

MITCHELL, APPELLANT.

CULLEN, RESPONDENT.

1852.
11th May.

Circumstances under which it was held—(reversing the judgment of the Court below) that payment by an agent was payment by the principal.

A debtor making a payment may direct to what portion of his obligation the payment shall be appropriated; and the creditor, so accepting the payment, shall be bound to apply it accordingly.

Lord Chancellor's opinion.

THE points involved in this appeal appear sufficiently from the remarks of the Lord Chancellor in moving for judgment.

Mr. *Bethell* and Mr. *Moncreiff* were heard for the Appellant; and Mr. *Rolt* and Mr. *Anderson* for the Respondent.

LORD CHANCELLOR (*a*):

It appears, my Lords, that, in the course of mercantile transactions, Mr. Mitchell had involved himself in great litigation. He had a solicitor of the name of Kerr, practising in Glasgow; and Mr. Kerr employed, as *his* representative in Edinburgh, Mr. Cullen, a writer to the Signet—the gentleman now contesting this question before your Lordships.

I understand that, by the law of Scotland, Mr. Cullen holds two persons as being bound to him for business accounts. In the first place, Mr. Mitchell, the real client, is liable to him. In the second place, Mr. Kerr, the person through whom Mr. Mitchell employed Mr. Cullen. Mr. Cullen has, therefore, a great advantage in this respect; and Mr. Mitchell, I am afraid, a corresponding disadvantage.

Mr. Mitchell having to transact business with Mr. Cullen through and by Mr. Kerr, it has happened that the correspondence is sometimes carried on by

(*a*) Lord St. Leonards.

Mr. Kerr with Mr. Cullen. In one instance the same correspondence is followed up by Mr. Mitchell with Mr. Cullen; and even a difficulty has arisen at your Lordships' bar between the learned counsel on opposite sides, to which correspondent (whether Mr. Kerr or Mr. Mitchell) a certain answer of Mr. Cullen's (to whom both were responsible) was addressed.

MITCHELL
v.
CULLEN.
—
*Lord Chancellor's
opinion.*

I do not understand from the argument that there is any difference between the learned counsel as to the law applicable to this case; and, indeed, I think there can be none. The law, in this respect, is the same in Scotland as it is in England. There is no doubt that a person paying a debt may direct the payment to be appropriated towards the discharge of any portion of his obligation; and the person who accepts the payment must accept it subject to that direction.

My Lords, on the 12th of July, 1845, Mr. Cullen writes a letter to Mr. Kerr in these terms—

Ranson v. Mitchell.—I send you enclosed my account—amount, 113*l.* 14*s.* 6*d.* I am, &c.

On the 17th of November, 1845, Mr. Cullen writes again to Mr. Kerr, saying—

I have a pressing payment to make on the 25th current. Mr. Fould's account and Mr. Mitchell's account for Ranson's case are both closed, and long outstanding. Fould's account, as

restricted, is	£45
Mr. Mitchell's, 113 <i>l.</i> 14 <i>s.</i> ; but say	110

—
£155

If I do not hear from you to the contrary by Wednesday morning, I will draw upon you for 155*l.* 15*s.*, at four months, in full of both accounts; or, perhaps, you may prefer making me a remittance of 155*l.* in full, which will greatly oblige me.

I beg your attention to this request; and I remain, &c.

MITCHELL
v.
CULLEN.
—
*Lord Chancellor's
opinion.*

On the next day, November 18th, 1845, Mr. Kerr writes to Mr. Cullen—

Mr. Mitchell has gone to Liverpool; but as you seem anxious for a payment to account, I will send you my acceptance for 150*l.* to-morrow, and will arrange with you, after Mr. Mitchell returns, as to Ranson's account. I am, &c.

My Lords, it appears that Mr. Kerr did what he promised. On the 19th of November, 1845, he writes to Mr. Cullen—

As requested, I send you my acceptance to you, for 150*l.*, at four months' date. When we meet we will adjust Ranson's case and Fould's case. Please acknowledge receipt. I am, &c.

On the 20th November, 1845, Mr. Cullen acknowledges receipt, saying—

I have your favour, dated yesterday, with your acceptance, which I have placed to the credit of *your accounts*. Yours, &c.

In a letter from Mr. Cullen to Mr. Kerr, dated so far down as the 31st October, 1848, he says—

On the 19th November, 1845, you sent me a bill for 150*l.* as a payment to account; and in my answer, dated 20th Nov., 1845, I state: "I have your favour, dated yesterday, with your acceptance, which I have placed to the credit of your account."

