

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kershaw v. Kirkpatrick and another, from the Court of Queen's Bench for the Province of Quebec, Canada; delivered January 25th, 1878.

Present:

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS was an action for money had and received, to which the general issue was pleaded. The question in the cause may be shortly stated to have been the appropriation of a payment, on which the Lower Court, and the Court of Queen's Bench, have found in favour of the Plaintiff.

The material facts of the case are as follows: Mr. Kershaw, the Defendant, a broker, bought a cargo of wheat as a broker from the Plaintiffs, Kirkpatrick and Co., for and on behalf of a firm named Stevenson. The quantity of wheat bought was on the whole some 13,000 bushels. There was however a separate invoice with respect to 8,127 bushels, the price of which amounted to 10,000 and some dollars.

Mr. Kershaw had also acted as broker in another transaction whereby Stevenson became the purchaser of the cargo of another vessel called the "Europe," of which the price was some 17,000 dollars. In this cargo Kershaw appears to have had some interest himself, but it had been pledged to the Bank of Montreal, who were the ostensible vendors. On these two accounts a sum of about 37,000 dollars was due from Stevenson to Kershaw on the 18th of July 1874. On that day Kershaw sent his clerk,

a Mr. Benac, to Stevenson's office to get what money he could on account. Mr. Stevenson, the Plaintiff's principal witness, gives the following account of what then took place. He says, "Mr. Benac, Mr. Kershaw's clerk, who " is in the habit of acting for him sometimes, " came into the office and asked me how " much I could give him, and I told him I " did not know. I would give him as much as " I could. There was some mention of 20,000 " or 30,000 dollars. I said I could not give " him much that day. He went away, and " in a few minutes came back again, when I " told him I had been disappointed in getting " money. I drew a check for 8,000 dollars " and handed it to Mr. Benac. That account " paper "B" being with a lot of other accounts, " I handed the account to Mr. Benac with a " cheque, and he marked the words 'July 18th, " cash on account, P. Benac, 8,000 dollars.'"

In page 15 of the case that document is set out. It is an invoice of wheat sold by Kirkpatrick and Co. to Stevenson, of the 15th of July, and runs in this way: "8,127 $\frac{3}{4}$ Bushels Amber " Michigan Wheat ex barge 'Swan' into 'Eliza- " beth Alice,' at 1.25 = - - \$10,159. 37

Brokerage 40. 63

\$10,200. 00"

Below the \$10,200. 00 is the entry "July 18th, " cash on account with the bank \$8,000," which is what this witness referred to as having been written by Mr. Benac at that time on this invoice. It may be here observed that it was not written on the back of the invoice, but on the face of it and under the figures which have been referred to. There are in this exhibit also the words "Balance, \$2,200." But it does not appear distinctly when and where those words, which are in pencil, were written. Mr. Steven-

son goes on to say, "The invoice, after the money
" was paid and the receipt written, was in the
" same state as it is now, with the exception of
" some figures in pencil. I fancy the cheque I
" gave was paid. It was on the Union Bank."
He identifies the cheque. Cross-examined, he
says, "The wheat was from the barge 'Swan.'
" I employed Mr. Kershaw to buy the wheat.
" He was my broker. Mr. Benac, when he came
" for the money, said, as near as I can recollect,
" 'Is that all you can give me,' and I gave him
" the cheque for the 8,000 dollars. The first
" time he came was the 18th July, about 12
" o'clock. He asked me how much I could give
" him, and I said I could not tell. He then said,
" 'How much do you expect?' and I said '20,000
" or 30,000 dollars.' That is all that transpired
" at that interview. He came back again
" about half-past 12. He said, 'How much can
" you give me?' I said, 'So far I have only
" been able to get 8,000 or 9,000,' and I handed
" him the account and a cheque. He made some
" remark about not taking it on that account."
(It should be observed that Mr. Benac, when
called, does not in any way corroborate this latter
statement.) "His precise words when he came
" in were, 'How much can you give me?' and I
" said, 'Take that in the meantime, and I will
" see if I can do any more.'" He says, further
on, Benac returned in about 10 minutes, "and
said, that Mr. Kershaw would not receive
" that upon account of the 'Swan's' cargo; that
" is Plaintiff's debt; and to change the receipt.
" I said to Benac, 'I am going away, we can
" leave that until Monday.' He said the 8,000
" dollars was not to be on account of Kirkpatrick
" and Cookson, but on account of the 'Europe,'
" which was an older debt of some days before.
" I said I was just going away, and I would see
" and straighten it upon Monday. I was going

