

No. 3. must be held to be sunk in the company estate, leaving only a personal interest in each of the partners, agreeably to the principles of the decision 19th November 1742, Neilson against Rae, No. 52. p. 716. But they remitted to the Lord Ordinary to hear parties farther as to the tenement of houses.

Lord Ordinary, *Polkemmet.*

Act. *Cathcart.*

Agent, *John Young.*

Alt. *Robertson.*

Agent, *Ja. Balfour, W. S.*

Clerk, *Menzies.*

J.

Fac. Coll. No. 152. p. 339.

* * This case is under appeal, not yet (1809) discussed.

1805. February 5. MURRAYS against MURRAY.

No. 4.

The stock of a company, though consisting entirely of heritable property, is, in questions of succession, held to be moveable.

IN the year 1781, Hugh Murray, and William Murray his brother, engaged in a copartnery to sell porter and ale by retail in Edinburgh. They had both originally been operative masons; and after they had carried on the business of selling ale for several years, they were induced to employ the profits of their trade in building houses, or in purchasing houses, and afterward disposing of them. This traffic in houses was so profitable, that the brothers were induced to embark in it to a considerable extent, though they, at the same time, continued to carry on their former business.

There was no written contract of copartnery in either concern; but it was understood by both, that the profit and loss should be divided equally. Their stock was applied indiscriminately to the one business or the other. The purchases which they made of houses or areas were devised "to William Murray and Hugh Murray, their heirs and assignees whatsoever;" and to avoid a plurality of vassals, the feu-rights were generally taken to one or other of the brothers.

In 1795, Hugh Murray died, leaving a widow and several children. Upon this occasion an action was brought by William, with concurrence of his brother Hugh's representatives, to have the whole of the property, heritable and moveable, which constituted this joint concern, equally divided. A proof of the rental and value of the heritable property was taken, which was divided into two lots, one of which was adjudged to William Murray, and the other to Thomas Murray, the eldest son and heir of Hugh. The moveables and stock were in like manner divided into two parts, one of which was retained by William Murray, and the other allotted to his brother's widow and younger children. While this division was going on, it does not appear, that the widow or younger children conceived that they had any right to a share of the heritable property, except the right of terce enjoyed by the widow.

Afterward, however, an action of reduction and declarator was brought at their instance against Thomas Murray, the eldest son, concluding, that the

above decree of division should be reduced, and that the heritage allotted to the eldest son, being part of the stock in trade of William and Hugh Murray, should be divided in the same manner as the moveable effects.

The Lord Ordinary sustained the defences. Afterward, however, the Court, upon advising a petition with answers, remitted to his Lordship to receive a condescendence from the pursuer, and allow a proof before answer. A proof was accordingly taken; and the Lord Ordinary took the cause to report, reserving to the Court to determine whether William Murray, the brother of the deceased, should be examined as a witness.

The Court ordered his examination; and his deposition was accordingly taken, from which, as well as from the rest of the proof, it appeared, that the two brothers understood their copartnership to extend to the whole of the houses which they purchased; and that they were all bought with the view of being afterward sold with profit.

Upon advising informations for the parties, with the proof adduced, the Lords (1st March 1804) altered the interlocutor of the Lord Ordinary, and sustained the reasons of reduction.

Against this interlocutor, the defender presented a reclaiming petition, and

Pleaded: The feudal investitures by which these tenements were held, were not taken to a company, but to individuals, their heirs and assignees. This marks distinctly upon whom the succession was intended to devolve. The copartnership, as far as related to the purchase and sale of houses, was nothing more than an agreement between the two brothers, to have a joint concern in heritable property, and in all the profit and loss that might attend it. It is not to be presumed that any such undertaking was intended to alter the rules of succession in heritable property. It is true, company stock is considered as moveable, so as to descend to executors; but this has arisen from the circumstance, that the stock of a trading company is generally in its own nature moveable, and would descend to executors, although it did not form any part of a company-stock. In like manner, heritable subjects have been held as part of a company-stock, when they are so necessarily connected with the copartnership, that the business could not be carried on without them, as a brewery, distillery, or dock-yard; and, in this case, the cellars where the porter-business was managed, come under the description of company-stock. But the principle has never been extended to heritable subjects nowise connected with the trade which is carried on. On the contrary, in the case of a lease granted to a number of persons, the right of each partner, upon his decease, devolves to his heir; Fairholm against Marjoribanks, 23d January 1725, No. 7. p. 14558.

Answered: The principle which regulates the interest of individual partners in a company concern, has been long understood and established. Where a copartnership is formed, an artificial person is created distinct from the individual

No. 4. members. The company, which is this artificial person, is to be the proprietor of the whole stock, heritable as well as moveable. The interest of the individual partner is merely a personal claim against the company, for his share of the profits during the subsistence of the copartnery. Hence it follows, that an individual partner has no right of property in any subject belonging to the company; that company-creditors are preferable over the stock of the company; and that the share of a partner is taken up, not by service, but by confirmation; Erskine, B. 3. Tit. 3. § 24.; Neilson against Rae, 19th November 1742, No. 52. p. 716; Young against Campbell, 27th January 1790, No. 62. p. 5495.

Such being the principles by which company-stock is regulated, it evidently makes no difference whether that stock consist of heritable or of moveable property. It is admitted, that a partner's share of an heritable subject, if occupied by the company for the purposes of the trade, becomes moveable. But, if the place where the company trade is carried on, though heritable in its nature, becomes moveable, there is no reason for holding that the stock which is the property of the company, should not undergo the same change. It may be very true, that the stock of copartners is generally moveable; but at the same time they are often possessed of heritable property to a great value, which they must be understood to hold under the same conditions as the rest of their property; Crooks against Tawse, 29th January 1779, No. 33. p. 14596. And the circumstance of a company being possessed of more or less heritable property, can make no difference on the general rule.

It is true, the title-deeds are not taken to the company, but to the individual partners. But, it is perfectly clear that it was not meant to put the heritable property upon a different footing from the rest of the company effects; nor has it been pretended, that those tenements, the titles of which were taken in favour of the one or the other, became the private and exclusive property of him in whose name it was taken. The whole was a company concern; and the interlocutor cannot be altered, without an alteration of the law with regard to copartnery funds.

The Court, upon advising the reclaiming petition, with answers, by a great majority, adhered to the interlocutor.

The majority of the Judges were perfectly satisfied, that the fact of the partnership was completely made out; and, that being the case, that the right of each partner was of the nature of a personal obligation against the company, for a share of the profits, whether these arose from dealing in heritable or moveable subjects.

Lord Ordinary, *Craig*.
Alt. *Inglis*.

Act. *Fletcher*.
Agent, *Wm. Allister*.

Agent, *S. Macknight, W. S.*
Clerk, *Ferrier*.

J.

Fac. Coll. No. 197. p. 441.