Thursday, January 29.

SECOND DIVISION.

[Lord Trayner, Ordinary.

CUNNINGHAM *v.* BROWN.

Sale or Joint-Adventure—Agreement between Author and Publisher.

An author and a publisher entered into an agreement for the publication of a treatise, the author undertaking to provide the work and drawings, the publisher taking all the risk of publication and paying the author half the profits if the publication was successful. The edition was fixed at 1000 copies. While a considerable part of the edition was still unsold the publisher became bankrupt, and his trustee in bankruptcy sold it to another bookseller and publisher at a price considerably below the selling price of the work, and offered the author half the profit actually realised.

In an action of accounting between the author and the trustee—*held* (following the case of *Venables* v. *Wood*, 1 D. 659) that as the transaction between the author and the bankrupt was a sale and not joint-adventure, the defender was justified in the course he had taken, and the action *dismissed.*

In 1878 D. J. Cunningham, Professor of Anatomy, Trinity College, Dublin, wrote a medical text-book entitled, "The Dissector's Guide," and made an arrangement for its publication with Maclachlan & Stewart, booksellers and publishers, Edinburgh, in these terms:—"1. We agree to relieve you of all risk attending the expense of paper, printing, engraving, woodcuts, and advertising, the drawings for the woodcuts to be furnished by you free of all expense. 2. The preceding expenses being paid by us, they are to be charged against the book, and the proceeds of sales in the first instance are to be placed to the credit of the aforesaid charges until liquidated, the surplus thereafter to be divided between the author and the publisher in equal proportions. 3. Paper, printing, and engraving are to be charged at the invoiced prices. 4. Statements of sales to be made up annually, and all copies sold are to be accounted for at the usual trade sale price, 25 copies to be reckoned as 24. 5. The edition to consist of 1000 copies."

The book was published in three parts, and as the first edition of the first part was exhausted, the parties entered into another agreement in 1888 for the publication of a new edition. This agreement was similar to the first, with this addition:—"1. That Maclachlan & Stewart were to receive a publisher's commission of 10 per cent.; and 2. That a sum of £20 was to be paid by them to the pursuer's assistant for work done by him in connection with the work." This edition was printed and was in the hands of Maclachlan & Stewart in October 1889. In the following month, when very few copies had been sold, Maclachlan & Stewart became bankrupt. Richard Brown, C.A., Edinburgh, was appointed trustee on their sequestrated estate, and in the negotiations which took place between him and Dr Cunningham, he wrote on 26th March 1890 to Mr Lindsay Mackersy, Dr Cunningham's agent:—"I am unable to formulate any further proposal consistent with the equitable rights of parties; and in order to obviate any possible misunderstanding in the future, I here repeat the various proposals I have made with a view to settlement, and intimate that I shall found upon these in any future proceedings which may take place. 1st, I offer Mr James Thin, bookseller and publisher, Edinburgh, to take the place of Maclachlan & Stewart under the said agreements, leaving Professor Cunningham precisely in the same position with him as he was with Maclachlan & Stewart. If required, Mr Thin will find security; and if Dr Cunningham has any reasonable objection to Mr Thin, I shall endeavour to find another publisher to suit him. 2nd, I offer to hand over the whole stock of books to Dr Cunningham on receiving payment from him of the value which may be placed, by any practical valuator or valuators mutually chosen, upon the publishers' interest therein, as defined by the agreements and the course of dealing. 3rd, I offer by the hands of Mr Thin to purchase Dr Cunningham's interest at a similar valuation, the only condition I attach to this offer being that Dr Cunningham shall not, in consequence of his interest in the future sale of the book being bought up, be thereby left free to bring out any subsequent edition or any work calculated to damage the sale of any of the parts of the book published by Maclachlan & Stewart until the copies of that part have been sold, or the sale thereof in the ordinary course of trade has practically ceased." Mr Lindsay Mackersy replied—"I offered to give you £100 for any interest you may have in the surplus stock; this offer you declined. I offered to take £100 for any interest Professor Cunningham may have in the surplus stock; this offer also you declined. I offered also to divide the surplus stock, leaving each party free to do what they please with their share; this offer you also declined, except upon conditions which Dr Cunningham could not think of agreeing to." Upon 10th June 1890 the trustee wrote—"As my efforts to make an arrangement with Dr Cunningham have failed, and as you have intimated that it is unnecessary to make any other proposal unless on the lines formerly indicated by him, I have now sold the remaining copies of the book to Mr James Thin, and will account to Dr Cunningham for his interest in the proceeds in due course." The trustee on 12th July rendered an account, and sent a cheque for the balance in Dr Cunningham's favour of £17, 1s., representing half the profits actually realised less certain debts due by Dr Cunningham to the publishers. The cheque was returned, and Dr Cunningham raised this action of accounting against Mr Brown.