“ away early, at half-past one. I was going to
“ the country to St. Hilaire by the 2 o'clock
“ train. That is all that transpired on the
“ Saturday between me and Benac.” Then he
goes on to speak of what subsequently took
place. “ I received a visit from Kirkpatrick
“ that afternoon about 10 minutes after Benac
“ was gone. Mr. Kirkpatrick came to my office,
“ and asked for some money on that debt
“ of the ‘Swan.’ I said I could not give
“ him the whole. He said, ‘Give me some.’
“ I said, ‘I have given Mr. Kershaw all I
“ ‘had, and I suppose he will give you
“ ‘some.’ That was all that transpired at that
“ interview. Mr. Kirkpatrick then went away,
“ but came back in 5 or 10 minutes. I fancy, from
“ the direction which I saw him coming from,
“ that he went to Mr. Kershaw’s. He said that
“ Mr. Kershaw had said that he had no money
“ for him. I said I supposed he had applied it to
“ some other account. He then asked me if I
“ could not give him some, and I then gave him
“ a cheque, I think, for 4,000 dollars. I did not
“ take a receipt for that payment, to the best of
“ my recollection. The cheque was made pay-
“ able to the firm’s order. I do not recollect
“ whether it was that Saturday or the Monday
“ following that he told me that he would look
“ to me for the account. He said I was not to
“ pay any more money to Mr. Kershaw, but that
“ he looked to me for the entire amount of the
“ wheat purchased. I paid Mr. Kirkpatrick
“ afterwards 5,000 dollars, either on the Monday
“ or the Tuesday following.” Then the question
is put, “Is it not a fact Mr. Kirkpatrick, time
“ after time, and after payment by you of 4,000 or
“ 5,000 dollars, dunned you for the payment of
“ the balance of the cargo of the ‘Swan?’
“ Answer:—Yes, on several occasions he asked
“ me for the balance. I saw Mr. Kershaw on

" the Monday. He told me that he had sent
 " Benac over to say that he would not accept
 " that payment on account of Kirkpatrick and
 " Cookson, and to cancel that receipt and put
 " it to the account of the 'Europe,' which was
 " due long before that to which he had paid
 " it. I said it was no use doing anything about
 " the matter, it could easily be explained. He
 " said the money was for the "Europe's' cargo,
 " which was due before that, and that he had
 " sent Benac over to say so. I refused to cancel
 " it. I did not think it was worth while to
 " cancel it. I said to Mr. Kershaw it was much
 " better to leave it as it was and explain the
 " circumstances. I got the 'Europe's' wheat
 " from Mr. Kershaw, who had given a 'Bailee'
 " receipt to the Bank of Montreal." Then he
 " says, "When Mr. Kirkpatrick came to my office
 " I told him that the \$8,000 I had paid I
 " expected Mr. Kershaw would give him some
 " of it. I did say in my deposition before the
 " police magistrate that I said to Mr. Kirk-
 " patrick that I expected the 8,000 dollars I
 " had given to Benac was for him (Kirkpatrick).
 " I had previously promised Kirkpatrick to pay
 " him his account on that day." Then there
 " is a little explanation on his re-cross-examination,
 " the question being, "You have stated in answer
 " to Mr. Kerr that you have sworn in your
 " deposition at the Police Court that you had
 " told Mr. Kirkpatrick on the 18th of July that
 " you were under the impression that you had
 " paid Mr. Benac 8,000 dollars which you
 " expected was for him, did you not also state,
 " to complete the same sentence which did not
 " end there, the following words, 'but as there
 " 'were other accounts running between
 " 'Mr. Kershaw and me that it had been applied
 " 'to something else?' Answer: I did."

