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 infeftment, are "entitled to rank upon the bygone rents of the estate of Finlaystone in prefer- "ence 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 as- "sign 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 favourble 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.* For Mr. Graham's Trustees, *D. Cathcart.*
Alt. *H. Erskine.* Clerk, *Home.*

R. D. *Fac. Coll. No.* 181. *p.* 415.

1803. *December* 13.

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

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

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 what- "soever, heritably and irredeemably."

No. 2. debtor was proprietor, must be paid out of it, without relief from the other estates, when the succession has been divided between two heirs of line.

By a decision of the Court, it was found, that the fee of the lands was vested in Mrs. Robertson, and not in her husband.

Of the same date, (4th February), Mason executed his last will, nominating Alexander Robertson his sole executor, bequeathing to him his whole personal estate, burdened with certain provisions to his three younger daughters.

Alexander Robertson, in his own right, was proprietor of the lands of Giffin, of a house in Edinburgh, and an heritable bond of £1450.

Robertson, in lieu of the provision he was bound to pay to Ann Mason, one of the daughters, granted her a bond (4th February 1777) for an annuity of £40. over the lands of Giffin, on which she was infeft. A similar transaction was made with Elizabeth Mason, another of the daughters, who accepted of an annuity of £30. secured on the lands of Dalry.

Robertson died in September 1779, leaving a son, William, besides other children, having previously (18th September 1777) executed a will in the English form, bequeathing his whole estate, real and personal, to his spouse, who, upon this title, entered into possession of the whole, uplifting the rents and interests due from the various subjects which belonged to him.

William Robertson having (14th June 1786) served heir in general to his father, brought a reduction of the settlement, so far as it respected the heritable property in Scotland.

He completed his title to the heritable bond, (4th December 1787), by being infeft on a precept of *clare constat*. He also obtained a precept of *clare constat*, and a charter of confirmation of the lands of Giffin, but died before infeftment was taken,

He made up no title to the other subjects.

After his death his creditors raised processes of constitution against Alexander, his son and heir; and upon his producing a renunciation, they obtained decrees *cognitionis causâ*, and adjudications against the *hæreditas jacens* of William. They also insisted in the action of reduction, when the Court found, (9th December 1795), "That the last will, executed after the English form, "cannot effectually convey an heritable property in Scotland."

Adjudications were also led at the instance of Ann and Elizabeth Mason, and others, creditors of Alexander Robertson, *senior*. Processes of ranking and sale were brought of the whole property belonging either to him or to his son William. The whole was sold, and the price *in medio* was to be divided among the creditors, according to their rights. A dispute occurred in the ranking respecting the fund from which the annuity of Ann Mason was to be paid. The rents of Giffin amounting only to £20. the remainder of the annuity had been paid by Mrs. Robertson, now looked upon as factor for her son, from her intromissions with his other estates. In the accounting between her creditors and his creditors, the former were charged with £20. annually as the rent of Giffin during William's life; and as an article of discharge in their favour,

No. 2.

was stated the annuity of £40. during the same period paid out of the general intromissions.

The creditors of William objected to this, and insisted that the excess of the annuity above the rents of Giffin should be a burden upon the price of Giffin; in support of which they

Pleaded: The only subject which was feudally vested in William's person was the heritable bond, although he was also entitled to the whole succession of his father. The remaining subjects being *in hæreditate jacente* of Alexander Robertson, *senior*, are descendible to Alexander, *junior*, as heir of line to his grandfather. The heritable succession, then, of Alexander, *senior*, has been divided, part being taken up by his son as heir of line, and part by his grandson in the same character. While the creditors have both successions bound to them *in solidum*, in a question betwixt the heirs themselves, the ultimate payment of the debts must be divided *pro rata*, according to the value of the subjects that descend to each. Their separate creditors, deriving right from them, are exactly in the same situation in their mutual claim for relief. When the succession is divided by the act of the law, as among heirs-portioners, the same rule is adopted. It was adopted also as the rule between an heir of line and heir-male, Rose against Rose, 17th January 1789, No. 22. p. 5229. Again, the creditors of William would not only be entitled to a relief from the other funds of his father, in all cases of general debts having no particular reference to any special subject; but they are here entitled to a total relief, as the annuity is expressly laid upon the lands of Giffin. These lands, so burdened, must be taken by the heir who succeeds under this burden; and when he pays the debt, he must pay it without any relief; Stair, B. 3. Tit. 5. § 17; Ersk. B. 3. Tit. 8. § 52.

