

[12th May 1835.]

JOHN HUTTON SYME, Appellant.—*Sir William Follett.*

PETER BROWN, Respondent.—*Serjeant Spankie.*

Proof.—Circumstances under which the partners of a joint stock company were held (affirming the judgment of the Court of Session) to be competent witnesses in a question, whether a partner had purchased shares for behoof of another person, who alleged that he had been deceived by misrepresentations to agree to purchase.

THE respondent Brown, merchant in Edinburgh, raised an action of declarator, payment, and relief before the Court of Session against the appellant Syme, a brewer in Alloa, setting forth, that in the month of May 1829 the appellant applied to the respondent to assist him in procuring fifty shares of the stock of the Edinburgh, Glasgow, and Alloa Glass Company: That he represented, that as the Stirling Banking Company, of which he was a partner, although just about obtaining a discharge under their sequestration, had not finally accomplished that object, it would be as well to have the shares taken, in the first instance, ostensibly in the name of some third party; and he prevailed on the respondent to allow his name to be interposed for that purpose, on the express condition, that so soon as the appellant obtained his discharge as a partner of the Stirling Banking Company the shares should be regularly and formally transferred to his own name: That, in consequence of this arrangement, the respondent purchased in his own

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name, but for behoof of the appellant, fifty shares of the stock of the company, at 3*l.* 10*s.* per share; and he granted a missive to the appellant, to the effect that he had sold him the shares at that rate: That the appellant shortly thereafter reimbursed the respondent for the money so advanced: That in the following month of June the appellant requested the respondent to obtain for him other fifty shares of the same stock, which the respondent accomplished at the same rate as in the former transaction; he gave the appellant a letter to that effect, and the appellant afterwards reimbursed the respondent for his advances: That some time thereafter the Stirling Banking Company and the individual partners thereof were discharged, and the sequestration of their estates wound up, and on this being done the respondent became anxious to have the shares thus ostensibly standing in his name formally transferred to the appellant; but as the company had in the meantime become a losing concern the appellant refused to take a transference of the shares: That in consequence the respondent was compelled to pay certain instalments of the one hundred shares, to the extent of 200*l.*, and two other instalments had been demanded by the company, which the respondent was in danger of being compelled to pay, amounting to 300*l.* He therefore subsumed that the respondent, having made the payment of 200*l.* for behoof of the appellant, was entitled to reimbursement from him; and being liable for the sum of 300*l.*, and to be called on for farther payments so long as his name stands as a partner of the company for the shares, the appellant was not only bound to relieve him of all such payments, with interest, but also to relieve him entirely from every risk or responsibility connected with these shares of the stock, by immediately

getting the shares effectually transferred to his own name and risk; and he concluded that it should be found and declared, that the one hundred shares of the stock were purchased for behoof of and belong to the appellant, who ought to be decerned, at his own expense, to have the shares regularly transferred from the respondent to himself, according to the forms and in terms of the contract and regulations of the company; also to make payment to the respondent of the sum of 200*l.*, advanced and paid by him, and interest thereof from the respective periods of advance; and in the event of the respondent being obliged to advance the other sum of 300*l.*, or any part of it, or to make any farther advances or payments on account of the shares, the appellant should be ordained to pay the amount of the same to him, with interest thereof from the periods of advance till payment; as also generally to free and relieve the respondent of all calls or payments exigible or to become exigible by or to the company on account of the stock.

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In defence the appellant stated, that the respondent had adventured largely in the company, having a large number of shares, and was by the contract appointed one of the original directors, and he then removed from Edinburgh, and took up his fixed residence at Alloa, where he took the sole charge as manager, and where the appellant first became acquainted with him; that among other topics which formed the frequent subject of conversation, the state and prospects of the Glass Company was a favourite one, and often introduced by the respondent, who represented it to be as in the most flourishing condition, and in order to induce the appellant to purchase he entered into a variety of particulars and minute details, showing, not only that it was perfectly

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solvent, but that a very certain and large profit would be derived by those who should become partners, and that on the faith of those statements the appellant was induced to give the respondent authority to buy the shares to the extent and at the rate and in the mode stated in the summons, he therefore pleaded, that having been induced by fraudulent concealment and misrepresentation on the part of the respondent, a holder of stock to a large amount, and the managing director, to enter into the transaction, he was not bound thereby, or liable for any part of the sums concluded for.

