

No. 4. consequently, that they did not void the contract, by which the sailors were entitled to earn their wages during the period of the voyage.

Lord Ordinary, *Craig.* Act. *Jeffrey.* Agent, *R. Playfair.* Alt. *J. Murray.*
Agent, *D. Wemyss, W. S.* Clerk, *Pringle.*

F.

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1808. June 1.

ARCHIBALD CONSTABLE and Co. against The Trustees of Professor JOHN ROBISON

No. 5.

An author agreed with a Bookseller for the publication of a work of Science, the price according to a certain rate per sheet, payable by instalments, as the work was published. After the publication of one volume, constituting in itself a complete part, the progress of the work was interrupted by the death of the Author. His representatives are entitled to the price of the finished portion, according to the stipulated rate.

PROFESSOR JOHN ROBISON, having resolved to publish the substance of his Lectures on the Elements of Mechanical Philosophy, had certain communings with Mr. Constable on the subject.

Mr. Constable then addressed the following letter to Mr. Robison. 7th November 1803. "I agree to purchase the copy-right of your work, to be entitled the Elements of Mechanical Philosophy, at the rate of ten guineas per printed sheet; and the whole work to consist of about 500 pages in octavo; and as you propose publishing in four parts, you will of course allow me the usual credit given to the trade in similar transactions. Your answer in course of to morrow will much oblige me. I am," &c. and on the 15th December a letter in these terms: "In addition to my note to you of the 7th current, I now beg leave to propose to you, that if your work shall be published in parts, you shall be entitled to payment at the rate of ten guineas per sheet, at nine months after the publication of each part: or, if you prefer it, the whole to be paid at six and nine months after the publication shall be finally completed."

In advancing with the composition of the work, the views of the author extended beyond his own original intention, or that of the booksellers; and he wrote the following letter. "18th July 1804. I have not been unmindful of my engagements with you; and have been pushing on my syllabus as much as in my power. I have however only been able to complete the article as Astronomy; and if I had my choice altogether unembarrassed, I should write it all over again before sending it to the press, because I think it too full. I fear that what I have now to give you will run to 350 pages; this, with 264 already printed, will make too large a volume. At the same time, I am not altogether resolved what to do. Astronomy is the part of the whole course, which it would be the greatest saving of time to my lecturing, if my students had a full instruction in their hands. None of the English elementary books that I know enable the students to understand the Newtonian Philosophy. This is my favourite object; and I shall give no more than

“ what is absolutely necessary for this purpose. This however is not the book-
 “ seller’s concern; and I am in some measure to be swayed by your notions
 “ of the thing, otherwise I do not attend to the terms of the agreement between
 “ us, in the sense in which it was taken. You may, and I do fear, that the
 “ great bulk of this part may hinder the sale of the whole. If this be your
 “ opinion, I can easily curtail the volume by 150 pages of letter press, by
 “ omitting the two last articles, the figure of the earth and the tides; yet they
 “ are the most curious, as they are by far the most intricate parts of the New-
 “ tonian Philosophy. I beg you will think of this; and let me know your
 “ mind as soon as possible; for in four or five days, I shall be ready to go on
 “ with Mr. Wilkison, whom I expect to be now at leisure, as the session papers
 “ are now asleep for a while. I am sadly troubled about my figures; my eyes
 “ fail me very much; and I cannot draw them so small, and so exact as I have
 “ done. This will occupy more plates, but I cannot help it. Engravers can-
 “ not reduce mathematical figures like others, because they know not how
 “ they are drawn. I wish you would call here; and I would show you the
 “ figures. They will amount to about fifty besides those already drawn.
 “ I am,” &c.

The letter written in answer to this communication was not produced; but
 the Court assumed, and the pursuers did not deny, their unqualified acquies-
 cence. The first volume was printed in November 1804; and after its publica-
 tion, the pursuers inclosed bills for the sum of £515, at 6, 12, and 18 months,
 in the following letter: “ 10th January 1805. We have the pleasure to en-
 “ close you our promissory notes as under, for the amount of the copy-money
 “ of the first volume of your Elements of Mechanical Philosophy. We also
 “ placed £8. 16s. 6 $\frac{1}{2}$ d to the credit of your account, being the difference of
 “ interest on the additional credit allowed us. We shall be happy to have
 “ frequent occasion to make you similar payments; and we are,” &c. The
 above is all that is material in the writings that passed on the subject.

On the 30th January 1805, Professor Robison died. One of the bills was
 paid; but the trustees found it necessary to charge the pursuers for payment
 of the rest. The charge was suspended by the pursuers, who at the same time
 brought an action for repetition of the sum already paid, under the qualifica-
 tion of accounting regularly for the expense, and the sale of the published
 volume.

