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Judgment of Conviction, Effect in a Civil Case as Res Judicata or as Evidence

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Austin, Nichols & Co., Inc. v. *Gross*,[10] in which case the defendant had signed a check with his individual name without adding words to indicate any representative capacity, the name of the corporation being printed across the left end of the check. Nevertheless, the defendant was allowed to show that he signed on behalf of the corporation as an authorized agent.

Hence it would seem that, in view of such a liberal holding, the fact that the signature of the agent is not indented beneath the corporate name should not be sufficient to deprive the signature of its ambiguous appearance.

That the *Herman* Appellate Court case is poor authority is further borne out by the fact that it refuses to consider the effect of the word "by." This is directly contrary to the provision of Section 20 of the Act of 1907, the first part of which provides that:

"Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of the principal or in a representative capacity, he is not liable on the instrument if he was duly authorized."

That part of the section certainly intends to give effect to such words as "by." Nevertheless, the *Herman* case states that:

". . . the word 'by' portends nothing and must be treated as if it was not there. The note is the obligation of the three defendants, the corporation, Zimmerman, and Nat Rue."

In conclusion, it appears that the *Herman* case is out of line with the authorities; that it has confused the principle of not admitting parol evidence to vary the terms of an instrument with the principle admitting extrinsic evidence to explain an ambiguity in an instrument; that it has ignored the distinction pointed out in the *Hypes* case, on which its reasoning is principally based; that it has ignored the *Scanlon* case, and that it has also ignored the significance of the first part of Section 20 of the Illinois Negotiable Instruments Law.

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JUDGMENT OF CONVICTION—EFFECT IN A CIVIL CASE AS RES JUDICATA OR AS EVIDENCE.—[New York] A case[1] recently decided by the New York Court of Appeals presents several interesting questions. In a suit on an insurance policy the answer set out a provision of the policy avoiding liability in case of any fraud by the insured, and, as a bar to the action, the conviction of the insured of the statutory offense of making fraudulent proofs of loss under such policy. This attempted defense was struck out by the trial court, and the ruling affirmed by the Appellate Division. The Court of Appeals with some reluctance affirmed the order of the Appellate Division, and suggested:

"The Legislature can get over the authorities by enacting that all convictions shall be *conclusive* evidence of the guilt of the convicted person in any proceeding, civil or criminal, *whoever may be parties*, for the purpose of establishing whenever material the facts on which the conviction rests. The court might so decide were the occasion imperative and the

10. (Conn. 1923) 120 Atl. 596; *Brannan* "Negotiable Instruments Law" (4th ed.) 169, 170.

1. *Schindler* v. *Royal Ins. Co.* (1932) 258 N. Y. 310, 179 N. E. 711.

necessity clear, but established precedents are not to be lightly set aside, even though they seem archaic."

The opinion then goes on to approve the doctrine of the *Crippen* case[2] in which it was held that a judgment of conviction of a criminal offense was admissible against the convict and those claiming under him as "presumptive proof" of his actual guilt.

So far as the actual decision goes little comment is needed because it is in accord with the great mass of decisions that a judgment of conviction does not conclude the convict in a subsequent civil action between him and a stranger, as to the existence of the facts on which the prosecution was based. The doctrine of stare decisis has settled beyond controversy that a judgment inter partes is only binding in subsequent actions between the same parties and those claiming under them; and that a stranger who is not bound by the adjudication cannot invoke it as binding on his adversary.

The Court of Appeals was amply justified in following the almost unbroken line of precedents, though one late case[3] took a contrary view and apparently held that the conviction of the insured on a charge of burning the insured property barred his action on the policy. Where the former judgment has been rendered in a civil case it has never been seriously contended that it should be binding in favor of a stranger, but the argument for the binding effect of a criminal conviction is based on the rule that in criminal prosecutions the necessary facts must be proved beyond a reasonable doubt and hence that it is certain that the defendant was really guilty. It is doubtless true that comparatively few innocent defendants are convicted, though the requirement of proof beyond a reasonable doubt may mean very little. It makes it easy for jurors to acquit where sympathy inclines them to do so, but it is extremely doubtful whether this theoretical requirement leads to any more careful consideration of the evidence in the cases where the jury does find the defendant guilty. There are numerous cases in the books where convictions have been reversed because the evidence was insufficient to warrant a submission of the case to the jury.

