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 decreet."

Act. *Jo. Grant* Alt. *Ro. Craigie.* Clerk, *Justice.*

S. *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

No 31.
having ordered goods to be sent him from Holland, and the ship in which they were sent having been lost, he was found liable for the price of them, although no bill of lading, or letter of advice had been sent.

Hoog, on the 12th of August, shipped the goods on board the Hopewell, Burton, bound for Leith, and committed the invoice to the care of the captain: He sent no bill of loading, or formal letter of advice, by course of post; but, on the 3d of September, he transmitted a copy of his account-current, wherein he took credit for goods sent by Burton for Leith as per invoice, without specifying either the goods or the ship. The Hopewell sailed from Rotterdam on the 6th of September, and next day was lost. Kennedy and Company being pursued by Hoog for the price of the goods commissioned, *contended*, That they were not liable; and *pleaded*, That Hoog, as executor of a mercantile commission, was bound to have sent bill of loading, invoice, or letter of advice, by course of post, to his constituents; and that his omission must subject him to the damage arising from the loss of the goods. Neither does it alter the case that the loss was fortuitous; for that the custom of merchants presumes, That, where damage could have been avoided, on information given, it would have been avoided. Now, the defender might, on advice, have insured the goods, and avoided the damage; without advice, he could not; Hoog must therefore be subjected to the damage, which, by his own neglect, became inevitable.

Answered for Hoog: The defences ought to be repelled; for that the commission was executed according to its precise tenor; neither bill of loading, nor letter of advice was required; and the custom of merchants is, in this case, indeterminate. Where regular posts are not established, it is impossible to send bills of loading and letters of advice; where the ship generally arrives sooner than the post, which happens in the run between Holland and Leith, it would be superfluous. But, *separatim*, the defenders might, in consequence of the advice given, have insured the goods. Advice was timeously given, That goods were shipped on board a vessel, commanded by Burton, and bound for Leith; the defenders knew that the goods in question were the only goods commissioned by them from the pursuer; they might therefore have insured them; for that, although the voyage must be specified in the policy of insurance, the extent of the premium depending upon it; yet the name of the vessel and of the commander need not.

"THE LORDS found the defenders liable, and also found expences due."

Act. *J. Dundas, A. Lockhart.* Alt. *J. Dalrymple.* Clerk, *Justice.*

D. *Fol. Dic. v. 4. p. 59. Fac. Col. No 113. p. 168.*

*** Lord Kames reports this case:

UPON the 12th July 1751, Kennedy and M'Lean wrote to Mr Hoog, merchant in Rotterdam, and commissioned from him two butts bright madder, and 300 pounds tartar, to be sent by the first ship to Greenock, Leith, or Borrowstounness. Upon the 12th of August, these goods were put on board the Hopewell, Captain Burton master, for Leith, without any bill of lading, invoice, or letter of advice. On the 14th of September, Mr Hoog transmitted to his cor-

No 31. respondents their account-current, in which was engrossed the goods commissioned, mentioned to be sent *per* Burton for Leith. It appeared after, that Burton had sailed from Rotterdam 25th August, and, on the 4th September, was shipwrecked on the coast of Holland. A process being brought for payment of the price of the goods commissioned; the defence was, That if the pursuer had sent a letter of advice *debito tempore*, the goods would have been insured; and, therefore, that his neglect must subject him to all hazards. And, in support of this defence, it was laid down as a general rule, that it is the indispensable duty of factors and others who deal by commission, to give regular notice of the shipping of the goods by course of post, and also to transmit a copy of the bill of lading. It was *answered*, That this general rule suffers many exceptions; in particular, that in small commissions from this country to London or Holland, there is no such thing in practice as regular letters of advice by course of the post; and that such regular advice would, especially from Holland, be an useless piece of form; because, for the most part the ship arrives at Leith before the letter can come by the course of the post. The pursuer insisted upon another circumstance, that he did not deal by commission, nor stated any commission, but furnished the goods to the defenders at the same price he furnished them to the factors and others in Holland.

"THE LORDS repelled the defence, and decerned."

The pleadings in this case being extremely loose, I shall endeavour to put it in its true light. The pursuer insisted, that he was not bound to send a letter of advice. *Ergo*, Whatever damages might have happened by want of that advice, he would not have been liable. For example, had the ship arrived at Borrowstounness, and the goods been lost in the landing, or after they were landed, for want of care, the pursuer by his argument would not have been answerable. This is surely pleading the point too high. If regular advice may possibly prevent loss, it clearly follows, that it is the duty of the factor or merchant to give advice. In the present case this step was indispensable, where the commission was to send the goods either to Greenock, Leith, or Borrowstounness; for without advice the defenders could not know where to expect their goods. This point being established, the only remaining point is, Whether the factor's neglect of duty will subject him to every damage that might possibly have been prevented by a regular advice, or only to the damage which is the necessary consequence of neglecting to give advice? This question is easily determined; for I take it to be a general rule in all other affairs, as well as in commerce, that neglect of duty subjects the party to every risk and to every damage, except what he can show must necessarily have happened though he had done his duty. Upon this reasoning the interlocutor is well founded; for the pursuer made it evident, that the goods must have perished though he had done his duty. The letter of advice he sent, though late, yet gave the defenders an opportunity to insure, if they thought this measure proper; because they did not hear of the shipwreck for some time after this letter of ad-

vice came to hand. They did not, however, insure; and from this it was justly presumed, that they would not have insured though they had got the most early advice. No 31.

Sel. Dic. No 67. p. 90.

1758. *December 12.*

COUNTESS-DOWAGER of GLASGOW *against* JANET THERMES.

No 32.
Carrier breaking agreement, liable for every hazard.

LADY GLASGOW being to send some looking-glasses from Edinburgh to Glasgow, gave express orders to the carriers of them, who were employed under Janet Thermes, a carrier, to carry them upon horseback, and not in a cart; which orders were promised to be obeyed.

The carriers, however, put them upon a cart above meal. When they arrived at Glasgow, they were found to be broke.

In a process at my Lady's instance against Janet Thermes, for the value of the glasses, Janet Thermes proved, that the glasses were so insufficiently packed in the frames, that they could hardly fail to have been broke though carried on horseback.

"THE LORDS found Janet Thermes liable."

Act. *Miller.* Alt. *Ja. Dalrymple.*

J. D. *Fol. Dic. v. 4. p. 59. Fac. Col. No 144. p. 261.*

1771. *February.* OGILVIE *against* Ross and WOOD.

No 33.

OGILVIE at London, sent a cask of apples to his brother at Edinburgh, directed to William Ogilvie, Esq; by the ship Adolphus, Ross master. Ross, who brought the apples safe to Leith, could not find, from the vague direction of Esquire, where to send them, but allowed Wood, a factor in Leith, to take them into his custody, where they remained some months till they were spoiled; after which Ogilvie discovered them, and pursued both Ross and Wood for their value.—THE LORDS at first found Wood liable; but, on review, when it appeared that the loss was owing to Ogilvie at London not sending a bill of lading, and that Ogilvie at Edinburgh had not made sufficient timeous enquiry about the parcel, the Court altered and assoilzied. See APPENDIX.

Fol. Dic. v. 4. p. 59.