The pursuer pleaded—"(3) The said books sold by the defender being the property of the pursuer, or otherwise of the pursuer and the bankrupts jointly, the pursuer is entitled to decree as concluded for."

The defender pleaded—"(1) The pursuer's statements are irrelevant and insufficient to support his pleas. (2) The right of publication of the book in question having been sold by the pursuer to the bankrupts, his claims ought to be remitted to be adjudicated on in the sequestration. (3) The right of publication of the book in question having been sold by the pursuer to the bankrupts under the agreements libelled, and the pursuer having been paid the remuneration therein stipulated for, the defender is entitled to absolvitor, with expenses."

Upon 25th November 1890 the Lord Ordinary (TRAYNER) sustained the defender's first and second pleas-in-law and dismissed the action.

"*Opinion.*—The question in this case is, whether the agreements entered into between the pursuer and Messrs Maclachlan & Stewart are contracts of sale or contracts of joint-adventure? As the two agreements are practically the same in their terms, I take the one earliest in date as showing what was agreed on between the parties. That agreement bears to be one 'regarding the publication of a "Guide to the Dissecting-room,"' of which the pursuer is the author, and its import may be shortly stated. The pursuer undertook to provide the work and drawings for the woodcuts by which it was to be illustrated. This is his only obligation. On the other hand, the publishers agreed to relieve the pursuer of all risk attending the expense of paper, printing, engraving woodcuts, and advertising, the expense connected with which was to be charged against the book, and discharged out of the proceeds of sales in the first instance; the balance or surplus of such proceeds, after payment of expenses, was to be divided equally between the author and publishers; the edition was to consist of one thousand copies. In a sentence, the contract was the familiar one by which the publishers took all the risk of the publication, paying the author half the profits if the publication was successful.

"The parties are at one in saying that the agreement does not involve any question about the copyright of the work; that right remains with the author. But as regards the particular edition, the pursuer maintains that the contract was one of joint-adventure, while the defender (the trustee on the publishers' sequestrated estates) contends that it was a sale. The question thus raised appears to me to be one of considerable nicety. Looked at from one point of view, the agreement in question presents many of the features of a joint-adventure. The author contributes his work in manuscript, and the publisher contributes the necessary cash for paper, printing, binding, &c., so as to put that work upon the market. The whole expense incurred by the publisher is charged against the proceeds of the joint-adventure; the profits of the joint-adventure, after all expenses have been paid, are divided between the two contracting parties. Both parties, in the event of the joint-adventure being successful, are equal gainers. They each get back their contributed capital, and each get half of the profits earned. On the other hand, the agreement is quite as suggestive of sale as joint-adventure. The author sells one edition of his work, or the privilege of publishing one edition of his work, for a certain or at all events an ascertainable price. He makes no contribution of capital to a partnership; he incurs no outlay or liability for outlay in connection with the publication; he bears no share of the loss if loss is incurred. The publisher has the uncontrolled power of determining the kind of paper, printing, binding, &c., which are to be adopted; he fixes the price at which the book is to be sold. The author's only obligation is to furnish the MS. and drawings for woodcuts; his only right is to payment of one-half of the profits, if profits ensue from the publication, as the price of the privilege he has granted.

