

## SECT. IV.

## Contumacy.

No 88. 1633. *November 26.* LINDSAY *against* FAIRFOUL.

A PERSON being pursued for a bloodwit, at the instance both of the procurator-fiscal, and the party wronged, and being fined only for contumacy, this fine was found to belong to the judge alone, and that he might discharge the same after sentence; for the LORDS found, That the judge might have tried the fact, although the party compeared not, and might have punished him, and appointed satisfaction to the party hurt; but no trial being taken of the fact; no censure could pass upon the party for the same, so that the pain being for contumacy only, no part thereof could belong to the complainer, who might pursue for damage and interest, notwithstanding of the foresaid sentence.

*Fol. Dic. v. 2. p. 182.*

1748. *July 19.* WYLIE & CUMING *against* Mrs ANDERSON.

No 89.

An advoca-  
tion of a pro-  
cess of re-  
moving not  
having been  
produced till  
decree was  
pronounced,  
ejection fol-  
lowing on the  
decree was  
found no con-  
tempt of au-  
thority.

MARION MENZIES, relict of Mr William Anderson, one of the ministers of Glasgow, executed a precept of warning against John Cuming, maltman of Gorbals, to remove from a house possessed by him, which her husband had entered to the civil possession of upon an adjudication, and disposed to her an annuity forth thereof, assigning her to the mails and duties.

John Wylie, cordner in Glasgow, on the title of another adjudication, had insisted against Mr Anderson, during his life, in a process of mails and duties, and transferred it against his son, who renounced to be heir; and John Cuming, who had been Mr Anderson's tenant, and on his death entered into payment to his widow, obtained a tack from John Wylie after he was charged to remove.

Mrs Anderson insisted in an action of removing before the town-court of Glasgow, the citation being 24th May, obtained decret, and charged thereon the same day to remove within twenty-four hours, the principal warrant being delivered for that purpose without extracting. An advocaion of the removing and ejection, or other action that might be intented on the warning, was presented on the 25th, and refused to be admitted after decret pronounced; and the time of the charge being expired, Cuming was ejected upon a warrant from the Bailie.

Wylie and Cuming gave in a complaint against the Bailie, clerk, and party, for that Mrs Anderson, who was only an annuitant, had no title to pursue a removing. The decret was pronounced on the same day with the summons, and the principal delivered to the officer; so that when a petition was offered next day, the clerk had no process in his hands, and no signature was made upon it; and though the ejection was advocated, yet the Bailie proceeded to determine therein after producing the advocacion.

No 89.

*Answered;* Mrs Anderson had an assignation to the mails and duties from her husband, who had a title to possess; but whether she had right to remove tenants or not, there was no ground for a complaint, if the Bailie thought her title good, though he might be mistaken; he pronounced a decret of removing, which in burghs behoved to be very summary, as one person not removing might throw many into confusion; and hence it was the custom of this burgh without staying for extracting, to deliver out the warrant to charge. The petition had been refused by the Bailie, either as incompetent after decret pronounced, or not moving him to change his interlocutor, and the advocacion could not be received after decret. The ejection was no action, but the execution of the removing, which the LORDS of Session grant upon a bill, and therefore it was absurd to advocate it; and to make an advocacion stop execution, would be giving it the force of a suspension.

THE LORDS, 10th July, "found there was in this case no contempt of authority." And

This day refused a bill, and adhered.

Act. Lockhart.

Alt. W. Grant.

Clerk, Kirkpatrick.

*D. Falconer, v. 1. No 279. p. 373.*

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S E C T. V.

Holden as confessed—Confessing or denying,

1579. February 6. CUNINGHAM against LD. KERSE.

In a spuilzie the defender refusing to give his oath of calumny, and thereupon being holden as confessed, the LORDS found, That this superseded any probation by witnesses, either of the possession or spuilzie.

No 90.

*Fal. Dic. v. 2. p. 184. Colvil.*

\*\* This case is No 33. p. 9375. voce OATH.