

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 *finis 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.

No 30.
ried, his account book with the evidence of his clerks and his oath in supplement, were held sufficient to make his correspondents liable for the loss.

post L. 100 in notes ; and he alleged he had accordingly, the next day, upon receiving their order, wrote them an answer ; and with his own hands inclosed in it the L. 100, and sent it by his son to the post-office.

Marshalls acknowledged the commission ; but as the answers and notes had never come to their hands, *pleaded*, They had no reason to believe the money had ever been sent, and therefore they could not be liable.

A proof being allowed before answer, the pursuer was not able to bring any direct evidence, either of his having enclosed the notes, or sent the letter to the post-office. But he proved by his clerks, that, in letters which he dictated to them, he was in use to inclose bank-notes to his correspondents, and, in particular to these defenders : That he generally sealed these letters himself, and sent them to the post-office by his son, who attended his shop in the quality of a clerk : That, on the very day the letter covering the notes was said to be sent, a copy of it had been entered in his copy-book of letters, and the sum entered into his cash-book ; and that, in the same evening, his cash was balanced, and the sum found exactly to answer with the cash in hand. It appeared likewise in the proof, that the post-seal had been broke off the Falkland bag, in which this letter should have been carried. But this last circumstance did not seem to have any weight in the determination of the cause ; for, upon advising the proof, the Court was of opinion, that the pursuer's books, together with his oath in supplement, if required, was sufficient evidence that the commission was obeyed. An example was given of notifying the dishonour of a bill of exchange, where a copy of a letter to the drawer or indorser, ingrossed in the copy-book of letters, is held sufficient proof, without necessity of bringing parole evidence that the letter was wrote and delivered at the post-house.

The defenders upon hearing the opinion of the Court, did not insist for the pursuer's oath in supplement.

“ THE LORDS found that Mr Cuming had executed the commission given him by Marshalls, faithfully and conform to their orders ; and therefore found the defenders liable to the pursuer in the account claimed, and also in expences of process, and for extracting the decret.”

Act. Jo. Grant

Alt. Ro. Craigie.

Clerk, Justice.

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Fac. Col. No 50. p. 74.

*** Lord Kames's report of this case is *voce* PROOF.

1754, July 24.

WILLIAM HOOG Merchant in Rotterdam *against* KENNEDY and MACLEAN, Merchants in Glasgow.

No 31.
A merchant in Scotland

In July 1751, Kennedy and Company commissioned certain goods from Hoog, to be sent by the first ship bound for Leith, Greenock, or Borrostownness