DAVID MATHIE, Appellant.—*Abercromby.* No. 13.
ROBERT MUIR, Respondent.—*Shadwell.*

Title to Pursue—Guarantee—Fraud.—An indorsee of a bill having, in consideration of a premium, obtained a guarantee of it from A, to whom he delivered, but did not indorse it; and the bill having been dishonoured, and the drawers of it having granted to a trustee for A two promissory-notes in place of it; and B having bound himself by a letter to see them paid;—Held, 1. (affirming the judgment of the Court of Session), That the trustee for A was entitled to pursue B for payment of the promissory-notes; and, 2. That it was not relevant for B to allege that the original indorsee was a party to a general agreement, under which B had been induced, by the misrepresentation of the drawers, to guarantee to their other creditors the payment of a part of their debts.

March 12. 1824.

1ST DIVISION.

Lord Alloway.

JAMES and David M'Gown, manufacturers in Glasgow, purchased goods from William Ewing, merchant there, acting for Messrs Orr and Company of Paisley, and in payment indorsed to him a bill drawn by them on Lamont and Company of Glasgow, for L.420. 15s. dated 19th August 1815, and payable at seven months. Thereafter, on the 2d of December 1815, Leckie and Alexander, manufacturers in Glasgow, guaranteed to Ewing the payment of this bill to the extent of L.300, by a letter in these terms:—'We have this day received from you L.7. 10s. 'as guarantee and commission on L.300 on a bill by J. and 'D. M'Gown on Alexander Lamont and Company, at seven 'months from 19th August 1815, for L.420. 15s., only L.300 of 'which we guarantee the payment of to you or your constituents.' The bill was thereupon delivered by Ewing to Leckie and Alexander, but was not indorsed to them.

The acceptors, Lamont and Company, became insolvent, and the affairs of the M'Gowns having got embarrassed, they called, in the month of March 1816, a meeting of their creditors, before whom they laid a state of their affairs, shewing (as they alleged) that they were solvent, and would have a reversion of about L.4000. At this meeting the creditors came to an agreement, expressed in these terms:—'We, subscribers, creditors, or 'agents for creditors, of Messrs James and David M'Gown, 'having considered their request to be indulged in the manner 'after-mentioned, as also the depressed state of the trade, and 'the representations as to the state of their affairs indorsed here-'on, do agree to take their bills at six, twelve, and fifteen months, 'from the 15th day of March instant, for the debts owing us or

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'our constituents, including interest; we receiving a guarantee 'for the regular payment of the third instalment.'

Annexed to this agreement was the following note, alluded to in it:—'We have granted the Messrs M'Gowns the indulgence 'before-mentioned, and recommend to the other creditors to do 'so, from the circumstance that the state of their affairs, ex-'hibited to us, shews that they will enjoy a reversion of between 'three and four thousand pounds.

'Glasgow, March 5. 1816.

'JOHN FREELAND and Co. for Culcreuch Cotton Company.

'WILLIAM DONALDSON, WILLIAM DUNN, FULTON M'KERREL.'

In consequence of this arrangement, and, as the appellant alleged, on the faith of the state which had been exhibited by the M'Gowns, he granted the following obligation for payment of the third instalment:—'In the event of Messrs J. and D. M'Gown 'obtaining the assent of their creditors to the agreement as to the 'payment of their debts, agreed to by you this morning, I hereby 'promise and engage to guarantee to you and these creditors the 'regular payment of the third instalment. I am, &c.

'Glasgow, March 5. 1816.

'To Messrs John Freeland and Company, for themselves, and 'the other creditors of Messrs J. and D. M'Gowns, manu-'facturers in Glasgow.'

To this arrangement he alleged that Ewing, and Orr and Company, agreed to accede, but there was no written evidence of that allegation.

