

L. O. HIBBERD, PLAINTIFF AND APPELLANT, VS. WM. J. ROHDE AND D. J. MCMILLIAN, DEFENDANTS AND APPELLEES.*G.R. No. 8418. December 09, 1915*

Ponente: TRENT, J.

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This is a suit on a promissory note against the makers. Only one of them, the defendant Rohde, appeared and answered. He not having entered a verified specific denial of the genuineness and due execution of the note, the plaintiff claims that his special defense of illegality of consideration is cut off by section 103 of the Code of Civil Procedure, which reads as follows: "Actions and defenses based upon written instruments.—When an action is brought upon a written instrument and the complaint contains or has annexed a copy of such instrument, the genuineness and due execution of the instrument shall be deemed admitted, unless specifically denied under oath in the answer; and when the defense to an action, or a counterclaim stated in an answer, is founded upon a written instrument and the copy thereof is contained in or annexed to the answer, the genuineness and due execution of such instrument shall be deemed admitted, unless specifically denied under oath by the plaintiff in his pleadings."

By the admission of the genuineness and due execution of an instrument, as provided in this section, is meant that the party whose signature it bears admits that he signed it or that it was signed by another for him with his authority; that at the time it was signed it was in words and figures exactly as set out in the pleading of the party relying upon it; that the document was delivered; and that any formal requisites required by law, such as a seal, an acknowledgment, or revenue stamp, which it lacks, are waived by him. Hence, such defenses as that the signature is a forgery (*Puritan Mfg. Co. vs. Toti & Gradi*, 14 N. M., 425; *Cox vs. Northwestern Stage Co.*, 1 Idaho, 376; *Woollen vs. Whitacre*, 73 Ind., 198; *Smith vs. Ehnert*, 47 Wis., 479; *Faelnar vs. Escano*, 11 Phil. Rep., 92) ; or that it was unauthorized, as in the case of an agent signing for his principal, or one signing in behalf of a partnership (*County Bank vs. Greenberg*, 127 Cal., 26; *Henshaw vs. Root*, 60 Ind., 220; *Naftzker vs. Lantz*, 137 Mich., 441), or of a corporation (*Merchant vs. International Banking Corporation*, 6 Phil. Rep., 314; *Wanita vs. Rollins*, 75 Miss., 253; *Barnes vs. Spencer & Barnes Co.*, 162 Mich., 509); or that, in the case of the latter, that the corporation was not authorized under its charter to sign the instrument (*Merchant vs. International Banking Corporation*, supra) ; or that the party charged signed the instrument in some other capacity than that alleged in the pleading setting it out (*Payne vs. National Bank*, 16 Kan., 147); or that it was never delivered (*Hunt vs. Weir*, 29 111., 83; *Elbring vs. Mullen*, 4 Idaho, 199; *Thorp vs. Keokuk Coal Co.*, 48 N. Y., 253; *Fire Association of Philadelphia vs. Ruby*, 60 Neb., 216) are cut off by the admission of its genuineness and due execution.

The effect of the admission is such that in the case of a promissory note a prima facie case is made for the plaintiff which dispenses with the necessity of evidence on his part and entitles him to a judgment on the pleadings unless a special defense of new matter, such as payment, is interposed by the defendant. (*Papa vs. Martinez*, 12 Phil. Rep., 613; *Chinese Chamber of Commerce vs. Pua To Ching*, 14 Phil. Rep., 222; *Banco Espanol-Filipino vs. McKay & Zoeller*, 27 Phil. Rep., 183.) But we have held that the section is not applicable to the indorsement on a promissory note in a suit against the maker (*Heinszen & Co. vs. Jones*, 5 Phil. Rep., 27); nor against the heirs of a

decendent who signed a document declared upon (*Nery Lim-Chingco vs. Terariray*, 5 Phil. Rep., 120). Under statutes similar to our own it has been held that the admission of the genuineness and due execution of the instrument does not bar the defense of want of consideration. (*Farmers & Merchants Bank vs. Copsey*, 134 111. [Cal.J., 287; *Barnes vs. Scott*, 29 Fla., 285; *Booco vs. Mansfield*, 66 Ohio, 121; *Holt vs. Robinson*, 21 Ala., 106.) And in Kentucky in actions based upon promissory notes the consideration for which were gambling debts, it has been held that such an admission does not prevent the defense of illegality of consideration. (*Burton vs. Emerine*, 10 Ky., 499; *Arnold vs. Trundle*, 30 Ky., 115.) In *Freeman vs. Ellison* (37 Mich., 458), it was said: "It is now claimed for plaintiff below that this (rule) precludes any inquiry into the date of delivery or the circumstances of the signing as bearing on any defenses dependent on time in any way.

