Supreme Court of Canada

Miller *v.* White (1889) 16 SCR 445

Date: 1889-04-30

Henry U. Miller (Defendant)

Appellant

And

Vincent S. White (Plaintiff)

Respondent

1888: Nov. 19, 20; 1889: April 30.

Present—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Evidence—Admissibility of—Entries in boohs—Goods charged to third party—Verdict against evidence—New trial.

McK. was a member of two firms, C. McK. & Co. and McK. & M. In an action against McK. & M. for goods sold and delivered it appeared on the trial that the goods were ordered by McK. and shipped to the place of business of McK. & M., but were charged in plaintiff's books to C. McK. & Co., which he said was done at McK's. request. McK., called as a witness for plaintiff, corroborated this, and on cross-examination he produced, subject to objection, the books of C. McK. & Co., in which these goods were credited to that firm. A verdict was given for the defendant M.

*Held*, reversing the judgment of the court below, that the books of C. McK. & Co. were properly in evidence on the cross-examination of McK. and the rule for a new trial should be discharged.

Appeal from a decision of the Supreme Court of New Brunswick[[1]](#footnote-2) setting aside a verdict for the defendant and ordering a new trial.

The action in this case was for goods sold and delivered, and the defence was that the credit was given to a third party. The facts were briefly as follows:—

The appellant, Miller, and one McKean, who was also a defendant in the suit, carried on a lumbering business in Economy, N.S. McKean was also a member of the firm of Carvill, McKean & Co., of St John, N.B.

The goods in question were brought by McKean for

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the lumbering business of McKean & Miller. They were charged in the plaintiff's books to Carvill, McKean & Co., and the plaintiff had taken a note of Carvill, McKean & Co., in payment of a portion of them.

When these facts came out on the trial the plaintiff explained that the entries in the books were made in this way at the request of McKean, and the note was taken by the plaintiff also at McKean's request, and for the accommodation of McKean & Miller.

The defendant, McKean, was examined on behalf of the plaintiff, and gave evidence to the effect that he had purchased the goods" for himself and Miller. On behalf of the defence the books of Carvill, McKean & Co. were put in evidence, subject to objection, to show that the goods in question were entered in those books as received from the plaintiff and forwarded to Economy.

A verdict was given for the defendant and a new trial was moved for, on the grounds that the evidence of these books, and that of Carvill, McKean & Co.'s book-keeper, were improperly admitted, and that the verdict was against evidence and misdirection. A new trial was granted, the reason for the judgment stating that it was on the ground that the said evidence was improperly admitted. The defendant appealed to the Supreme Court of Canada from the order for a new trial.

Weldon Q.C. and C. A. Palmer for the appellant.

McLeod Q.C. and A. S. White for the respondent

Sir W. J. RITCHIE C.J.—Was of opinion that the appeal should be allowed.

STRONG J.—Concurred in the judgment of Mr. Justice Patterson.

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TASCHEREAU J.—I concur with Mr. Justice Gwynne, and, for the reasons given by him, I think that this appeal should be allowed.

GWYNNE J.—This case was eminently one for a jury to determine, and the precise point in the case which was submitted to them was stated by the learned Chief Justice who tried the case, in a manner which admitted of no mistake, in a charge as to which no just ground of complaint, in my opinion, has been, or could be, reasonably made.

The jury who tried the case appear to have paid the greatest attention to the trial, so much so as to draw forth this observation from the learned Chief Justice: "I shall not take up a great deal of your time, for I saw that you paid great attention to the evidence as the case progressed. Many of you are, perhaps, commercial men and so you could apply it" (that is your attention) to the case as it went along.

