

No 142. in setting pupil's lands were warrantable, the law would secure him ; and therefore left him to do as he will be answerable.

Reporter, *Redford*.

Fol. Dic. v. 1. p. 499. Dirleton, No 277. p. 135.

No 143. 1678. July 20.

MORRIS *against* ORROCK.

The Lords found, that *ex officio* they might supply defects in apprisings, to make them subsist as securities.

MORRIS pursues a reduction of several apprisings led against him by Orrock of Balram, wherein the penalties of the sums were exorbitant, yet the Lords did not abate the same ; but it being *alleged* against one of the comprisings, that it was null, proceeding upon a registration on a clause in these terms, ' To be registrate in the books of Session, or any other competent judicature of the kingdom ;' it was registrate where the creditor lived, but the debtor was not in that jurisdiction, and so there was no competent judge. It was *answered, imo*, That, by competent judge, was understood any judge having ordinary jurisdiction ; *2do*, In the apprising there were diverse other sums for which the apprising ought to stand, and to be sustained, though not in this sum.

THE LORDS considering, that *ex officio* they might supply defects in apprisings, to make them subsist as securities for the just interest, without the extraordinary advantage of expiring of the legal, or unequal penalties, did declare, that if the defender would restrict his whole apprising to the ordinary penalties (for the Lords had deducted the termly failzies, and would not allow them) they would then sustain this apprising for the whole sums ; but he having refused, the Lords reduced the apprising *in toto*. See LEGAL DILIGENCE.

Stair, v. 2. p. 637.

* * * Fountainhall reports this case :

1678. July 19.

A COMPRISING found null because led on a bond registered in Kirkcaldy town books, within whose jurisdiction the debtor dwelt not ; and the appriser here refused to restrict to his just sums ; and as the Lords maintain comprisings as a legal security, so they embrace every opportunity to cut them off where they are rigid.

Fountainhall, MS.

1687. July 22.

THE BRETHERN and SISTERS of PATRICK SCOT of Orchardfield *against* BARBARA FOULER, and RICHARD PRESTON TAYLOR, her Husband.

No 144. In a question of fraud, the Lords having

THE Brethren and Sisters of Patrick Scot of Orchardfield insist against Barbara Fouler, and Richard Preston Taylor, her husband, for reduction of the

said Patrick's testament, whereby he had nominated the said Barbara, his nurse, his sole executor, which was better than 2000 merks; *1mo*, Because he was a boy little past 14, of great debility of body, and of more infirmity of mind, which follows *corporis temperamentum*; and that it was *testamentum maxime inofficiosum*, made to the prejudice and exclusion of his five indigent and necessitous brethren and sisters; *2do*, Testaments procured by circumvention and fraud, by force, extortion, or fear of persons who have them under their power or influence, by flattery, importunity or solicitation used on weak testators, are void and null; or where *sibi ascribunt legatum, vel testatorem prohibent testari*, they lose the benefit as *indigni*; and here she enhanced the defunct wholly, by keeping him in her own house, and refusing access to his brethren and other friends; and when he inclined to renew his testament, she dissuaded him; and all he designed her was only a gratuity. These are grounds for quarrelling testaments in the Roman law, and sundry have been annulled on the like heads by the Parliament of Paris; and two English lawyers, viz. Swineburn and Godolphin, are clear, that testaments obtained by fear or flattery are null, if the testator's judgment be small, and the legacy great; especially if it proceed from such as have the chief care of the testator in his sickness, whom he fears may desert him, as this nurse was. *3tio*, He was heard to declare, that he intended not to wrong his nearest of kin, but only to give a token to his nurse. And an act before answer was craved for proving these circumstances of dole and fraud. *Answered*, They opposed the testament, which was made by him freely when he was 15, without any compulsion, and he needed not adhibit his curator's advice; and it cannot be taken away by such lubric presumptions and general qualifications of fraud. Yet the LORDS (*referente domino Castlehill*) allowed before answer a mutual probation for examining all parties, for expiscating the matter of fact, and if unwarrantable practices were used in eliciting this testament. See Lady Innerleith's case, No 16. p. 6847, where they examined witnesses if the testament was read to her.

1687. December 3.—IN the reduction pursued by the brethren and sisters of Patrick Scot, as mentioned 22d July 1687, against Barbara Foulter and her husband, it was *objected*, that Walter Scot, goldsmith, his brother, and James Scot of Bristol, his tutor, could not be received witnesses, because of their relation. —THE LORDS, on Saline's report, received them, being an act before answer, wherein they would take all manner of expiscation as to the fraud and contrivance, reserving to themselves to consider at the advising what it should operate.

1688. July 7.—THE reduction of the testament made by Patrick Scot to his nurse, mentioned 3d December 1687, is advised; and the Lords sustain it, and assoilzie from the reduction, because the qualifications of fraud were mainly proved by his brethren and near relations, who would gain in the cause.

Fol. Dic. v. 1. p. 498. Fountainball, v. 1. p. 469, 487, & 510.

No 144.
ex officio pronounced an act before answer, they admitted witnesses, otherwise exceptionable, with a view to make all manner of expiscation; reserving to themselves, at advising, what this should operate.