

terminated proportions of the profits; and if the partners were not obliged to join, a ninety-ninth share was as good, and might draw as much profit as all the rest of the patent.

To obviate the inconveniency of forcing a society, and at the same time to fix the interest of the parties proportionably to their interest in the patent, it was proposed by some of the Lords, that they might act separately, and account to one another for the profits.

The Lords, 26th June, 1745, found, that Mr. Freebairn the pursuer was not entitled to compel Mr. Watkins to enter into a joint trade of printing patentee books with him; that the said Richard Watkins, in consequence of his rights, might print separately all or any of the books enumerated in the patent, and that he was not obliged to communicate to the said Robert Freebairn any share of the profits arising therefrom; and, on a bill and answers, adhered.

Act. *A. Maedonall & Lockhart.* Akt. *W. Grant.* Reporter, *Dun.* Clerk, *Murray.*

*Fol. Dic. v. 4. p. 289. D. Falconer, No. 112. p. 133.*

1798. January 24.

PATRICK WARNER and his CURATORS, against ROBERT REID CUNNINGHAME.

IN 1783, Patrick Warner and Robert Reid Cunninghame, two adjoining proprietors on the coast of Ayrshire, entered into a contract, by which Mr. Warner granted to himself and his partner, and their heirs, a lease of the whole coal upon his estate, for 124 years from 1770, since which time, in consequence of previous agreements, a connection had subsisted between them; and Mr. Cunninghame, on the other hand, granted a lease of part of the coal on his property, with the salt-pans on it, and right to a canal through it.

The coal and salt-works were to be wrought for the joint behoof of the Company during the contract, which was declared binding on the partners and their heirs for its whole period, unless the coal on Mr. Warner's property should be sooner exhausted.

Mr. Cunninghame was declared to be sole manager during his life, and, at his death, the manager was to be chosen by the parties, or, in case of their not agreeing in their choice, by the Sheriff-depute of the county.

Mr. Warner died in 1794, and in 1796, his son Patrick Warner, with consent of his curators, raised a reduction, in which he, *inter alia*,

Pleaded: The *dilectus personæ* and consent necessary for the constitution of a copartnership, are equally requisite for its subsistence. Hence, both by the Roman law, and our own, a private society, though formed for a fixed period, may be renounced at any time, the person renouncing being always liable in damages, if he do so, *dolose* or *intempestive*, *D. Pro socio, L. 4. L. 14. L. 65. § 6. Voet. h. t. § 9.*

No. 35.

No. 36.

A contract of copartnership, by which the partners granted to themselves, and their heirs, mutual leases of coal and salt-works on their respective estates, to be wrought for their joint behoof, found to be binding on their heirs, unless they could show good cause for dissolving it.

No. 36.

It is equally fixed upon the same principle, that the heir of a partner is not only not obliged to continue in the Company, but that he is not even entitled, without a new consent of the surviving partners, to remain a member of it; *D. Pro socio, L. 35. L. 36. L. 39. L. 65. § 9; Voet, h. t. § 23.; Bankton, B. 1. Tit. 22. § 18.; Erskine, B. 3. Tit. 3. § 25, 26.*

Nor do the mutual leases contained in this contract vary the question. They are subordinate to the contract, and, upon the division of the stock of the Company, each party will resume his own property.

Answered: Whatever may have been the case in the Roman law, where questions of this sort were little understood, our law on the subject is well stated by Lord Stair, who declares, that a private copartnery is not supposed to descend to heirs, "unless by custom or paction the contrary be provided; which no doubt is consistent with, though not consequent from the nature of the society;" Stair, B. 1. Tit. 16. § 5. Now, in this case, it was expressly agreed, that the connection should subsist during the whole period of the contract; and, independently of the express obligation upon heirs continued in it, this must have been implied from the nature of the concern, where a great expense was necessary at its commencement, and a long period before an adequate return could be expected. The general doctrine is confirmed by the mutual leases contained in the contract.

The Lord Ordinary "found, that as the pursuer, Mr. Warner, represents his father, he is bound to fulfil his father's lawful engagement: Found it was a lawful engagement for him to enter into a copartnery connection with the defender, beyond the probable endurance of his own life, where the subject of the concern was to consist of coal and salt-works, on which a great expenditure was required, to render them profitable, and a tract of years to realize that profit: Found it was a lawful provision in such a contract, to appoint the defender manager of the concern during his life, and that of consequence there is, *in hoc statu*, little room for the pursuers founding on a cordial co-operation of partners as an essential of the contract of copartnership; but the Lord Ordinary being nevertheless of opinion, that if the partnership challenged was obtained by deception practised against the late Mr. Warner, a reduction of it is competent; and also, that if it is a losing concern, and threatens to involve the pursuer in future loss, or if the defender's conduct as manager has been such as to render his fidelity or ability for the undertaking justly suspected, it must be competent to the pursuer to get free of the concern, by obtaining a dissolution of the partnership, and a sale of its property, whether heritable or moveable, and thereupon a final division of the profit and loss: Appointed the pursuer to put in an articulate condescendence, without argument, of what he alleges on one or all of these grounds, for getting free of the partnership."

Upon advising a petition for the pursuer, with answers, the Court, upon the principles stated in the interlocutor by the Lord Ordinary, "adhered."

Lord Ordinary, *Meadowbank.*

Act. Solicitor-General Blair, Hope, D. Cathcart.

Alt. Geo. Fergusson, Boyle.

Clerk, Pringle.

D. D.

*Fac. Coll. No. 56. p. 126.*