

1804. March 1. SIME, against BALFOUR and Others.

No. 3.

JOHN SIME, shipbuilder in Leith, by his first marriage had a daughter Margaret, and by a subsequent marriage a son John, who was for many years his partner in business. Before the commencement of this copartnery, the father purchased certain heritable subjects in North Leith, the conveyance of which was taken to himself and his second wife in conjunct fee and liferent, and to John Sime junior, their only son, his heirs and assignees whatsoever, heritably and irredeemably, "with liberty to the father to sell or burden the subject."

A subject in itself heritable, if forming part of the funds of a company, and used for the purposes of their trade, is held to be moveable so far as regards the interest of each individual partner.

John Sime and son carried on the business of shipbuilding without ever having entered into any regular contract of copartnery. During the subsistence of the concern an inventory was made of the funds of the Company, in which were inserted not only the goods and debts belonging to them, but also the heritable subjects which had been acquired by Sime senior. These consisted partly of dwelling-houses in Leith, which were let to tenants, and partly of a dock-yard, with its appendages, which was used for carrying on the trade. John Sime senior died in 1777, after having executed, the year before, a general disposition and assignation of his whole estate, real and personal, in favour of his son, whom he appointed his sole executor, under the burden of an annuity of £50 to his daughter. John Sime junior, intromitted with the whole of his father's effects, continued to carry on the business as formerly, and his sister lived in his family till his death. In 1789, he executed two deeds, by which he conveyed his whole estate to James Balfour, writer to the Signet, and others in trust, for payment of certain legacies and annuities, and for conveying the remainder to John Kirkpatrick, his residuary disponee. He died in 1796, and soon after his sister brought an action against his trustees and residuary disponee, concluding for payment of the annuity provided to her by her father, under deduction of a reasonable allowance for her board while she lived in her brother's family, and also for the legitim due to her out of the goods belonging in communion to her father and mother.

After some procedure, the Lord Ordinary reported the cause, and the Court (May 28, 1800) found the pursuer entitled to her *legitim*, and remitted to his Lordship to ascertain the amount.

In ascertaining this amount, several questions occurred. The pursuer contended, that she was entitled to one half of the value contained in the inventory of the goods belonging to John Sime and Son. But it was maintained by the defenders, that as this contained the whole stock in trade belonging to the copartnery, one half of it belonged to the son as his own property, which must be withdrawn before the amount of the father's moveables at the time of his death could be ascertained.

It was farther contended by the pursuer, that the heritable subjects contained in the inventory of the goods and debts belonging to the copartnery of

No. 3. John Sime and Son must be considered as moveable, being part of the stock of a trading company, and that she was entitled to include these subjects in the fund from which the *legitim* was to be drawn; Crooks, 29th January 1779, No. 33. p. 14596. But it was maintained, on the other hand, that the mere insertion of these subjects in the inventory could not alter their nature so as to render them moveable, in opposition to the feudal investitures by which they were held, and that John Sime *junior* was entitled to them both as his father's heir or general disponee, and as the heir under the investitures. It was contended, that whatever reason there might be, in questions with creditors, for holding the whole funds of a company to be moveable, so as to be attached for the debts of the company, it would be a very different case, if the mere insertion of such subjects in an inventory were to do away the deliberate settlements previously executed, and alter the succession in favour of a party for whom it was never intended.

