

June 1949

Evidence--Admissibility of Indictments in Civil Cases in Federal Courts

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Recommended Citation

D. A. B., *Evidence--Admissibility of Indictments in Civil Cases in Federal Courts*, 51 W. Va. L. Rev. (1949).

Available at: <https://researchrepository.wvu.edu/wvlr/vol51/iss4/7>

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tion. *Elder v. Elder*, 139 Va. 19, 123 S. E. 369 (1924); *Greco v. Greco*, 121 Atl. 666 (Del. 1923). Contra: *Thompson v. Thompson*, 49 Nev. 375, 247 Pac. 545 (1926). Whether *Norman v. Norman*, *supra*, so holds is not quite clear from the opinion but such would seem to be the law, from the inference in *Currence v. Currence*, *supra*. In *Myers v. Myers*, 127 W. Va. 551, 33 S. E.2d 897 (1945), an attempt at reconciliation was made consisting of husband and wife kissing each other and going to bed together after a quarrel. The court held that such conduct did not amount to a condonation or reconciliation of differences between the parties as respects the wife's right to a divorce on the ground of cruel and inhuman treatment. From the above authorities it would seem that something more than a mere intent to forgive and isolated acts of coition would be necessary to constitute condonation.

It is said that condonation as an affirmative defense is favored by the law. *Brown v. Brown*, 51 R. I. 132, 134, 152 Atl. 423 (1930). But in divorce cases where a determination is made by the trial court upon the evidence, the findings of the trial chancellor should be given great weight, *Maxwell v. Maxwell*, 75 W. Va. 521, 84 S. E. 25 (1915); here, the trial court refused to find condonation. As was pointed out in the dissenting opinion of Judge Kenna in the instant case, "If condonation is to become the likely result of unsuccessful efforts to become reconciled, it is certain that the person whose rights have been injured will be extremely apprehensive of the slightest gesture that might result in surrendering a legal right to relief. It will result in fewer, not more reconciliations." The authorities and the more nearly analogous cases seem to support the dissent.

J. F. S., Jr.

EVIDENCE — ADMISSIBILITY OF INDICTMENTS IN CIVIL CASES IN FEDERAL COURTS.—*A* and *B* were jointly sued for the conversion of money. They introduced evidence of their general good character. They objected to the introduction of testimony by the plaintiff that they had had been jointly indicted for an earlier crime, receiving stolen property, in 1931 and 1933. On both occasions *A* pleaded guilty and was sentenced. No further proceedings, beyond the indictment, were taken against *B* as to the 1931 indictment; but he pleaded guilty to the 1933 indictment and later was permitted to withdraw his plea and the case as to him was dropped. The trial

court admitted this testimony. *Held*, on appeal, that evidence rebutting defendants' good character was admissible; and the testimony concerning the indictments of the defendants was admissible for all purposes against both defendants. Judgment affirmed. *Mourikas v. Vardianos*, 169 F.2d 53 (C. C. A. 4th 1948).

The court correctly recognized the general rule that indictments are inadmissible. In the instant case *A* was a witness in his own behalf, and *B* was probably also a witness. But an indictment is inadmissible to impeach the credibility of a witness because it involves a violation of the hearsay rule. *Kennedy v. International Great Northern Ry.*, 1 S. W.2d 581 (Tex. Comp. App. 1928); 3 WIGMORE, EVIDENCE § 980 (a) (3d ed. 1940). But cf. *State v. Maslin*, 195 N. C. 537, 143 S. E. 3 (1928) (an indictment is much more than a mere charge). It would seem that the same objection could be made to the use of indictments as a means of rebutting good character and that they should also be inadmissible for that purpose.

The court, however, holds them admissible because of the following circumstances: (1) the indictments were against the same joint defendants now defending the civil suit; (2) the indictments were followed by pleas of guilty, although withdrawn as to *B*; and (3) the rules of evidence favoring admissibility shall be applied because of FED. R. Civ. P. 43 (a).

As to the first factor, the fact that the indictments and present suit were against the same persons would seem important only because the same parties were involved and not because the indictments were joint and the present action joint. As to the second, the pleas of guilty following the indictments would seem important for it is a much stronger evidentiary fact. A withdrawn pleading is generally admissible against the pleader. *Kunglig Jarnvagsstyrelsen v. Dexter and Carpenter, Inc.*, 32 F.2d 195 (C. C. A.2d 1925); 4 WIGMORE, EVIDENCE § 1067. Contra: *Ralph v. Hensler*, 114 Cal. 196, 45 Pac. 1062 (1896). A plea of guilty is admissible in the trial of a civil action to which the person making the plea is a party where the plea is relevant to an issue tried in the civil case. *Morrissey v. Powell*, 304 Mass. 268, 23 N. E.2d 411 (1939); cf. *Interstate Dry Goods Stores v. Williamson*, 91 W. Va. 156, 159, 112 S. E. 301, 303 (1922) (conviction on a plea of guilty admissible). In West Virginia a withdrawn declaration is inadmissible. *Bartley v. Western Maryland Ry.*, 81 W. Va. 795, 95 S. E. 443 (1918). But cf. *State v. Fisher*, 123 W. Va. 745, 752, 18 S.

E.2d 649, 652 (1941) (verified plea). This latter case raises some doubt as to whether West Virginia will continue to follow the *Bartley* case. The better view favors the admissibility of a withdrawn plea. 4 WIGMORE, EVIDENCE §1067. Therefore, it would seem sounder and more logical to have admitted the evidence as a withdrawn plea and the indictment as a part thereof. As to the third reason, the fact that FED. R. CIV. P. 43 (a) applies, there seems to be a valid reason for assigning some importance to this. In cases of doubt as to the admissibility of evidence it should be admitted. *Pfotzer v. Aqua Systems*, 162 F.2d 779 (C. C. A. 2d 1947); *Neff v. Pennsylvania R. R.*, 7 F. R. D. 532 (1948). The intent of Rule 43 (a) is admissibility not exclusion. 3 MOORE, FEDERAL PROCEDURE 68 (Supp. 1947).

As a matter of policy it would seem that there are conflicting arguments: (1) the admission of this testimony would result in the defendants' being prejudiced because of prior wrongs; or (2) all evidence should be admitted if it will aid in reaching a true decision. Since the federal courts are bound by FED. R. CIV. P. 43 (a) favoring admissibility, the result in the instant case would seem correct. Even in state courts where this rule does not apply the sounder approach would be to admit such evidence as a withdrawn plea.

D. A. B.

FAIR LABOR STANDARDS ACT — CONTINGENT FEE AGREEMENT — ALLOWANCE OF REASONABLE ATTORNEY'S FEE UNDER FLSA CONDITIONED UPON ATTORNEY'S SURRENDER OF CONTINGENT FEE AGREEMENT. — In an action by an employee against his employer for overtime wages under the Fair Labor Standards Act, 52 STAT. 1060 (1938), as amended 29 U. S. C. §201 (Supp. 1948), the trial court awarded the plaintiff overtime wages, an equal amount as liquidated damages, costs, and a reasonable attorney's fee. Plaintiff had a contingent fee agreement with his counsel for compensation in addition to that which the court would allow. *Held*, on appeal, that this private agreement is invalid as being contrary to the purpose of the Act, and the judgment is modified so as to make the payment of the fee fixed by the court conditional upon the attorney's surrender of all rights to additional compensation under his agreement with the plaintiff. Affirmed as modified. *Harrington*