

No 390. advocated, nor any instruction given therein; but remitted to the Sheriff to proceed as he should see cause.

Act. J. Grant.

Alt. Bruce.

D. Falconer, v. 2. No 154. p. 178.

** Kilkerran's report of this case is No 18. p. 374. voce ADVOCATION.

1798. June 6.

DAVID STEWART against The YORK-BUILDINGS COMPANY.

No 391.

Decree of constitution pronounced for a random sum, in name of damages, reserving objections *contra executionem*.

THE Creditors of the York-Buildings Company having prevailed in a reduction of a lease granted by the Managers of the Company, and it having afterwards come to be understood, that the Company would have a reversion, after paying their debts, an action of damages was brought against them by the Representative of the lessee, founded on a clause of absolute warrandice contained in the lease.

The pursuer died during the dependence of the action, which was insisted in by David Stewart, as his assignee. After the action had been some years in Court, the LORD ORDINARY "circumduced the term against the defenders," for not reporting a diligence which had been granted them, for recovering the decree of reduction, and "decerned against the defenders, conform to the conclusions of the libel; reserving to the defenders all objections *contra executionem*, and answers thereto, as accords."

At moving a petition against this interlocutor, a doubt was expressed of the competency of pronouncing decree of constitution in these terms, which, it was observed, was a very different case from allowing an adjudication, reserving objections, where the claim has been previously constituted, and can be set aside only by suspension or reduction.

But, on advising the petition, with answers, in which parties confined themselves chiefly to the relevancy of the claim of damages, it was observed, that similar decrees had often been pronounced by the Court, and that the present would enable Mr Stewart to adjudge, if not in payment, at least in security, of his claim; 7th March 1794, Creditors of Macneil against Saddler, No 35. p. 122.

THE LORDS, "In respect that, by the interlocutor reclaimed against, nothing is determined with regard either to the validity of the claim of damages, or to the amount of such claim," "adhered."

Lord Ordinary, Polkemmet.

Act. Solicitor-General Blair, Neil Fergusson.

Alt. Lord Advocate Dundas, John Clerk, et alii.

Clerk, Gordon.

D. D.

Fac. Col. No. 78. p. 183.