

Mifflin Vs. Bingham

Mifflin Vs. Bingham

SooperKanoon Citation : sooperkanoon.com/77938

Court : US Supreme Court

Decided On : 1788

Appeal No. : 1 U.S. 272

Appellant : Mifflin

Respondent : Bingham

Judgement :

MIFFLIN v. BINGHAM - 1 U.S. 272 (1788)

U.S. Supreme Court MIFFLIN v. BINGHAM, 1 U.S. 272 (1788)

1 U.S. 272 (Dall.)

Mifflin et al.

v.

Bingham

Supreme Court of Pennsylvania

April Term, 1788

The Plaintiffs, being disappointed in their evidence, voluntarily suffered a nonsuit. The following points, however, were resolved in the course of the trial, to illustrate which, it is necessary to relate the leading circumstances of the case. The Plaintiffs were

owners of a Privateer called the Rattlesnake, commanded by Captain M'Collough. This Privateer, having taken a valuable prize, during the late war with Great Britain, carried her into Martinique, where the Defendant resided as agent for the United States. At the time of her arrival, the Defendant was exceedingly embarrassed on account of certain pecuniary engagements, which he had entered into for the public; and, in order to relieve himself, he applied to captain M'Cullough for the use of the proceeds of the Prize, offering to pay the amount by bills of exchange, drawn on his correspondents in Philadelphia. To this proposal M'Cullough agreed; and, on delivering to the Defendant the portion of the prize that belonged to the owners, the bills of exchange were drawn, and regularly accepted; but when they became due, they were paid in continental money, which, at that time, had depreciated to the rate of three paper dollars for one hard dollar. The Plaintiffs, at first, believing this transaction, between M'Cullough and the Defendant, to have been on a public foundation, did not complain of the loss which it occasioned; but settled with the Captain and Crew for their respective shares of the prize, and allowed the bills of exchange, in M'Cullough's accounts, as a specie charge. Afterwards, however, it was suggested to them, that the whole was a private speculation for the Defendant's emolument; and that no part of their funds, which had been thus transferred to him, was carried into his accounts with the United States. Under this persuasion they brought the present action, to recover the difference between the value of their effects put into the hands of the Defendant, and the depreciated amount of the continental money, in which the bills of exchange were paid; alledging that those effects had been obtained from M'Cullough under false pretences. I. The principal witness for the Plaintiffs, was M'Cullough, and, in hopes, at all events, to secure his testimony (as he was about to sail on a distant voyage) a rule had been obtained for taking the depositions of going witnesses, upon the usual terms, and subject to all legal exceptions. Under this rule, M'Cullough was, accordingly, examined by the Plaintiffs, and cross-examined by the Defendant; and his deposition, thus taken, was offered to be read upon the trial. But two objections were made: 1st, That M'Cullough was interested in the event of the cause, and, therefore, inadmissible as a witness, even if he

were present: and 2nd. That no subpoena had issued to procure his personal attendance at the trial. 1. To the first objection, it was answered by the Plaintiffs, that it would appear by M'Cullough's cross examination, that he, as well as the whole crew, had been fully satisfied for their respective shares of the prize money, and, consequently, that he was not interested in the fate of this action. It was urged that the effects delivered to the Defendant, were not delivered on M'Cullough's account, but on the account of the owners of the privateer, as their appropriated part of the prize; that, therefore, having sustained no loss, he would not be entitled to any retribution; and that, in fact, the only question

Page 1 U.S. 272, 274

arising from the transaction at Martinique, now lay exclusively between the Plaintiffs and the Defendant, whether the former should receive from the latter a compensation, equivalent to the loss on the bills of exchange. But it was insisted, that, at all events, this objection came too late, as the Defendant had cross-examined M'Cullough under the Rule; which, having the same effect as if he had been cross examined in court when sworn in chief, precluded every subsequent objection to his competency; and that his deposition must indeed be considered, from the nature of the questions asked on the cross-examination, as tantamount to a denial of interest on his voir dire. 4 Burr. 2251. 2nd, On the second objection the evidence was, that, though M'Cullough had left Philadelphia, he had not sailed from Marcus Hook, on the Sunday preceding the day of trial (Wednesday) nor was it certain that he had even yet taken his departure from that place. But it appeared that the Plaintiff, although he had not issued a Subpoena himself, had given notice to the Defendant of the intention of the witness to sail, in order that he might issue a Subpoena, if he preferred M'Cullough's viva voce testimony on the trial, to the deposition under the rule. The Plaintiff contended, therefore, that there was no reason to suppose that he wished to avoid M'Cullough's evidence delivered and canvassed in the most open manner; that the spirit of the rule had been complied with, by putting it into the power of the Defendant to secure the personal attendance of the witness; that it would be absurd to require a Subpoena to be issued in all cases; as, for instance, where the absence of the witness was a

matter of notoriety; and that, in the present case, if a Subpoena had been served, M'Cullough must either have brought himself into a contempt of the Court, by disobeying its process; or have run the risque of ruin, by delaying his voyage. 1. In support of the first objection, the Defendant's counsel contended, that M'Cullough, being once interested in the proceeds of the prize, it was not enough to show that he had been satisfied, but the Plaintiffs must produce a release. 2 Atk. 15. It was urged, that, in order to perfect every appropriation of joint effects, the consent of both parties is necessary; that, in this case, it did not appear that the Plaintiffs ever consented to the transaction, and, consequently, M'Cullough still retained the share in the effects delivered to the Defendant, to which he was originally entitled as a captain of the Privateer. If then a recovery takes place in the present action, M'Cullough may hereafter sue the Plaintiffs to compel them to pay over his share of the money recovered; and, therefore, his testimony is within the principle of 5 Burr. 2727. where one insurer was declared to be an incompetent witness in an action on the policy, because he could compel the other insurers to contribute. Nor is the objection too late. Depositions in chancery are always taken *de bene esse*. When M'Cullough was examined, no Court was sitting that could pronounce upon his competency; and the adverse doctrine would involve the Defendant in this dilemma, that if he did not examine,