The cause was discussed before the Lord Justice Clerk, Ordinary, who pro-
 nounced the following interlocutor, (17th January 1806 :) “ In respect that
 “ the agreement between the parties contains a provision for publishing the
 “ work in parts, and for paying for the same, either at the time of publication
 “ of each part, or after the publication of the whole, at the option of the au-
 “ thor; and that the volume published is admitted to contain a complete part,
 “ treating of one separate branch of science, forming an intelligible and useful
 “ work by itself; and further, in respect that the suspenders did publish and

No. 5. "sell to the public this said volume or part, without any condition to take back what they now plead is of little or no value without the rest of the work; and the suspenders, by paying one of the bills, which did not fall due till after the author's death, appear to have themselves understood this to be the genuine interpretation of the agreement; repels the reasons of suspension; finds the letters orderly proceeded, and decerns; finds expenses due; and allows an account thereof to be given in, and submitted to the auditor."

The cause came by petition and answers before the Inner House.

Argument of the pursuers.

To ascertain the nature of the contract between these parties, and the obligations thence arising, it is necessary to attend to what was its object. From the letters between them, it is clear that the subject which Professor Robison proposed to sell, and the pursuers agreed to purchase, was an entire work, to contain, and be entitled the "Elements of Mechanical Philosophy." The contract related to a system, or whole, involving the various branches and parts of a science; and the value of the work consisted in the union and completion of all the parts, in a systematic form.

As, therefore, in contracting for such a work, the pursuers could not expect reimbursement till after the period of its completion, the amount of the price must have been determined on the confidence, and under the implied condition, that a complete work was ultimately to be delivered. Of all commodities, a literary work containing a system of science, is that of which the value depends the most upon its completion. Its permanent value is derived from its systematic form; and several editions are required to reimburse the expense of publication. The mode and times of payment, whether wholly at the commencement, or after the termination of the work, or partially, according to its progress, are contingent circumstances arising from the liberality of the parties, or their confidence in each other; and cannot affect the fundamental principles and stipulations by which the amount of the price was ascertained. The mode of partial payment, therefore, could not alter the substance of the contract, the nature of the subject purchased, or the terms on which alone the payments could be understood to be warranted.

Neither can it affect the principles by which this case must be decided, that the science, of which this work was to treat, consisted of various distinct branches, nor that the published volume contains a complete part. If a fragment only had been contained in it, the same decision must have been pronounced for which the defenders contend in this instance; because a court of law cannot place its judgments on so fluctuating a foundation as the accidental divisions of any science of which the nomenclature and arrangement are daily changing by the progress of discovery.

To illustrate by another instance. Several of the pictures of Sir Joshua Reynolds occupied that artist many years to finish. If, however, he had re-

ceived part of the price, and died before their completion, the individual works would have been without value. In such a case, it is impossible to maintain that the purchasher could have been bound to receive the unfinished picture, or the representatives of the artist entitled to retention of the partial payments.

In like manner, a sailor has no claim for wages if he does not finish the voyage; neither have his executors if he dies before it be completed.

In terms of the contract, the contingency of the author's life has not been provided for; and this risk must fall where the presumptions of the case direct.

That the risk should be imposed on the pursuers cannot be maintained on the general principles of the law of contract, because a purchaser stipulating for the delivery of a commodity, or the performance of a fact, is not presumed to incur any risk which may impede the one or prevent the other, unless it be specifically so stipulated.

In the general case, an author brings a complete work to the booksellers for sale; and if he had died before its completion, the loss must have been his own. There is nothing in the terms of the contract in the present instance to remove it out of the general case; and this partial and progressive payment of the price cannot alter the essentials of the contract.

In a word, the pursuer has not received that for which he stipulated; and must be entitled to repetition of the sums paid on the faith of a contract of which it is now impossible to obtain fulfilment. Besides, a decision in favour of the defender would be injurious to the interests of literature. The most valuable monuments of genius, those by which the power of mankind has been extended, and their minds enlightened, have been the laborious and gradual production of many years, and their publication has in many cases been retarded by the pressure of poverty. This inconvenience has been removed by the practice of modern booksellers, the best patrons of genius, who have been accustomed to advance the price according to the progress of the work. But this liberality will be fatally and necessarily checked, if in cases like the present, when the price has been progressively advanced, the booksellers shall be held bound to pay for an unfinished work.

Argument for the defender.

