

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.

No. 15. effect of annulling the complaint. There is a great difference between an error in the name of a pursuer and of a defender. A defender, if cited by a wrong name, is not bound to appear, not being obliged to know that he is the person meant to be summoned. But the misnomer of one of a number of pursuers can nowise affect the interest of defenders. In this case, the complainer, whose name has been inaccurately stated, signed the protest against the election and the mandate to insist in the complaint, and acknowledges himself to be the person really meant. Even, therefore, upon the supposition of a misnomer being equivalent to a total omission of the name of a pursuer, the defect is remedied by his sisting himself a party; and as nothing is more easy in common cases, than for a pursuer to amend his libel, all that is necessary in this case, to remove every shadow of objection, is for the complainer to sist himself in his own name as a party to the complaint.

It was conceived by one of the Judges, that the statute did not require the execution of the complaint to take place within two months; that it was enough if the complaint be, within that time, presented to the Court; and that although there was a misnomer in the complaint, it was removed by the party afterward sisting himself. But the majority of the Court held the objection to be sufficient, and that a complaint is not understood to be brought within the statutory period, if it be *ex facie* imperfect, which in this case it was, on account of the omission of the name of one of the councillors of the burgh. They, therefore, without entering into the merits of the case, dismissed the complaint, by sustaining this preliminary objection.

For Complainers, Clerk, W. Clerk.
Alt. Campbell, W. Erskine.

Agent, A. Millar, W. S.
Agent, Ja. Davidson, W. S.

J.

Fac. Coll. No. 148. p. 331.

1804. March 6. WEAVERS OF LANARK *against* PORTEOUS and Others.

No 16.

An exclusive privilege to carry on the weaver craft, does not comprehend un-freemen living within the burgh weaving cotton cloth for their employers without the burgh.

By seal of cause dated 19th January 1660, the weavers of Lanark were incorporated; “and it was ordained, that nae person nor persons within the burgh be admitted or suffered to work as unfreemen of the said craft, or to set up looms, booths or working-houses, without they be admitted by the said craft, under the pain of £5. to be exacted from ilk person contravener *toties quibties.*”

Of late, from the great extension of the cotton manufactures, particularly in Glasgow and Paisley, it has been usual to give out cotton yarn to weavers residing in the country, or even the neighbouring burghs, for the purpose of being manufactured into cloth, which is returned to their employer to be disposed of by him. Among other towns which benefited by this kind of employment, was Lanark, where John Porteous and others living within the burgh