

APPENDIX.

PART I.

COMPETITION.

1800. *May 26.*

SAMUEL HAWKINS, and Others, Personal Creditors of the late John, Earl of Glencairn, *against* SIMON TAYLOR, and Others, Trustees of William Cunningham Cunningham Graham.

THE estate of Finlaystone, which belonged to the late John Earl of Glencairn, was strictly entailed, but was burdened with an heritable debt of the entailor's, to the amount of £867. 5s. 3d. which came to be vested in the person of the Countess of Glencairn, Earl John's mother.

Earl John contracted large personal debts; for payment of which his creditors attached the rents of Finlaystone, by arrestments in the hands of the tenants, and of the factor on the estate.

A multiplepinding was brought by these creditors in the name of the arrestees; in which the Lord Ordinary appointed a factor to levy the arrested rents, to the amount of £1816. 11s. 9d. The Countess also used arrestments; and, as an heritable creditor on the estate, she brought a process of mails and duties against the tenants; which was conjoined with the multiplepinding.

Earl John died in 1796, and in 1797 William Cunningham Cunningham Graham succeeded, on the death of his father, to the estate of Finlaystone. At this time his affairs were under trust; and his trustees having purchased from the Countess the heritable debt on the estate of Finlaystone, they claimed a preference over the rents *in medio*, not only for the interest of the heritable debt which had fallen due during Earl John's possession of the estate, but also for the principal sum.

The Earl's personal creditors admitted the preference as to the interest, but disputed it as to the principal sum; and

No. 1.

If an heritable creditor on an entailed estate, insist on drawing payment of the principal sums due to him out of rents which have been arrested by the personal creditors of the heir in possession, he is bound to assign to them his heritable security, to an amount equal to that part of his principal sum which has been paid out of the arrested rents.

No. 1.

Pleaded : As the debt was acquired by Mr. Graham's trustees, after the conjoined actions were in Court, the trustees can stand in no better situation than the Countess of Glencairn, their cedent. Now as the heritable debt is admitted to be secured over the whole tailzied estate, she could have no interest in drawing her payment of the principal out of the arrested rents, seeing that not only all future rents, but the soil itself stood impledged for her payment ; and it is a rule of equity, that a catholic creditor cannot act emulously, by drawing payment in a manner, which, without benefiting himself, would injure the interest of co-creditors ; Ersk. B. 2. Tit. 12. § 66. Dict. *voce*. DEBTOR AND CREDITOR.

Besides, before the Countess brought the action of mails and duties, the rents were in the hands of the judicial factor appointed by the Lord Ordinary ; by which means they were so separated from the estate, that they could not be attached by that process, or fall under her heritable security ; and, in virtue of her arrestments, she can come in only *pari passu* with the personal creditors.

At all events, even supposing the Countess to have a preference over the funds *in medio*, she cannot exert it to the prejudice of the personal creditors, without being obliged to assign to them her heritable security, in order that they may operate their relief from the entailed estate.

Answered : The circumstance of the trustee having acquired the heritable security *pendente lite*, will not preclude them from deriving the same benefit from it, as if it had been acquired before the litigation commenced ; 19th Jan. 1757, Earl of Buchan against his Father's Creditors, No. 36. p. 15406.

An heritable creditor, in virtue of the assignation to the mails and duties contained in his security, is preferable on the rents both for his principal sum and interest, to any diligence done by personal creditors ; 13th July 1780, Webster against Donaldson, No. 104. p. 2902. And the rule of equity, by which a catholic creditor cannot draw his payment so as to injure secondary creditors, is applicable only to cases where he can assign without injuring himself. But even if the heritable debt had remained with the Countess, she had an obvious interest in seeking her payment out of the first and readiest of the rents ; and, if she had done so, the law would not have allowed her to assign her security to the prejudice of the heir of entail ; case of the Earl of Buchan, 1st December 1738, mentioned in the report, *sup. cit.* 19th January 1757, Earl of Buchan against his Father's Creditors. And as the heritable debt is now in effect vested in the heir of entail himself, he has a still stronger interest that it should be extinguished by the rents *in medio*, in place of remaining a burden on the estate.

Further, the equitable maxims pleaded by the personal creditors, apply only where there are two distinct subjects, out of either of which the catholic creditor may operate his payment. But in this case there is truly but one subject ; for the estate itself, and the rents arising from it, admit not of being separated ; nor is the question affected by the circumstance of these rents having been up-

lifted by the judicial factor, before Mr. Grahame's trustees made their claim ; for this step having been taken merely for the sake of preserving the rents, they must be held in legal construction to be still in the hands of the tenants.

No. 1.

The Lord Ordinary found, " That the trustees of William Cunningham Cunningham Graham, in virtue of their heritable right and infestment, are entitled to rank upon the bygone rents of the estate of Finlaystone in preference to the arresting creditors, both for the principal sum and interest due to them ; and that the said trustees are not bound, on drawing payment, to assign in favour of these creditors."

The personal creditors presented a reclaiming petition, on advising which with answers, it was

Observed on the Bench : Mr. Graham's trustees cannot plead their cause higher than the Countess of Glencairn could have done, had the heritable right remained in her person. Now, it is a settled rule with regard to the debt of an entailer, that the heir in possession must keep down the interest ; but that he is not bound to pay any part of the principal sum, without obtaining an assignation from the creditor, so as to enable him to keep it up against the estate. In the present instance, the arresting creditors are in a still more favourable situation than the heir ; and therefore if Mr. Graham's trustees demand their payment out of the arrested funds, they must so far assign their heritable security to the competing creditors.

The Lords unanimously found, " That the trustees of William Cunningham Cunningham Graham are preferable on the sum *in medio* for the interest due on the principal sum, but not for the principal sum itself ; and therefore in so far altered the interlocutor of the Lord Ordinary reclaimed against, and remitted to his Lordship to proceed accordingly.

Lord Ordinary, *Craig*.
Alt. *H. Erskine*.

For Mr. Graham's Trustees, *D. Cathcart*.
Clerk, *Home*.

R. D.

Fac. Coll. No. 181. p. 415.

1803. December 13.

CREDITORS of ALEXANDER ROBERTSON, *against* CREDITORS of WILLIAM ROBERTSON.

WILLIAM MASON (4th February 1772) executed a conveyance of the lands of Dalry, in favour of his eldest daughter, " Janet Mason *alias* Robertson, and Alexander Robertson her husband, their heirs, executors and assignees whatsoever, heritably and irredeemably."

No 2.
An heritable debt specially secured upon one of three estates, of which the