

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.