April 30. 1824.

In conclusion, my Lords, I may observe, that the appellant has held the report of the two referees as equivalent to a regular decreet-arbitral. But supposing these gentlemen had possessed powers to conclude the parties, the Court below were, and your Lordships are now entitled to look at the grounds of their opinions; and if these grounds, as detailed in their several reports, are found to be unsatisfactory, your Lordships may and must decide upon the facts as they appear in the cause.

Upon the whole, my Lords, I humbly offer it as my opinion, that the last interlocutor of the Court of Session ought to be affirmed. There may be some difficulty as to the findings in some of the previous interlocutors, for which reason I would propose to delay giving formal judgment until Tuesday next.

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

(Ap. Ca. No. 33.)

Sir WILLIAM F. ELIOTT, Appellant.—*Sugden—Whigham.* No. 25.
GEORGE POTT, Respondent.—*Moncreiff—Jeffrey.*

Bona Fides—Violent Profits.—Circumstances in which (affirming the judgment of the Court of Session) a party was found not liable for violent profits, prior to the first term after the judgment of the House of Lords setting aside the lease as contrary to the terms of an entail.

May 10. 1824.

1ST DIVISION. Lords Gillies and Meadowbank.

AFTER the judgment of the House of Lords, pronounced on the appeal of Sir William Francis Eliott, of Stobs, against George Pott, tenant of two of the farms on that estate, finding that his lease was contrary to the terms of the entail of the estate, and therefore reducing it, (see ante, Vol. I. p. 16.) the case returned to the Court of Session, to decide upon a demand made by Sir Francis for payment of the violent profits. In reference to this claim, the facts were these:—

By two judgments of the Court of Session, in 1793 and 1798, it had been found, that as the heir of entail of the estate of Stobs was laid under no restriction, he 'had power to grant leases at 'the former rents, and take grassums.' Previous to this time, the appellant's grandfather, who was then in possession, had, in 1784, let to the father of the respondent the lands of Langside, part of the entailed estate, for 19 years, at a rent of L.195; and, in 1790, he again let him the lands of Penchrise, also for 19 years, at the

May 10. 1824.

rent of L.84;—the total rent being thus L.279. In 1794, and soon after the first of the above judgments, and after consulting two of the most eminent Counsel at the Scottish Bar as to the legality of the transaction, an agreement was entered into between Sir William Eliott, the appellant's father, who had recently succeeded to the estate, and the father of the respondent, by which it was arranged, that the former should grant a new lease to the latter for 77 years at a rent of L.285, and payment of a grassum of L.2904. This grassum was accordingly paid, the lease executed, and possession obtained and enjoyed without objection till 1812, when Sir William having died, was succeeded by his son, the appellant. Within six months thereafter, the appellant raised a summons of reduction of the lease, alleging that it had been granted in fraudem of the entail, and concluding for payment 'of the sum of L.1500 sterling, or such other sum as our said 'Lords shall find to be the yearly worth and value of the lands 'and others contained in the said tack or lease, and that for the 'current year of 1812; and of the like sum for every subsequent 'year during which the defender may continue to possess the 'same.' Every receipt for rent was qualified with a special reservation of this claim.

After a great deal of procedure, the Lord Ordinary and the Court, by repeated interlocutors, sustained the lease, and assoilzied the respondent; but, on the 14th of March 1821, the House of Lords reversed that judgment, and decerned in the reduction; (see ante, Vol. I. p. 16.) A motion was then made by the appellant before Lord Gillies, for decree against the defender for payment of the violent profits from the period of his succession to the estate; but his Lordship found, 'that the defender 'can be considered in mala fide in possessing the farm in question 'only from the date of the judgment of the House of Lords, pro-'nounced on the 14th of March 1821, reversing the interlocu-'tors of the Court of Session: that the defender is therefore not 'liable to account for violent profits for crop 1820, and preced-'ing crops; and as to the claim made by the pursuer for violent 'profits for crop 1821, appoints the Counsel for the parties to be 'ready to debate at next calling.' To this judgment Lord Meadowbank adhered, and the Court, on the 30th May 1822, refused a petition without answers.*

Thereafter, the case went back to Lord Meadowbank to decide

---

* See 1. Shaw and Ballantine, No. 199.

the point reserved by Lord Gillies, and his Lordship thereupon found 'the defender not liable to account for violent profits preceding the term of Whitsunday 1821;' and to this interlocutor the Court adhered on the 29th June 1822. Sir William then appealed to the House of Lords, where the same arguments were maintained on both sides as in the Queensberry cases, (see ante, Vol. II. p. 43–96.), which were heard at the same time. The House of Lords, agreeably to the decisions in these cases, 'ordered and adjudged that the appeal be dismissed, and the 'interloeutors complained of affirmed.' May 10. 1824.

Appellant's Authorities.—2. Ersk. 1. 25, 26.; Thomson, Feb. 17. 1624, (1737.); Cunningham, Feb. 19. 1635, (1738.); Hume, Dec. 2. 1635, (1739.); M'Caull, Jan. 19. 1636, (1740.); Manderston, March 21. 1637, (1741.); Kirkland, Nov. 27. 1685, (1741.); King's Advocate, June 26. 1729, (1742.); Grant, Nov. 1633, (1743.); Reid, July 7. 1708, (Mor. 1744.); Cardross, Jan. 2. 1711, (1747.); 41. Voet, 1. 29. and 31.; 2. Stair, 3. 23.; 2. Ersk. 1. 28. and 29.; Cockburn, Feb. 12. 1697, (1732.); Milne, July 19. 1715, (1759.); Oliphant, Nov. 30. 1790, (1721.); Wedgewood *v.* Catto, June 13. 1820, (not. rep.); Duke of Athol, June 20. 1822, (1. Shaw and Ball. No. 560.)

Respondent's Authorities.—2. Ersk. 1. 27.; Cases in Mor. App. voce Bona et Mala Fides; 1. Stair, 7. 12.; 1. Bank. 8. 12.

J. RICHARDSON—J. CHALMER,—Solicitors.

(Ap. Ca. No. 36.)

A. THOMSON, (Gourlay's Trustee), Appellant.—*Moncreiff—A. Murray.* No. 26.

R. GOURLAY, and Others, Respondents.—*D. of F. Cranstoun—Matheson.*

Bankrupt—Jus Crediti, or Spes Successionis.—A party, in consideration of the renunciation of a lease by his son, who was about to be married, having granted a bond of provision obliging himself to pay to the children of the marriage a sum of money at the first term after his own death; and a relative contract of marriage having, on the faith thereof, been executed between the son and his intended spouse, by which the bond was assigned to trustees for behoof of the children nascituri; and the granter having become bankrupt, and children having come into existence;—Held, (affirming the judgment of the Court of Session), That the children were entitled to be ranked as creditors on the estate of the granter of the bond.

OLIVER GOURLAY, Esq. proprietor of the lands of Pratis, situated in the county of Fife, granted a lease of them to his eldest son, Robert Gourlay, at a rent of L. 300, and on which it May 11. 1824.

1ST DIVISION.