The Lord Ordinary pronounced the following interlocutor: ' Finds, That a copartnership in the trade of shipbuilding subsisted between the father and the son, John Sime *senior* and *junior*, for a number of years: Finds it instructed by the inventories made up at four different periods, that the whole property both heritable and moveable, contained in said inventories, fell under this copartnership, and was understood between the father and son to be their joint *pro indiviso* property, in equal shares, both as to stock and profits: Finds, That the assumption of the son into this copartnership, whereby the father in his lifetime had bestowed on him one half or nearly so of his whole substance, is to be held as a virtual and effectual forisfamiliation of the son, so as to exclude him from any after-claim of *legitim* at his father's death: Finds, That by the father's death the copartnership was dissolved, and that there then fell to be an equal division of the property thereof, one half of which belonged to John Sime *junior pro proprio jure*, and the other half fell to be taken up by the father's representatives: Finds, That the plea of the pursuer, that the father's interest in the whole copartnership subjects and effects is to be held as a moveable or personal right falling under the executry, (though applicable to the case of a copartnership, or trading or manufacturing company, so constituted as not to be dissolved by the death or bankruptcy of one partner, and when the share of the deceasing or bankrupt partner is to be drawn out according to a certain valuation), does not, however, apply in this case, where the father's death affected a total and absolute dissolution of the copartnership, so that his share of the property thereof did thereby become descendible to his representatives, according to the general rules of law as to heritable or moveable succession: Finds, That such part of the father's half of the copartnership property as was heritable fell to John Sime *junior*, as disponee by the father's settlement in his favour: Finds, as to the father's moveables, that the half or dead's part fell likewise to John Sime *junior*, in virtue of said settlement: Finds, That the other half, as *legitim*, fell wholly to the pursuer, her father's

‘ only remaining child *in familia*, in consequence of the son’s forisfiliation
 ‘ aforesaid : Finds the pursuer entitled to said legitim, with the interest there-
 ‘ of from her father’s death : And finds, That the long lapse of time which
 ‘ intervened between the opening of the pursuer’s claim and its being insisted
 ‘ in, affords the defender no plea of favour for the restriction of the interest or
 ‘ otherwise, in respect there is no appearance that John Sime *junior* did ever com-
 ‘ municate to his sister, the pursuer, the contents of their father’s settlement, or
 ‘ ever applied for her acceptance of the annuity in place of her right of legitim :
 ‘ As to the other matters in controversy between the parties, renews the re-
 ‘ mit to the accountant, to report a state of the amount of the pursuer’s legi-
 ‘ tim upon the principles of this interlocutor.’

Both parties presented representations against this interlocutor, with which his Lordship made great avisandum. And the Court (November 17th, 1803), upon the report of the Lord Ordinary, and “ having advised the mutual in-
 “ formations for the parties, find, That there was a subsisting partnership be-
 “ tween John Sime and Son, in consequence whereof John Sime, *junior*, had
 “ right *proprio jure* to one half of the partnership : Finds, That the dock, and
 “ pertinents thereof, which were used in the business of the partnership, must
 “ be held as sunk in the Company’s estate, and moveable as to every question
 “ of succession ; that the son’s legitim remained entire, in respect the same has
 “ never been discharged, without prejudice to any claim of collation at the in-
 “ stance of his sister Margaret, who is also entitled to her claim of legitim,
 “ with interest from the time of her father’s death, but subject to a reasonable
 “ deduction for board, clothing, and other articles furnished to her while she
 “ lived in family with her brother ; and remits to the Lord Ordinary to hear
 “ parties with respect to the tenement of houses which was not used in the
 “ business of the copartnery, though entered in the inventories.”

To this interlocutor the Court adhered, by refusing a reclaiming petition without answers.

There was some difference of opinion on the Bench, with respect to the claim of the pursuer to a share of the heritable subjects contained in the inventory of the company effects. Some of their Lordships thought, that the insertion of these subjects in the inventory of goods belonging to a father and son, was not of itself sufficient to alter their nature, so as to render them moveable, and therefore that no legitim was due from any of these subjects. It was thought, on the other hand, that the exception of company funds, though heritable, from the ordinary law of heritage, was as much established as the general rule ; that the whole subjects in the inventory ought to be held as sunk in the Company’s estate ; and therefore, that the pursuer’s claim of legitim extended to her father’s share of the whole of these heritable subjects, whether they had been used for the business of the partnership, or rented by tenants. The majority of the Court, however, were not prepared to carry the exception this length. They were of opinion, however, that the dock and its pertinents

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