1668. *July* 1. ALSTON *against* ORR.

No 54.

JOHN ALSTON having given bond to one James Orr for L. 90, as the price of lint-seed, and being charged, did suspend upon this reason, That the seed was insufficient and did not grow, and being *vitium latens* by the civil law, *De empt. et vend. actionibus*, the buyer is not liable in payment. This reason was found not relevant, unless that the suspender could prove that all those persons to whom he sold in retail the rest of that parcel of seed, did sow the same and had no increase; and that it was not enough to say, that a part thereof was insufficient.

Fol. Dic. v. 2. *p.* 356. *Gosford, MS. p.* 6.

1669. *June* 23. ROBERT FAIRIE *against* JAMES INGLIS.

No 55.
A charge of circumvention not sustained where parties had made a bargain, though it was offered to be proved by the defender's own oath, that the pursuer was lesed one half, and that he was a minor.

ROBERT FAIRIE having charged James Inglis, younger of Mordiston, for 1000 merks due by bond, he did suspend, and raised reduction upon minority, lesion, and circumvention. Litiscontestation was made upon the reason of minority, and the term was circumduced, and he decerned. He suspends again, and insists upon the second reason of reduction, upon circumvention, and qualified it thus, That albeit the bond bear borrowed money, yet he offers to prove by Fairie's oath, that the true cause was the boot between a horse and a mare interchanged betwixt the parties; and, albeit the suspender have as good as he got, yet he was induced to give this bond of 1000 merks to boot, so that he is lesed *ultra dimidium justi pretii*, which in law is a sufficient ground alone to dissolve the bargain and restore either party *actione redhibitoria et quanti minoris;* and next in so gross inequality *ex re præsumitur dolus*. The charger *answered*, That the reason is no way relevant, because our law and custom acknowledges not that ground of the civil law, of annulling bargains, made without cheat or fraud, upon the inequality of the price; neither can there be any fraud inferred, upon the account of the price of an horse, which is not *quantitas* but *corpus*, and has not a common rate, but is regulated *secundum pretium affectionis*; and now the horse and the mare not being to be shown in the condition they were in, the suspender cannot recal the bargain; 2*dly*, The reason ought to be repelled, because by a ticket apart with the same date of the bond, the suspender declares upon his soul and conscience, that he should never impugn the bond; and thereafter by his second bond produced, he ratifies the same, and passes from any revocation thereof, or quarrel against the same. The suspender *answered*, That he was content to refer to the charger's own oath, whether, in the charger's own esteem of the rate, the suspender was not lesed above the half; and as for the two tickets, the first was obtained when he was minor, and both *laborant eodem vitio*, the inequality still remaining without satisfaction.

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 allegeance 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-