

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