

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the same, he should be free of all greater annual-rent which might be sought from him for that term thereafter; and superseded the charges, while the said term.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