When the bill for L.420. 15s. became due, it was dishonoured; and Leckie and Alexander thereupon indorsed it to the respondent, Muir, one of their clerks, with a view to recover the amount. Muir then raised diligence upon it, and, with the approbation of Ewing, and of Leckie and Alexander,—(the former of whom had an interest in the bill to the extent of L.120, being the difference between the sum guaranteed by Leckie and Alexander, and its amount),—entered into an arrangement, by which, in lieu of that bill, he agreed to take two promissory-notes by the M'Gowns, the one for L.190. 7d. and the other for L.192. 7s. 3d., and both to be guaranteed by the appellant. Accordingly, two promissory-notes, dated 22d March 1816, were granted by M'Gowns, and at the same time the appellant delivered this obligation:—'I hereby agree to guarantee to you the 'regular payment of Messrs J. and D. M'Gown's promissory-

'notes to you at six and nine months from this date, the first 'for L.190. 7d. and the second for L.192. 7s. 3d., the same as 'if these had been indorsed by me.' March 12. 1824.

Muir then indorsed these bills to Leckie and Alexander, who, together with Ewing, granted to him an obligation 'to free and 'relieve you from all recourse from said indorsation, as these two 'bills are solely on our account, and at our risk.'

In the month of August thereafter, the M'Gowns were rendered bankrupt, and a sequestration was awarded of their estates. The promissory-notes were dishonoured, and having been reconveyed by Leckie and Alexander to Muir, he raised an action for payment of them before the Magistrates of Glasgow against the appellant, founding on his letter of guarantee; and at the same time he obtained an obligation of relief from Ewing, and from Leckie and Alexander, of any expenses which he might incur.

In defence, the appellant maintained, that as the bill of L.420. 15s. had never been indorsed to Leckie and Alexander, the right to it, and the consequent jus exigendi, remained vested in Ewing, or in Orr and Company; and that, as the promissory-notes were mere substitutes for it, Muir, as representing Leckie and Alexander, had no title to pursue: that as the guarantee of the promissory-notes formed an accessary to the guarantee relative to the general arrangement, to which both Ewing, and Orr and Company, had acceded; and as the general guarantee had been obtained by a fraudulent misrepresentation of the state of the funds of the M'Gowns, the appellant was not bound by it, and consequently the present one was also ineffectual. The Magistrates pronounced this judgment:—'Find the verity and validity 'of the obligation of guarantee libelled on, not disputed; repel 'the defence founded on the alleged erroneous and fallacious state-'ment of the affairs of J. and D. M'Gown, by which the defender 'may have been induced to grant the said obligation of guarantee, 'in respect it was the legal duty of the defender to have ascer-'tained the accuracy of the said statement before he granted any 'such obligation, and in respect it is not averred or offered to be 'proved that the pursuer was in any way accessary to the pre-'paration of the said fallacious statement, or was even in the 'knowledge of the statement being erroneous: Find, That in 'granting the said obligation of guarantee, the defender appears 'to have relied on the statement of J. and D. M'Gown, for whom 'he became cautioner, and is liable for the consequences of his 'having done so: But, before farther judgment, allow the de-'fender a proof by writ or oath, that the pursuer was not a bona

