

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.

Stair, v. 2. p. 749.

No 57.

1681. *Ebruary 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. Fountainball, 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. Fountainball.

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

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