

fender suffered a great loss, and so ought to have a proportional abatement of the price thereof. It was *replied*, That the pursuit being founded upon a written bond, could not be taken away by witnesses, especially seeing the pursuer, after sight of the commodity, did buy the same, and granted tickets for the price, and the same being accordingly delivered by him, they were received without any protestation, or offer to send the same back to the seller; but on the contrary, sent the same to Holland, and disposed thereof, without intimating any loss he had sustained, by the space of two years after the receipt; so that the allegiance could not now be received to be proven by witnesses, as to any part thereof, but ought simply to be referred to the pursuer's oath. THE LORDS did find that the defence could not be divided, but ought altogether to be referred to the pursuer's oath, in respect that this was not a case of *vitium latens*, which could not be seen, but was of a parcel of goods wherewith he himself was satisfied to buy them as they were, the time of the bargain, and accordingly had received them without any protestation.

No 56.

*Gosford, MS. p. 480. No 771.*

1678. February 7.

SHEWELL against MOWBRAY.

No 57.

A CHARGE upon a ticket is suspended, because it was granted for the price of some silk, and offered to prove by witnesses it was neither of the colour he commissioned, nor yet full weight. THE LORDS refused to divide the probation, since he had both granted bond, and intromitted with the silk, but found it only probable by the London merchant's oath, because of the trust among merchants, albeit the bond was given before receipt of the silk.

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

\* \* \* Stair reports this case :

MOWBRAY silk-weaver in Edinburgh having desired Shewell merchant at London, to send him parcels of silk, he sent the same in a box, delivered by his factor un-opened, whereupon Mowbray gave bond of borrowed money; and being thereupon charged, suspends on this reason, that the true cause was silk, which he took upon trust, without opening the box, but when he opened the same, he found it not of the colour or quantity for which he gave bond, which he offered to prove by witnesses who saw it opened.

THE LORDS refused to admit witnesses, seeing he had received the box, and had not opened the same in presence of the factor, but found it only probable by Shewell's oath, that the quantities and colour were not conform to the mandate, or the price was exorbitant, and that *cum onere expensarum*.

*Stair, v. 2. p. 611.*