

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