The following issues were sent to a jury :—

1. Whether, in the month of May 1829, the defender employed the pursuer to procure fifty shares of the stock of the Edinburgh, Glasgow, and Alloa Glass Company, and, in the month of June 1829, fifty other shares of the said stock, for behoof of the defender; and whether the pursuer did accordingly procure said shares; and whether the defender wrongfully fails to take delivery of the said shares, or any of them, and to pay the calls effeiring thereto, and otherwise relieve him as libelled? or,

2. Whether, by the false and fraudulent representations or fraudulent concealment of the pursuer, as to the credit and solvency of the said company, the defender was induced to purchase the said shares or any of them?

At the trial before the Lord Justice Clerk, as President of the Second Division, and a common jury, the respondent put in evidence a great many documents to prove the first issue; and in anticipation of the evidence to be led by the appellant in support of the second issue he adduced, among other witnesses, several part-

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ners of the company. In particular, in the bill of exceptions, afterwards presented, he offered “ Maurice Lothian, solicitor in Edinburgh, who, it was admitted by the counsel for the pursuer, was a partner of the said Edinburgh, Glasgow, and Alloa Glass Company, and had been a partner of the said company for several years. Whereupon the counsel for the defender did object,—That the said Maurice Lothian was not a competent witness for the pursuer in this action, in respect that he was a partner of the said Edinburgh, Glasgow, and Alloa Glass Company, and as such partner was materially, directly, and immediately interested in the issue of this action, inasmuch as it was for the interest of the witness that the pursuer, being still a partner of the company, should obtain decree in terms of the libel in this action; and, in support of this objection, the said counsel for the defender did offer instantly to prove that the said Edinburgh, Glasgow, and Alloa Glass Company was absolutely and irretrievably insolvent at the date of this action. But the said Lord President did overrule the said objection preferred by the counsel for the said defender, and did allow the said Maurice Lothian to be received and examined as a witness for the said pursuer. Whereupon the said counsel for the said defender did except to the foresaid opinion and deliverance of the said Lord President, and did tender their exception accordingly.” Several other witnesses who were in the same position were objected to, but the objection was repelled; and after they had been fully examined by the respondent, and cross-examined by the appellant, the following statement appeared in the bill of exceptions:—“ And it being ad-

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“mitted by the counsel for the pursuer, that all the
“witnesses objected to were partners of the said Edin-
“burgh, Glasgow, and Alloa Glass Company, the
“counsel for the defender did then and there state to
“the said Lord President, that, in consequence of the
“decision of the Court allowing the said witnesses to
“be examined, and the turn the evidence had taken;
“they now gave up the case. And the said Lord Pre-
“sident did direct the jurors aforesaid to find for the
“pursuer on both issues; and the said jurors did ac-
“cordingly find for the pursuer on both issues.” The
bill of exceptions¹ was afterwards presented to and heard
before the Second Division, who (5 Feb. 1835) dis-
allowed it, and found the defendant liable in expenses.²

Syme appealed.

Appellant.—The defence of the appellant resolved into an allegation, that his consent to purchase the

¹ The bill contained a full recital of all the documents, and of the notes of the presiding judge; and in reference to this the appellant stated, “It is necessary to explain in what manner the bill of exceptions which has been disallowed comes to embrace a great deal not material to the decision of the question. As originally framed by the appellant, the bill was brief enough, and only set forth the objections which had been taken to the witnesses whose evidence was deemed inadmissible, and the evidence which they gave. The bill in this form met with the approbation of the learned Lord Chief Commissioner Adam, who, though not now a judge on the Scotch bench, is pleased to favour the profession with his valuable assistance in all matters relating to trial by jury. The bill was then signed by the judge who presided at the trial. But at the hearing of the exceptions the respondent insisted that the whole of the judges’ notes should be engrossed in the bill; and the court being of opinion that this request ought not to be resisted, the appellant consented. The consequence has been, that the bill has assumed its present unwieldy appearance, and embraces much more than is material to the decision of the question upon which the judgment of this House is called for.”