The action was brought against Henry U. Miller and George McKean for goods alleged by the plaintiff to have been sold and delivered to them. The defendants were partners, in a certain business carried on by them at a place called Economy, in Nova Scotia; the defendants both resided at St. John, New Brunswick, where the defendant McKean was managing partner of a lumbering firm of Carvill, McKean & Co., in which firm Miller had no interest. The goods in question were purchased by McKean, and the firm of Carvill, McKean & Co. having become insolvent a question arose whether the goods had been sold, and credit given, to the firm of Carvill, McKean & Co., or to Miller & McKean. The defendant, Miller, pleaded never indebted and payment; the defendant McKean pleaded never indebted only, but made no defence. The plaintiff gave testimony to the effect that the goods were sold

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to Miller & McKean, although they were invoiced to Carvill, McKean & Co., and entered both in the books of the plaintiff and of Carvill, McKean & Co. as sold to them; and although Carvill, McKean & Co.'s note for the amount was given to the plaintiff, this entry in the plaintiff's books to Carvill, McKean & Co., and the giving of their note by McKean, was stated by the plaintiff to have been an arrangement made at the special request of McKean, although the sale was in fact made to Miller & McKean, and the goods were shipped to their place of business in Nova Scotia. The plaintiff was submitted to a strict cross-examination upon this his evidence. He called also as a witness on his behalf the defendant, McKean, who also swore, in support of the plaintiff's evidence, that the sale had been to Miller & McKean. This witness was also subjected to a strict cross-examination upon certain entries in the books of Carvill, McKean & Co., kept under his direction and control, which were insisted upon as discrediting certain material evidence given by McKean in his oral examination. This reference to the books of Carvill, McKean & Co., and the examination of McKean in relation to such entries therein, was objected to by the plaintiff's counsel as not being properly admissible in evidence, and a verdict having been rendered for the defendant, and that objection renewed, on a motion to set aside the verdict and for a new trial, the court set aside the verdict and ordered a new trial to take place; and from the order granting the new trial this appeal is taken.

There can, I think, be no doubt that the examination of McKean upon the entries in the books of Carvill, McKean & Co. was quite admissible for the purpose for which those entries were used, namely, of testing the proper weight to be attached to McKean's oral testimony upon the main point at issue—which was,

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whether the plaintiff had sold the goods and given credit to Carvill, McKean & Co., or to Miller & McKean. The fact that those entries accorded with entries in the plaintiff's own books purporting to represent the sale as having been made to Carvill, McKean & Co. was one which could not be withheld from the jury; and the learned Chief Justice did not fail to draw their attention to the matter in a manner which was wholly free from objection. The appeal, therefore, in my opinion, must be allowed with costs, and the verdict of the jury restored, and the rule for a new trial be ordered to be discharged with costs.

PATTERSON J.—This appeal is from a rule granting a new trial on the motion of the plaintiff, White. The defendant, Miller, appeals. There are one or two questions raised by way of objection to the charge to the jury, but the principal point, and the one on which the new trial has been ordered, relates to the admissibility of certain evidence.

Miller, the defendant, carried on a lumber business in St. John, under the firm of Miller & Woodman, but that business is not involved in any way in the action. McKean also lived at St. John, where he managed the business, which was that of shippers of lumber, of the English firm of Carvill, McKean & Co., and he was a member of that firm.

Miller and McKean individually carried on at Economy, in Nova Scotia, where they had saw mills, the business of manufacturers of lumber. The establishment at Economy was in charge of James Miller, a son of the defendant. Supplies for the establishment were purchased in St. John from the plaintiff. This action is to recover the price of those supplies. It is not resisted by McKean, but it is resisted by Miller, on the ground that the supplies, which were purchased

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by McKean personally or by clerks of Carvill, McKean & Co., were sold on the credit of Carvill, McKean & Co., and not to Miller & McKean. It is not disputed that the goods were bought for the purpose of being used in the Economy establishment, or that they were actually used there, but the contention of the defendant Miller is that the concern in which he was partner got them from Carvill, McKean & Co., and not directly from the plaintiff. The occasion for the contest arises, as is usually the case, from the insolvency of some one. Carvill, McKean & Co. having failed, it is important for the plaintiff to maintain, if he can, his recourse against Miller. The desire of Miller to escape personal liability needs no explanation. It is apparently a fair contest on both sides, with, perhaps, as part of the evidence seems to indicate, some complication of interests other than those of the nominal parties.