The creditors of Alexander

Answered: The creditor in the bond of annuity had a double remedy for obtaining payment; the heritable security over the lands of Giffin on the one hand, and the personal obligation against the debtor and his heirs on the other. Now, William Robertson was the sole heir of the granter, entitled to take up the whole succession. There was thus no person to divide the responsibility with him, and against whom any claim of relief could be competent. The debt, then, was paid by the proper debtor, who at the time of payment was not entitled to the benefit of discussion or claim of relief. The debt, therefore, is extinguished, so that it cannot afterwards be revived to any effect whatever.

It is true, that those who take an heritable estate, must take it with all the burdens affecting it. But the burden affecting Giffin is already, *pro tanto*, extinguished by the payment made by the proper debtor; so that when Alexander Robertson *junior* comes to take up the fee of this estate, or the creditors of the grandfather do so, they take it effectually disburdened of the bygone annuities, so far as already paid out of other funds belonging to the debtor.

No. 2.

The Lord Ordinary (14th May 1799) "found, That as the annuity payable "to Ann Mason was heritably secured by Alexander Robertson on his lands "of Giffin, exceeding the amount of the rents thereof; and as credit is claimed "and allowed to William Robertson's creditors for the whole of those rents "during his surviving his father, whom he must be held to have represented, "and even down to his mother Janet Mason's death; her creditors or repre- "sentatives are entitled to take credit, in accounting with William's creditors, "for the said annuities, in so far as the same were paid by her to the said Ann "Mason."

The creditors of William petitioned the Court, when it was found, (25th May 1803), "That the bygone annuities due to Ann Mason, secured upon the "lands of Giffin, fall to be charged upon the price of these lands in the first "place; and with this explanation, adhere to the interlocutor of the Lord "Ordinary, and remit to his Lordship to proceed accordingly."

Upon again advising a petition, with answers thereto, the Court (13th December 1803) "found, That the bygone annuities due on Alexander Robert- "son and his wife's bond to Ann Mason at and subsequent to the death of "Alexander Robertson, so far as they exceed the rents of Giffin for the same "period, fall to be charged upon the price of the lands of Giffin, as a prefera- "ble debt thereon, in respect that the annuity was secured by heritable bond "and infeftment upon that particular subject; and with this explanation adhere "to the former interlocutor."

Lord Justice-Clerk, *Eskgrove.* For William's Creditors, *Solicitor-General Blair.*
Agent, *Ja. Thomson, W. S.* Alt. *George Jos. Bell.* Agent, *Wm. Molle, W. S.*
Clerk, *Home.*

F. *Fac. Coll. No.* 129. *p.* 285.

1807. *November* 19. JEAN M'LURE, and Others, *against* WILLIAM BAIRD.

No. 3.

If a creditor use an inhibition against his debtor, and if, after the inhibition, but before any diligence used by any other creditor to affect it, an heritable subject belonging to his debtor be sold by voluntary sale, then the

JAMES REYBURN was proprietor of a small tenement in Wallacetown. He owed £100. to David Cumming, and various sums to other creditors. Cumming raised letters of inhibition against Reyburn on the debt due to him, which were regularly executed and recorded on the 2d May 1775. No other creditor did any diligence against Reyburn's estate. In this situation, Reyburn soon after sold the tenement to William Baird, who then held it as tenant for rent. Cumming went abroad in the naval service. His wife, Jean M'Lure, having in vain endeavoured to get payment of the debt due to her husband, at last raised, in his name, an action of constitution of this debt, in which she obtained decree, and afterward an action for reduction of the sale on the inhibition, concluding also for payment of the rents. She obtained decree in this action also, extracted it, and thereon charged Baird, who presented a bill of suspension, and after-