² XIII. S. D. B. 407.

shares had been obtained through gross and wilful misrepresentation and concealment of the situation of the company at the time he was induced to communicate with the respondent. If the allegations of the appellant be true, it is plain that the respondent and all the subsisting partners of the company had a material interest to induce as many persons as possible to become shareholders of the concern, with the view of obtaining the greatest possible security against being obliged to sustain more than their rateable proportion of the loss. Besides, in regard to third parties, the subsisting partners have an interest to get in additional associates, because, by so doing, they diminish the chance of attack upon themselves, and are less likely to be placed in the situation of parties who have to levy contributions on the other partners, instead of being merely rateable contributors. And the risk arising from the possible bankruptcy of any of the subsisting partners, who, while solvent, may be made universally responsible, materially increases the interest of all the present partners in having new parties introduced, so as to enlarge the aggregate of individual responsibility, and improve the chances of mutual relief among the subsisting partners. It was in these circumstances that the respondent adduced his socii as witnesses. Although the appellant was at one time sequestrated as a partner of the Stirling Bank, he has obtained his discharge, and is now perfectly solvent. So that the attempt is not to bring in an insolvent partner into the company, but one of whose solvency there is no question. Had it been contended that the appellant was insolvent, the question as to the admissibility of the respondent's copartners might have been viewed differently, because their interest might have been dif-

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ferent. This question is always one of circumstances; and will be decided according to the interest which these circumstances may create. In arguing it, the case of Mr. Lothian may be taken, and it is plain he had an interest that the appellant should be found to be a partner. The respondent was, independent of the shares purchased for the appellant, a partner, so that this is the case, not of the substitution of one person for another, but of the introduction of an additional partner. It is admitted that all the shares have not been paid up, and that many of the instalments still remain due. Now, the partner introduced into the company is obliged to pay to his copartners a proportion of whatever sum shall not be recovered from the defaulters. It is true, that the obligation will attach according to the number of shares which are held; but the security is greater from two persons than one, even admitting that both are solvent. The respondent concludes for payment of instalments said still to be due, or for relief of demands that may still, and some of which inevitably must, be made for the liquidation of the debts of the company. It is admitted that the respondent is bound for these instalments, and he must pay them if he is able; and it is obviously for the interest of Mr. Lothian to obtain a guarantee for that payment? It is true, that it may be indifferent to him by whom the payment is made; but it cannot be indifferent to him to have a guarantee for the sure payment. The respondent bought the shares in question, and whether, in buying them in his own name, but for behoof of the appellant, he deceived the latter or not, the respondent must make good to the copartners all the obligations corresponding to these shares; but if he succeeds in showing that he did not deceive

the appellant, then the appellant is bound to relieve him; that is, he too will be bound to make good all the obligations corresponding to these shares.

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If this were the case of a sale to a person who comes into the market on his own account, and being unable to do so by the contract of copartnery, makes a new sale to another purchaser, there might be room for contending, that if the sale were validly effected, the first purchaser was out of the field, and the company must take the second purchaser; and that if both were solvent, it was a matter of indifference to the company which of the purchasers retained the share. This was the view taken in the Court below; but it is quite erroneous. It is the case where there will be two partners in place of one, and consequently two parties from whom the other partners may obtain relief instead of one only.

Therefore it is obvious Mr. Lothian had an interest to make the appellant a partner. The decree in this action would clearly make the appellant a partner, for the judgment would be *probatio probata* to all the world; and the appellant could never maintain, after such decree, that he was not a partner. No doubt the decree might be *res inter alios acta*, but it could never be *res alia* in the question whether he was a partner or not; Lothian had, therefore, precisely the same interest to bring in new partners which the respondent had. Every benefit which would accrue to the respondent would also accrue to Lothian, and consequently the latter cannot be admitted to further that interest.¹

¹ Tait on Evidence, p. 355, (last edition); *Bank of Scotland v. Padon*, 10 July 1824 (S. D.); 2 Stair, p. 413 (More's edition); *Muschet v. Christie*, 5 July 1759 (16768); *Ralston v. Rowat*, 3 Clark & Finnelly, p. 424;

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Respondent.—1. The course adopted by the appellant before the jury, if he meant to prosecute it farther in any other shape, was contrary to the express directions of the statute which regulates trial by jury in civil cases in Scotland. By that act (55 G. 3. c. 35. s. 7.) it is provided, that “it shall be competent to the counsel
“ for any party at the trial of any issue or issues to
“ except to the opinion and direction of the judge or
“ judges before whom the same shall be tried, either as
“ to the competency of witnesses, the admissibility of
“ evidence, or other matter of law arising at the trial;
“ and that on such exception being taken the same shall
“ be put in writing by the counsel for the party object-
“ ing, and signed by the judge or judges; but, notwith-
“ standing the said exception, the trial shall proceed,
“ and the jury shall give a verdict therein for the pur-
“ suer or defender, and assess damages when necessary;
“ and after the trial of every such issue or issues the
“ judge who presided shall forthwith present the said
“ exception, with the order or interlocutor directing
“ such issue or issues, and a copy of the verdict
“ of the jury indorsed thereon, to the division by
“ which the said issue or issues were directed, which