The nature of the contract must be discovered from the correspondence joined to the circumstances and presumption of the case. That the pursuer had contracted to receive, and Professor Robison to deliver a complete work, embracing a system of science; and that, except in the event of its completion, the stipulated price was not to be paid, is a view of the case which the correspondence of the parties does not warrant, and which in the absence of distinct and specific stipulation, is not to be presumed.

The author approached the age of seventy; and was debilitated by long continued disease. The work was of great research and magnitude, and consisted

No. 5. of many volumes, of which the materials had neither been prepared nor arranged. These facts were known to the pursuers; and they confessedly did not deal for an article ready for delivery.

It is impossible to presume, that a philosopher, whose name was unrivalled in his country, would have exclusively devoted his time to the production of a work which in all probability would occupy the remaining years of his life; and for which, except in the event of its completion, he was not to receive a recompense.

The circumstances of the parties, and the views to which these circumstances led, must dictate the bargain between them, so far as is unprovided for by themselves. The author was to receive a fair reward for his labour; and the booksellers trusted that he would live to finish what he had begun. The former might, unfettered by contract, have published a complete system, by bringing out distinct branches or parts, each constituting a valuable and independent whole, yet each having a systematic relation to the other. The latter, by withdrawing the author from other employment, secured to themselves a fair chance of a work from which they would have derived permanent profit. The stipulation that the work should be published in parts, establishes that the pursuer was desirous to combine the present profit of selling a treatise on distinct and independent branches, or parts of the science, with the ultimate profit arising from the sale of the complete system.

The bargain clearly was, that the work should be published in parts, and that each part should be paid for when published. The obligation of Mr. Robison has been so far fulfilled, and that of the pursuer to the same extent incurred. The defenders do not insist, that for an unfinished work, the pursuer shall pay the price of a complete work, but that they shall fulfil an obligation of which to them the counter part has been already performed.

If the published volume had produced to the pursuers profits exceeding, instead of falling below expectation, it would not have been competent for the trustees of Mr. Robison to have insisted for repetition of these profits on payment of the expense of publication. Are the pursuers then to be free while the defenders are bound? Or are the pursuers bound only by a lucrative contract?

The cases put in illustration are inapplicable. The unfinished work of a painter is not a "complete part, treating of one separate branch of science, forming an intelligible and useful work by itself."

The interests of literature cannot suffer by a decision which is consonant to justice, and bestows on labour and talents their fair reward. On the contrary, no man of genius would ever withdraw his attention from other objects, and devote it exclusively to the production of a long work, if, in the event of his death, that part of his recompence which accorded with the progressive completion of the work, and on which himself and family had subsisted, is to be wrung from his representatives.

The Court coincided in the grounds of decision of which a summary is contained in the interlocutor of the Lord Ordinary ; and observed, that at the first communing about the projected publication, a smaller work was in contemplation of the parties. The transaction then changed its nature, and a work was undertaken of greater extent, research, and importance ; and of which a longer period was required for the completion. By occupying the time, and by giving a direction to the labour of the author, and by withdrawing him from other pursuits, the pursuers must be understood to have undertaken the risk of his death. No doubt both parties, in entering into the contract, had in their contemplation the completion of the work, but this part of the contract is modified by the stipulation that it was to be published in parts ; and that each part was to be paid for when finished. If the profits of the volume that was published had exceeded the expense of the printing, and the stipulated price of the copy right, the defenders, on the death of Professor Robison, would not have been entitled to compel the pursuers to account for those profits, and to return the price that had been paid to them. The argument of the pursuers, therefore, would lead to the inadmissible conclusion, that one of the parties was bound and the other free.

One Judge was of a different opinion. The pursuers, he observed, had stipulated for a whole work, and not for one volume, or one sheet of a book, or one section, or branch of a system. The object of the partial payment was the accommodation of the author, and not any qualification of the original obligation. The copy right of a complete and entire work, and not of a part of it, was the object of the contract. To entitle a party to pursue implement of a contract, he himself must be in a condition to fulfil, and to offer to his adversary the alternative of performance, or entire restitution. But it is plain that the defenders are not in that situation. In the case supposed, therefore, the defenders, on obvious principles, were not entitled to return the price and receive the profits of the publication, and no argument can be drawn from this view of the corresponding obligation.

The following interlocutor was pronounced, (1st June 1808) : “ The Lords having resumed consideration of this petition, and advised the same, with the answers thereto ; adhere to the interlocutor complained of, and refuse the desire of the petition.”

Lord Ordinary, *Justice Clerk.*

Act. Ja. Menierieff.

Alt. Advocatum.

Jas. Gibson, W. S. and Hay Donaldson, W. S. Agents.

M. Clerk.

J. W.

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