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Admission of Conspirators

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tion company which was afterwards active in the operation of the railway company, but there was no evidence that King knew this fact. The railway company issued a large amount of debenture notes; the road was constructed and operated for a few years, when all its property was assigned to another street railway company, and the B. & D. Company ceased to do business, owing large sums of money to creditors, among whom were the plaintiffs in this action.

The effort to recover from King was based chiefly upon the contention that the rights and liabilities resulting from the subscription by King were not assignable, that there was no novation, and that in any event, the assignment was in fraud of the company's creditors.

The court held that, by the subscription and the acceptance of it by the corporation, King acquired certain rights and incurred certain liabilities; that the rights acquired by him under the subscription were assignable; and that when the company accepted S. as the successor to King's rights and liabilities, there was a complete novation, which operated to release King, unless the transaction could be impeached as one in fraud of creditors. Upon the latter question, it was pointed out that there were no creditors at the time of the transaction, and the findings expressly disclaimed any intention on the part of King to defraud future creditors.

The making of the subscription and its acceptance by the corporation ordinarily completely establish the rights and liabilities of the subscriber, even though no call has yet been made for payment, and no certificate of stock has yet been issued. There seems to be no reason why these rights and liabilities should not be transferred at this stage as completely as they may be after certificates of stock have been issued, and to this effect are the authorities.[2]

FLOYD R. MECHEM.

EVIDENCE — ADMISSIONS — CONSPIRATORS.—[Iowa] M and F were jointly tried and convicted on a charge of conspiracy to commit the crime of adultery. Each of the defendants had made separate incriminating admissions which were proved at the trial over the objection of each to the admissions of the other. *Held,* that such admissions were properly received, though the admissions of one could not be considered as evidence against the other. *State* v. *Martin.*[1]

In the ordinary case of co-defendants on a joint trial, where one may be convicted and the other acquitted, the rule is well settled that an admission or confession is admissible against the defendant who made it, but not against the other, and the jury should be cautioned not to consider it as evidence of the guilt of the latter.[2]

2. See *Valentine* v. *Water Power Co.* (1901) 128 Mich. 280, 87 N. W. 370; *Roosevelt* v. *Hamblin* (1908), 199 Mass. 127, 85 N. E. 98, 18 L. R. A. (N. S.) 748.

1. (1924) 200 N. W. (Ia.) 213.

2. (1895) *Sparf* v. *U. S.* 156 U. S. 51.

In the case of an indictment of two defendants for conspiring with each other, or for any other strictly joint offense requiring the participating of both, it is generally held that if one is acquitted, both must be acquitted.[3]

It might be supposed therefor, that the issue is single in such a case, and hence that no evidence could be received unless it was admissible against *both* defendants. Such a rule has generally been applied in will contest cases to exclude admissions by a legatee or devisee because not competent against the other parties, and the issue could not be separated.[4]

Professor Wigmore has criticized the rule in the will cases as unduly technical and not a necessary result from the fact that the issue is single.[5]

But a jury could hardly be expected to deal with the one question of testamentary capacity from the different angles involved in considering various items of evidence, good against a particular legatee, but not against the others. The inevitable difficulties and confusion from such an attempt seem to furnish a sufficient justification for the accepted rule in the will cases. The single question in a will contest differs from the question involved where two persons are charged with co-operating, because the co-operation is the result of the acts of each. A and B are charged in a civil case as joint promissors; the joint promise is the result of the signing by each of a written instrument. A and B are charged with conspiring with each other. The conspiracy results from the words and acts of each. Hence in such cases it is not only possible, but frequently necessary, to prove the acts of each by different items of evidence. Where A and B are charged with conspiring with each other, it may be logically impossible for A to be guilty and B innocent, but there is no inconsistency in recognizing that evidence, which is admissible against A alone, may prove the guilt of both so far as he is concerned, though the hearsay rule may prevent its consideration for the purpose of convicting B. This has frequently been recognized where the technical rule requiring the acquittal of both in case of a failure of proof as to one was not applied. For example, in a suit for divorce, where the principal defendant and the co-respondent were charged with adultery.[6]

And even on an indictment of two for adultery, where the only proof of the marriage of the woman was her own admission, and both were found guilty, the Supreme Court of Massachusetts sustained the exceptions of the male defendant and allowed the conviction of the woman to stand.[7]

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3. (1846) *State v. Mainor* 6 Fed. 340; (1883) *Reg. v. Manning* 12 Q. B. D. 241; (1919) *Feder* v. *U. S.* 257 Fed. 694.

4. (1825) *Nussear* v. *Arnold,* 13 S. & R. 323; (1868) *Shailer* v. *Bumstead* 99 Mass. 112; (1900) *Shierbaum* v. *Schemme* 157 Mo. 1; (1912) *James* v. *Fairall* 154 Ia. 253; (1920) *Joyal* v. *Pilotte* 293 Ill. 377.

5. Wigmore, Evidence, 2 Ed. Sec. 1081 (2).

6. (1858) *Robinson* v. *Robinson* 1 S. W. and Tr. 362.

7. (1868) *Commonwealth* v. *Thompson* 99 Mass. 444.

The technical requirement that both be acquitted if either is acquitted does not affect the possibility of considering the evidence against each separately, as would be the case on separate trials. Hence it appears sufficient if each is found guilty on evidence proving the whole issue against him.[8]

E. W. HINTON.

HUSBAND AND WIFE—SUITS BY ONE AGAINST THE OTHER.—In *Plotkin* v. *Plotkin*[1] [Delaware] a husband joined his wife in a replevin suit, under a statute which provided:

"That the property of a married woman, whether real, personal or mixed, and choses in action which she may have acquired in any manner, and all the income, rents and profits thereof, should be deemed to be her sole and separate property, and she may sell, convey, assign, transfer, devise, bequeath, encumber or otherwise dispose of the same, and she may contract jointly (including with her husband) or separately, sue and be sued, and exercise all other rights and powers, including the power to make a will, which a feme sole may do under the laws of this state."

This provision, the court held, did not expressly give power to husband and wife to sue each other; and, because "the right to sue each other strikes at the very heart of domestic relations, and its effect not only upon home ties but upon society generally would be far-reaching," the court refused to extend the operation of the provision, by implication.

It should be observed that the litigation here in question was not one in tort, and while it might be said to be one involving the separate property of the wife, it was not one designed to protect her in the enjoyment of that property, for the husband brought the suit.

The present day married women's legislation in Illinois provides:

"A married woman may own, in her own right, real and personal property obtained by descent, gift or purchase, and manage, sell and convey the same to the same extent and in the same manner that the husband can property belonging to him . . . "

And by another section—

"may in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried, and an attachment or judgment may be enforced by or against her as if she were a single woman."

And by still another section—

"Should either the husband or wife unlawfully obtain or retain posses-

8. (1897) *People* v. *Butler* 111 Mich. 483; (1902) *Commonwealth* v. *Rogers* 181 Mass. 184; (1914) *People* v. *Darr* 104 N. E. (Ill.) 389; (1919) *Feder* v. *U. S.* 257 Fed. 694; (1921) *State* v. *Newman* 113 Atl. (N. J.) 225.

1. (1924) 125 Atl. 455.