Carter v. Pearce, 1 Term. Rep., Durn. and East., 163; Radburn v. Morris, 3 Car. and P. 254; S. C. Nom. Radburn v. Morris & Bottomley, 4 Bing. 649; Vaughan v. Worrell, 2 Swan, 399; and in Mulvany v. Dillon, 1 Ball. & B., 409; Tindal C. J. in Fox and Clifton, 6 Bing. 776; Col. on Partnership, p. 626; Pothier, Traité du Contrat de Société, c. 6. s. 1; Lord Eldon in Carlen v. Drury, 1 Ves. & Beam. 157; Starkie on Evidence, p. 105, et seq.; Phillips, vol. i. p. 59; Bent v. Baker, 3 Term. Rep. 27; Smith v. Prager, 7 T. R. 60; Collyer's Treatise on Partnership, p. 455; 2 Esp. Rep. 608; Buckland v. Tankard, 5 Term Rep. p. 579; Powel v. Gordon, 2 Espinasse, p. 735; Evan's Pothier, tit. Evidence; Starkie on Evidence, p. 119; Brown v. Brown and Jubb, 4 Taunt. 752; Chapman v. Graves, 12 Campbell, N. P. C. 333; Ripley v. Thompson and two others, 12 Moore, p. 55.

“ division shall thereupon order the exception to be
 “ heard in presence, on or before the fourth sederunt
 “ day thereafter.”

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Now, the appellant, instead of allowing the trial to proceed, stopped it short, and stated judicially that he gave up the case.

Accordingly, the rule bears that “ it being admitted
 “ by the pursuer, that all the witnesses objected to were
 “ partners of the said Edinburgh, Glasgow, and Alloa
 “ Glass Company, the counsel for the defender did
 “ then and there state to the said Lord President, that
 “ in consequence of the decision of the Court allowing
 “ the said witnesses to be examined, and the turn the
 “ evidence had taken, they now gave up the case.”

The appellant, therefore, was not within the statute at all when he presented the bill of exceptions; and as this is entirely a statutory remedy, he is not entitled to it at all, if he is not in the precise case that the act points out. The act, however, only allows a bill of exceptions where a trial proceeds and is finished, and not where the case is given up before the proof is closed.¹

2. There was no intelligible or specific objection taken at the trial, nor is there any set forth in the bill of exceptions, to the admissibility of the witnesses.

It is impossible to discover in the bill of exceptions upon what ground in law it can be maintained that the witnesses were improperly admitted. It is merely said that the witness was incompetent, “ in respect that he

¹ Doe v. Lord Teynham, 6 Bing. p. 561; Alexander, 2 Crompt. & Jer. p. 133; Scott, 3 Murray, p. 529; Gilchrist, 3 Murray, p. 367; Phillipps on Evidence, chap. v. sect. i.; Vaughan, 2 Swanston, p. 399; Earl of Fife, 1 Mur. Rep. p. 130; 3 Mur. p. 451; 4 Mur. p. 176; Middleton v. Frost, 4 Car. & Payne, p. 16.

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“ was a partner of the said Edinburgh, Glasgow, and
 “ Alloa Glass Company, and as such partner was ma-
 “ terially, directly, and immediately interested in the
 “ issue of this action, inasmuch as it was for the
 “ interest of the witness that the pursuer (respondent),
 “ being still a partner of the company, should obtain
 “ decree in terms of the libel in this action.” This is
 the only explanation that was given by the appellant
 at the trial, of his objection to the competency of the
 witnesses in question, and it is the only explanation set
 forth by him in his bill of exceptions, which is the only
 record or pleading that can be looked to on the subject.
 It is merely said, that the witnesses were incompetent,
 as being interested that the pursuer should obtain a
 verdict, because they were, like him, partners of the
 glass company; but it is nowhere explained how this
 circumstance created an interest. The glass company
 were not pursuers of the action, or parties to it in any
 shape, and therefore the objection to the witnesses can-
 not rest on that ground; neither is it pretended that
 they were liable with him in the expenses of the suit,
 or were connected to him by relationship, so that the
 objection cannot refer to any plea of that description.

It is indeed impossible even to explain the alleged
 interest without travelling out of the bill,—without sup-
 posing and imagining facts, or a possible state of facts,
 not even alleged in the bill. But before an objection to
 a witness can be sustained on the ground of interest
 that interest must be proved as matter of fact, and it
 must be stated as matter of record.

