

1803. *January 19.* SKIRVING and Another, *against* SMELLIE and Another.

No. 12.

PRESCRIPTION sustained as a sufficient title to the exclusive privileges of an incorporated trade.

* * This case is No. 163. p. 10921. *voce* PRESCRIPTION.

1803. *February 17.* CAMPBELL *against* LINDSAY.

No. 13.

By the 4th clause of an act of Council of the Magistrates of Edinburgh, (29th June 1785) "it is enacted, That the houses in the two streets, to be called Thistle Street and Rose Street, shall not exceed two stories, exclusive of the sunk and garret story; and that no floor shall exceed eleven feet in height, including the joisting and floor, at least that the whole side of the side-wall from the floor of the sunk story shall not exceed thirty-three feet." To secure the observance of the various regulations contained in the act, it was provided, "That no proposal for a feu be agreed to, unless it contains a reference to this act, and an obligation on the proposer to observe and fulfil the articles before enumerated; and that every such proposal shall be written on a paper to be annexed to a printed copy thereof."

The regulations of the act of Council 1785, relative to the buildings in Edinburgh, are not abrogated by a contrary practice, and may be enforced at the instance of an individual whose property is affected by their disuse.

The Honourable Robert Lindsay of Leuchars purchased an area in Rose Street, for the purpose of building a coach-house and stables on the back part of it; and for the front to Rose Street, he obtained a plan and elevation of a house similar to most of those, in the same situation. On application to the Magistrates, their overseer inspected the plan, and gave his opinion, that it was agreeable to the act of Council, when the Magistrates in Council assembled, gave their approbation to the plan, and granted Mr. Lindsay (9th April 1800) right to the area by charter, and he proceeded to build upon it, in conformity to the plan.

Archibald Campbell of Clathick, proprietor of two houses in George Street, opposite to the house in Rose Street, conceiving himself injured by the building, which contained sunk apartments, exclusive of which and the garrets, there were three entire stories to the front, and four to the back, the first entering by a flight of a few steps from the street, complained to the Dean of Guild, and craved an interdict against building to so great a height.

The interdict was at first granted, (7th December 1802) and afterward the Dean of Guild, (10th) "In respect the building complained of is in conformity to the elevation approved of by the Town-Council, and similar in height and otherwise to buildings in the same street, recalls the interdict."

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.

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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,"