"There is no authority that we know of or any such construction of the rule. Undoubtedly when a plaintiff produces in court an instrument corresponding to the one set forth he is exempted from proving its execution. But the actual time of delivery may involve questions which it would be absurd to hold foreclosed by any such assumption. If a note is dated back in order to include usurious interest, and that defense is set up, it would hardly be regarded as bearing on the question of execution. Execution can only refer to the actual making and delivery, but it cannot involve other matters without enlarging its meaning beyond reason. The only object of the rule was to enable a plaintiff to make out a prima facie, not a conclusive case, and it cannot preclude a defendant from introducing any defense on the merits which does not contradict the execution of the instrument introduced in evidence."

To so interpret section 103 as to prohibit such a defense as illegality of Consideration, which is clearly a defense of new matter, would pro tanto repeal the second paragraph of section 94, which permits a defendant to answer by "A statement of any new matter constituting a defense or counterclaim." Likewise, section 285 provides that the terms of a writing may be impeached by reason of its illegality or fraud. We do not understand that such defenses are barred by the provisions of section 103. We accordingly hold that the special defense interposed by the defendant of illegality of consideration is not barred by his failure to enter a verified denial of the genuineness and due execution of the note set out in the complaint. Hence, the evidence in support of that plea was competent. The note reads as follows:

BAGUIO, BENGUET, April 27th, 1911.

"For value received, we the undersigned parties, jointly and severally agree to pay to the firm of Brand & Hibberd, of the city of Baguio, P. I., twelve hundred pesos, Philippine currency, in monthly installments of one hundred pesos per month, beginning with the first day of June, 1911. (Not transferable, excepting to Jos. C. Brand or L. O. Hibberd.)

"Wm. J. Rohde.

"D. J. McMillian."

According to the testimony of the defendant Rohde, McMillian was in the retail liquor business and secured a stock of merchandise valued at P1,200 from Brand & Hibberd and sold it. Alleging that they delivered the merchandise to him on deposit only, Brand & Hibberd filed a complaint of estafa against McMillian. McMillian was arrested and released on bond pending the preliminary hearing before the justice of the peace. The defendant Rohde was a practicing attorney and undertook McMillian's defense in the estafa case. Rohde testified that he was well acquainted with the nature of the transaction between the firm of Brand & Hibberd and McMillian; that the merchandise was sold outright to McMillian; that he knew the estafa complaint was absolutely without foundation; and that McMillian could not possibly be convicted; but that one Sullivan informed him after the preliminary hearing was held that he knew positively that McMillian would be bound over for trial in the Court of First Instance. In rebuttal, Sullivan testified that what he told Rohde was that he was satisfied from the evidence introduced at the hearing that McMillian would be held for trial in the Court of First Instance. Upon the strength

of Sullivan's statement, Rohde agreed to sign the note reproduced above if Brand & Hibberd would withdraw the estafa complaint. He did this because he did not want his client to remain in confinement pending his trial in the Court of First Instance, which would not have occurred for three months. His client was sick at the time and Rohde was afraid that confinement in the jail for such a period of time would seriously endanger his health. After the execution of the note, Brand & Hibberd moved in the justice court that the estafa complaint be dismissed and this motion was granted by the presiding justice. In the order dismissing the complaint, the justice stated that, from the evidence introduced at the hearing he was convinced that there was no sufficient basis for a criminal action, but that the controversy was of a civil character. Rohde subsequently paid two hundred pesos on the note. The note was assigned to the plaintiff L. O. Hibberd, on June 10, 1911.

