1747. *June* 17. Shaw of Dalton *against* Crawford of Kiers.

No 41.
Arbiters having decerned for a sum, with annualrent from a term, providing, that if the creditor should neglect to grant a discharge of all his claims at the term, the interest should only commence on his granting the discharge; to this effect was given, tho' it was pleaded, that the discharge being now granted, the debtor had suffered no prejudice by its being delayed.

John Crawford of Kiers appointed William, his son and heir, to be his executor and universal legatar, burdening him with 250 merks Scots to his daughter Agnes, wife to John Shaw of Dalton, payable on her husband's decease; but they claiming their legitim, a submission was entered into by the parties, and the arbiters, 21st October 1726, "Decerned William Crawford to pay to the said John Shaw 2400 merks at the term of Martinmas then next, in full satisfaction of all that he and the said Agnes Crawford can claim of the said William Crawford, as representing the said John Crawford his father, or in virtue of his testament or portion natural; and the said John Shaw, upon his receiving the above 2400 merks, is to grant to Agnes Crawford his spouse, an additional liferent of 120 merks, commencing the first term after his death, during her widowity: Likeas they decern the said John Shaw, as taking burden upon him for her, to grant and deliver to the said William Crawford, a full and valid discharge of all that they can claim of him, on any of the accounts foresaid, and decern the said 2400 merks to bear interest from the said term of Whitsunday, with this provision, that the said John Shaw, and his said spouse, shall deliver to the said William Crawford the said discharge, at and betwixt the said term of Whitsunday; but in case the said John Shaw and his spouse, neglect or refuse to grant and deliver the above discharge, the above sum of 2400 merks is not to bear annualrent but from and after the granting and delivering the said discharge: And in case the said John Shaw shall decease, without his and his said spouse granting the said discharge, the said William Crawford shall be obliged to pay to his said sister, during her widowity, the above sum of 120 merks; without prejudice always to the representatives of the above John Shaw, to receive the above sum of 2400 merks, upon their granting the above discharge, who shall then be obliged to relieve the said William Crawford from all payment of the said 120 merks."

Dalton died in March 1738, his wife having predeceased him; during which time no payment was made, nor was any discharge offered or demanded.

John Shaw of Dalton, his heir, pursued Kiers for the sum, with interest from the term of payment; and the Lord Ordinary, 12th February 1745, 'Found the 2400 merks contained in the decreet-arbitral, behoved to bear annualrent from the term of payment, notwithstanding of the compulsatory clause contained in the decreet, no tender having been made of the money, or discharge demanded, and no prejudice arising from the want thereof.'

It was disputed whether the giving a discharge was to be considered as the condition of the sum's bearing annualrent, or resolutive only of the obligation for it, which was decerned to commence from the term of payment; in which view it might be looked upon as penal, and not to be inflicted, unless damage had followed from the neglect. It was also disputed whether it was incumbent on

the debtor to offer the money, and demand a discharge, or on the creditor, to tender the discharge and demand the money. No 41.

THE LORDS altered the interlocutor, and found annualrent not due from the term of payment.

Act. *H. Home.* Alt. *A. Macdowal.* Clerk, *Kirkpatrick.*

D. Falconer, v. 1. No 188. p. 252.

1749. *January* 31. ROBERTSON *against* MELVILL and LIDDELL.

No 42.
A letter from a seller to a buyer, promising to deliver goods free of all risk, found to import only, that the seller was to suffer the consequences, if lost before delivery, but not to be liable for damage if delivered.

ROBERT ROBERTSON, merchant in Eymouth, by his missive to John Melvill, tenant in Stonehouse, and James Liddell, tenant in Dalders, 'accepted of their offer for his old oats he had on hand, which might be about 150 bolls; and promised by the first opportunity to ship them off for Carron-water, where they were to be delivered free of all charges and risk, upon their paying for each boll 10s. 8d.' And he accordingly shipped off and insured them, and they arrived at the destined port, 91 bolls being damaged by a storm they had met with; whereupon the seller's correspondent applied to the Judge Ordinary for having them valued, in order to liquidate the damage against the insurers; and citing the purchasers as witnesses, they deponed they were only worth L. 5 Scots; whereas, had they come safe, they would have been worth L. 7: 10s.; but refused to take them at that price; and took them, as they said, to dispose of for the benefit of the seller.

Robertson pursued Melvill and Liddell for the price, who pleaded retention for the damages due to them, on account of the failure of the delivery; the seller having undertaken the risk.

THE LORD ORDINARY, 5th July 1748, 'found the defenders liable for the price that they themselves had put upon the spoiled oats, in the question betwixt the pursuer and the insurers, since they could produce no account of sales; and found the seller liable for the difference between the L. 5 and the L. 7: 10s. in regard that if the victual had perished entirely, the seller would have been liable in the buyer's damages.' And 22d, 'Having considered the letter signed by the pursuer, whereby he was bound to deliver the victual free of all charges and risk, in pursuance whereof he insured the victual, whereof part was damaged, adhered.'

Pleaded in a reclaiming bill, By the letter no more is imported, than that if the goods were lost or damnified before delivery, the seller was to suffer the loss thereof; but not that he was to be liable in damages, if the loss happened through no fault of his; especially as it was not a sale of a *genus*, but a *species*, to wit, his victual on hand; and his subsequent insuring the cargo could not alter the terms of the bargain, which were made by his letter.