

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.*

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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.*

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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

l. 13. D. De action. empti, where the machinations of sellers to circumvene ignorant buyers are prevented; and Ulpian says, If the seller knows the defects of the thing sold and conceals them, he underlies this *actio empti*; but he will be much more liable, if, when interrogated, he affirm the beast to be sound. The *second* is the *actio redhibitoria ex edicto edilitio*, whereby parties buying faulty wares, and induced by the seller's silence, would not have bought them if the faults had been opened and discovered to them, in that case they must take back the thing and restore the price with interest and damages. The *third*, is *actio quanti minoris*, to refund me in so far as it was less worth than truly was paid for it. Now by the probation it appears the horse was crooked, spavied, and ringboned when sold; so it cannot be pretended that he got these *ex malo regimine* afterwards; and that he was offered back within two or three weeks of the bargain, and that Wright said the horse was as whole as himself. *Answered*, You being horse-coupers, if one's eye be his merchant; much more must it be yours; and with us *læsio ultra dimidium justipretii*, is not a ground to rescind a bargain, (as it did in the Roman law) else the commerce and free transmission of moveables would be mightily stopt and embarrassed. Neither is the upholding proved, but *ex auditu* only; and by the probation it appears there is a difference betwixt internal and external diseases of horses and other cattle. If it be external and visible, the witnesses say, it must be offered back, within 48 hours; but if inward, 40 days is the customary period: Now the distempers here condescended on were such as were obvious to the eye, and the seller was not bound to receive him back after several weeks custody. The Lords minded the English custom used at Smithfield and other markets, that all horses sold are booked, and caution found called borgh and haimhald, (see Skene *De verborum significatione*) which not only imports they are leal come by and not stolen, but also their freedom from defects; but crooking is not a material one, seeing the pricking of a nail can make that. But we have not that English form. The Roman law gave 60 days, and the Lords thought 48 hours too short a time to be confined to. Some proposed that 20 days might be fixed as the time in which they must be offered back. But this was not determined at this time; for the Lords found the upholding the horse not proved, and so assoilzied from the repetition of the price. It ought not to be in the power of horse-coupers, when they have deceived an unwary buyer, then by their oaths to establish a custom so noxious to the lieges, if the horse be not offered back to them within two days, they are not bound to receive him. This were to confirm cheatry by a law; therefore the Lords were thinking to give a greater latitude of time, but had no occasion to determine it in this case. But however to do horse-coupers equal justice, it must be always instructed the horse had these diseases at or before the bargain, and were not contracted after.

*Fol. Dic. v. 2. p. 357. Fountainhall, v. 2. p. 710.*