1812.

FLEMING v. M'NAIR.

belong, shall require the opinion of the Judges of the other Division in matters or customs of law.

For the Appellant, *Tho. Plumer, Wm. Adam, Mat. Ross, John Clerk, James Moncreiff.*

For the Respondents, *Ar. Colquhoun, David Boyle, Sir Sam. Romilly, Ad. Rolland, Robt. Craigie, Wm. Horne.*

ARCHIBALD FLEMING, Merchant in Groenock, *Appellant;*
JOHN M'NAIR, Agent at Greenock for the Bank of Scotland, ... } *Respondent.*

House of Lords, 16th July 1812.

PARTNERSHIP—LIABILITY AS PARTNER—ELECTION.—The partnership of Hugh Mathie and Co. consisted of three individuals, who carried on business in Greenock. They had an interest in a separate adventure or concern, with other individuals, at Nassau, one of whom was Fleming in Greenock, the other Howie, in Nassau. Hugh Mathie and Co. managed this foreign business in Greenock. Mathie and Co. became bankrupt, with large bills due to the Bank of Scotland at Greenock, where Mathie had discounted them. The question was, Whether Fleming was a partner of the Company of Hugh Mathie and Co., and liable on these bills? Held him liable for three of them, upon this principle, that his connection with them in the foreign adventure, was such as led to the belief that he was a partner, and made him liable as such. In the House of Lords, it was affirmed, but by applying the doctrine of election to the case.

The company of Adam and Mathie, merchants in Greenock, was dissolved on the death of Mr. Adam, on 26th July 1799. Before that event, they had projected a plan of carrying on a separate concern in Nassau, in New Providence, with the aid and assistance of James Howie, who was to conduct the business at Nassau, receive a salary, and a certain share in the concern. But this project came to nothing by the death of Mr. Adam.

After his death, Mr. Mathie formed a new partnership, consisting of himself, John Parker, his brother-in-law, and James Jamieson, who carried on the old business, under the firm of Hugh Mathie and Co.

The appellant, a merchant in Greenock, then a partner of the firm of Archibald Fleming and Co., and who had become

acquainted with the intended project at Nassau, proposed to Hugh Mathie, then acting under the new firm of Hugh Mathie and Co., that the adventure should be resumed, and offered to take a share in it; accordingly, it was agreed, in 1799, to put into execution the original plan. Howie was to settle there, to receive a salary and share of the business. And it was agreed that the transactions connected with the adventure should be conducted at Greenock by Hugh Mathie and Co.; and as the appellant's house had a house in London, where he himself resided nine months in the year, it was agreed that he should conduct the business connected with the Nassau adventure in London.

There was no written contract of copartnery.

The Company of Hugh Mathie and Co. became bankrupts in 1803, with many bills due, or to become due, in the hands of the respondent, as agent for the Bank of Scotland, who had discounted the same. It seems Mr. Mathie had also been one of the respondent's sureties to the bank for his bank transactions; and it was alleged there was a tendency thence arising to be liberal in discounting.

Although the Nassau adventure was kept separate, unconnected in the general business of Hugh Mathie and Co., and although the appellant alleged that his connection with Hugh Mathie and Co, in that adventure, could not make him generally liable for every bill upon which the name of that firm appeared, yet the respondent, on the bankruptcy, made his claim against the appellant for three of these bills, amounting to £1000, (which form the subject of the present appeal), and also for five bills, amounting to £3999. 10s. 3d. (which form the subject of a separate suit and appeal.)

Vide next appeal.

The proceedings adopted against the appellant were by charges upon the bills, whereupon he brought a suspension of those charges, stating that the appellant had never received any value for these bills; that the name of the appellant did not appear upon any one of them as drawer, acceptor, or indorser; that the appellant was no partner of the firm of Hugh Mathie and Co., and had no other connection with that company than merely that he had joined along with them in an adventure or particular trade to Nassau. And, separately, that the charges were erroneously served, being left in the appellant's house in Greenock, while he was in London, where he had been for some months, whereas, according to the forms of law, they ought to have been served at the market cross of Edinburgh, and pier and shore of Leith.

1812.

FLEMING
v.
M'NAIR.