"I have come to be of opinion that the contract was one of sale—(1) The pursuer cannot be said to contribute any capital as to a joint-adventure. He lends his MS., but the work itself—the copyright—is not contributed. Whether the publication is successful or not he loses no capital; he has adventured none. (2) If the author, instead of accepting what are called 'half-profits' for the privilege of publication, had stipulated for payment of a fixed sum—say £100 — the character of the transaction would have been, I think, clearly a sale. But a sum that is ascertainable by a fixed or agreed-on standard is not less a price than a fixed sum. (3) It strengthens the view that the publisher purchased the right to publish that he is left with the uncontrolled right to determine the character and size of the book, so far as these are affected by paper, printing, binding, &c., and to fix the price at which the book shall be offered for sale.

"In *Venables* v. *Wood*, 1 D. 659, a contract in no material respect distinguishable from the agreement in the present case was held to be a contract of sale, and not a contract of joint-adventure. It is said that the soundness of that decision has been doubted by Mr Ross. But that fact does not entitle me to disregard the decision as an authority. The doubt, however, I think is balanced by the 'query' of Mr Justice Lindley, who appears to me to approve of the decision. See also Coppinger on Copyright (2nd ed.), 605."

The pursuer reclaimed, and argued—This transaction was either agency or joint-adventure. The pursuer regarded it as joint-adventure. In the first place, the pursuer contributed his manuscript to the joint-agreement, and the right to publish an edition of it. This was of the nature of a limited copyright. As regarded the price, no doubt a sum that could be ascertained might suggest a sale, but where it was doubtful whether the transaction was a joint-adventure or a sale, such

an arrangement as here stipulated for tended to show that it was a joint adventure and not a sale. It was not the case that the publisher had the sole voice in the choosing of paper, binding, &c., and the pursuer was prepared to prove that he took a large share in the choosing of those matters. In the case of *Venables* v. *Wood* the transaction was held to be sale, but from the opinions it was plain that even if the Court had been of opinion that the transaction was a joint-adventure, they would not have found Wood liable to the pursuer for the price of the goods which was sued for. Assuming that this was a joint-adventure, it was legal for one party to contribute an asset which might remain his property, and for which the other parties to the adventure might not be liable — *Lockhart* v. *Moodie*, June 8, 1877, 4 R. 859. It had been settled in England that a trustee on a publisher's bankrupt estate was not entitled to dispose of a book which was the joint-property of the author and the publisher to the detriment of the author—*Stevens* v. *Benning*, December 7, 1854, 1 Kay & Johnstone, 168—*aff.* 60 J. M'Naughton & Gordon, 223. There was a *delectus personæ* in the choice of a publisher, and that selection was not carried to a trustee, but there must be a new arrangement and a new publisher selected—*Reade* v. *Bentley*, March 5, 1857, 3 Kay & Johnstone, 271. An arrangement like this held joint-adventure —*Reade* v. *Bentley*, January 26, 1858, 4 Kay & Johnstone, 656.

