any other suit for that misconduct; and so he cannot be rejected on the score of interest on that ground. If any questions put to him had tended to criminate him he might have refused to answer, but this rule is an indulgence to the witness, and not an objection to him. And as to the objections founded on the affidavit, it is evident that the witness cannot be rejected on this account, which is not of the nature of a judicial act; and which, therefore, cannot render him inadmissible.

After hearing counsel,

LORD MANSFIELD said:—

"That the point in question was merely, whether the appellant had a right to set off certain bills, remitted for another purpose, towards a debt due to himself, before the person remitting the same became a bankrupt, or had committed any act of bankruptcy; or whether, receiving the bills as a part of the general fund, he was now bound to throw them into the common stock, and be accountable to the assignees of the bankrupt, and come in of course as a common creditor. In my opinion, as no act of bankruptcy had been proved before the remitting of the bills, the appellant was entitled to set them off against the debt due to himself, and I therefore move that the interlocutor complained of be reversed."

It was ordered and adjudged that the interlocutor of 2d March 1774 be affirmed, and the interlocutor of 17th February 1775 be *reversed*; and that the appellant's defence be sustained.

For Appellant, *Henry Dundas, Ja. Wallace.*

For Respondents, *Al. Wedderburn, Gilb. Elliot.*

Unreported in Court of Session.

JOHN M'DOWAL, Merchant in Glasgow, and ALEXANDER GRAY, W.S. Edinburgh, } *Appellants;*

ANNAND and COLHOUN'S ASSIGNEES, Merchants, *Respondents.*

House of Lords, 26*th February* 1776.

GUARANTEE—RELIEF—ARRESTMENT—TRUST—PROOF—OATH OF BANKRUPT.—Two parties became guarantee for a company, on the latter depositing bills due to them in their hands as a security. This was done, and a list of the bills drawn out and handed over, and a receipt granted by the guarantees. They were immediately delivered to one of the partners of the company, who discounted and used some of them for company purposes. Held, on failure of the company, that the guarantees, though they had thus parted with

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possession, were to be preferred to an arresting creditor. The oath of one of the bankrupts of the company allowed to be taken to prove that he had the bills returned to him, not for behoof of the company, but in trust for the guarantees.

Mr. Ebenezer M'Cullock and George Young carried on business as merchants in Edinburgh, under the firm of Ebenezer M'Cullock and Company.

The appellant, M'Dowall, was married to M'Cullock's daughter, and Mr. Gray was the professional agent of the company.

In 1768, M'Cullock and Young were in difficulties for want of money to carry on their business; and, with the view of supporting their credit, they resorted to the plan of drawing and circulating bills, and proposed to M'Dowal and Gray, in the following letter from M'Cullock to the for-

Dec. 3, 1768. mer, that they should be guarantees for the company: "Mr. "Young and I will have some £3000 or £4000 to meet, and "for which, without discounting bills, we cannot make cer- "tain provision, unless we are at liberty to value upon Lon- "don, and then it is customary to give a letter of credit. I "wish to be in a capacity in either shape, and therefore "would propose to ask the favour of you and my friend "Alexander Gray, writer to the Signet, to give such a let- "ter of credit in our favour to the house of Malcolm, Hamil- "ton and Company, London, to the amount of £3000 and "4000. And, for your and Mr. Gray's security, *I shall put* "*an equal value in bills* due to Mr. Young and me, (but "at long dates,) into Mr. Gray's hands *for your security.*"

Dec. 15, —— In answer to this, Mr. M'Dowal wrote:—"If it can be of "any service I am willing; and shall be satisfied with Mr. "Alexander Gray's taking the needful from you and Mr. "Young to make us safe." And the following letter was

Dec. 26, —— addressed and signed by both:—"To Messrs. Malcolm, Ha- "milton and Co. Gentlemen,—Messrs. Ebenezer M'Cul- "lock and Company have been, and are still, in the course "of holding with your house an exchange account, by draw- "ing bills and making remittances from time to time, as they "have occasion, we, John M'Dowal, merchant in Glasgow, "and Alexander Gray, writer to the Signet, do hereby "oblige ourselves to see you duly reimbursed for such bills "as these gentlemen have already drawn, or may have oc- "casion to draw, to the extent of £5000 sterling. We are," &c.

A parcel of bills was then brought, along with a particular list thereof, the names by whom due, the dates and time when payable. In this list were two bills, one due by James Murray, for £206. The other by D. M'Ilmun for £708; and another by same party, for £934. At the bottom of this list there was an acknowledgment signed by Gray, that the above bills in the list, sixteen in number, were lodged with him "in security of relief from the effect of a letter of credit "subscribed by me and John M'Dowal, amount £5050."