The Lord Ordinary ordered memorials to report to the Court, and this being done, the Court passed the bill without caution or consignation. On advising a reclaiming petition, in order that the case might be disposed pure of the irregularity of the diligence, the appellant's counsel appeared, and stated that he passed from these objections, and a proof having been allowed and reported, this interlocutor

Feb. 10, 1805. was pronounced: "The Lords having resumed considera-
"tion of the petition for the charger, Mr. M'Nair, and heard
"counsel thereon, in respect of the above consent on the
"part of the complainer, to pass from the objections to the
"formality of the diligence, alter the interlocutor reclaimed
"against, and remit to the Lord Ordinary to refuse the bill
"of suspension."*

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* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL said,

"My Lords,

"The following facts are instructed : 1st, The project of a Nassau concern, originated 29th June 1799, Adam, Mathie, and Howie being the intended partners. But Adam having died, 25th July 1799, Mr. Fleming immediately agreed to come in his place. 2d, The firm of that Company was, Hugh Mathie and Co., under which all its business was transacted in this country. 3d, It was not a momentary adventure, but a permanent copartnery, which continued till Mathie's insolvency in 1803, and would still have continued, had not that event happened. 4th, Mathie carried on other branches of trade, particularly to Barcelona ; first by himself, then with a partner ; and it is supposed with Jameson, under same firm of Hugh Mathie and Co. 5th, The bills in question were discounted at the bank with the firm of Hugh Mathie and Co. upon them, without explanation *ex facie* of the bills for what purpose to be applied, or what Company was meant. Hence the question arises, Whether M'Nair, the holder of them on account of the bank, is entitled to demand payment from Fleming, or what defence the latter has? I am clear that Fleming, as a partner under that firm, is *prima facie*, or by legal presumption, liable ; and that the burden of proof lies upon him of showing relevant grounds upon which he may excuse himself from liability. The holder of a bill, drawn or accepted, or indorsed by the firm of a company, has a right to go against all and every partner of that firm, whether the money has been duly applied

Mor. 14569. or not, Dewar *v.* Miller, 14th June 1766.

"We must take under view both the rules which govern partnership, and the nature of bills of exchange.

Unreported. "In the case of P. Forrester, even where there were no bills, but

On reclaiming petition the Court adhered, but found no expenses due.

The result of this judgment was to find that the appellant was liable in three of the eight bills, amounting to £1000, only sales of goods, and where there were distinct concerns under similar firms, namely, 'P. and Fr. Forrester, Merchants, Leith,' in which there was a John Watt concerned; and 'Peter and Fr. 'Forrester, Merchants in Edinburgh,' yet the Court found, 27th Feb. 1798, that the Leith firm was liable for the price of goods purchased and applied by P. Forrester to the Edinburgh house, and entered in their books, unless where the creditors were aware that the furnishing was to the Edinburgh house, relief being reserved to the Leith house against the Edinburgh house.

"In the present case, if it can be sufficiently made out that M'Nair had *notice* that these discounts were for Mathie's separate concern, this may be relevant to bar him *personali exceptione*, or upon the ground of private knowledge. But it may be asked, does he hold these bills for himself or the bank? What if he had indorsed them away to others? As to one partner binding another by bills, see Harrison *v.* Jackson Douglas, p. 356."

LORD JUSTICE CLERK (HOPE).—"I think the defender here is liable. The firm of Hugh Mathie and Co. was assumed, with the knowledge and approbation of Mr. Fleming. The insurances on their cargoes and vessels, effected under the firm of Hugh Mathie and Co. would have been null, if without interest. It makes no difference that the same name is the firm of another. This ought just to have put him more on his guard. It binds him the more, because the public are more liable to be deceived. This was not a joint adventure, but a trade, similar to the Baltic trade, Turkey trade, &c. Suppose it had been a joint adventure under an individual name, *e. g.* Hugh Mathie. A bill under such a name deceives nobody. If the holder of such a bill can find another latent partner liable under that bill so signed, so far good and well; if not, he is not deceived. But a firm induces a belief that others are concerned."

"It might have happened that Nassau was the losing concern, and the other flourishing, the hardship would have been reversed."

LORD BALMUTO.—I am of opinion that Fleming was not a general partner. The Nassau concern was carried on separately, in different rooms,—different places,—different books."

LORD MEADOWBANK.—"This Company acted as agents for the Nassau concern. The dealers with Mathie were not in *bona fide* to neglect inquiring into the matter. It was their duty to inquire."

