MAY 11, 1852.

JOHN MITCHELL, *Appellant*, *v.* JOHN CULLEN, W.S., *Respondent.*

Proof — Evidence — Presumption — Payment — Agent and Client — *A law-agent having received two sums in payment of specific accounts, gave only a receipt to general account, and afterwards claimed the full sums due on those specific accounts.*

HELD (reversing judgment) *that the correspondence established that the payment was specific and not general.*[1]

The respondent brought an action in the Court of Session against the appellant, for payment of £172 2*s.* 3*d.*, as a balance due on his accounts for professional business in conducting certain lawsuits for him. The respondent had been employed by Mr. Archibald Kerr, a writer in Glasgow, on behalf of the appellant. Various sums had been from time to time sent to the respondent, accounts had passed, a meeting of parties, and some communings, and a long correspondence ensued, in reference to a settlement. In defence it was maintained, that, in the circumstances, the accounts were to be held as having been adjusted and paid, excepting a balance of £30, which was tendered; and, at all events, that if the accounts for processes *Mitchell* v. *Ranson* and *Dick* v. *Mitchell* (processes the expenses in which formed the principal subject of contention) were to be held as still unsettled, the appellant was entitled to have these accounts audited in ordinary form.

The Court of Session held that two payments sent to the respondent were not chargeable to the specific account, because the offer to abate the sum in those accounts was not accepted in time. The question turned wholly on the import of the correspondence.

LORD CHANCELLOR ST. LEONARDS.—My Lords, it is, no doubt, much to be regretted that litigation should be carried on to such an extent in these trifling suits; but I have had occasion so often lately to make the same remark in regard to appeals coming from the same quarter, that, probably, observations of that sort will have but little weight.

My Lords, the question which your Lordships have to decide in this case lies, certainly, in a very narrow compass. Mitchell had involved himself, in the course of mercantile transactions, in great litigation. He had a solicitor of the name of Kerr, who was not himself, as I understand, residing in Edinburgh; and Kerr employed Cullen (who is now the person contesting this question) as his representative.

I understand that, by the law of Scotland, Cullen holds two persons as being bound to him. Mitchell, the real client, is liable to him for business which he (Cullen) has transacted, and Kerr, the person through whom Mitchell employed Cullen, is also liable. Cullen has certainly a great advantage, therefore, in that respect; and Mitchell, I am afraid, has a corresponding disadvantage—that is to say, he is liable for the same amount both to Kerr and Cullen; and if that be so, I must say the sooner the law is altered in that respect, the better, as it appears to me, it it will be for Her Majesty's lieges in Scotland.

The questions now before your Lordships arise principally out of this double character which is filled by this gentleman; for Mitchell having to transact business through and by Kerr with Cullen, it has happened, as your Lordships will see, that the correspondence is sometimes carried on by Kerr with Cullen, and, in one of the instances which your Lordships have to consider, the same correspondence is followed up by Mitchell with Cullen; and even a difficulty has arisen at your Lordships' bar, between the learned counsel on opposite sides, to which correspondent (whether to Kerr or to Mitchell) a certain answer of Cullen's (to whom both were responsible) was addressed.

My Lords, the first question is simply this:—There were two matters—one was a matter in which Mitchell had involved himself, which is called *Mitchell* v. *Ranson*, and the question is, whether a certain sum of £150 (which certainly in part related to another transaction, and with which Mitchell had nothing to do) did bear specifically upon the costs in that particular case of *Mitchell* v. *Ranson*.

This case has been very well and very shortly argued. The decision of it depends on a very few letters; and I confess I cannot bring my mind to entertain any doubt whatever as to what the true construction of those letters is,—that the £150 would represent in part, if it be a specific appropriation, the bill of costs in *Mitchell* v. *Ranson*.

