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.

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was alleged Robert made improvements to the extent of about L.3000.

In 1807, Robert became engaged to marry Mrs Jane Stuart, a widow lady, who was possessed of about L.2000, besides an annuity; and an arrangement was then entered into, through a Dr Arnott, between Robert and his father, by which the latter offered to him either a conveyance of the property of Pratis, estimated at L.20,000, subject to a debt of L.10,000, or an annuity of L.300, and at his death of L.150 to his widow, and a sum of L.4000 to his children. Robert having accepted of this latter alternative, his father, on the 29th of July, addressed to him this letter:—'As 'you have made your election of accepting the former of the two 'proposals contained in the Reverend Dr Arnott's letter to you 'of the 22d current, I therefore, in terms thereof, agree that you 'shall be discharged of the rent for the Mains of Pratis, crop '1806, and the four preceding years; and that you shall con-'tinue to possess the same for crops 1807 and 1808, at the yearly 'rent of L.300 sterling, you discharging me of all claims you 'may have for buildings and improvements; and at Martinmas '1808 you shall enter upon an annuity of L.300 sterling, pay-'able at Whitsunday and Martinmas thereafter, by equal por-'tions, during your life. Upon your removal from the farm of 'Pratis, which you become bound, by acceptance hereof, to do 'at Martinmas 1808, you shall be entitled to the whole stocking, 'in order to enable you to take and stock another farm for your-'self; and, in the event of your marriage, and your wife surviv-'ing you, she shall be entitled to the half of said annuity, viz. 'L.150 sterling per annum, payable at Martinmas and Whit-'sunday thereafter, by equal portions, during her life. I farther 'engage to make a provision for the children of your marriage 'of L.4000 sterling, payable at the first term of Whitsunday or 'Martinmas after my death; but declaring, that I am not to be 'liable for any debts that you have contracted, or may hereafter 'contract; and, on these conditions, I become bound to grant 'you my bond for performing the foresaid stipulated articles, in 'full and ample form, when required so to do. I am,' &c.

In consequence of this letter, a bond was executed by the father on the 10th of August; and on the same day a contract of marriage was executed between Robert Gourlay and his wife, and the marriage thereupon took place. The bond was granted on the narrative of the letter of the 29th of July, and after obliging the father to pay L.300 per annum to Robert during his life, and L.150 to his widow, proceeded in these terms:—

And farther, 'in the event of the said Robert Gourlay marry- May 11. 1824.
'ing, I hereby bind and oblige myself, and my aforesaids,
'to make payment to him of the sum of L.4000 sterling, as
'a provision for his children, and that at the first term of
'Whitsunday or Martinmas after my decease; with a fifth part
'more of the said principal sum of penalty in case of failure,
'and the due and ordinary annualrent of the said principal
'sum from the said term of payment until payment of the
'same; but in trust only, for behoof of the child or children to
'be procreated of any marriage into which he shall enter: De-
'claring, that the said Robert Gourlay shall, notwithstanding,
'have full power to convey the whole of the said sum of L.4000,
'hereby provided to his children of his first or any after mar-
'riage, to the exclusion of his other children, and to proportion
'the same among his said children as he shall think fit, and that
'either in his marriage-contract, or by any writing under his
'hand: And also declaring, that, in the event of the said Robert
'Gourlay surviving me, no part of the said principal sum shall
'be payable to any of the said child or children till the first
'term of Whitsunday or Martinmas after his death; and that he
'shall not be accountable to them for the interest thereof.'

The bond was signed, not only by the father, but by Robert, who, by acceptance thereof, renounced the lease, and all claim for improvements on the lands of Pratis. The contract of marriage (to which the father was not a subscribing party) proceeded upon the narrative of the bond, which was fully recited; and in reliance upon it Robert bound himself to pay to his widow an annuity of L.150, and the sum of L.4000 to the children, all as provided by the bond, which he assigned, in security of the implement of his obligations, to trustees, who were nominated for carrying the same into effect.

At the date of the deeds, Oliver Gourlay, the father, was perfectly solvent, but thereafter he became bankrupt, and his estates having been sequestrated, Thomson was appointed trustee. Several children having been born of the marriage, a claim was made on their behalf, as creditors on the estate of their grandfather for the L.4000. This claim having been rejected, their father Robert, along with the trustees, presented a petition and complaint to the Court, praying to have Thomson ordained to rank the children as creditors. This was resisted, on the general ground that no jus crediti, but merely a spes successionis of a gratuitous nature, had been created by the bond, and therefore, that the children could not compete with onerous creditors.

May 11. 1824. The Court, however, by a narrow majority, found, 'that a jus 'crediti has been created in this case in favour of the grandchil- 'dren, so as to entitle them to compete with the onerous credi- 'tors of Oliver Gourlay; and therefore sustained the complaint, 'and remitted to the trustee, with instructions to admit the claim 'of the petitioners, on behalf of the children of Robert Gourlay, 'to be ranked on Oliver Gourlay's estate, in terms of the statute; 'and ordained the said Andrew Thomson, the trustee, to rank 'them accordingly; but found no expenses due:' and to this interlocutor they adhered on the 15th December 1820.* Thomson, the trustee, then entered an appeal, and maintained,—

1. That it is a rule perfectly established in the law of Scotland, with regard to provisions in favour of children, whether contained in a marriage-contract or in a separate bond, that unless either principal or interest be made payable at a term which may arrive in the lifetime of the granter, the children are held to be only heirs of provision, whose right of credit extends no farther than to prevent the granter from disappointing the provision by gratuitous deeds, and consequently they are not allowed to compete with the granter's onerous creditors.

