

No 55.

THE LORDS, in respect of the tickets, and ratification after majority, and that there was no fraud or deceit qualified, repelled the reasons and decerned.

June 24.—AT the reporting of the former interlocutor yesterday, Fairie against Inglis, it was further *alleged* for Inglis, That he offered him to prove, by Fairie's oath, that he was circumvened in granting of the ratification, because Fairie upon that same design drank him drunk.

Which allegiance the LORDS repelled in respect of the bond and first ticket, wherein he declared, upon his soul and conscience, never to come in the contrary.

*Fol. Dic. v. 2. p. 358. Stair, v. 1. p. 623.*

\* 1675. July 7.

PATON against LOCKHART.

No 56.  
Goods were alleged to have been insufficient. No intimation having been given of this for two years, it was found, the insufficiency could be proved only by the oath of the seller.

PATON having charged Lockhart upon his bond of L. 200, he suspends, on this reason, that he offered to prove by the charger's oath, that the bond was granted for certain packs of skins, bought and received from the charger, and which the charger sent to the suspender, and were received by him, upon confidence of the charger, that they were sufficient; but offered to prove by witnesses, that they were insufficient. It was *answered, Non relevat*, unless it had been a latent insufficiency, and that the suspender had offered to return the skins; but after he had sold them, to pretend insufficiency was not sustainable, and would destroy all commerce; but especially witnesses could not be received to prove the insufficiency, seeing they were not at the bargain, but the suspender saw the skins when he bought them, and none but those that were present, could know whether the pretended insufficiency was then visible, and so was accepted by the suspender.

THE LORDS refused to admit witnesses, but found the insufficiency latent, and the trust or delivery probable by the charger's oath.

*Fol. Dic. v. 2. p. 356. Stair, v. 2. p. 340.*

\*\*\* Gosford reports this case :

In a pursuit at Paton's instance against Lockhart, for payment of 238 pounds Scots, as the price of a parcel of skins bought by Lockhart from the pursuer, which was advocated of consent, it was *alleged* by the defender, that he offered him to prove by the pursuer's oath, that the ticket was granted for a parcel of skins, as being good and sufficient; and he offered him to prove by witnesses, that the same being sent after the ticket, by the pursuer to Leith, they were most insufficient, being spoiled and eaten with rats, whereupon the de-

fender suffered a great loss, and so ought to have a proportional abatement of the price thereof. It was *replied*, That the pursuit being founded upon a written bond, could not be taken away by witnesses, especially seeing the pursuer, after sight of the commodity, did buy the same, and granted tickets for the price, and the same being accordingly delivered by him, they were received without any protestation, or offer to send the same back to the seller; but on the contrary, sent the same to Holland, and disposed thereof, without intimating any loss he had sustained, by the space of two years after the receipt; so that the allegiance could not now be received to be proven by witnesses, as to any part thereof, but ought simply to be referred to the pursuer's oath. THE LORDS did find that the defence could not be divided, but ought altogether to be referred to the pursuer's oath, in respect that this was not a case of *vitium latens*, which could not be seen, but was of a parcel of goods wherewith he himself was satisfied to buy them as they were, the time of the bargain, and accordingly had received them without any protestation.

No 56.

*Gosford, MS. p. 480. No 771.*

1678. February 7.

SHEWELL against MOWBRAY.

No 57.

A CHARGE upon a ticket is suspended, because it was granted for the price of some silk, and offered to prove by witnesses it was neither of the colour he commissioned, nor yet full weight. THE LORDS refused to divide the probation, since he had both granted bond, and intromitted with the silk, but found it only probable by the London merchant's oath, because of the trust among merchants, albeit the bond was given before receipt of the silk.

*Fol. Dic. v. 2. p. 357. Fountainball, MS.*

\* \* \* Stair reports this case :

MOWBRAY silk-weaver in Edinburgh having desired Shewell merchant at London, to send him parcels of silk, he sent the same in a box, delivered by his factor un-opened, whereupon Mowbray gave bond of borrowed money; and being thereupon charged, suspends on this reason, that the true cause was silk, which he took upon trust, without opening the box, but when he opened the same, he found it not of the colour or quantity for which he gave bond, which he offered to prove by witnesses who saw it opened.

THE LORDS refused to admit witnesses, seeing he had received the box, and had not opened the same in presence of the factor, but found it only probable by Shewell's oath, that the quantities and colour were not conform to the mandate, or the price was exorbitant, and that *cum onere expensarum*.

*Stair, v. 2. p. 611.*