

The interlocutor of the Lord Ordinary was affirmed, (23d November 1804), on advising a petition, with answers. No 49.

To which judgment the Court adhered, (18th December 1804), by refusing a reclaiming petition without answers.

Lord Ordinary, *Hermann*. Act, Solicitor-General Blair, Fletcher. Agent, Ja. Gilchrist, W. S.
 Alt. Geo. Jos. Bell. Agent, Jo. Lang. Clerk, Home.
 F. Fac. Col. No 186. p. 416.

S E C T. IV.

Lesio ultra duplum.—Sale by sample,—weight,—measure, &c.—*Actio redhibitoria et quanti minoris.*

1594. December.

L. of SORNBEG against SCHAW.

THE auld Laird of Sornebeg having disponit certain lands to William Schaw his sone, he band himself be ane several obligation to warrand him fra all uther alienations, wodsetts, takkis, &c. This obligation of warrandice being registrate against this Laird of Sornebeg, oy and aire to the auld Laird, he was chargit be warrant the said William fra certain takkis thairof set to the tennentis be the auld Laird. He suspendit, *alledgeand*, That this persewar could have na warrandice fra the said takis, becaus the samen wer set of his express knowledge, in sa far as at the setting thairof, he ressavit the gressummis, was witness insert in sum of the said takkis, and he had oft tymes ressavit the dewtie thairof, et sic cum scienter emerit prædia hoc onere affecta non debet ei cavere de evictione; whilk reasoun of suspensioun the LORDS fand relevant, albeit it was ane secund suspension, and urgit not the suspendar to verifie it *instanter* or be wreit, bot admittit it to probation be the witnesses insert in the takkis, the wryttars thairof and the delyveraies of the gressummis and duties. Durum id permultis visum est.

Fol. Dic. v. 2. p. 358. Haddington, MS. No 456.

No 50.
Qui scienter emit rem vitiosam has no recourse against the seller.

1629. January 9.

BROWN against NICOLSON.

No 51.

In a pursuit for the price of a horse, an exception was made, That the horse was crooked when he was bought; and the defender offered him back in as
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No 51. good condition as when he got him. The LORDS respected not this offer of restitution, made *pendente lite*, and as the defender had kept the horse a year without making any such offer.

Fol. Dic. v. 2. p. 357. Durie.

*** This case is No 52. p. 8940. *voce* MINOR.

1665. January 6.

No 52.

ABRAHAM HOGGERSWORTH, Dutchman, *against* JOHN HAMILTON, Merchant.

ABRAHAM HOGGERSWORTH, Dutchman, pursues John Hamilton, merchant, for payment of 320 guilders, conform to his bond. It was *alleged* by the defender, That the bond given to the pursuer as the price of certain bolls of madder, the samen madder was altogether insufficient, and that he had pursued this Dutchman before the Dean of Guild Court, for abusing him in the bargain; and that therefore now he ought to be free of his bond, the madder being vitiated and rotten; and that he has action. *quanti minoris* competent to him against the pursuer. THE LORDS found the defender ought to condescend upon the vitiosity of the madder, and the way of proving and trying the same in Holland; notwithstanding it was alleged by the pursuer, that the defender should have come back and offered him all his madder in due time, and that he had sold and disposed of it all.

Fol. Dic. v. 2. p. 356. Newbyth, MS. p. 16.

No 53.

It was alleged, that a horse sold for six years old, was twelve. Found irrelevant, unless the horse had been offered back recently after the purchase.

1668. January 29.

Laird AITON *against* JAMES FAIRIE.

THE Laird of Aiton having bought a horse from James Fairie, pursues for repetition of the price, and for entertainment of the horse since, upon this ground, That he offered to prove by the witnesses, at the buying of the horse, that James Fairie promised to uphold him but six years old, and that he was truly twelve years old. The question was, Whether this was only probable by oath or witnesses.

But the LORDS perceiving an anterior question, how soon the horse was offered back by the pursuer, they ordained him to condescend, that very shortly thereafter he offered the horse back, otherwise they would not sustain the process.

Fol. Dic. v. 2. p. 357. Stair, v. 1. p. 517.