

1628. *February 9.* LORD COLVIL *against* ANDREW.

IN a suspension betwixt the Lord Colvil and Andrew, who, suspending charges upon a contract, for payment of victual annual-rent, anterior to the Act of Parliament, 1597; wherein the suspender offered and consigned the annual-rent, according to ten for ilk hundred, and desired the letters to be suspended for the victual acclaimed, in respect of the said act, albeit the contract preceded that Act;—the Lords sustained the charges for the victual annual-rent, in respect the contract was before the said Act, and found that the Act struck only upon contracts and writs astringing parties to pay more than ten for the said hundred since the date of that Act. But the Lords declared, that if the suspender, betwixt and Whitsunday, redeem the annual-rent, by payment of the sum, and all the byruns preceding that term, that, in that case, or by the consignment thereof, in case of refusal to receive the same, he should be free of all greater annual-rent which might be sought from him for that term thereafter; and superseded the charges, while the said term.

*Act.* ———. *Att.* Bruce. Hay, *Clerk.*

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1628. *February 16.* ADAM MARSHAL *against* JOHN BYRES.

IN a pursuit by the creditors of umquhile Adam Marshal, maltman in Edinburgh, *against* John Byres, burgess there, who, as executor to the defunct, their common debtor, was convened for payment to them of their debts; and the said John Byres being a creditor of the defunct's, and having confirmed himself executor to him only *ad hunc effectum*, to be paid of his own debt;—the Lords preferred him in his own debt to the rest of the creditors, and sustained his intromission, and defence founded thereon, concerning his preference in the defunct's goods, to all the rest of the creditors: notwithstanding that the pursuers alleged that he ought not to be preferred, but ought to come in with the rest of the defunct's creditors *pro rata*, and that the gear ought to be divided amongst them all proportionally; seeing John Byres had nothing to verify the defunct to be his debtor, but only an obligation made to him by the defunct on his death-bed, *viz.* upon the very day before his decease; likeas, immediately after his decease, the said John had confirmed himself executor to him; which diligence could not be the cause of his preference, being so preposterous, and the pursuers having omitted no diligence, but having pursued as soon as they knew the testament to be confirmed, and that the defender was executor, before which time they could do no more timely diligence; likeas their pursuits were intended within two or three months after the defunct's decease, so that they were not *in negligentia*. This reply was repelled, and the defender preferred, *qui sibi vigilavit*. Neither was it respected that the defender's bond was granted by the defunct on his death-bed: because the pursuer confessed that the debt was truly owing by him to the defender before; so that the taking of the bond on death-bed was but a confession of the debt, which was truly and lawfully owing before, and could not prejudice the defender. And, seeing he had done diligence

by obtaining himself executor confirmed, to the effect he might get payment of his just debt, and that he had accordingly obtained payment, therefore he was preferred without division with the rest.

*Act.* ———. *Alt.* Burnet. Hay, *Clerk.* *Vid.* 13th July, 1632, Pollock *against* Fairholm; 7th January, 1624, Shaw *against* Gray; and 26th January, 1628, Adie.

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1628. February 28. MAULD *against* L. MATHERS.

IN a pursuit of letters conform, Mauld *against* Mathers, Mauld being constituted assignee to a pension granted to Andrew Mauld, father to the assignee, which Andrew had the said pension from the E. Marishal, *cum potestate transferendi etiam in articulo mortis*;—the Lords sustained this action at the assignee's instance, being now pursued after the cedent's decease, the principal pensioner; albeit it was alleged, that the cedent being now dead, that the translation was null; seeing the cedent remained still in possession, notwithstanding of the translation, by uptaking thereof, and giving acquittances thereon, in his own name; so that the translation took never effect in the maker's lifetime, whereby it became ineffectual. This allegiance was repelled, and the action and translation sustained; for this summons of letters conform was raised before the cedent's decease, and thereby the assignation was intimate; whereas, for want of intimation, the contrary was found before, in the action Douglas *against* the B. Aberdeen. *De quo vid. penult* June, 1622.

*Act.* Oliphant. *Alt.* Mowat. 17th December 1628, Chalmer *against* L. Craigivar.

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1628. March 6. NICOL *against* HUME.

NICOL, pursuing some of the Laird of Aiton's tenants, to make their farms addebted by them to the Laird, their master, forthcoming, as arrested in their hands by the pursuer, for a debt owing to him by the Laird;—in this process compears one Hume, creditor to the Laird, and who had arrested thir same farms, and alleged that the pursuer had obtained a decret for farms arrested in the tenants' hands, of another year preceding, which would extend to a greater quantity than would satisfy his debt; and so he ought not to misken that sentence, whereby he might be paid, and *de novo* again arrest, thereby to pre-judge other creditors. The Lords found that the pursuer, having recovered a decret for his debt, as said is, ought either to renounce the same, or to assign it to the party, or qualify and instruct some competent reason why the same cannot be available to him: or, if he would not, but that he did adhere thereto, that he could not arrest, *de novo*, for satisfying of that same debt, whereof he behoved to be found satisfied by that sentence, which he could not show he could be frustrated in the execution thereof; it being in his own default, that