

1749. *January 24.*HARLE *against* OGILVIE.

IN April 1746, Joshua Harle of London received a letter from Malcolm Ogilvie of Edinburgh, wherein he was desired to ship for Ogilvie's account certain quantities of sugars of different kinds, if the convoy was not sailed; and in a postscript it was added, "If the ships be all sailed, there is nothing for it, but wait the first convoy."

Upon receipt of this letter, Harle shipped the sugars aboard a vessel bound for Leith with stores for the army, and which he was informed was to fall down to sail with the convoy, but the convoy happened to be gone: Meantime, the ship escaped the enemy, and arrived at Leith; but, by some misfortune the sugars having got water, were much damnified, and Ogilvie refused to receive them.

In the action at Harle's instance for the price, the Ordinary sustained the defence, "That he had not observed the *fines mandati*;" and the LORDS "adhered."

At moving the petition and answers, the President stated it as a doubtful point: On the one hand, there was not here any special commission to ship the goods in a particular ship, or to intrust a particular master with them, but only a general direction not to send them without convoy; where the reason was one single cause and could be no other, to prevent capture, to the risk whereof Harle no doubt subjected himself; but having escaped capture, the commission was no less performed than if the ship had come under convoy. But on the other hand, the property was certainly not transferred by the putting on board, as it would have been had the ship come under convoy: That was in suspense till her arrival; and although had the sugars come safe, it might have been no excuse for the defender's not accepting them, that they had not come under convoy, yet as they came not safe, and that till they arrived at the port of delivery the property of the sugars was not transferred to the defender, neither could they be on his risque.

*Fol. Dic. v. 4. p. 59. Kilkerran, (PERICULUM.) No 4. p. 377.*

1752. *December 21.*

WILLIAM CUMING Merchant in Edinburgh *against* JOHN and JAMES MARSHALLS Merchants in Auchtermuchty.

WILLIAM CUMING, a merchant of a fair character, sued John and James Marshalls for payment of an account, containing, among other articles, one in these words: "To bank-notes sent per post L. 100." He produced a letter from the defenders, dated 28th October 1751, ordering him to send them by the

No 29.

On whom the hazard lies of goods sent upon commission.

No 30.

A merchant alleging he had sent bank notes in a letter by post which miscarried.