

charger's property, and as an house of office is not declared to be a nuisance by the laws of Britain, the Lords suspended the letters *simpliciter*.

No 12.

Act. Swinton.

Alt. Arch. Murray.

Clerk, Home.

P. M.

Fol. Dic. v. 4. p. 200. Fac. Col. No 226. p. 418.

1760. August 5.

GEORGE BUCHAN of Kello, against CHARLES FREEBAIRN, Architect in Edinburgh.

SOME old houses upon the high-street, at the head of Cant's close, in Edinburgh, being taken down, a plan for rebuilding them of the height of five stories above the shops or ground-floor, was authorised by the guild-court, after citation of all the conterminous heritors, and no objection made.

After the building was carried to the intended height in the front by Charles Freebairn the proprietor, Mr Buchan complained, in a bill of suspension, of the raising the back part of the upmost story, as prejudicial to the lights of a house belonging to him in Dickson's land, which stands immediately to the west of the new building; and he insisted, That as by act 8th, Parl. 1698, it is provided, "That all new houses be built no higher than five stories above the causeway," this upmost story of the new building being the sixth from the causeway, could not be lawfully erected.

*Answered* for Charles Freebairn; *imo*, This objection comes too late, as it ought to have been made before the Dean of Guild granted warrant for rebuilding the house, according to the plan which has been since exactly followed out. *2do*, The practice of the city, authorised by warrants of the guild-court, has immemorially explained the act, so as to allow five stories above the shops in the front, and the story immediately above them is always held to be the first story, and so progressively. Custom or practice is sufficient even to abrogate statute-law, and much more to explain it; and it tends more to beautify the city, to allow the raising the front or side walls five stories above the shops, than to have such fifth stories made by projections, or stormonts, as they are called, in the depth of the roof, which is admitted to be subject to no prohibition by this statute. And, *3tio*, According to the words of the act, the computation of five stories from the causeway ought to be made from the highest part of the causeway adjacent to the house; and, in this case, the causeway of the close ascends from the street, so that the story on a level with the shops is, in the back part, opposite to the suspender's windows, almost entirely sunk below ground; and, consequently, the top-story in question is in that part only the fifth above the causeway, though, computing the shops, it is, at the front, the sixth above the level of the high-street.

No 13.

The act 1698, regulating the manner of buildings within Edinburgh, is still in force.

No 13.

*Replied* for the suspender; *imo*, It is not competent for the Dean of Guild to authorise a plan contrary to the statute; and if he has been misled to yield to this attempt, it cannot bar this court from confining the building to the legal regulation, especially when the challenge is made before it is finished. *2do*, The meaning of the statute is clearly expressed in computing the five stories from the causeway, and appointing the thickness of the side-walls to be proportionally lessened as they ascend; so that it cannot be doubted, the fifth story, including the shops, is the highest the law allows to be finished within the side-walls. Positive statutes, enacting rules of an arbitrary nature, may be abolished in Scotland (though not in England) by disuse. But necessary rules of public police can never be abolished by disuse, or rather by a very bad custom counteracting them; *L. 39. D. De legibus*. But further, instances have been discovered, where parties have complained of this very abuse; and the Court of Session has interposed its authority to support the law, particularly in 1742, in the case of a land opposite to the Luckenbooths, then rebuilt by Messrs Farquhar, Menzies, and Baillie, where the LORDS prohibited them from building higher than five stories, inclusive of the shops or ground-story. And, *3tio*, It is apparent from the whole tenor of the statute, that the elevation of the house is to be computed from the causeway of the high-street. This is the rule, where closes descend from the street, so that the buildings in the back parts frequently contain several stories more than in front, which is held to be within the bounds of the law; and there is no reason why the same rule should not be applied where closes happen to ascend.

“THE LORDS found the act still in force, and therefore passed the bill.”

Reporter, <i>Kames</i> .	Alt. <i>Rae</i> .	For the suspenders, <i>Ferguson</i> .
<i>D. R.</i>	<i>Fol. Dic. v. 4. p. 198.</i>	<i>Fuc. Col. No 245. p. 447.</i>

No 14.

1760. December 17. WALKER and HERD *against* THOMSONS.

THE Justices of Peace of Kincardine having warned the tenants and labourers to come out to perform the statute-work upon the 15th, 16th, and 17th days of August, and granted warrant for pointing the effects of the deficient, to the extent of the composition-money, which was accordingly executed; the tenants, whose goods were pointed, brought an action for restitution, and for damages and expenses, against the Justices, on the ground of their being called out in time of harvest, contrary to the act 5th, George I., which limits the term for calling them out, to before the last day of June. The Justices insisted chiefly, that the statute was in non-observance, and that harvest was not actually begun, although the pursuers had cut some green corn to give a pretence for their plea. THE LORDS found the warrant granted for pointing was illegal, as the tenants were not summoned within the time limited by the