Any agreement which has for its purpose the concealment of a public offense, the suppression of evidence thereof, or the stifling of a criminal prosecution already commenced is contra bonos mores and against public policy. Every successful attempt to shield persons guilty of such offenses adds impetus to crime by encouraging the culprits and all others of criminal tendencies who may learn of such perversions of justice, to commit further offenses. A person suffering pecuniarily from the commission of such a crime may not barter away the benefits of public order and the personal safety and security of the people by representing to the culprit that he will actively aid in the task of securing immunity from the public prosecution if his civil damages are made good. Courts are charged with the duty of administering the law, and they should not lend their aid to the enforcement of any contract which looks to its perversion. (Wever vs. Shay, 56 Ohio, 116; 60 Am. St. Rep., 743; Ormerod vs. Dearman, 100 Pa., 561; 45 Am. Rep., 391; Partridge vs. Hood, 120 Mass., 403; 21 Am. Rep., 524; Gardner vs. Maxey, 9 B. Mon. [48 Ky.], 90; Goodrum vs. Merchants & Planters Bank, 102 Ark., 326; Ann. Cas., 1914A; Nickelson vs. Wilson, 60 N. Y., 362.) Nor is it important that the shielding of the guilty party was a minor consideration of the agreement, or necessary that a crime shall have been in fact committed. The intention of the parties to obstruct criminal justice to whatever extent taints the entire contract and makes it unenforceable. (United States Fidelity & Guaranty Co. vs. Charles (Ala.), 57 L. R. A., 212; W. T. Joyce Co. vs. Rohan, 134 Iowa, 12; 120 Am. St. Rep., 410; Crowder vs. Reed, 80 Ind., 1.) The courts will not interfere either to rescind an executed contract or to enforce an executory contract of such character. The parties are left just where they are found. Perez vs. Herranz, 7 Phil. Rep., 693; Rohdes vs. Neal, 64 Ga., 704; 37 Am. Rep., 93; Bowman vs. Phillips, 41 Kan., 364; 13 Am. St. Rep., 292; Atwood vs. Fisk, 101 Mass., 363; 100 Am. Dec, 124; Case vs. Smith, 107 Mich., 416; 61 Am. St. Rep., 341; 31 L. R. A., 282.)

A very large number of public offenses, however, inflict pecuniary damage on private persons. The Penal Code recognizes the civil liability of offenders (arts. 119, et seq). In this civil liability the State has no interest other than its undertaking to aid the injured person in securing compensation for his injuries, and it cannot be doubted that if the injured person so desires he may privately negotiate with the criminals or with persons interested in the latter for the settlement of his private damages. Article 1813 of the Civil Code provides that a civil action arising from a crime may be compromised, but the public action for the imposition of the legal penalty shall not be extinguished thereby. So long as the right of the State to exact the penalty for the public offense is not trenching upon, there is nothing unlawful or immoral in such a contract. (Schirm vs. Wieman, 103 Md., 541; 7 Ann. Cas., 1008; Atwood vs. Fisk, 101 Mass., 363; 100 Am. Dec, 124; Goodrum vs. Merchants & Planters Bank, 102 Ark., 326; Ann. Cas., 1914A; Lomax vs. Colo. Nat. Bank, 46 Colo., 229.) And mere threats of prosecution will not vitiate an instrument given for an amount embezzled or for the value of property feloniously taken, unless coupled with an agreement not to prosecute if the instrument be given. (Wolf vs. Troxell Estate, 94 Mich., 573; Portner vs. Kirschner, 169 Pa., 472; 47 Am. St. Rep., 925; Goodwin vs. Crowell, 56 Ga., 567; Thorn vs. Pinkham, 34 Me., 101; 30 Am. St. Rep., 335.) A mere expectation of one of the parties that the settlement of the civil injuries will step the public prosecution is not sufficient to make such a contract void as against public morals or public policy.

(Phillips vs. Pullen, 45 N. J. Eq., 830.) As was said in Moog vs. Strang (69 Ala., 98), the law does not "seek to control the hope or expectation of the offender. He may very reasonably, in many cases, expect that the prompt settlement of a discovered default may tend to paralyze the energy of an incipient prosecution, and however reprehensible the motives of the parties, they are not cognizable by the courts so long as their minds fall short of concurring in an agreement, express or implied, to compound or not to prosecute as the consideration in part or in whole of the payment of the debt or damages resulting from the crime committed"