There is also the evidence of Benac, which does

not throw much more light upon the main question in the cause, how and under what circumstances the invoice was given to him, and he wrote the receipt. He gives a short account of what took place at the interview, but without stating the circumstances under which he received the invoice or wrote upon it. He only refers to it incidentally by saying "I brought back the cheque to the office and handed it to Mr. Kershaw. Mr. Kershaw asked me if it was intended for any particular account. I said to Mr. Kershaw, 'No; Mr. Stevenson did not tell me anything about it, but I think I gave a receipt for the money on Mr. Kirkpatrick's invoice.'" Then he further says "I was in a great hurry, and I took the first invoice in order to acknowledge the sum which I received from Stevenson. It was merely accidental; if it had been another account it would have been the same thing. There were a lot of accounts together. Generally we do the same thing in all the houses where we are doing business." This does not appear to their Lordships a very probable statement, considering the importance attached by the Canadian law, somewhat greater than that attached by our law, to instruments of this description.

The judgments of the two Courts are very short. The first is the judgment of Mr. Justice Mackay, who, as their Lordships understand, had the witnesses before him. It consists, as far as the decision on the point in the cause is concerned, in these words: "Considering that the defendant on the 18th day of July last received 8,000 dollars, money for plaintiffs, as alleged from J. B. Stevenson & Co., purchasers of Plaintiffs' wheat, that at the time of payment of it J. B. Stevenson & Co. meant it for plaintiffs." Their Lordships therefore observe that Mr. Justice Mackay finds as a fact that the money was meant, that

is, meant by Stevenson, for the Plaintiffs. He goes on to say, "And defendant so expressed it by
 " the account rendered and receipt given to the
 " said J. B. Stevenson & Co. on the said 18th day
 " of July last, against which Defendant cannot
 " go, certainly not under his plea pleaded (mere
 " general issue)."

Their Lordships do not read this judgment as ruling that the receipt *per se* would be conclusive, and that the Plaintiff could not go against it; but that the receipt having been given, effectuating the intention of the parties, or at all events the intention of the debtor, who had a right to appropriate the payment, it cannot be impugned at all events under these pleadings.

The judgment of the Court of Queen's Bench recites what seem to the Court the most material facts thus: "On the 15th of July 1874 the said
 " Thomas Kershaw, acting as agent of the
 " Respondents, rendered to the said J. B. Stevenson
 " son & Co. an account for 8,127½ bushels of
 " amber Michigan wheat so sold and delivered
 " to the said J. B. Stevenson & Co. by the
 " Respondents, together with his account for
 " brokerage, making in all the sum of 10,200
 " dollars. On the 18th July 1874 the said
 " Thomas Kershaw sent his clerk to the said
 " J. B. Stevenson & Co. to get some money; the
 " clerk received 8,000 dollars, and gave a receipt
 " on account of the Respondent's wheat. When
 " he returned the said Thomas Kershaw asked
 " him if the 8,000 dollars was on any particular
 " account. The clerk replied that he thought
 " he had given a receipt on account of the Re-
 " spondent's cargo of wheat, upon which the said
 " Thomas Kershaw replied, 'Go back and tell
 " Stevenson.'" After reciting the judgment
 of the Court below, the Court of Queen's
 Bench proceed to say, "The Court here see no
 " reason to alter the judgment of the Court

“ below. The imputation was made by the
“ parties at the time the receipt was given, and
“ to this date this receipt remains in evidence
“ that Stevenson paid the \$8,000 to Appellant
“ on account of amount due to Respondents.”