Page 1 U.S. 272, 275

he lost all the benefit of the testimony, and if he did examine, he forfeited all right of exception to the competency of the witness. There is not, therefore, any similitude between a cross-examination under such circumstances, and the *voir dire*, which is a mere preliminary enquiry; whereas, it appears, that the witness had undergone a long examination on the part of the Plaintiffs, before the Defendant proposed a single question to him. 2. In support of the second objection, the Defendant's counsel referred to the rules, tit. Witness, No. 48; and insisted that these being *literae scriptae* to govern the practice of the Courts, it was incumbent upon the Plaintiffs to prove the service of a Subpoena, or, at least, a reasonable endeavour to serve it. The greater satisfaction and justice to be obtained from *viva voce* testimony formed the reason of the rule; and this, it was

urged, is of such weight, that the common law never admits depositions to be read, but in cases of absolute necessity. If then a Subpoena had been taken out a week ago, is there any ground to assert, that the witness, whose family resides here, would not have attended; or that the sailing of the vessel (which may at this moment be anchored within twenty miles of Philadelphia) could not be safely postponed? Where then is the absolute necessity to which the common law yields the wholesome rigour of its rules? It is said, that it would have been ruinous to M'Cullough if he had been detained: but this is a matter of which the Plaintiffs had no right to judge; the witness, in the first instance, and the Court eventually, were only competent to determine it; and, after all, the service of a Subpoena does not compel an attendance, but only requires that a sufficient cause should be shown, why the party did not attend. Suppose the deposition had not been taken, and the Plaintiffs had moved to put off the trial on account of M'Cullough's absence, would not the Court have said then, that they were not entitled to the delay, as the witness was here a few days ago, and they had not pursued any legal steps to obtain his evidence? Is there not as much propriety in saying so now? for it is idle to rely upon the notice of M'Cullough's intention to sail, since the Plaintiffs had the same opportunity of detaining the witness which was given to the Defendant; and the latter would have been absurdly officious indeed, if he had taken it upon him to subpoena his adversary's witness.

M'Kean, Chief Justice. There are two ways of proving a witness to be interested in a cause: first, by examining him on his voir dire; or, secondly, by showing his interest from other evidence, either parol or written. But both these ways cannot be pursued at the same time; for the election of the one conclusively bars any subsequent recourse to the other. The Defendant's cross-examination under the rule in this case, is not, however, upon the same footing with an examination upon the voir dire; and, therefore, we do not think that he is now precluded from the advantage of any legal exception to the competency of the witness.

Page 1 U.S. 272, 276

With respect to the admission of testimony, the law has been so well established, and is so perfectly understood, that it is needless to enter minutely into the

doctrine. The whole, indeed, may be reduced to a short rule; if the witness speaks under an interest, it is fatal to his competency; if he is liable to an influence, it taints his credibility. On the present occasion, we are of opinion that Captain M'Cullough, at the time of taking the deposition, was not an interested witness; and, therefore, if there was no other objection, we should certainly allow the Plaintiffs the benefit of his testimony: For, in the authority cited from Atk. 15. Lord Hardwicke can only mean, that a witness, who has been once interested, shall be presumed to be so still, unless the contrary is proved by a release, or other satisfactory evidence. The Plaintiffs, however, have failed in another respect. A Subpoena ought certainly to have been taken out, and, if possible, served upon the witness; for, it was his, and not their, province, to determine whether he would attend or not. The rule never was meant, indeed, to direct an useless thing; such as issuing a Subpoena for a witness actually residing in London, or any other distant country; though even this was heretofore required in strict practice. But, in the present instance, Captain M'Cullough was known to be here a few days ago, his family always resides here, and he may himself, probably, be within a very short distance of the city, at this moment. The Plaintiffs, having taken it upon themselves, not only to decide for the witness, that he would not attend, but also for the Court, that they would not insist upon the rule, have acted in their own wrong; and, upon this objection, we are of opinion, that the deposition ought not to be read in evidence. II. The Defendant's counsel offered his books to prove, that in his account with the United States, at the time of the transaction between him and M'Cullough, there was a considerable balance in his favor. But it was objected, for the Plaintiffs, that the books of a party are only evidence of goods sold and delivered, or work done; and that, therefore, they were inadmissible to the present purpose, which was to show that the money was advanced upon a contract different from that which the Plaintiffs alledged. To this it was answered, that although the books of a party are only evidence to charge in the cases mentioned, yet, that they might well be received to establish a matter collateral to the cause.

And by M'Kean, Chief Justice. This is a point, that I do not remember to have ever occurred before. The books are not offered to prove a charge against the Plaintiffs, but only to determine a collateral question, whether a third person was the

Defendant's debtor, at a particular period? How can this be accomplished, but by the evidence of the books, fairly and regularly kept? To make it a charge, other vouchers of the entry might be necessary; but for

Page 1 U.S. 272, 277

this purpose, if it is of any importance to the cause, (which I do not think) I can conceive no other mode of proceeding.

The Defendant, thinking, however, that he could accomplish his object in another way, did not call for a decision of the Court; but waved the reading of the books.

For the Plaintiffs-Ingersol and Sergeant.

For the Defendant-Tilghman, Lewis, and Wilson.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com