

No. 13. Against this judgment, Mr. Campbell (11th December) presented a bill of advocation to the Lord Ordinary on the Bills, who granted an interdict, on considering the bill of advocation, and after having heard parties; and again, upon considering the bill, answers and replies, (17th January 1803,) ordered memorials to be reported to the Court.

What the complainer contended was a sunk story, the defender alleged was meant only for cellars. Neither Rose Street nor Thistle Street properly has a sunk story as in the principal streets, so that when applied to these streets, the act means only the first story; from the floor of which, the height of the front of the house is not above the legal height; and as to the back-walls, to them the regulations do not apply; so that in every street the practice is almost universal, of raising the back-walls a story higher than the front.

It was on the other hand urged, that the plan had been approved of by the Magistrates, who must be held to be the best interpreters of their own act of Council, and that practice had so far explained what at first was somewhat ambiguous, as to make this building in exact conformity, if not to the regulations for building, at least to the other buildings of these streets. Besides, that no individual has any right to enforce these regulations, a power which belongs solely to the Magistrates, who may make and dispense with their own enactments as they think fit.

But the Court in general agreed with the complainer in thinking, that as the act of Council was unrepealed, it remained still in force; and that no practice, however general, could weaken its effect; and that as every proprietor purchased his feu on the faith that the regulations then existing should be enforced, he had a palpable interest to see them enforced; and no deviation, however general, of so short a duration, nor how much soever sanctioned by the Magistrates, could deprive an individual, whose property was injured by the interception of light, or otherwise, from having the act of Council enforced.

The Court therefore passed the bill, and continued the interdict.

Lord Ordinary, *Methven.* For Complainer, *B. Erskine.* Agent, *Ro. Syme*, W. S.
 Alt. *H. Erskine, Monypenny.* Agent, *Jo. Young*, W. S.

F.

Fac. Coll. No. 87. p. 192.

1803. March 8. MARSHALL against LAMONT.

No. 14.

An act of warding may be executed without any previous search for moveables belonging to the debtor.

HUGH MARSHALL, distiller in Rothesay, was indebted by a bill for £9. to Duncan Lamont, farmer in Toward, Argyllshire. Having failed to discharge the debt, he was incarcerated in the prison of Rothesay, (9th June 1791), upon an act of warding granted by the Magistrates.

In an action of damages brought for wrongous imprisonment, it was, among other circumstances, pleaded, that no legal act of warding could be granted "for apprehending and incarcerating the debtor until he pay the debt,"

unless the officer first return an execution, “ that he went to poind the debtor’s effects, but could find none,” or make oath to that effect: That in direct violation of this rule, the act of warding had been obtained, without any previous search for moveables to obtain payment by poinding, No. 14:

At advising the cause, a certificate was produced from the City Clerk of Edinburgh, bearing, that it was not the practice to require a search for moveables or a poinding previous to granting and executing the act of warding.

The Court accordingly adhered to the interlocutor of the Lord Ordinary, finding that Marshall was legally incarcerated.

Lord Ordinary, *Woodhouselee.* Act. *Fletcher, Wright.* Agent, *D. Macgowan.*
 Alt. *Wemyss.* Agent *W. Beveridge, W. S.* Clerk, *Colquhoun.*

F.

Fac. Coll. No. 94. p. 207.

1804. February 24. GRAY and Others *against* SPENS and Others.

A petition and complaint against the Michaelmas election of the Magistrates of Rutherglen, was presented in name of John Gray of Scotstown, and certain other persons councillors or burgesses of the burgh, stating, that they had been duly elected Magistrates by a majority of the electors. The petition was served upon John Spens of Stonelaw, and other Councillors who had been returned, and answers were given in by them to the different objections of the complainers.

Before replies were lodged, a minute was presented by the respondents, stating, That a mistake had been committed by the petitioners in the mode of bringing forward the petition, which was fatal to the complaint. One of the councillors, John Watson, weaver, was not made a party to the action, either as complainer or respondent; and a person of the name of John Wilson, weaver, designed “councillor of the burgh,” appeared as one of the complainers, though there is no person of this name councillor in the burgh. In cases of complaints against burgh-elections, it is indispensable that all the Magistrates and councillors be made parties to the suit, and an omission to call any one of them is fatal; *Wight on Elections, B. 4. C. 1. p. 338.*; *Gillies against Waugh, February 18, 1755, No. 22. p. 1875.* *Young against Johnston, January 1766, No. 238. p. 8861.* *Wight, p. 339.* Without entering, therefore, into the merits of the objection, the omission to list John Watson as a complainer is sufficient to dismiss the action; and as the statutory period is elapsed, it is incompetent to prefer a new complaint.

It was answered, *1st*, Objections of this nature ought to be proponed *in limine*. By stating peremptory defences, however, the respondents must be held to have abandoned all dilatory defences, and to have passed from the objection; *Erskine, B. 4. Tit. 1. § 66.* *2dly*, The objection merely amounts to an error in spelling the name of one of the complainers, which cannot have the

No. 15.

In a complaint against the election of the Magistrates of a royal burgh, all the Magistrates and Councillors must be parties either as complainers or respondents.