LORD CRAIG.—"I think Fleming is liable. He trusted Hugh Mathie to use the firm. The burden of inquiring did not lie on M'Nair. This would make every case of the kind a particular case.

1812.

FLEMING v. M'NAIR.

while, on the other hand, he is not liable for the other five bills, amounting to £3999, which forms the subject of the next appeal brought by Mr. M'Nair. The ground of the distinction taken was this, that in February 1803 the respondent wrote Mathie to know who were his partners, that he might know upon whose credit he advanced money, and from the evidence it appeared that the respondent was then made aware of who these partners were. The three bills for £1000 were discounted prior to that date; but the five bills for £3999 were discounted subsequent to that date, so that the Court held as to them that the respondent could not have discounted these bills under the belief that Mr. Fleming was a partner.

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

Pleaded for the Appellant.—1. The respondent has pleaded all along that the appellant was a partner with Hugh Mathie and Co. in their general business; but the Judges of the Court below rested their decision upon the principle, that though the appellant was not a partner of Hugh Mathie and Co. in their general business, yet as he was a partner with them in an adventure of some importance, and retired their bills connected with that adventure, after the bankruptcy of Hugh Mathie and Co., the respondent, Mr. M'Nair, might have supposed that the appellant was a partner in Hugh Mathie and Co. in their general affairs; and having trusted to the credit of the appellant on reasonable grounds, he was entitled, in equity, to require the appellant to guarantee the whole debts of Hugh Mathie and Co., but the respondent does not so narrow his case, for he contends that the appellant was a general partner of Hugh Mathie and Co. The answers which he has to make to this demand are, 1st, That he received no value in any form for the bills charged on; 2d, And by the practice of merchants, it is not understood that an individual, by taking a share in a particular adventure or speculation, along with a commercial

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Suppose the bills had been discounted in Glasgow or Edinburgh. The case of Forrester and Bannatyne is decisive. An agent for a bank cannot put such questions; and perhaps if he did, may not receive a true answer. Must still trust to the bill itself."

LORD METHVEN.—" I am of the same opinion. Merchants ought to carry on their trade more correctly. We cannot go upon careless practices; and I am therefore for refusing the bill."

" *All* the Judges, except three, held, that Fleming was liable."

company, and allowing that company to manage the adventure, becomes thereby liable to pay the whole debts of the company arising out of their general trade, with which he has no concern. 3d, The appellant never consented to pay the bills in question, nor did he directly or indirectly hold himself out to the public as a person liable to pay the debts of Hugh Mathie and Co. in their general trade. Even Hugh Mathie and Co. did not attempt to support their credit by the name of the appellant, and did not understand that they had power to bind him in matters unconnected with the adventure to Nassau, to which the bills now under consideration bear no relation. The appellant cannot be bound for money which neither he himself, nor any party in his name, did directly or indirectly engage that he should pay. 4th, No positive law declares, that bills or other obligations, granted by a commercial company in their own affairs, shall bind strangers, who have merely taken a share with them in a special trading adventure, such a law would be contrary to equity, would greatly embarrass commercial transactions, and accordingly it has received no countenance in the practice of the courts of justice. 5th, The Bank of Scotland, who, through their agent, are respondents in this case, are a permanent incorporation. Their former agent, Alexander Dunlop, knew that the appellant was not a partner, or member of the firm of Hugh Mathie and Co., and, like the principal merchants of Greenock, considered the appellant as liable only for the engagments of Hugh Mathie and Co. relative to the Nassau concern. The knowledge of an agent must be held equivalent to knowledge by his constituent; and the Bank of Scotland, which is a permanent body, though consisting of fluctuating members, cannot be permitted to say, that by changing its agent, it was ignorant of the matter. 6th, The inquiries made by the respondent concerning the partners of the firm of Hugh Mathie and Co. demonstrate that the respondent did at no period, in discounting bills for Hugh Mathie and Co., rely upon the credit of the appellant. 7th, Supposing, however, that the respondent did, previous to 1803, *believe* the *appellant* to be a partner in general business with Hugh Mathie and Co., and consider himself, on account of that *belief*, as entitled to recourse against the appellant for payment of all obligations granted by Hugh Mathie and Co., it is very clear that on discovering his error, it became the duty of the respondent to have immediately informed the appellant of the principle on which he meant to act; and till the appellant could have

1812.