Now, 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

[1] See previous report 22 Sc. Jur. 646. S. C. 1 Macq. Ap. 190: 24 Sc. Jur. 431.

paying money may desire it to be appropriated towards the discharge of any portion of his obligation; and the person who accepts it, must accept it in that way. If there be no specific appropriation, the question would arise, as to how it should be applied; and the question arises here as to the right of Cullen to appropriate it as he has done. (His Lordship then referred to the correspondence and continued)—I am clearly of opinion, and I submit that opinion to your Lordships for your consideration, that the true construction of this correspondence, and of the whole transaction, admits of no doubt whatever, that the £150 is a sum which is to be carried to the account of the particular transactions to which I have called the attention of your Lordships.

As far as regards that question, therefore, in my opinion, the judgment of the Court below ought to be reversed; and it should be declared by your Lordships, that the £150 must be deemed to have been paid by Kerr on account of the debt of Mitchell in the case of *Mitchell* v. *Ranson*, and that credit must be taken for that as a specific payment.

Then, my Lords, we come to the other point, which, if possible, would appear to be still more clear than the one to which I have called your Lordships' attention. The Lord Ordinary was of opinion in favour of the appellant. The Lords of the Second Division overruled his decision; but nothing can be more clear or plain to my mind, than that the Lord Ordinary was right in the view he took of the case. The question simply is, whether, upon the two letters which passed between these parties, Cullen did agree to take £120 for a debt of £152 and upwards; and if he did so, whether the terms upon which he offered to do that were sufficiently accepted and acted upon to make that offer binding upon him, so that he could no longer depart from it. Upon that question there was a difference of opinion in the Court below, the Lord Ordinary being of opinion in favour of the appellant, and the Lords of the Second Division overruling that interlocutor, and deciding in favour of the respondent. (His Lordship then referred to the correspondence and continued)—Cullen says to Mitchell in the most clear and explicit terms—"It is a hard case upon you—you have sustained a great loss, and have incurred great expense: I will take £120 instead of £152 2*s.* 3*d.*; if you will send me £100 the remaining £20 may stand over." Then, having said that, he afterwards comes and says—"You have not paid me the £20, and therefore I claim to charge you the whole £152 which I claimed in the first instance." It seems to me that that is a most unrighteous demand, and wholly without foundation.

To the argument upon the *nudum pactum*, I need not refer, because no point can possibly arise upon it; consequently, this part of the interlocutor of the Lords of the Second Division, your Lordships, if you agree with me, will think ought to be reversed. I think it should be declared that the account of Mitchell was an account for the sum of £120, and that the £100 which was paid must be considered as having been paid in discharge of £100, part of that £120. Those two declarations I should propose to your Lordships. I propose that your Lordships should reverse the interlocutor complained of, adding those two declarations, and remitting the case to the Court below to do what is just.

Interlocutors reversed, with declarations and remit.

Second Division—Lord Robertson, *Ordinary*.—Thomas Deans, *Appellant's Solicitor*.—Surr and Gribble, *Respondent's Solicitors*.

MAY 17, 1852.

HENRY INGLIS, W.S., *Appellant*, *v.* THE GREAT NORTHERN RAILWAY CO., *Respondents.*

Railway—Register of Shareholders—Appointment of Committee—Proof—Jury Cause—Issues—Statutes 8 and 9 Vict. c. 16; 6 Geo. IV. c. 120; 12 and 13 Vict. c. 84—Act of Sederunt 15th February 1841—1. *An issue in an action for payment of railway calls, went to trial, and resulted in a verdict for the defender. On a bill of exceptions, a new trial was granted; but before the trial, an alteration was made in the issue with the approval of the Court in order to give effect to certain powers conferred by* § 84 *of the railway act, of which the company had availed themselves subsequent to the granting of the new trial.*

HELD *that, in the circumstances, the alteration in the issue was proper, as meeting the justice of the case.*

2. *In the course of the new trial, the register of shareholders, consisting of several volumes, was produced in evidence. The last volume only was sealed, but not the volume containing the defender's name—the expression "calls" was also used to denote payments made on shares, in place of the expression "subscriptions," as used in the statute.*