Upon this correspondence, the argument maintained at your Lordships' bar, on behalf of Mr. Cullen, is, that the remittance of 150*l.* had no specific reference to the two accounts mentioned in the letters—but is to be regarded as a general indefinite payment—for which Cullen gave credit to Kerr individually.

But, my Lords, I apprehend that this position is unsustainable. The two accounts, of which Mr. Mitchell's was one, are represented by Mr. Cullen as "both closed and long outstanding." This is the ground of the

application for payment ; and it deserves your Lordships' particular attention. Payment by Kerr was in law payment by Mitchell. The acknowledgment by Cullen to Kerr, on the 20th November, 1845, states that he has placed the acceptance to the credit of "your accounts," evidently meaning the two accounts, the payment of which, as being "both closed and long-outstanding," was so urgently requested.

MITCHELL
v.
CULLEN.
—
Lord Chancellor's
opinion.

When Mr. Cullen ultimately carried in his different accounts against Mr. Kerr, he said, in a letter to that gentleman of the 31st October, 1848—

You referred to my letter, dated the 17th of November, 1845. That letter is perfectly distinct ; and, had you sent me your acceptance for 155*l.* 15*s.*, at four months, I should have accepted it *as in full of the two accounts therein mentioned*. But you did nothing of the sort.

That is to say, if 5*l.* 15*s.* more had been sent, he would have appropriated the acceptance to the discharge of the two accounts,—Fould's account and Ranson's account ; but because the amount sent was only 150*l.*, instead of 155*l.* 15*s.*, it was accepted, not in payment of those accounts, but in satisfaction of a general balance as to which it had no bearing whatever !

In the same letter of the 31st October, 1848, Cullen proceeds to represent himself as having made to Kerr, on the 20th November, 1845, this statement, namely—"I have your favour dated yesterday, with your acceptance, which I have placed to the credit of your account." Whereas, in truth, the statement was, "to the credit of your *accounts* ;" in the plural and not in the singular number, evidently showing that Mr. Cullen felt the difficulty, and endeavoured to get over it.

The letter from Mr. Cullen to Mr. Kerr of the 17th November, 1845, not only asks payment of the two accounts as "both closed and outstanding," but it

MITCHELL
v.
CULLEN.

Lord Chancellor's
opinion.

earnestly “begs attention to *this request*.” The letter from Mr. Kerr to Mr. Cullen of the 18th November, 1845, sending the acceptance, sends it “*as requested*.” Now how was it requested? Why in payment or satisfaction of the two accounts. What stronger evidence of appropriation to a specific purpose can be required? The answer complies with the request. The act done follows up and makes good the promise.

Mr. Cullen no doubt adds—“When we meet, we will adjust Ranson’s case and Fould’s case.” This may account for the acceptance being 5*l.* 15*s.* short. I dare say Mr. Kerr hoped that Mr. Cullen would make him some allowance in these matters. It is possible that this may have been the case—because, in point of fact, Mr. Cullen had got his client from Mr. Kerr. But, at any rate, this circumstance seems quite insufficient to prevent the *act* to which I have adverted from having its due operation.

It has been said that there is no proof that Mitchell paid Kerr. But, as I before observed, any payment by Kerr, on account of Mitchell, is in law a payment by Mitchell. As in a question with Cullen, the inquiry whether Mitchell paid Kerr, is immaterial. But, in point of fact, Kerr admits that he has been paid by Mitchell.

I, therefore, my Lords, am humbly of opinion that the interlocutor of the Court below, on this point, cannot stand.

The next point I conceive is still more clear in favour of the Appellant. The *Lord Ordinary* (Lord Robertson) has so found it; and although the Inner House has overruled his finding, I am disposed to return to it.

The question upon this second point is simply whether, under certain letters, Mr. Cullen did, or did not, agree to accept of 120*l.* for a debt of 152*l.* 2*s.* 3*d.*; and if he did so agree, whether the terms were

sufficiently adopted and acted upon by Mr. Mitchell and Mr. Kerr, to prevent Mr. Cullen from afterwards demanding the original sum, which the Court below, by their final interlocutor, have permitted him to do?

MITCHELL
v.
CULLEN.
—
*Lord Chancellor's
opinion.*

[The Lord Chancellor here went into an examination of the letters and circumstances, stating the grounds upon which his Lordship was clearly of opinion that Mr. Cullen had agreed to accept the 120*l.*, and that he could not retract.]

On the whole, my Lords, I beg to move that the interlocutors complained of be reversed, and that a remit be made to the Court below to proceed as may be just.

Interlocutors reversed, and Cause remitted with a Declaration giving effect to the principles laid down in the Lord Chancellor's opinion.

DEANS.—SURREY & GRIBBLE.