No 13. *Replied* for the suspender; *1mo*, 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, *Kames.* Alt. *Rae.* For the suspenders, *Ferguson.*

D. R. *Fol. Dic. v.* 4. *p.* 198. *Fac. Col. No* 245. *p.* 447.

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 poinding the effects of the deficients, to the extent of the composition-money, which was accordingly executed; the tenants, whose goods were poinded, 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 poinding was illegal, as the tenants were not summoned within the time limited by the

tatute; and found the Justices liable in restitution of the goods, and in expenses of process. No 14.

Fol. Dic. v. 4. *p.* 201. *Fac. Col.*

*** This case is No 352. p. 7642, *voce* JURISDICTION.

1762. *February* 26.

PROPRIETORS in CARRUBBER'S CLOSE *against* WILLIAM REOCH.

No 15.
A wright's shop in the middle of a crowded town is a public nuisance, as being liable to fire. It is the province of the Dean of Guild to remove that nuisance, not of the Court of Session.

IN August 1758, several houses in Carrubber's close were destroyed by fire, which begun in the shop of William Reoch wright. He having begun to rebuild his shop, and to fill his area with timber as formerly, the neighbouring heritors applied to the Dean of Guild-court, setting furth the danger of fire, and that a wright's shop in the middle of a crowded town was a public nuisance; and, therefore, praying an order upon Reoch to remove his timber, and to desist from building. This complaint being advocated to the Court of Session upon the pretext of delay of justice, it was doubted whether a case of this nature be at all competent to be determined by the Court of Session. Judges can decern for reparation of damage done. It belongs to Magistrates to prevent damage where it is imminent. They can pull down an old house which may fall upon passengers; and they can pull down any house to prevent the spreading of fire. They can no more, which is to remove a public nuisance. Therefore, the present case, which resolves into a regulation for preventing fire, is not the province of the Court of Session, but belongs to the Dean of Guild, a Magistrate, who, like the Roman *Ædile*, has a superitendency of buildings within town. The Court of Session indeed may correct unsuitable regulations made by the Dean of Guild, upon the principle that every evil must have a remedy. Upon this account chiefly was the cause remitted to the Dean of Guild, with an instruction to proceed without delay.

A cause of the same nature betwixt Wood and Duncan, on the one part, and George Sandeman, wright in Perth, on the other, concerning a wright's shop in the town of Perth, was the same day, and for the same reason, remitted to the Dean of Guild.

Sel. Dec. No 192. *p.* 256.

1762. *February* 27. MAGISTRATES of MONTROSE *against* SCOTT of Brotherton.

No 16.
No building can be erected upon the public streets of a town.

THE Murray-street of Montrose runs for about 1200 feet from north to south, and is of a great breadth, particulary at the south end it is 150 feet broad. At that end stands the church, an old town-hall, and a guard-house. The Ma-