

- No 28. *titulus coloratus* was repelled, as incompetent against a restitution *per modum justitiæ; et tanquam ab initio*. Neither did the LORDS regard his other allegiance, That the grandfather's intrusions could not be reckoned a debt to burden him by the quality of the disposition, unless the same had first been constituted against the grandfather's heir of line.

Forbes, p. 104.

1756. February 27.

EVAN BAILLIE and Others *against* His MAJESTY'S ADVOCATE.

No 29.
Cautioners for a forfeited person are not entitled to claim against the Crown the expences laid out in prosecuting their relief against the forfeited estate.

THE pursuers had become cautioners for Lord Lovat in the year 1741; and being distressed by the Creditors, they entered a claim upon the forfeited estate of Lovat, for the sum they had been obliged to pay, and likewise for the expenses laid out in entering and prosecuting their claim.

Objected by his Majesty's Advocate; *1mo*, No part of these expenses did exist at the time the estate of Lovat became vested in the Crown; they are debts contracted after the 24th June 1747; and therefore cannot be charged upon this estate. Besides they were not a debt existing at the time of entering the claim. *2do*, By the vesting act no decree can pass against the Crown for penalties. And it has been a rule constantly observed, not to give the expenses of claims, however just the claims may be; and there appears no reason for establishing a different rule in the case of cautioners claiming relief; seeing every creditor is equally entitled to recover from the debtor what expense he may be put to in making his debt effectual.

Answered for the claimants; To the *first*, The debt did exist before the estate was vested in the Crown, being clearly implied in the obligation in the bond of relief, by which Lord Lovat was bound to keep them free and skaitless of this cautionary obligation, which certainly includes every expense necessarily incurred by means of it. To the *second*, This claim is not properly a penalty, but a part of the obligation of relief; and the claimants are in a very different situation from creditors claiming upon a simple bond or obligation; for that, from the nature of relief, interest is always allowed upon interests paid by the cautioner, but it is otherwise with every other creditor.

'THE LORDS dismissed the claim as to the expenses of entering and prosecuting thereof.'

Reporter, *Prestongrange*.
W. S.

Act. *Burnet*.

Alt. *King's Counsel*.

Clerk, *Kirkpatrick*.

Fac. Col. No 191. p. 284.