

THE LORDS found, that the clause as it is conceived in this contract for warranting the bear to be sufficient and marketable, did not import that it behoved to be sufficient to be malt, if it was sufficient to be meal, albeit the bargain was with malt-makers, unless it were proved that it was expressly communed and agreed upon to be sufficient for malt; and in that case the LORDS found, that the merchants having seen and accepted of the bear in the barns and kilns, that it was relevant to prove that the parcels in question were parts of the same bear they had seen; and found, that the insufficiency to be malt was in no case relevant, unless that the merchants would prove that the same bear which was sent to them, was in due time steeped, and the ordinary duty of malt-making being used, it would not malten, and that then the charger had been required to see the same, and to shew the evidence that that was the bear received from the charger, and that duty had been used to malten it without effect; but found the instrument did not prove, but sustained the same to be proved by the witnesses in the instrument, or others as aforesaid.

Stair, v. 2. p. 749.

No 57.

1681. *Ebruary 16.* HENRY WALLWOOD *against* JAMES GRAY.

No 58.

REPETITION of the price of a horse, because when he was bought he was affected with the strangile, or mord de chien, and how soon he discovered it he offered him back, and therefore concludes payment, *actione redhibitoria, per l. 13: D. De actionibus empti et venditi.* THE LORDS sustained the action, the pursuer proving the horse was afflicted with the disease the time of the bargain, and that the horse was offered back within 24 hours after the pursuer discovered it.

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

1684. *November 28.* BRISBANE *against* MERCHANTS in Glasgow.

No 59.

FOUND, That the seller was not bound to take back the victual, though insufficient, a year having elapsed before the offer, so that the victual might have been deteriorated, merely by so long keeping.

Fol. Dic. v. 2. p. 357. Fountainball.

* * * This case is No 101. p. 12528., *voce* PAOOF.

1686. *December 2.* BAIRD *against* CHARTERIS.

No 60.

SIR JOHN BAIRD of Newbyth having sold some wheat to Bailie Charles Charteris, and he being charged on the contract, craved deduction, because it was

No 60. blacked and spoiled. *Answered*, By a posterior writ you have stated the price at L. 1700, which is an acknowledgement of the debt, and a passing from the abatement. *Replied*, Though that states the whole price, yet it does not cut him off from seeking so just an abatement. THE LORDS, on Forret's report, sustained Bailie Charteris' reason; and allowed him to prove the badness of the victual.

Fol. Dic. v. 2. p. 357. Fountainhall, v. 1. p. 433.

1694. February 22. MITCHELL against BISSET in Aberdeen.

No 61.

THE pursuer *alleged*, He had commissioned him to buy some potashes for him at Dantzick, and they proved insufficient. *Answered*, You did not intimate the same to me, but have sold them, and now pretend you were forced to give the buyer somewhat down, in regard they were spoilt. THE LORDS assoilzied, in respect he did not shew them to a Magistrate at first discovery of their insufficiency, nor took witnesses on it by way of instrument; else every man may say the goods were spoilt when he is required to pay the price.

Fol. Dic. v. 2. p. 357. Fountainhall, v. 1. p. 613.

1712. January 23. MORISON and GLEN against FORRESTER.

No 62.

A horse bought in public market was afterwards found to have spavin and ring-bone, and offered back. Not having been upheld to be sound, repetition of the price was not decreed.

ONE Wright, servant to Forrester of Braes, sells a horse in the market at Perth, to Morison and Glen for L. 6 Sterling in money, and a young mare valued at L. 24 Scots given of Boot. Morison after some days discovers the horse he had bought was affected with the ringbone and spavvy, and about two or three weeks after offers him back, and then pursues Forrester for re-payment of the money, and returning the mare given in the change, and to take back his horse. *Alleged, Non constat* the horse had these distempers when sold, but might, by over riding, and other bad usage, contract these afterwards. *2do*, It is denied he was upholden as a sound wholesome horse. *3tio*, He was not offered back *debito tempore*. *Answered*, Offered to prove that he laboured under these diseases before, and at the time he was bought; and which you concealed. To the *second*, Wright actually upheld him. And *3tio*, We offered him back as soon as we discovered his faults, and law has prefixed no set time. The Lords allowed either party a probation of the several points of fact founded on; and which coming in to be advised this day, it was contended for Morison pursuer, that the principle of all laws banish frauds and deceits from all bargains, but mainly from emption vendition, which is *contractus optima fidei*; and the Roman law has provided three remedies in such cases; the *first* is *actio ex empto ad præstandum dolum*, l. 68. D. De contrah. empti. l. 1. § 1. et