The respondent argued — The trustee found this book in printed volumes as part of the bankrupt estate; he was bound to take it and make the best use of it for the estate and for the interest of the creditors. With the view of doing the best he could for all parties he made various most reasonable suggestions to Dr Cunningham, but they were all rejected; he therefore did the best thing he could, and sold the whole concern to Mr Thin. All that he was bound to account for was the author's share of what was actually received from the sale, because the trustee had never accepted the contract to publish and sell the pursuer's book as the bankrupts would have done if they had continued solvent. The amount realised had been offered, but he had refused it. The trustee was willing to pay that sum to him now. It did not matter whether the transaction was called a sale or a joint-adventure—the same result happened in either case—but it really was a sale by the author of the right to publish an edition of his work. That had been decided in *Venables* v. *Wood*, in which the agreement was in much the same terms as the one here, and no other result could be reached without overturning that case. The exception to the ruling was reported in *Venables* v. *Wood*, March 23, 1838, Macfarlane's Reps. 44-50; Lindley on Partnership, 14. The English cases quoted by the pursuer were not in point, as the point had never been directly decided in England. Even in the case of a joint-adventure it might be that the property of the asset might be in one partner, although another might have a claim upon any profits. In that case if the partner whose property the asset was became bankrupt, all that the other partner could claim was a ranking upon the bankrupt estate for his share of the profits. In this case Dr Cunningham was not really asking for his share of the profits, but for damages against the trustee calculated on the amount that he would have gained if the trustee had taken over the book and worked it as under the contract. But the trustee never accepted the contract—*Warren* v. *Routledge*, June 12, 1874, 18 L.R., Eq. 497.

At advising—

LORD JUSTICE-CLERK—The arrangements between Dr Cunningham and Maclachlan & Stewart were not of an unusual nature between an author who wished to publish and his publisher, that the latter should publish and sell the book, and that the nett profits derived from the sale, after all charges had been paid, should be divided between the two parties. The agreement was that the publisher took all the risk; he therefore not only got his publisher's profits but also one-half of the nett profits for taking the risk. It may be difficult to say exactly into which category this contract may fall. The Lord Ordinary is of opinion that it falls under the category of sale; for my own part, I cannot say I am quite clear that it must really fall under the category of sale, but in the view I take of the case it is not necessary to consider under what category it does fall.

What happened was this—after the work had been printed and one edition had been sold off, another arrangement was entered into with reference to a second edition. Maclachlan & Stewart became bankrupt before the sale was completed; it therefore became impossible for them to fulfil the contract. What then was the trustee upon Maclachlan & Stewart's bankrupt estate to do with the books that existed at the time.

I think there are only three things that he could have done. In the first place, the trustee might have taken the place of the bankrupts as regarded this matter, and having the whole printed book in his possession might have proceeded to carry out the sale. He could only have done that by taking up the business and going on for some time, as it no doubt would have taken some time to exhaust the publication. Now, that course was open to him, but I think that he was not bound to take it, and indeed that he was right in rejecting that mode of action. Again, he might have come to an arrangement with the author by which the printed matter which the trustee had in hand might have been disposed of in the way most advantageous for both. It is clear to my mind that the trustee made strong endeavours to come to some arrangement. I think that the propositions he made for that purpose were reasonable and fair, but they were rejected. We therefore arrive at the third course which I think it was possible for the trustee to take, and that was to sell the

printed matter for such price as he could get from the booksellers. Well, he went to Mr Thin and sold him all the printed matter he had for what he could get. He then wrote to Professor Cunningham that he was not going to raise any question whether the half of the profits so obtained was to go into the sequestration or not, but that he would pay him the whole sum. He therefore tendered him a cheque for £17, 10s., which was the proper sum to be paid if the trustee was entitled to act as he did.

Under these circumstances I think it is to be regretted that this litigation has taken place. I am not prepared to say that the arrangement between the pursuer and the publishers amounted to a sale of the publication, but I think that the result which the Lord Ordinary arrived at was a just and proper one, and that we should adhere.

LORD YOUNG—I concur with your Lordship in regretting that this litigation has taken place, and about such a small sum, but the questions which were argued to us were important, and I think we ought to give our opinion upon them.