These bills, however, were given back to Young, that he might keep them as trustee for Gray, and some of their contents were thereafter uplifted and appropriated in carrying on the company business by Young, with whom they were so deposited.

In December 1769, M'Cullock and Company stopped payment, and the respondents, Annand and Colhoun, being creditors of the company in £6000, were involved and made bankrupts by that failure. They had previously used arrestments in the hands of M'Cullock and Company's debtors, to secure as much as they could, and among the sums attached by their arrestments, were the sum due by D. M'Ilmun of £879. 5s. 7d.—And the sum of £63, being the balance of the bill due to the company by James Murray of Leith, both mentioned in the above list.

The appellants, Gray and M'Dowal, also arrested for relief of their guarantee; but seeing that they had no chance, in virtue of the arrestment, the respondents being prior in date, they claimed to be preferred to these two bills, on the ground that they were transferred to the appellants, Gray and M'Dowal, in security of their letter of guarantee, conform to the list and docquet above referred to. A competition thus arose in an action brought for the purpose, and a proof being allowed of the facts, it appeared that the bills were placed in the hands of Gray as a security, and afterwards returned by him to Young, to be kept by him, not in the company's counting house, but at his own house, in a particular repository, under the care of Mackie, a clerk, who had the key, and access to which was not allowed to the company. They were tied up by themselves, and backed, "Note of bills deposited with Mr. Alex. Gray." The company had also a receipt signed by Mr. Gray, as having received those bills in security, and which receipt was put up along with the company's bills—that when the company were greatly pressed for want of money, Young yielded with

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reluctance to use one of the bills deposited with Gray, by getting it discounted; "declaring in the presence of the "clerk, that he was doing an exceeding wrong and blame-"able thing, which nothing but necessity could force him "to, and hoped that he should be able to replace the bill." Among the witnesses examined by the appellants was George Young, one of the bankrupt partners of M'Cullock & Co.; and to whom objection was taken as incompetent; but his evidence was allowed, under reservation of the objection.

Aug. 5, 1774. The Lords, of this date, found "that Messrs. Annand and "Colhoun, and their assignees, have the preferable right to "the sums in question, and therefore grant warrant to, and "ordain the factor to pay the same to them and their attor-"ney accordingly, with such interest as shall be due there-"on, in terms of his factory, and decern;" and, on reclaim-

Jan. 18, 1775. ing petition, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The condition of the appellants' becoming guarantee for M'Cullock and Company to Malcolm, Hamilton and Company, was, that M'Cullock and Company should lodge or deposit, in Gray's hands, for their mutual security, bills equal in amount to the letter of credit they gave, so that they might operate their relief against these in case M'Cullock and Company failed to pay. They gave a letter of credit for £5000, in terms of M'Cullock's request, on the condition stipulated. This condition was complied with, and bills to the amount of £5050, due to M'Cullock and Company, but drawn at long dates, were handed to Gray "*in security of relief from the effect of a* "*letter of credit*," as the receipt expressly bore, besides further setting forth that "on your relieving us of that en-"gagement, we are to return you the above bills." So ran the receipt signed by Gray and M'Dowal, and such was the nature of the transaction between the parties. Looking, therefore, to the circumstances of the transaction, proved beyond all doubt—the treaty for depositing the bills —the indorsement and actual delivery of the bills to Gray by Ebenezer M'Cullock and Company—his granting a receipt for the same, setting forth that he held them in *security of relief from the effect of a letter of credit* granted by the appellants—the delivery of these bills by Gray to George Young, to be kept by him for the use and security of the appellants—the lodging of these by Young in his own private cus-

tody, that is, in his own private repository in his dwelling house, separate and at a distance from the company's counting house and effects—his constantly keeping the bills for the appellants, are all so many incontrovertible proofs of what the parties meant to do, and what they actually did, as clearly to demonstrate that the bills having been delivered to Gray by M'Cullock and Company, were lodged by him with George Young as a trustee for the appellants. Nor does it alter their right over them, that Mr. George Young did what he had no right to do, and what he knew was a great wrong, to take any one of these bills and discount it for his own use. This was a misappropriation of that over which another had, in the meantime, entire right and control. But, in truth, had George Young taken and applied the whole to his own proper or private use; or had failed duly to negotiate them, the loss must have fallen on the appellants, because they had granted their receipt and obligation to M'Cullock and Company to return these bills to them. If, therefore, his interest in those bills was a good interest as a security, and the possession held by Young as his trustee, a good possession, so as to subject him to such risks and responsibility: by parity of reasoning, he ought to be allowed to keep that interest and to protect that possession. The Court of Session have gone on the principle that George Young, in a company transaction, could not act as an individual, because, in the eye of law, he was to be viewed so incorporated with the company as to be incapable of performing any company transaction but for behoof of the company, and therefore these bills, being company bills, were to be presumed deposited with him for behoof and on account of the company. But this reasoning is fallacious, and contrary to the whole proved facts of the case, which clearly prove Young to have acted as a trustee for Gray, in holding these bills. This is established by the parole proof adduced, which, in the circumstances of the case, was quite competent. It was also quite competent for the Court to order the evidence of George Young to be taken; while it is clear, on the other hand, the judgment of the Court below on this point was acquiesced in by the respondents; and as they have brought no appeal of these interlocutors, they are final and conclusive.