3. From the terms of the issues it is manifest that the
 first was that in which alone, in the first instance, any
 burden of proof lay on the respondent. But that issue,

(which relates simply to the fact of the appellant having authorized the respondent to buy one hundred shares of the stock for him,) was proved by the documentary evidence alone. And if any farther proof were necessary, there was the evidence of the two first witnesses examined, to whom no objections of any sort were stated; and accordingly the respondent left the first issue with the jury upon that evidence.

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The second issue was framed with the view of giving the appellant an opportunity of proving his charges of fraud, if he could. The whole burden of establishing these averments lay on the appellant; and therefore the question put to the jury under the second issue was, “Whether, by the false and fraudulent representations or fraudulent concealment of the pursuer, as to the credit and solvency of the said company, the defender was induced to purchase the said shares or any of them?”

But it was the right and duty of the respondent, before closing his case as pursuer, to meet these allegations, and with that view to adduce the various members of the company who could establish that the appellant had, by inquiries at themselves, taken means to ascertain the real state of the company from those best acquainted with its affairs. The members of the company were obviously the witnesses best qualified to speak to the origin and cause of their later embarrassments, and to prove their opinion of the prospects of the company, and the real worth of the shares in 1829, when the purchases were made for the appellant's behoof. In order to establish the facts on this part of the case, the respondent called as witnesses five gentlemen, who were shareholders in the company at the period of their examination.

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The appellant objected to these witnesses as incompetent on the ground of interest. He alleged that the company was insolvent,—at least that its stock could not meet its engagements;—that there must be large contributions from the partners to provide for the loss; and that the general body of shareholders had thus a direct interest to get the appellant declared a partner, so as thereby to have an additional party liable to them for relief of a sum against the loss sustained by the company.

But it was plain that the shareholders had no interest in the present question. The whole loss on the shares must be borne either by the respondent or appellant, according as the right to the shares may be ultimately declared. So that it was of no importance to the other partners from which of the present litigants the contribution came. No doubt, if the respondent had been bankrupt, the other shareholders might have had an interest in having the shares transferred to a more solvent party; but no allegation of bankruptcy against the respondent was made.

Nay, the shareholders had rather an interest against the respondent, for the appellant himself only got his discharge as a bankrupt in the year preceding the date of the summons in this action,—and, therefore, if any weight could be given in a question of this sort from remote contingencies or probabilities, the chance rather was that the respondent was a better partner for the other shareholders than the appellant.

Besides, even if any interest had been made out, the partners would have been competent, from the peculiarity of their situation, and from the necessity of the case, as they could speak to facts which they alone, in the ordi-

nary course of business, could be acquainted with. The state of a company's affairs can only be properly known to the partners. And when the purchaser or assignee of a share of any joint-stock association says that he relied on the statements of the seller alone, it must surely be competent to call other shareholders, to show that he applied to and got from them all their views respecting the situation of the company. In such a case the shareholders were obviously the best witnesses to speak to the facts connected with the second question here put to the jury. Accordingly, the respondent is not aware that any such objection as the present was ever attempted to be stated before. On this matter the law of England and of Scotland is the same; but if a question arose in any of the English courts respecting the sale of a few shares of any of the great mercantile companies, such as the Bank of England, Sun Fire Office, or even any of the later joint-stock companies, could an objection of interest be gravely stated in a trial respecting specific shares, if any of the conferences relative to the bargain were proposed to be proved by witnesses who had no connection with the parties, except holding other shares in the same extensive companies?

The appellant of course will say, that the companies, in the case supposed, are not bankrupt, while the affairs of the Alloa Glass Company are in a state of deplorable wreck. Now, it is quite true that in one sense the Alloa Glass Company is bankrupt; that is to say, its stock and assets are very far short of the obligations and debts due by the company; but in another sense the company is redundantly solvent, as some of the wealthiest men in the city of

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Edinburgh are partners in it; so that all third parties will receive (and it is believed have received) payment of every farthing of principal and interest due by the company.

4. But, fourth, the bill of exceptions was properly disallowed, because enough was proved aliunde and exclusive of the witnesses objected to, in order to entitle the respondent to a verdict.

LORD BROUGHAM. — My Lords, I do not take the trouble of going through the arguments in this case. I am of opinion that the interest in this case is not that direct, and immediate, and substantial, and pecuniary interest which disqualifies the witness from giving evidence. I think the Court below have properly admitted his evidence, and that there are some Scotch cases referred to which afford a precedent for what has been done.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant.

JOHN MACQUEEN — RICHARDSON and CONNELL, —
Solicitors.