

No. 1. accusation. When he appeared in court, no opportunity was given him of adducing witnesses in support of his defence; and after the decree had been pronounced without evidence, he was instantly carried to prison, without having an opportunity of applying to a superior court for redress.

Answered: The materials of the Circus only were exposed to auction. Now, the lamp-irons did not fall under this description; and as the sale proceeded at the instance of the Procurator-fiscal, he was bound to take care that no part of the subject should be lost to the creditors. His application to the Magistrates was therefore necessary, and the subscriptions of the four witnesses to the pursuer's declaration, prove it to have been correctly taken down; consequently the judgment proceeded on sufficient proof, and the pursuer's imprisonment arose from no wrong on the part of the defenders, but entirely from the pursuer's own contumacy; for, as he carried off the lamp-irons after he heard his right to them denied, he was bound at all events to return them agreeably to the rule, *Spoliatum ante omnia restituendum*. This would in no respect have injured his alleged right of property in the lamp-irons, which, if so advised, he might afterward have enforced by an action before the Magistrates, or any other competent court.

The Lord Ordinary ordered memorials.

A great majority of the Judges were of opinion, that the Magistrate ought not to have decided on the pursuer's unsigned declaration, and that the whole proceedings were harsh and rapid beyond what the circumstances of the case warranted.

The Lords found 'the defenders liable, conjunctly and severally, in £10 of damages, and expences of process,' which they modified to £50 Sterling.

A reclaiming petition for the pursuer, craving higher damages, was refused, without answers.

Lord Ordinary, *Stonfield*.
Clerk, *Sinclair*.

Act. *Montgomery*.

Alt. *Hope, Burnett*.

R. D.

Fac. Coll. No. 152. p. 341.

1808. March 3.

MARSHALL against LAMONT.

No. 2.

AN act of warding may be executed without any previous search for moveables.

This case is No. 14. APPENDIX, PART I. *voce* BURGH ROYAL.