

1677. *December 5.* The EARL OF DUMFERMELING *against* The EARL OF CALANDER.

THE Earl of Dumfermeling being dead, and his brother, who succeeded to him, insisting in that famous process against the Earl of Calander, it was ALLEGED, He behoved to transfer. ANSWERED, He needed not, for he had an assignation to the process from his brother, and so he now insists as assignee.

REPLIED,—*Imo*, It was on death-bed, and not intimated *in vita defuncti*. *2do*, It was not judicially produced in process in his lifetime, and so cannot summarily give him a title.

Yet the Lords sustained it, and would not so put him to the necessity of a transferring as to give it out and enrol it *in communi forma*; but to be seen in the clerk's hands, and immediately call it as an act; which was little or no delay. See *10th January, 1679, Auchmouty and Dumfermeling.*

*Advocates' MS. No. 671, folio 310.*

1677. *December 8.* ANTONIETA PYRONON *against* GEORGE MORISON of Pitfour.

ANTONIETA PYRONON, as executor confirmed to John Peironnoun, broker in Bordeaux, her father, having obtained a decreet against George Morison of Pitfour, as oyer and heir by progress to George Morison, provost of Aberdene, for L. 2000 or thereby, resting by the said provost to the said John Pyronon, and which was proven to be resting by the said George's latter will and testament, where, from a touch and remorse of conscience, he acknowledged that debt, which had been long concealed; she did thereafter pursue this same defender for the annual-rent of this principal sum, upon this ground of fact and law, that brokers' money, by the law and custom of Bordeaux, bears annual-rent. And the custom having been sustained relevant formerly to infer annual-rent, and a commission directed to Monsieur La Vi for proving of it at Bordeaux; and the same being advised this day, the Lords, by the report, found the custom sufficiently proven, and therefore decerned for the annual-rent from the time of John Peironnoun's decease, which was in 1631; and so found annual-rent due, though there was none in the bond, decreet, or rather in the testament by which the debt was proven; and that in respect of the custom of brokers at Bordeaux to get annual-rent for the monies they advanced to merchants. But thereafter, on a supplication given in by the defenders, the Lords, on the 5th of February, 1678, restricted the annual-rent to the time of Provost Morison's decease, which was in 1658, on this reason, that there being no other probation but his confession in his testament, declaring such a sum in the general to be resting, it was to be presumed and understood, that with the same ingenuity he confessed the principal, he would likewise count the annual-rent. (They found, the only probation of the debt emitted being his confession *ob levamen conscientiae*, it was to be presumed he had confessed all that was due *calculo rotundo*.) But he would not dream of any annual-rents due, nor mind the custom. See a note of

this Antonieta Pyronon's process *alibi*. See our informations, with their bill, and our answers to it. See *Oliphant* against —, *December*, 1677, No. 678.

And it having been alleged, that thir annuals behoved to be confirmed, the Lords found no necessity thereof, since they were due after Peironon's death, and so belonged to her *nomine proprio*, and not *executorio*; and could not be in Peironon's goods, they not being then due when he deceased.

*Advocates' MS. No. 673, folio 311.*

1677. *December 11.* WILLIAM LOCKHART *against* JOHN LOCKHART, Legatee.

THE Lords, after advising the probation, reduced the disposition granted by John Lockhart, as done *in lecto*, and in prejudice of William, his brother and heir; for though he went to kirk and market, yet it was supported; and repelled their decreet of declarator, finding that he granted that disposition *in liege poustie*, because the witnesses were not then examined upon this interrogatory, Whether he went supported, yea or not. *Vide supra*, in *December*, 1672, *Boyd and Cleiland of Faskein*, No. 379; *item*, *Balmerino and Couper*, in *February*, 1670.

John Lockhart had dispooned much of his estate to outed ministers, and other pious uses, which all fell by his reduction. William was at this time lurking, in regard of the error he had committed with Dalhousie's sister, and yet refused to marry her.

*Advocates' MS. No. 677, folio 311.*

1677. *December.* OLIPHANT of Gask *against* —————.

IN a case of Oliphant of Gask's, there is an old bond bearing annualrent. The same is transacted; and in satisfaction thereof, and in obedience to a decreet-arbitral, a new bond is given, but contains no obligation for paying of annual; yet it is acclaimed, because the old bond bore it, *et surrogatum sapit naturam ejus in cuius locum subrogatur*. (See Stair's Decisions, 30th July, 1661, *Brown and Carleton*; and Dury, 15th July, 1631, *Forbes*.) The Lords found annualrent due; which some thought strange. Dury, in his Practiques, observes sundry cases where annual is due, though there be no paction for it. It is due, *ex lege*, after horn-ing; 2do, To a cautioner; 3tio, If the price of land; 4to, Upon bills of exchange; 5to, Upon use of payment; 6to, If one term be mentioned in the bond, though no more; 7mo, To brokers in Bordeaux. *Vide* No. 673, *Pyronon* against *Morison*, 8th *December*, 1677; as, also, see other observes anent this point beside me.

*Advocates' MS. No. 678, folio 311.*

1677. *December 13.*—A DECREET, obtained by James Sinclair of Roslin against Major Winrahame, was turned to a libel; because the decreet was collusively pronounced: and it was acknowledged, the Major was then at London, and the decreet was given in absence.

*Advocates' MS. No. 680, folio 312.*