

No 25.

A party having entrusted another with money to buy goods for him, and the trustee having been robbed, the Lords assailed him upon his making oath in supplement.

1666. June 26.

BEGG against NICOL.

THOMAS BEGG, merchant in Edinburgh, having delivered to Patrick Nicol of Roystoun, L. 26 Sterling, for employing whereof, he gave him commission to buy some commodities for him at London, in *anno* 1645, or thereby; pursues Patrick Nicol for re-delivery of the money. It was *alleged* for Patrick Nicol, that he acknowledged the receipt of the money, and the commission, which bears, that the constituent, Thomas, was to bear the sea risk; *ita est* that the defender going to London by sea, the ship wherein he was, and all the money, was taken. Whereunto it was *replied*, *Non relevat*, except the defender prove, that the individual sum delivered to him was embarked. THE LORDS sustained the allegiance, and found the defenders needed not say, that that individual sum was taken, because he might have made use of that individual money another way, and yet have taken the sum in quantity with him on ship-board, for which the LORDS found the defender behoved to give his oath in supplement.

Fol. Dic. v. 1. p. 590. Newbyth, MS. p. 63.

* * * Stair reports this case.

THOMAS BEGG gave commission, bearing, that he had delivered a certain sum of money to Patrick Nicol, to buy ware for him in England, whereunto there is subjoined the said Patrick his acceptance, bearing sea hazard excepted. Thomas Begg now pursues for the money, or ware. Patrick Nicol alleged *absolvitor*, because he offers him to prove, that shortly after the said commission, he went upon the voyage, and that the ship was taken, and the whole goods there, wherein it must be presumed the pursuer's money was. It being impossible for the defender to prove, that that individual money was there, yet he is willing to make faith, that it was there. It was *answered*, That the defender had factor-fee, and should have transmitted the money by bill, as he did some of his own; and at least he might prove, that he had a considerable sum of money in the ship.

THE LORDS sustained the defence, and repelled the reply, and that the defender being trusted by the pursuer, he could not refuse his oath in supplement, that his very money was taken, seeing he neither might, nor could show, what money he had when he entered to his voyage, unless the pursuer alleged, that he gave the defender allowance for the exchange.

Stair, v. 1. p. 379.