dered entirely abstracted from his being heir, and, in such view, it cannot be doubted the testament would be exhausted by the debts of the defunct, to which he had either right by assignation, or paid and taken discharges of the same before confirmation; and consequently, whatever might be the operation of law in a question with the executor himself, who is liable in the other character as heir, the cautioners must be entitled to the defence to which he would be entitled, were he merely executor confirmed. The law has provided, most justly, that an executor should not be exonered otherwise than by payments upon decreets, to avoid collusion betwixt the executor and certain of the favourite creditors, and that it might not be in the power of the executor to prefer one creditor to another. But where the payments are made before the confirmation, there is no ground for the supposition of collusion; for as these creditors, to whom such payments are made, might have confirmed themselves executor-creditors, and thereby have preferred themselves to the other creditors; so the payments made to them by the person who afterwards confirms, state him in their place. According to the pursuer's argument, cautioners for an executor, who is likewise heir to a defunct, would be universally liable to all the defunct's debts, though ten times more than the value of the subjects confirmed; and as the executor could never plead an exoneration from any of those debts, so neither could his cautioners; which would be absurd. An heir, no doubt, has relief against the executor, as to the moveable debts due by the defunct, and paid by him; and he can only plead this relief against the free executry, and not in competition with the creditors of the defunct. But that cannot touch the present case; for, though the heir had paid such moveable debts upon lawful sentences, his relief would not be competent against the executry, in a question with any of the defunct's creditors. But as such payments would infallibly exhaust the testament, as the heir was likewise executor confirmed, and be available to the cautioners in the confirmation; so must the payments made by him, before confirmation, exhaust the testament, and so exoner the cautioners. *See* Spottiswood, tit. EXECUTOR, p. 114.; and 26th January 1628, Aldie *against* Gray; Durie, p. 332. *voce* PASSIVE TITLE. No 29.

THE LORDS found, That the cautioners in the eiks of Sir William's testament, ought to have credit for such debts as were paid by Mr Thomas Menzies before confirmation, and of which debts he took assignations and discharges; and that, notwithstanding Mr Thomas Menzies the executor was also heir.

*C. Home, No 159. p. 269.*

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1757. *February* 27.

HUGH M'LEOD of Genies, *against* HENRY ALLAN, Writer. No 30.

By the vesting act, the Crown was not liable for

UPON the 18th November 1743, Lord Balmerino and Henry Allan became bound, conjunctly and severally, to Hugh M'Leod, for the sum of 2000 merks.

No 30.
expenses due by a forfeited person; yet the cautioner for such a person was found liable to the creditor for expense of diligence.

The estate of Balmerino was afterwards forfeited to the Crown.

Hugh M'Leod entered a claim in terms of the vesting act; which was sustained to the extent of the principal sum and annualrents only, in regard no expenses were considered as due by the Crown in terms of that act.

Hugh M'Leod brought an action against Henry Allan, for the expense he had laid out in the Court of Session for ascertaining his claim, and afterwards in Exchequer, at receiving payment, amounting to L. 16 : 6s.

Henry Allan objected to this claim, and *argued*, That he was only cautioner for Lord Balmerino, as was proved by a bond of relief; that the expenses claimed are cut off by act of Parliament, and therefore cannot be effectual against him; for if he should be decerned to pay them to the pursuer, he would have relief against the Crown, having duly entered his claim for securing that relief; and therefore the judgment of the Court, upon Hugh M'Leod's claim, finding him not entitled to expenses from the Crown, must be considered as a judgment, finding also that he can have no claim against the cautioner.

*Answered*, Although expenses were refused upon M'Leod's claim, it does not follow that they will be refused to Allan, when he claims upon his relief; for that in a former case, of a debt paid by Allan to Ross of Culrossie, it was found, That Allan was entitled to relief in terms of his claim, so far as he had already paid, or should afterwards, upon distress, as cautioner, be obliged to pay. At any rate, it was optional for the pursuer to have at first demanded his debt from Allan instead of the Crown; in which case, the expense now claimed must have been laid out by Allan, in order to recover his relief out of the forfeited estate; and it cannot vary the case, that, out of favour to the defender, he first endeavoured to recover the debt from the Crown, as in place of the principal debtor.

'THE LORDS found Henry Allan liable for the sum claimed. *See* FORFEITURE.

Act. *Swinton.* Alt. *Rae.*

*W. Johnston.* *Fol. Dic. v.* 3. *p.* 116. *Fac. Col. No* 17. *p.* 28.

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No 31.
A bond granted by two cautioners having been given up and cancelled, upon an erroneous idea that the obligation of the debtor had been fully implemented,

1788. *November* 16.

PATRICK RIGG and Others, *against* GEORGE PATERSON and CHARLES BELL.

RIGG, and the other heritors in the parish of Cupar of Fife, having employed a person to rebuild the parish church, Paterson and Bell granted a bond, obliging themselves, as cautioners, that the work should be properly executed.

When the building was finished, it was examined by two tradesmen appointed by the heritors, and they having declared their opinion that the builder had fulfilled the conditions of his bargain; the heritors, after making payment to