her accounts.

The Lords were unanimous, that the process was properly brought, from the example of the civil law. Thus by L. 3. D. Ubi pupillus educari deb. "Jus alimentorum decerendorum pupillis prætori competit; ut ipse moderetur quam summam tutores vel curatores ad alimenta pupillis vel adolescentibus præstare debeant." And the rule to be observed by the Prætor is subjoined, Modum autem patrimonii spectare debet prætor, &c. ut semper aliquid ex reditu supersit.

But the doubt stirred was, Whether she ought not to keep an account, as a tutor is not to profit by his pupil's means? To which the answer made was, That had the tutrix alimented, all she would have been bound to do at accounting, was to give in a slump article for aliment, and, Why may not the Court before hand authorise the article which she may state?

But to others this was not satisfying; for though it is true, that a slump article for aliment will be sustained after the same has been expended, if it appear moderate, yet if it be objected to, the tutor ought to have some account to justify it, though not of every trifle, which the nature of the thing may not admit; for the article is only to be sustained as supposed to have been truly expended; whereas by modifying before hand, the tutrix has it in her power to employ the whole, or half of what is allowed, as she pleases, and no questions to be asked; and should this come into practice, it might have bad effects; and even the texts in the civil law do not exclude an account, but only settle the *maximum*. And not a few of

the Lords thought, that all the Court ought to have done, was to settle the *maximum* that the tutrix could state for aliment, but that whatever she should state was to be supported by an account. But the plurality did not think proper to make any limitation. The case was indeed singular; a great fund, only two girls, the tutrix herself narrowly provided, and a person under no suspicion; but it is much doubted if the like would be granted to every tutor who might apply.

No. 281.

The pursuer, however, not satisfied with this appointment, applied to have it enlarged; for that the unavoidable expense of house-rent, household-furniture, servants' fees, their maintenance and clothing, and maintenance of the pupils, would go far to exhaust the whole sum, so that little or nothing would remain for their clothes, school-fees, physicians, &c. That what she chiefly had in her eye, when she brought the case before the Court, were the articles that relate to house-keeping, &c. which consist, from their nature, in many and minute particulars, of which it is hardly possible to have vouchers; but as to disbursements for clothes, schools, and physicians, she always proposed to keep exact accounts; and therefore craved, that the Lords would either modify a larger sum for the whole, or modify a sum which she might take credit for in her accounts, as aliment, besides the expense of schooling, clothes, and physicians.

And of this date, the Lords varied their former interlocutor, and modified £.150 Sterling yearly in name of ordinary aliment for the two pupils, and that over and above the expense of clothes, schools, and physicians, of which she was to keep an account.

Kilkerran, No. 10. p. 587.

1747. February 25. BOSWEL against _____.

Mr. James Boswel of Auchinleck, being debtor in a certain sum to _____, which, upon the creditor's decease, fell to his sister's son, his nearest of kin, a pupil; and the pupil's father as his administrator-in-law, proposing to lift the money, in order to his employing it more beneficially for his son's behoof, Auchinleck, in order to his more safe payment, procured a suspension. At discussing whereof, the Lords, on the Ordinary's verbal report, without enquiring into the administrator's view, or design in taking up the money, "Found the letters orderly proceeded," in respect it was not alleged that the administrator was in suspected circumstances.

No. 282.

Administra-
tor's power
to uplift the
pupil's mo-
ney.

Kilkerran, No. 11. p. 589.

1748. November 29. LIDDEL against URE.

A person obtained a brieve for serving himself tutor in law to his niece, and got a verdict accordingly, which he never retoured to the Chancery, but intromitted

No. 283.