

S E C T. V.

Whether a bargain for a specific Subject is fulfilled by Offer of the same Kind of Commodity equally good?—Whether a change of circumstances voids the Bargain?

1757. February 15.

ZACHARIAS ALLASON *against* JOHN WATSON Writer to the Signet.

No 74.

One who had purchased grain in sacks, and had bound himself to return the sacks, or a certain sum for each, offered other sacks equally good. Found obliged to pay the money, if he did not return the specific sacks.

ALEXANDER ELLIOT, as acting for Robert Freeman at Lynn, agreed to sell a quantity of flour to Allason, under condition that Allason should return the sacks in three months, or pay 2s. for each undelivered sack.

Allason offered to return sacks equally good; but affirmed, That it was impossible for him to return the same sacks, as they had been mixed with a great number of others.

John Watson, as acting for Freeman, *insisted* for payment of 2s. in place of each sack, unless the defender would deliver, upon oath, the same sacks he had received.

The Judge-Admiral found, That the same sacks must be redelivered, or 2s. paid for each.

Pleaded for Allason, in a bill of advocation, That the 2s. stipulated for each sack undelivered was penal; and therefore ought not to be decreed when sacks equally good were offered; *2dly*, That he could not be obliged to swear to the identity; but that the pursuer ought rather to be appointed to make oath as to the marks of the sacks which he demanded back.

Answered, The 2s. for each sack is no penalty, but the real value of a sack which has been a little used, the original price being 2s. 6d.; *2dly*, The pursuer cannot be obliged to specify the marks of the sacks delivered: they were committed to the care of the defender, who had it in his power to have kept them separate from all others; and therefore the pursuer is entitled to prove, by the defender's oath, that the sacks offered are not the same. The defender might indeed be entitled to refer it back to the pursuer's oath, that they are the same; but as the pursuer could not, from the nature of the case, make oath to that fact, the defender must be obliged to pay the stipulated value.

THE LORDS refused the bill of advocation."

Act. Lockhart.

Alt. Hugh Dalrymple.

W. J.

Fcl. Dic. v. 4. p. 257. Fac. Col. No 12. p. 21.