The law of Canada with respect to the appropriation of payments appears not to differ materially from the law of this country. It is contained in the section 1,158 and the following sections of their Civil Code. Section 1,158 is in these terms: “A debtor of several debts has the right of declaring, when he pays, what debt he means to discharge.” This is very much a repetition of a similar provision in the Code Napoleon, the commentators on which paraphrase the expression “when he pays” by the expression “at the instant or the moment of payment.” Section 1,160 runs thus: “When a debtor of several debts has accepted a receipt by which the creditor has imputed what he has received in discharge specifically of one of the debts, the debtor cannot afterwards require the imputation to be made upon a different debt, except upon grounds for which contracts may be avoided,” which are to be found in Article 991, which declares that contracts may be avoided on the ground of fraud and error, and other grounds very similar to those on which they are avoidable in this country. Then section 1,161 says: “When the receipt makes no special imputation, the payment must be imputed in discharge of the debt actually payable which the debtor has at the time the greater interest in paying,” and so on. The only observation their Lordships think it necessary to make upon these provisions in the Code is, that they seem to attach somewhat more importance, as indeed the Code Napoleon does, to the written evidence of an appropriation than is attached to it in this country, the object

being, no doubt, as far as possible to avoid contradictions of parol evidence.

Such being the facts of this case, and the law applicable to them, their Lordships have to determine, not what decision they might have come to if they had heard the case as a Court of First Instance, but whether it has been established that the Courts below were wrong in their findings, which their Lordships regard as in a great measure findings of fact.

Undoubtedly the evidence of Stevenson and of Benac was far from satisfactory, and it is open to argument upon that evidence that the choice of the particular invoice on which the receipt was written was merely a matter of chance, without the intention of appropriating the payment to any particular debt. But there having been a finding of fact in both Courts that it was the intention of Stevenson to appropriate the payment to the debt of the Plaintiff, their Lordships are unable to say that the evidence did not warrant such a finding. Assuming this intention, they agree with the Courts that upon the giving of the cheque by Stevenson, and the receipt by Benac, who was sent by Mr. Kershaw for the purpose of receiving the money, and would therefore be acting within the scope of his authority in giving the receipt, there was an appropriation of the payment to the debt of the Plaintiffs.

That being so, Mr. Kershaw himself could not change the appropriation, although he appears to have desired to do so.

But it has been contended that there was a change of the appropriation by the consent of Stevenson and Kirkpatrick.

Their Lordships do not think it necessary to determine whether, considering that Kershaw received this payment on behalf of a third person, an agreement by Kershaw and Stevenson could have had the effect of changing the appropria-

tion of the payment as against Kirkpatrick, because they concur in what they understand to be the finding of the Court of Queen's Bench, that Stevenson did not agree to any change of the appropriation of the payment. He appears to have given an evasive answer upon the Saturday, and to have spoken again evasively upon the Monday. But the fact remains that he refused to alter the receipt, and their Lordships do not think the Court wrong in attaching great weight to the fact that the receipt remained in the terms in which it was originally written.

It has been further contended, that what took place between Kirkpatrick, Stevenson, and Kershaw on the Monday amounted to an agreement of all the parties to a change in the appropriation of the payment. It is true that Mr. Kirkpatrick appears to have tried to get as much as he possibly could, and to have got somewhat too much, which possibly he will have to account for to Stevenson's estate. But be that as it may, it does not appear to be made out that there was any rescision of the appropriation of payment by the consent of all parties. Their Lordships are further disposed to think that if such a defence had been set up it ought to have been specially pleaded, as the rescision of a contract is required to be by the code of civil procedure the appropriation of a payment being put upon the footing of a contract by the Canadian law.

Their Lordships think it right to say that no imputation can properly be made against Mr. Kershaw for his conduct. Considering that Mr. Kirkpatrick received the sums which he did from Mr. Stevenson, and having regard to all the circumstances, Mr. Kershaw may very well have thought that this was a case in which he was justified in taking the opinion of the Courts.

For these reasons their Lordships will humbly advise Her Majesty that the decision of the Queen's Bench in Canada be affirmed, and this Appeal be dismissed, with costs.