Pleaded for the Respondent.—The tendency of what the appellant contends for in this case, would be to open a door

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for the grossest frauds.—The present is just an instance of a secret lien. It is admitted, that if there were any indorsements upon the bills, it was in blank, and that Gray had them only in his hand for a moment. He left them therefore with Young. But whatever were the appellants' intentions, and M'Cullock's understanding, the pledge, if such was so intended, was incomplete and ineffectual in law. The pledge was not completed by possession or transference of the custody. Possession of the thing pledged in security, was essential to the completion of the transaction. In order to transfer a bill, either absolutely or by way of security, two things were necessary, an indorsation and delivery of the bill. A transference, *retenta possessione* is not valid in law. And even though the intention had been to create a trust, yet, for the same reason, law could not support it in such circumstances. A trust in the *assignor* for the *assignee*, is just another name for *retenta possessio;* and delivering the bills to Young was no other than giving them back to the company. The appellants' proof by witnesses, by which they endeavoured to establish the trust in Young, was not competent. The Scotch statute 1696 declares, that a trust shall not be proved, but by the writing of the trustee, or reference to the oath of party. There was no writing; and Young was only examined as a witness, not as a party. It was not a reference to his oath, nor could there be such a reference, as he was no party interested. Proof by his oath was therefore as much a breach of the statute, as the examination of the other witnesses in regard to the trust. It was incompetent to allow parole proof, as had been done, of such trust, especially in regard to bills, that *ex facie* stand purged of all such qualifications; and it would be a plain perversion of the nature and legal character of bills, were such proof admitted. It was further incompetent to allow Gorge Young the bankrupt to be examined, because "a bankrupt's oath cannot be admitted in "prejudice of his creditors." It is upon the deposition of Young that the parole proof of this trust rests. If, therefore, parole be incompetent to establish a trust; and if the witness brought to establish it be otherwise incompetent; nay, further, if his oath be the oath of a bankrupt, given against his creditors, then the whole case fails.

Bank, vol. 2, p. 657. Ersk. Inst. p. 669.

After hearing counsel, it was

Ordered and adjudged that the interlocutors of the 5th of August 1774, and 18th January 1775, complained of, be *reversed*, and that the interlocutor of the 7th of De-

cember 1774 also complained of be affirmed; and it is declared, that the appellants, Alexander Gray, writer to the Signet, and John M'Dowal, merchant in Glasgow, have the preferable right to the bills in question. 1776. ROSS v. ROSS.

For Appellants, *E. Thurlow, Ja. Wallace.*
For Respondents, *Al. Wedderburn, Alex. Murray, Ar. Macdonald.*

Unreported in the Court of Session.

MUNRO ROSS of Pitcalny, Esq. - *Appellant.*
CAPTAIN JOHN LOCKHART ROSS, - *Respondent.*

House of Lords, *9th May* 1776.

DEEDS CHALLENGED—FRAUD AND INCAPACITY—PRESCRIPTION.—Four several deeds were executed at intervals, conveying an estate to different parties, other than the heirs of investiture, and challenged on the head of incapacity, fraud, and circumvention.—Held the deeds irreducible, as there was no conclusive proof of incapacity, fraud, or circumvention. Held also prescription not to apply, so as to exclude the action.

This was an action of reduction, originally brought by the appellant's father, Alexander Ross of Pitcalny, for setting aside four several deeds, executed between 1685 and 1711, by David Ross, Esq. of Balnagowan, whereby that estate, which would have descended to the said Alexander, by the previous investitures, was conveyed away to strangers. The grounds of reduction were, fraud, circumvention, and incapacity of the granter.

The investitures of the estate of Balnagowan, for several centuries, had stood devised to *heirs male.* By charter from the crown 1615, it stood limited to George Ross, then of Balnagowan, and the heirs male of his body; whom failing, to David Ross of Pitcalny, the appellant's ancestor, and the heirs male of his body; whom failing, to Ross of Invercharron, and others, the next collateral heirs male, in their order; whom all failing, to the nearest heir male in general of the said George Ross.

The above George died in 1615, leaving issue a son,