The questions regard the legal character of an agreement between an author and publisher. In this case the book which was to be published was a work on dissection, the author was the pursuer of the action, and the agreement was between him and Messrs Maclachlan & Stewart. There was a note of agreement with five heads, but necessarily a good deal was left to be implied. The agreement in substance is that the publisher shall take the whole expense of bringing out the author's work, that he shall publish and sell the book, and that the two parties should then divide the clear profits between them equally. There is nothing said in the agreement about an obligation on the publisher to publish the book, nor is anything said about an obligation upon the author to permit the publication of the same work by another publisher, so as to interfere with the sale of the original publication. I think, however, that this agreement implies that the publisher shall print and publish the book, and put it out for sale within a reasonable time, in order that the author's expectation of profit may be realised. I also think it is clearly implied that the author will not grant permission to any other publisher to publish the same work so as to interfere with this publication.

Now, the publisher, in order to perform what he undertakes, has either by himself or by contracts with other people to get paper and binding done for the publication of the work, but he has also to acquire the author's leave to print, bind, and publish the book. It is by means of mercantile contracts that he deals with the tradesmen for what he gets from them; what then is the nature of the contract he makes with the author? Does he buy leave and licence to put out that book? I see no objection to calling it a contract of sale, and it does not occur to me as an objection to giving it that name, that if it was a complete sale the publisher might publish the book or not at his pleasure. Now, the price that was to be paid was fixed in quite a lawful manner; the price was to be half of the clear profits that should be realised after the publishers had fulfilled their part of the bargain, and in that view the book is the property of the bookseller and publisher, and although I am of opinion that this was a contract of sale, I should have arrived at the same conclusion if it had been called by any other name. It was the property of the publisher, but subject to the obligation under which he had acquired it, that he should put the book upon the market so as to ascertain the price at which it should be sold. Therefore, if Maclachlan & Stewart had remained solvent I think there would have been no difficulty about the matter.

Upon the bankruptcy of Maclachlan & Stewart, I think the trustee on their bankrupt estate took the article exactly as the bankrupts themselves had it, and I think he was bound to sell it. It is not necessarily implied that a sale of this book should take a long time; it might have been disposed of in a few days, and if that had been done, then I do not doubt that under the contract the author would have been entitled to claim half of the clear profits of the work. It so happens that that was not what was done by the trustee. What, then, was he to do to carry out his duty? I think exactly what he did propose to do, to substitute another publisher and bookseller in the place of the bankrupts. He proposed to substitute Mr Thin. That offer was made in March, but was rejected, and after waiting some months the trustee sold the whole work to Thin. I daresay he sold on rather disappointing terms, but I suppose they were quite proper terms to take in the discharge of his duty, and I do not think that we can say he acted illegally or improperly, or that either he personally or the trust-estate is liable to pay to Mr Cunningham any more than was actually received for the work. The share of that due to Mr Cunningham amounted only to £17, 10s., and a cheque for that amount was sent to him, which he returned. Then he raised this action. I think that the action should be dismissed, and that we should adhere to the Lord Ordinary's judgment.

LORD RUTHERFURD CLARK—I think that in deciding this action we are bound to follow the case of *Venables* v. *Wood*, which, I think, is an authority to the effect that a contract such as we have here is a contract of sale.

LORD TRAYNER—I think that it is of importance that we should determine to what category such a contract as we have here should be referred. I think it is of importance to settle what is the contract between the author and the publisher, and how far they are each concerned about the matter in the agreement.

It was, I think, agreed between the parties in the Outer House, and I so understood it, that this contract must fall under one of

two kinds, either that of sale or of joint-adventure, and I quite realised that, in deciding that it fell under one or other of these two categories, all the incidents of the contract were carried with it. After hearing the argument I pronounced my interlocutor, which I still consider a sound one, that this contract was one of sale, and that the property stipulated for passed to the buyer with all the usual results from such a purchase.

In the second place, I think that, in the event of the buyer's bankruptcy, the only right that the seller has is a personal claim for the price upon the bankrupt estate.