FLEMING v. M'NAIR.

an opportunity of taking measures for his own security, Mr. M'Nair ought to have given out of his hands no money belonging to Mathie and Co. Had Mr. M'Nair done so, the appellant could have operated relief, 1st, By demanding security from Hugh Mathie and Co., who were in good credit at the time; or, 2d, By arresting in the hands of Mr. M'Nair the funds of Hugh Mathie and Co.

Pleaded for the Respondent.—It is fully established by evidence that the appellant was a partner with Hugh Mathie and Co. in a mercantile business, carried on from the year 1799 to 1803, under the firm of Hugh Mathie and Co.; and the bills in question being accepted or indorsed by the acting partner of that firm in the name of that company, the appellant becomes thereby, as another partner, liable for the payment of negotiable instruments, to which the name of his firm of dealing has been legally affixed, and his credit thereby pledged. 2. Even if it had appeared, which by no means is the case, that Hugh Mathie carried on other business, in which the appellant had no concern, under the firm of Hugh Mathie and Company, that would not remove his liability. The respondent is an innocent holder of these bills, and gave a valuable consideration for them. It is not proved whether he knew that such a distinction did exist; and it is not so much as pretended that he was informed that the bills were not negotiated on behalf of that firm of which the appellant was a co-partner, or that the proceeds were not to be carried to their account. But, to use the words of the late Lord Chief Justice of England, (Lord Kenyon), in a case altogether similar to the present, the appellant is nevertheless liable; "he had traded under that firm, and "persons taking bills under it, though without his know-"ledge, had a right to look to him for payment."

Barker and Others *v.* Charlton, Peake's Ni. Pri. Cases, p. 80.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed; but without prejudice to any question which the appellant may be advised to raise, respecting the effect of any act of the respondent under any sequestration against any other person or persons.*

* This had reference to the possible case of M'Nair ranking, or having ranked and claimed as against the estate of Hugh Mathie and Company, which, if he did, according to the doctrine of Election in England, he could not also claim against the other concern, in which Fleming was a partner, and therefore he would be free.

For the Appellant, *Wm. Adams, Sir Samuel Romilly, John Clerk.*

For the Respondent, *Tho. Plumer, M. Nolan.*

NOTE.—This case is not reported in the Court of Session. Professor Bell, in his Commentaries, vol. ii. p. 670, refers to the case, and states that Sir Samuel Romilly, who was counsel in it, afterwards gave an opinion in a subsequent case, in which he gives, what he understood to be the grounds of the above judgment in the House of Lords, thus: "The question was, who became the debtor of Mr. "M'Nair by the signature of Hugh Mathie and Company to the "bills? The House of Lords was, as I understood that decision, of "opinion that where several partnerships, consisting of different in-"dividuals, carry on business under the same firm, and enter into "negotiable securities under the same signature, the holder of such "securities has a right to select which of these partnerships he "chooses for his debtors. But it never, as I conceive, entered into "the minds of any of the Lords, that he could take all the partner-"ships as debtors. The signature of H. Mathie and Co. being equivo-"cal, and being sometimes used for *Mathie, Parker, and Jameson*, and "sometimes used for *Mathie, Fleming, and Home* (Howie), the Court "was finally of opinion that the *holder of the bills* had an option to "say, which of those partnerships he would understand to be meant. "The Lord Chancellor Eldon, during the argument, expressed great "doubts even upon this point, and a very strong inclination of opi-"nion against it; and said he believed that there was no authority "for such a decision but a *Nisi Prius* case before Lord Kenyon, "which was cited to him in the course of the argument. And his "Lordship, in the strongest terms, stated that it was impossible that "both partnerships should be the debtors. There never was a part-"nership of *Mathie, Parker, Jameson and Home* (Howie), those "five persons, therefore, never could all become bound by the sig-"nature of Hugh Mathie and Company."

JOHN M'NAIR, Agent for the Bank of Scotland in Greenock, . . } *Appellant;*

ARCHIBALD FLEMING, Merchant in Greenock, *Respondent.*

House of Lords, 12th July 1812.

PARTNERSHIP—LIABILITY AS PARTNER.—Held, in the circumstances of the previous case, that after the bank agent wrote Hugh Mathie to know who were his partners, so that he might know on whose credit he discounted the bills, he must be presumed to have received in answer correct information on the subject, and that after *that* he could no longer act in the belief that Mr. Flem-