No 57.
Due intimation of insufficiency must be given.

1680. *January* 28. SEATON *against* CARMICHAEL and FINDLAY.

JAMES CARMICHAL and Andrew Findlay having bought a bargain of bear from Seaton of Barns, which he obliged himself to be good, sufficient, marketable bear, Barns charges upon the contract. They give in a bill of suspension, whereupon the cause was ordained to be discussed; and insist on this reason, that a part of the bear sent to them to Leith by Barns' servants, was in few days thereafter steeped, and brought to the floor, but did not come, whereupon several malt-men were called to see it, and an instrument taken, that it would not be malt; and another part thereof being sent thereafter, it was refused upon that same ground; and yet Barns' servants entreating to let the bear stand in their barns, being foul weather, the next morning the said servants turned it out of the sacks, contrary to their promise, and went away, so that any latent insufficiency being upon the hazard of the seller, by the civil law and our custom, if the insufficiency appear before acceptation of the ware, the bargain may be annulled *actione redhibitoria*, and if the insufficiency appear thereafter, the price must be abated according to the damage, and reduced to that rate such ware would have given, if the latent insufficiency had been known, *actione quanti minoris*; so that the one of these parcels having appeared insufficient, before it was steeped, the suspenders are free of the price thereof, being ready to give back the bear; and as to the parcel that was steeped, and thereby the insufficiency discovered, the price must be reduced to that which would have been competent, if it had been known it would not be malt; and as these grounds would have been sufficient without an express provision, much more when the contract bears warrandice, that the bear is sufficient and marketable ware. The charger *answered*, That he oppones the contract, wherein he is only obliged that the bear shall be marketable stuff, which it would be, though it could not be malt, but might be meal; 2*do*, Though sufficiency to be malt had been agreed on, yet the reason of insufficiency ought to be repelled, because it is offered to be proved, that at, or after the bargain, the suspenders saw the bear in the charger's barns, and kilns, and made the ordinary trial, by boiling a handful thereof, and were satisfied with the bear, and received the most part of it;—and as for the parcels now controverted, it is offered to be proved, that they were parts of the same bear that they saw in the barns and kilns, when they made the bargain; 3*tio*, Though the hazard of insufficiency to be malt could burden the charger, no respect can be had to the instrument produced for proving that it would not be malt, which was taken in absence of the charger; but the suspenders ought to have required the charger to have seen the bear so soon as it appeared not to have come upon the floor, and to have offered sufficient evidence, that that was the very bear sent by him.

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. No 57.

Stair, v. 2. p. 749.

1681. *February* 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. *Fountainhall, 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. *Fountainhall.*

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

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