The other view is, that, if this concern was a joint-adventure, we must hold as incident to that contract that the asset of the adventure—namely, the printed book—did not fall into the sequestrated estate, but that only the publishers' interest so fell, with the effect that Mr Cunningham did not rank upon the estate merely for his interest, but that he was entitled to have half of the profits of the joint-adventure paid over to him. It was suggested that in a joint adventure the asset might be the property of one of the partners, although the others might have a share in the profits. That view I think is quite an admissible one, and in some circumstances may be the correct one. I do not, however, think it is the right view here, because I think the pursuer was not merely a partner for profits, but that he made a sale of this publication to his publishers.

I think also that this question has already been decided in this Court, and that the case is ruled by that of *Venables* v. *Wood*. I therefore adhere to the judgment I pronounced in the Outer House.

The Court adhered.

Counsel for the Appellant—D.-F. Balfour, Q.C. — W. Campbell. Agents — Lindsay Mackersy, W.S.

Counsel for the Respondent—Graham Murray—Ure. Agents—Jamieson & Donaldson, S.S.C.

Friday, January 30.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MACROBBIE *v.* M'LELLAN AND OTHERS.

Reparation—Wrongous Use of Diligence—Law-Agent—Issue—Malice.

The law-agent of a body of trustees at his own hand improperly obtained a decree for expenses against a defender in an action of maills and duties, charged upon the decree, and threatened to petition for *cessio* unless the decree was implemented.

In an action of damages for the wrongous use of diligence—*held* that the issue against the law-agent need not contain malice and want of probable cause, and that the pursuer was not entitled to a separate issue against the trustees.

This was an action of damages by James MacRobbie, accountant, Glasgow, against the trustees of the late Peter M'Lellan, iron merchant there, and Forbes, Bryson, & Carrick, writers in Glasgow, their law-agents, for the wrongous use of diligence.

MacRobbie was trustee under a trust-deed granted by the late William Barrie, manufacturer in Glasgow, for behoof of his creditors.

Barrie, who was possessed of heritable subjects in Glasgow, had borrowed from Peter M'Lellan's trustees a sum of £1700, in security for which he granted a bond and disposition in security. This sum became repayable at Martinmas 1873, and various negotiations took place between the parties, resulting in 1890 in a petition of maills and duties being raised in the Sheriff Court at Glasgow by M'Lellan's trustees against MacRobbie as trustee, and also against the tenants and occupants of the subjects.

The prayer of the petition concluded thus:—"And in the event of any of the defenders appearing and offering opposition hereto, to find such appearing and opposing defenders liable jointly and severally in expenses."

The *inducice* of the petition expired on the 24th February 1890, and on that day MacRobbie posted to the Sheriff-Clerk an intimation in the following terms:—"Notice of appearance for James MacRobbie, accountant, Glasgow, in the action of maills and duties at the instance of the trustees of the late Peter M'Lellan. (Signed) JAMES MACROBBIE." This notice was not received by the Sheriff-Clerk until the 25th, after the *inducice* had expired.

When the case was called on the following day the attention of the procurator for M'Lellan's trustees was called to MacRobbie's intimation, and he thereupon wrote upon the interlocutor-sheet the following:—"*Glasgow, 24th February* 1890.—I consent to the above being received.—(Signed) (for Samuel Carrick, pursuer's agent), WM. GEMMEL, Procurator."

On the 27th day of February 1890 the Sheriff-Substitute (MURRAY) pronounced the following interlocutor:—"On the pursuers' motion, and of consent, Allows the notice of appearance for James MacRobbie to be received, and in respect that he has failed to lodge defences, and the other defenders to lodge a notice of appearance, holds them all as confessed: Decerns in the maills and duties as craved: Finds the said James MacRobbie liable in expenses, allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report."

On the 7th of March 1890 the Sheriff-Substitute pronounced as follows:—"Approves of the Auditor's report on the pursuers' account of expenses, and decerns against the defender James MacRobbie for payment to the pursuers of the sum of fourteen pounds fourteen shillings and one penny of taxed expenses."