The contention of the defendant that the credit was given to Carvill, McKean & Co. has been upheld by the jury. There is ample evidence to justify that verdict, but it is objected that some of the evidence was not properly admissible.

To render the discussion of that objection intelligible, it may be stated that the general result of the evidence is that the goods (being ordered, as I have said, by McKean personally, or by one of the clerks of Carvill, McKean & Co.), were charged in the plaintiff's books to Carvill, McKean & Co.; that accounts were rendered to that firm for the goods, and notes given for them by McKean in the name of the firm; that in the books of Carvill, McKean & Co. the goods were credited to the plaintiff and debited to an account headed with the name of the defendant Miller; and that on one or two occasions the debit was accompanied by a small charge in the name of commission.

The nature of the evidence which is said to have

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been improperly received, and the way in which the objection was dealt with, will best appear by reading from the judgment of the court as delivered by Mr. Justice King:—

The defendants put in evidence the books of Carvill, McKean & Co. to show that this firm (and therefore McKean) had treated these goods as purchased by them of the plaintiff, and then as resold by them to defendants. Amongst other things, in the account in Carvill, McKean & Co.'s books, they relied on a charge of a small commission as indicating (whether it would do so or not) a transaction of sale as between the firm and defendants. They also (on the cross-examination of McKean and the direct examination of the clerk of Carvill, McKean & Co.), put in evidence entries of other goods, purchased from other parties, which in these books were charged against defendants and on which also commissions were charged. Thus, on p. 73 it is stated that "other items of commission are traced, but none of Mr. White's and on p. 94 McIntyre speaks of the way invoices were made out of goods got from Stephenson as well as White; and again, on p. 95, Mr. McIntyre says: "When I bought goods, or any of the young men bought goods, they were billed to Carvill, McKean & Co.; they were then credited to the party from whom bought and charged to wherever they were sent. If sent to McAfee they were charged to McAfee, and if to Economy they were charged to H. U. Miller, and if they were bought for Collins they were billed to Collins."

This evidence seems inadmissible, and it is impossible to say that it might not have had weight with the jury. We therefore think there should be a new trial.

The learned judge has not mentioned the grounds on which the evidence was considered inadmissible. I understand it to have been on the ground that the entries in the books of Carvill, McKean & Co. were *res inter alios acta* as far as the plaintiff was concerned.

The plaintiff depends upon establishing that Miller was a principal for whom McKean acted as agent in buying the goods—not an undisclosed principal, for the evidence is that the plaintiff was given to understand that the goods were for the concern in which Miller was a partner. The fact that their destination was the Economy works is consistent with either an immediate purchase by Miller & McKean or a purchase

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by Carvill, McKean & Co., for the purpose of re-selling to Miller & McKean. It was important evidence for the jury, but not conclusive either way. The plaintiff called McKean to prove that he realty purchased for his Economy firm and that the process of charging the goods, as McKean directed them to be charged, to Carvill, McKean & Co., was a mere matter of convenience in connection with the circumstance that he and Miller had not yet opened a set of books; and he gave some other explanations. In answer to this evidence of McKean the defendant Miller was allowed to educe from McKean, and also to examine McKean's bookkeeper with the object of proving, that the transactions appeared in the books of Carvill, McKean & Co., which were the books of McKean, in a form inconsistent with the testimony given by McKean on behalf of the plaintiff, and consistent with the contention of the defence; and further, that that mode of dealing was not peculiar to these purchases from White, but was the system on which the business was conducted by McKean.

This evidence may have had much or little weight, going to the jury, as it did, with whatever explanations were offered. It cannot be said that it had no influence, and it is therefore necessary to decide the question of its admissibility. I do not see that it was improperly received. The question of the agency of McKean in making his purchases was the question at issue. His denial of the purchases being, as the written entries imputed that they were, on account of Carvill, McKean & Co., touched the central fact of the inquiry. To contradict him by direct evidence, whether educed from himself or from another source, which opposed his own acts or statements on other occasions to his testimony in the witness box, was not in violation of any rule of evidence or of *nisi prius* practice.