March 12. 1824. 'fide onerous holder of the bill for which the promissory-notes 'guaranteed by the defender were granted, but held the said 'bill in trust for William Ewing, and that the said William 'Ewing had, before delivering the said bill to the pursuer, ac- 'ceded to the composition agreement between J. and D. M'Gown 'and their creditors; and allow the pursuer a conjunct proof.' The appellant having reclaimed, the Magistrates found, 'in 'the first place, with regard to the character in which, and the 'title upon which, the pursuer insists in the present action, That 'the delivery of the bill for L.420. 15s. (for which the promis- 'sory-notes guaranteed by the defender were granted) by Mr 'Ewing, the confessedly onerous indorsee, for the behoof of his 'constituents, John Orr, junior, and Company, of the said bill 'of Leckie and Alexander, in security of their guarantee of the 'said bill to the extent of L.300, was sufficient to vest in Leckie 'and Alexander, for whom the pursuer is confessedly merely a 'trustee, the jus exigendi of the said bill to the said extent, 'onerous, and not defeasible by the act of the said indorsee, or 'his said constituents, subsequent to the date of delivery of the 'bill to Leckie and Alexander: That it is not competent for the 'defender to prove by the judicial examination, except upon oath 'of the pursuer or his said constituents, any more than by parole 'evidence, that they were not onerous holders to the said extent 'of the said bill; but allow the defender a proof, by writ or oath 'of the pursuer and his said constituents, that they were not 'onerous holders of the said bill, in the manner and to the ex- 'tent averred by them, as also of the date at which the said bill 'was delivered to them for the onerous consideration which may 'have been given for it; and grant diligence against havers 'at the defender's instance. In the second place, with regard 'to the validity of the defender's letter of guarantee, and the 'relevancy of the averments in his condescendence, to relieve 'him from his said obligation, find, That although several of 'the said articles do not appear to be directly relevant, and others 'only hypothetically relevant, a special judgment as to the rele- 'vancy, containing only a partial or restricted admission of the 'said articles to proof, cannot well be pronounced beforehand, 'without incurring the risk of excluding relevant evidence, or 'injuring the effect of the whole proof; but find, That to entitle 'the defender to adduce parole evidence for the purpose of 'obtaining relief from his letter of guarantee, it is necessary that 'the defender aver not merely error, arising so far from his 'own negligence, but actual fraud and deception on the part of

'the pursuer, or of those in the right of the said bill, either as 'principals or directly as accessories;—see Moses against Craig, '4th February 1773; Donaldson against Morrison, 1787; and 'with this explanation, and before judgment as to the relevancy 'thereof, allow the defender a proof prout de jure of the matters 'set forth in the condescendence, so far as not admitted or estab- 'lished by the documents produced.' March 12. 1824.

A proof having been then taken, the Magistrates, on advising it, issued this interlocutor:—'Before pronouncing judgment on 'the merits, appoint the defender to state shortly, and without 'argument, in a note annexed to his information, whether he 'has any further proof to adduce, for the purpose of establishing 'that the pursuer, or his constituents, Leckie and Alexander, as 'onerous holders of the bill in question to a certain extent, or 'Mr Ewing, as onerous indorsee for the behoof of his constitu- 'ents, John Orr, junior, and Company, were parties, or acces- 'sary to the agreement between J. and D. M'Gown and the 'defender, on the one hand, and certain of their creditors on the 'other hand, which proceeded on a statement of the affairs of J. 'and D. M'Gown, therein referred to, and by which the defen- 'der engaged to guarantee the debts of the said J. and D. 'M'Gown to a certain extent, in the event of their obtaining 'the consent of their other creditors, so as to shew that the spe- 'cial agreement made by the pursuer, or his constituents, which 'was subsequent to, and different from the said general agreement, 'both in the time of payment and in the amount of guarantee, 'formed a part of, or fell under the general agreement, to the 'effect of entitling the defender to found, as in a question with 'the pursuer or his constituents, upon the erroneous or fraudu- 'lent nature of the representation on which the general agree- 'ment proceeded, or on the non-implement of the condition 'upon which the defender agreed to become guarantee; viz. the 'accession of the whole creditors; or, upon the breach of the 'said agreement, by the acceding creditors adopting separate 'measures, and obtaining payment before the instalments agreed 'upon became due, and thereby forcing on a sequestration.'

No further proof having been offered, the Magistrates found the allegation not established; and therefore, and upon the other grounds noticed in their interlocutors, decerned in terms of the libel. The appellant then brought an advocation, in which the Lord Ordinary repelled the reasons, and remitted simpliciter. And on advising a representation he adhered, 'for the reasons 'stated in the judgments in the Inferior Court.' The appellant

March 12. 1824. reclaimed to the Inner-House; but their Lordships, on the 7th of December 1820, and 17th of January 1821,* refused two petitions without answers.