2. That although a contract of marriage is an onerous deed, and may give rise to a jus crediti, yet in this case the claim was not founded upon such a contract, but only upon a common bond of provision, payable after the death of the granter, which was a deed of a gratuitous nature, and could not vest the children with a jus crediti. And,

3. That although the bankrupt stood in the relation of grandfather to the children, yet he could not be regarded as a third party, but, on the contrary, in loco parentis to them; so that the principle of the cases which regulated the questions as between onerous creditors of a father and his children, must be here applied; and that that principle was, that bonds of provision were to be considered as merely giving a spes successionis; which rule was established in consequence of the jealousy of the law, and the facility which existed of a parent's conveying his effects to his own family.

On the other hand it was contended, that the children were entitled to be ranked,—

1. Because the provision in question was not only part of an onerous contract made between Oliver Gourlay and his son; but was granted in contemplation of the son's marriage, which was an

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* Not reported.

onerous cause per se; and it was no less a part of the marriage-contract, by the reference which these two deeds bore to one another, than if both had been engrossed in the same deed.

2. Because this onerous obligation by Oliver Gourlay was conceived, not in favour of his own children nascituri, but of the children of his eldest son, who were neither the heirs nor executors of Oliver Gourlay, the granter, and could have no other meaning or effect than that of securing to these children a jus crediti.

3. Because the obligation was onerous quoad the children, not merely by their mother's marriage, which took place on the faith of the obligation itself, but likewise by the surrender of her property to Robert Gourlay, her husband; which property, but for Oliver Gourlay's provision, might have been reserved for them. And,

4. Because the jus crediti of the children was not only indicated, but effectually established and secured by the creation of a trust, for their use and benefit, in the person of their father, Robert Gourlay, who was not even invested with a positive right to the liferent of the property.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

Lord Gifford.—My Lords, It is not usual for the person who has the honour to assist your Lordships' judicial deliberations, to assign the particular reasons upon which he founds his opinion, if that opinion goes to the affirmance of the judgment appealed from: and although, on the present occasion, I shall conclude with a proposition to that effect, yet there are in this case circumstances which induce me to trouble your Lordships with some observations. My Lords, the cause now before your Lordships turns upon the competency of creating, by means of family arrangements, such a right as shall authorize the holder to compete with the onerous creditors of a bankrupt. (Here his Lordship went shortly over the circumstances of the case.)—My Lords, many cases have been cited in the course of the pleadings, which go to establish the point, that children cannot come in competition with onerous creditors for provisions made to them by their parents.

My Lords,—It is the very farthest in the world from my intention, to call in question the soundness of the doctrine established by these cases. But my opinion, in the present case, is founded on this, that the transaction upon which the claim of these children is founded was an onerous contract,—a contract between their grandfather and their father, by which the former makes provision for his grand-children, while the latter surrenders a lease of great value, after having made

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considerable improvements upon the farm. The surrender was, in fact, the price which the respondent paid for a provision to his children; and I therefore hold them as onerous creditors to that extent. My Lords, I am anxious to impress it upon the minds of your Lordships, that I hope I shall not be understood as giving any opinion upon the general question argued in the pleadings at the Bar; and it was chiefly with a view to guard myself against any such supposition, that I wished to address to your Lordships even the few observations which I now take the liberty to offer. My Lords, I observe there was a considerable difference of opinion among the Judges in the Court below; but a majority were for sustaining the claim of the respondents; and upon the best consideration which I have been able to bestow upon this cause, I am satisfied that they have arrived at the right conclusion, and that the interlocutor appealed from ought to be affirmed. My Lords, while such is my opinion upon the merits of this cause, yet, considering the nicety of the case, and the great diversity of opinion which appeared among the Judges by whom it was decided in the Court of Session, I think the appellant, acting for a body of creditors, was justified in submitting the question to the judgment of this House, and that there is no room for awarding costs. All, therefore, that I mean to propose is, simply, that the interlocutors complained of in this case be affirmed.

Appellant's Authorities.—1. Bank. 5. 17.; 3. Ersk. 8. 39.; Graham, Jan. 24. 1677, (12,887.); Marjoribanks, Feb. 26. 1682, (12,891.); Strahan, July 21. 1754, (996.); 1. Bell, 554.; Lang, Feb. 1. 1820; F. C.

Respondents' Authorities.—1. Bell, 200. and cases there quoted.

J. RICHARDSON—J. CHALMER,—Solicitors.

(Ap. Ca. No. 38.)

No. 27.

JOHN M'CALL and Company, Appellants.—*Warren—Buchanan.*

JAMES BLACK and Company, Respondents.—*Shadwell—Stephen.*

Retention—Lien—Execution pending Appeal.—A party having been employed as a mercantile agent, to purchase and ship goods for a Company, on which he made large advances; and having by their orders purchased other goods as their broker, and of which he obtained possession, but on which he did not make any advances; and it having been afterwards disclosed that these latter goods formed part of a joint adventure, in which the Company and others were concerned;—Held in a compe-