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The opposing evidence may have been such, and I should say was such, as to be not unlikely to go beyond the office of merely contradicting or nullifying his statement, and may have been capable of being regarded by the jury as affirmative evidence in support of the issue. But that is not a consideration which requires the exclusion of the evidence, so long as the matter is a material and not a collateral one. The case of *Watson* v. *Little[[2]](#footnote-3)* is an authority for that proposition. That was an action of ejectment, in which the question was the legitimacy of the plaintiff. His mother swore that he was born five days after her marriage, namely, on the 13th of March. She denied, in answer to questions put in cross-examination, that she had been before the magistrates about the child, or said to the magistrates that he was born on the 8th of March, or that she had affiliated the child. Evidence was admitted in reply to show that she had affiliated the child as a bastard born on the 8th of March. The most of the argument in the case related to the admissibility, under the circumstances, of the order of bastardy as proof of the facts contained in it. That question does not concern us.

Martin B. said:

The defendant had a right to put in any legal evidence for the purpose of contradicting her in a material matter; and no doubt it was most material, in a question of legitimacy, to show that the mother had been before the Magistrates and stated that the child was born before marriage.

Bramwell B. said:

I cannot say that it would be evidence that the child was born on the 8th March, but it was certainly evidence to contradict the witness; though for that purpose the order must be proved by some evidence of the identity of the parties. Possibly it might operate on the minds of the jury for another purpose; but I cannot help thinking that the order tells the truth, and that the mother when before the magistrates, did say that the child was born before marriage. She might have been able to explain her motives for doing so, but as she denied the fact, the consequences must fall on the party who produced her as a witness.

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And Wilde B. said:

I give no opinion as to whether the order would be admissible to prove the bastardy. We cannot reject it, because, if admissible for one purpose, it may have an effect upon the jury as evidence for another.

*McEwan* v. *Thornton[[3]](#footnote-4)*; *Fowkes* v. *Manchester &c. Insurance Co.[[4]](#footnote-5)*; *Reg.* v. *Dennis[[5]](#footnote-6)*; and *Attorney General* v. *Hitchcock[[6]](#footnote-7)*.

I think the evidence was properly received.

In the respondent's factum the point is taken that McKean had not been asked respecting invoices made by Carvill, McKean & Co. to Miller and McKean, respecting which McIntyre gave evidence, and also that evidence touching purchases of goods from parties other than the plaintiff was irrelevant. These objecjections are, to my mind, answered by what I have said. The point being the character in which McKean acted in purchasing the goods directly in question, whether as representing Carvill, McKean & Co., or Miller & McKean, and there being no suggestion that in these purchases he departed from the system adopted for carrying on the business, but the contrary appearing from his answers to some questions, particularly as to purchases from De Forest, Burpees, Stephenson, &c., upon which a commission had been charged in the books, the enquiries were relevant. It was the broad question of agency, not one of narrow details.

Objections are taken to the charge for misdirection and for non-direction. They were not noticed in the judgment below, but they were taken in the rule and may of course be insisted on here.

I do not think it necessary to say more respecting them than that they resolve themselves into complaints of too much or too little stress being laid on parts of the evidence, or of expressions of opinion upon its bearing on some particular question of fact. I have carefully

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read the able and lucid charge of the learned Chief Justice. I am not of opinion that any of the complaints are well founded; but they are not matters of misdirection for which a verdict ought to be disturbed, even if the objections had been made at the trial when any supposed omission or oversight could have been remedied.

I think we should allow the appeal, and of course with costs.

Appeal allowed with costs.

Solicitor for appellant: C. A. Palmer.

Solicitors for respondent: E. & R. McLeod.

1. 27 N. B. Rep. 143. [↑](#footnote-ref-2)
2. 5 H. & N. 472. [↑](#footnote-ref-3)
3. 2 F. & F. 594. [↑](#footnote-ref-4)
4. 3 F. & F. 440. [↑](#footnote-ref-5)
5. 3 F. & F. 502. [↑](#footnote-ref-6)
6. 1 Ex. 91. [↑](#footnote-ref-7)