Against these judgments the appellant entered an appeal to the House of Lords, and in support of it maintained,—

1. That as the original bill was merely deposited with Leckie and Alexander, and as they did not pay value for it, and as the promissory-notes were granted in place of it, the jus exigendi did not vest in them, but remained in Ewing, or Orr and Company, who confessedly had an interest to the extent of L. 120; that accordingly Leckie and Alexander could not have protested the original bill, nor done diligence upon it; and therefore the respondent had no title to pursue, and at all events was liable to all the defences pleadable against Ewing, or Orr and Company.

2. That it was established by the written and parole evidence, that Ewing, and Orr and Company, had acceded to the general arrangement; and as the guarantee relative to that arrangement had been obtained by fraud, and as it was with the view of carrying it into effect, and as subsidiary and accessary to it that the present obligation had been granted, it was neither consistent with justice nor equity that the appellant should be compelled to implement that obligation.

3. That in obtaining the obligation in question a deception had been practised on the appellant, because it was held forth that the respondent was the true creditor in the bill, whereas he was trustee for creditors who had acceded to the general arrangement; and if the appellant had been aware of this fact, he would never have granted the obligation in question, seeing that the hands of these creditors were already tied up by the general arrangement. And,

4. That, subsequent to the institution of the action, the appellant had acquired right to a bill on which Ewing was an obligant, and he was therefore entitled to plead compensation against him.

To this it was answered,—

1. That as Leckie and Alexander had become bound for payment of the original bill to the extent of L. 300, and received delivery of it in the month of December 1815, the jus exigendi was thenceforth vested in them, at least to that extent, and their right could not be affected by any accession made by Orr and Company, or Ewing, to an arrangement with the M'Gowns in

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* Not reported.

the month of March thereafter: that, besides, the promissory-notes were payable to Leckie and Alexander, and the appellant had bound himself to pay to the respondent for their behoof; so that he could not object that the jus exigendi quoad these notes was not vested in them, or plead defences competent only against Ewing, and Orr and Company. March 12. 1824.

2. That it was not true that there had been any accession; and although it might be competent to prove, by parole testimony, facts and circumstances from which an accession might be inferred, yet it was not competent to establish in that way an actual agreement to accede: that neither was it true that the letter of guarantee in question formed a part of the previous general arrangement; that they were entirely different in every particular; that, even if they were identified, still there was no evidence shewing that the general arrangement had been accomplished by fraud; and the allegation, that the M'Gowns had misrepresented the state of the funds to the appellant, could not affect the creditors.

3. That it was not true that any deception had been practised on the appellant in obtaining from him the letter of guarantee, nor was there any evidence of that allegation; but, on the contrary, it was, together with the promissory-notes, voluntarily tendered by him and the M'Gowns. And,

4. That as the respondent, on behalf of Leckie and Alexander, was an onerous holder, and Ewing had no interest in the promissory-notes, being (as alleged by the appellant himself) a mere trustee for Orr and Company, and as he had become bankrupt, and the appellant had subsequently purchased up the bill at a small rate, with a view to found compensation, that plea could not competently be entertained.

Lord Gifford moved, and the House of Lords 'ordered and 'adjudged, that the appeal be dismissed, and the interlocutors 'complained of affirmed, with L.100 costs.'

Appellant's Authorities.—Campbell, July 5. 1791, (11,683.); Wilson, Feb. 18. 1762, (1214.); Croll's Trustees, May 7. 1791, (12,404.); 4. Ersk. 2. 20.; M'Ilhose, Feb. 28. 1744, (12,389.); 2. Bell, 443.; Watson and Company *v.* Auchencloss, Feb. 12. 1818, (not rep.); Mack, Nov. 25. 1814, (F. C.)

C. BERRY—J. RICHARDSON,—Solicitors.

(Ap. Ca. No. 17.)