In this country a person is not an accessory to a public offense except in the cases expressly provided by law. (Penal Code, art. 15; Act No. 292; U. S. vs. Caballeros, 4 Phil. Rep., 360.) In Goodrum vs. Merchants & Planters Bank (102 Ark., 326; Ann. Cas., 1914A), it appears that Goodrum was manager of a bank and that one Eagle held the majority of the bank's capital stock and controlled its policies. Goodrum defaulted, and to settle his shortage executed a trust deed which was to be surrendered to the bank in case an examination showed that he was criminally liable. In a suit by the bank to compel the conveyance, Goodrum sought to show the illegality of the contract by evidence that he had been promised immunity from criminal prosecution if he would make good the shortage. Eagle testified that he promised that, if the conveyance were made, "We won't lie around the courthouse and try to prosecute him; but if the grand jury calls on me and asks me to explain these books and asks me if the shortage occurred upon the expert's report, I will tell them everything I know about it." The court said: "We do not think that this statement of Mr. Eagle in effect that he would not go before the grand jury until summoned to appear was an implied agreement either to withhold testimony, conceal the crime, or to stifle the prosecution under the facts and circumstances of this case. The charges made against Goodrum that he was short in his accounts with the bank, and criminally so, were not only known to all the directors and persons present at the conference, but they had been published to the world, and the knowledge thereof rife amongst the people of that community, if not also amongst the people of the county. This is not a case where the charges were only known by a few persons, and upon their failure to divulge them they would not come to the notice or knowledge of the public or to those to whom the prosecution of crime is entrusted by the law. * * * At the most, Eagle only stated that he would not interfere with a prosecution. * * * Because he would remain passive relative to matters of which the public authorities had full knowledge, it can not be said that he thereby agreed to shield Goodrum from any public prosecution."

In Nickelson vs. Wilson (60 N. Y., 362), it was said: "But an agreement to lay the whole facts before the court, and to leave it to the free exercise of the discretionary powers vested in it by law, is not in itself wrong, and is not rendered illegal even by a stipulation on the part of a prosecutor to exert such legitimate influence as his position gives him in favor of the extension of mercy to a guilty party."

Whether the tendency of an agreement is to interfere with the due enforcement of criminal law is always a question of fact. (Martin vs. Tucker, 35 Ark., 279; Goodwin vs. Crowell, 56 Ga., 567; Beath vs. Chapoton, 115 Mich., 506; 69 Am. St. Rep., 589; Goodrum vs. Merchants & Planters Bank, supra.)

In the case at bar, the findings of fact made by the court below have been duly submitted to us for review. The trial court found as a fact that the consideration of the note was the compromise of a public offense. We do not think that the evidence justifies this conclusion. It is true that the defendant Rohde testified that the consideration of the note was "the withdrawal of the false charge against him (McMillian) and to get him out of jail." But it is also in evidence that McMillian owed Brand & Hibberd the full amount of the note and Rohde knew this fact before he signed the note. There is no charge that Brand & Hibberd filed the criminal complaint with a view of extorting a settlement of their claim against McMillian. The hearing at the preliminary investigation was duly had and all the evidence was before the justice of the peace before the agreement represented by the note was made. It is not shown that Brand & Hibberd agreed not to testify in any further criminal proceedings against McMillian, or

that they would suppress any evidence in their possession, or that they would solicit the State's prosecutor or any other Government official whose authority extend to the criminal case, to not hold the defendant for trial. What they actually did was to move in open court for a dismissal of the complaint. This is all they did so far as the record shows, and that it was satisfactory to the defendant Rohde is apparent from the fact that he subsequently made partial payments on the note.

There can be no doubt that the agreement which resulted in the execution of the note was entered into by Brand & Hibberd with an eye to the satisfaction of their pecuniary claim against McMillian. From the testimony of Rohde himself it appears that he strongly insisted that McMillian was not guilty of the crime charged, and no doubt his ability as a lawyer tended to convince the complainants that the criminal charge was unjustified. If they became converted to this view of the matter, they no doubt more readily consented not to actively assist in the further prosecution of the criminal complaint. We do not think the record justifies a more radical conclusion as to what Brand & Hibberd agreed to do with reference to the criminal phase of the transaction than that they promised not to further actively participate in the case. The record does not justify the conclusion that they went further and agreed to actively assist in preventing the due investigation of the criminal charge by suppressing evidence, by declining to appear against McMillian if duly subpoenaed as witnesses, or by other means. In our opinion, the case is similar in many aspects to *Goodrum vs. Merchants & Planters Bank* (102 Ark., 326), to which we have referred above. The record indicates the same passivity on the part of the injured party and the same publicity of the criminal charge. There having been no agreement to interfere with the due administration of the criminal law, we are constrained to hold that no part of the consideration of the note declared upon is illegal or against public policy. The plaintiff is therefore entitled to judgment. The judgment appealed from is reversed and judgment is decreed against the defendant Rohde for the sum of one thousand pesos, the amount remaining unpaid on the note, together with legal interest from the date of the institution of this action. Without costs. So ordered.

Arellano, C.J., Torres, Carson, and Araullo, JJ., concur.

Judgment reversed.

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