

of him without furnishing straw, unless express paction be in the contrary. See the Lady Rosseyth's case.

*Advocates' MS. No. 428. folio 228.*

1673. *November.* JAMES SYME *against* INGLIS of Murdeston.

JAMES SYME, tenementar in Hamilton, charges Inglis of Murdeston on a bond for 200 merks. He suspends; offering to prove, by the charger's oath, that the true cause of the granting of the bond was not borrowed money, but for the price of a horse: which being granted, then offered to prove by witnesses, that the said horse was scabbed, and insufficient, and not worth the money, and that he offered him back.

ANSWERED,—The reason was not relevant to be proven by witnesses, contrary to the brocard of law, That writ cannot be taken away but by a contrary writ or oath of party. *Idem eodem modo dissolvi quo colligatur, naturale est*; l. 35. *D. de Regulis Juris*. Dury, 15th July, 1624, Nisbet *against* Short; *supra*, numero 329, in February, 1672. *2do*, *Esto* the horse had been insufficient, *sibi imputet*, his eye being his merchant; unless he will make it relevant, and offer him to prove, that the seller, now charger, promised to warrant and uphold the horse, or knew its imperfections and fraudulently concealed them, or that they were so latent as they could not be perceived save after some time's trial. *3tio*, He must say, that how soon he discovered the imperfection, he instantly intimated the same to the seller, and offered him back. And all which, to take away his bond, may be proven *allenary scripto vel juramento*.

REPLIED,—That the bond was no other way here to be taken away but by the charger's oath, who once deponing and confessing the condition and cause onerous of the bond to have been for the price of a horse, that reduced the case to the nature of a bargain, the terms whereof no lawyer controverts but are probable by witnesses:—*Vide supra*, in December, 1672, No. 378. *in calce*. And he needed not prove the charger promised to uphold it, because *nemo ex suo dolo lucrari debet, actionem ve consequi*, l. —. *D. de Regulis Juris; et contractus emptionis et venditionis* is *bonæ fidei*, in which trust is most exuberantly relucant; and the *edictum ædilitium* has introduced, upon most rational considerations, the redhibitorian action, in case of latent vitiosity.—See my observes *alibi* on that edict, and a decision on the 1st of July, 1657, Fleeming and Reid.

The Lords found, the bond might be taken away in the manner offered in the reason: and that the charger acknowledging once it was for the price of a mare, then witnesses might be led as to terms, communing, agreement, and the insufficiency of the thing sold.

Which was thought somewhat lax, exposing all bonds granted for any other cause than borrowed money, (which bonds are very frequent in buying wares from a merchant, &c.) to be cavilled on and exposed to the tentation of the integrity of witnesses, if the goods given for the bond were sufficient; and draw the most tedious, troublesome, and uncertain inquiry into their goodness or badness, after many years.

If the Lords had ordained witnesses to be examined before answer *ex officio*, the hazard had not been so great, for that cannot be drawn into a preparative and ex-

ample. However, I find the Lords wanted not precedents for what they did ; for Dury tells us, on the 23d of June, 1626, the same was then decided between Maxwell and Drumlanrick ; see him, also, at the 26th of July, 1622, Esilmont and Buckie. *Vide infra*, in February, 1676, James Brown and Matthew Loury, *numero* 470.

When the probation came to be advised, the Lords found the insufficiency of the horse proven, and the offer back ; and thereupon suspended the letters, and assoilyied from the price. But if they had adverted, that the charger never got back his horse, but that he strayed waiff, it had been much more just to have modified something to the charger for his horse *actione quanti minoris*, upon the account of the scab it was proven he was infected with, and not make him lose both horse and price ; but Sir Jo. Dalrymple was for the suspender. See Stair's System, tit. 10. Of Conventional Obligations. Dury, 9th January, 1629, Brown and Nicolsone.

*Advocates' MS. No. 429, folio 228.*

1673. *November.* HALBERT LAUDER *against* WILLIAM ALISONE.

HALBERT LAUDER having married William Alisone's daughter, in the contract of marriage William obliges himself to pay L.1000 in tocher : 500 merks of it in good and sufficient ware ; 500 merks in assignations to bonds ; and the other 500 merks in money. Halbert charges for the L.1000. Alisone suspends. *1mo*, That he had given him 500 merks worth of goods. *2do*, He had assigned him to the value of 800 merks of bonds. *3tio*, Upon compensation ; he having given his daughter, before her marriage, merchant ware, to set up a little shop with, to the value of 400 merks. *4to*, He had alimeted them an year in his house after their marriage, for which he craved 600 merks. And, upon thir grounds, he had a process depending before the bailies of Edinburgh against his son-in-law, to hear and see it found and declared, that he had paid the L.1000 of tocher in manner foresaid, and were owing him 800 merks over and above it.

To this it was ANSWERED,—That the ware and bonds were acknowledged and accepted in part of payment : except one, which proving desperate, he offered to retrocess, since he was obliged to give him good and sufficient bonds ; and he never accepted it in satisfaction. And if it be pretended, that assignations are presumed to be taken in satisfaction, where the contrary is not expressed and provided ; it is answered, the presumption is just opposite, that assignations are not supposed to be accepted in satisfaction. See Hadinton, 25th February, 1624, Wishart *against* Ferme.—As to the third reason, it was absurd and ridiculous to think, that goods given to a maid *in familia* with her father, (like a *peculium profectivum*, to trade with apart,) and before marriage, can constitute a debt, so as to be obtruded for a ground of compensation, or imputed *ex post facto* in satisfaction of an obligation for a tocher, contained in a posterior contract of marriage, not relative to that furnishing, or mentioning that it shall be ascribed in the fore-end of the tocher.—Yet it may be doubted, whether what a father so gives his children *in familia* will be reputed *animo donandi*, or *animo repetendi*, at least *animo* to impute and attribute it in their legitim and natural portion, *pro tanto*.—As to the fourth, anent the aliment,—*non relevat*, unless it were offered to be proven, that it was promised and