If a miscarriage of justice has occurred in a criminal case it would work a double hardship to make this adjudication binding in civil matters in favor of strangers. On the other hand a plaintiff or defendant in a civil case who is required to prove the existence of the facts on which his claim or defense is based, without regard to the accidental circumstance that the State has succeeded in establishing the existence of the same facts in a prosecution of the adverse party, is under no greater burden than any other party in an ordinary case.

In this connection it should be noted that convictions sometimes affect civil rights and liabilities, and that such cases do not involve any question of res judicata. For example, if a life insurance policy is construed as excepting death by legal execution, the conviction and execution of the insured will bar an action by the beneficiary without regard to the actual *guilt*[4] of the insured.

2. *Matter of Crippen's Estate,* L. R. [1911] Prob. 108.

3. *Eagle, Star & British Dominions Ins. Co.* v. *Heller* (1927) 149 Va. 82, 140 S. E. 314, 57 A. L. R. 490 annotated.

4. *Burt* v. *Union Central Life Ins. Co.* (1902) 187 U. S. 362.

So the conviction and execution of the insured is not an "accident"[5] within the meaning of an accident policy.

A more interesting question is raised by the suggestion that the legislature might make the conviction conclusive in any case no matter who the parties were. Doubtless there would be no serious objection to a statute making the conviction conclusive *against* the convict and those deriving rights from him, since he would have had his day in court. But there is room for doubt as to whether such a statute would not violate the "Due Process" clause if applied to controversies between strangers. Suppose, for example, that A should be convicted of the murder of B who was insured against death by accident. Could the insurance company be foreclosed from a defense that it was really a case of suicide? In such a case the defendant company has never had its day in court. The reasoning in the *Duchess of Kingston's Case* would indicate that the judges thought that it was contrary to natural justice to conclude a party without an opportunity to be heard.

The Act[6] of Congress of March 31, 1875, undertook to make a conviction of larceny conclusive in the prosecution of another person for receiving stolen property. In a case[7] prosecuted under this statute the trial court instructed that the conviction of the alleged thief was prima facie evidence of the larceny as against the alleged receiver, but the Supreme Court held that this violated the defendant's right to be confronted with the witnesses to prove one of the esssential elements of the crime charged against him. While the due process clause was not invoked, the case is at least suggestive as to limitations on the power of the legislature to make a judgment of conviction binding on third persons. If the court was unwilling to hold the conviction binding on the convict should it sanction the evidential use of the judgment to prove the existence of the facts on which it was based?

For the collateral purpose of impairing the credibility of a witness the courts have usually felt no difficulty in admitting a judgment convicting him of a felony or other serious crime.[8] The theory involved is certainly that the conviction proves his actual guilt, and therefore tends to show that he is the sort of a person likely to be untruthful.[9] Possibly the admission of a conviction for this purpose is a more or less unconscious carry over from the time when a conviction disqualified the witness.

As proof of matter in issue in a case the great weight of authority, both ancient and modern, is clearly against the admissibility[10] of a judgment of conviction of either party. While the reason usually assigned for this rule, the lack of mutuality, is not very convincing, there are several serious objections to admissibility. For the purpose of proving the facts on which it is based the admission of the conviction seems counter to both the hearsay rule and the opinion rule. The finding of the jury is obviously nothing more than their conclusion from the testimony produced at the trial. It is clear that the

5. *Diamond* v. *New York Life Ins. Co.* (1931) 50 F. (2d) 884.
6. 18 Stat. at Large 479.
7. *Kirby* v. *United States* (1899) 174 U. S. 47.
8. *Rex* v. *Warden of the Fleet* (1700) 12 Mod. 337.
9. *Gertz* v. *Fitchburg R. R. Co.* (1884) 137 Mass. 77.
10. *Rex* v. *Warden of the Fleet* (1700) 12 Mod. 337; *Rostron* v. *Rostron* (R. I. 1928) 142 Atl. 162; *Page* v. *Phelps* (1928) 108 Conn. 572; *Montgomery* v. *Crum* (Ind. 1928) 161 N. E. 251; *Girard* v. *Vermont Fire Ins. Co.* (Vt. 1931) 154 Atl. 666.

individual jurors would not be admitted to testify to their belief in the guilt of the accused because of their lack of personal knowledge. Their formal verdict would seem to be no better than their present testimony. It is true that there are some precedents for admitting the verdict of a coroner's jury[11] to prove the cause of death, but that view has generally been repudiated.[12]

If the hearsay rule and the opinion rule could be brushed aside as technical obstacles to progress, there remains a purely practical objection. When we admit evidence to a jury we assume that their general knowledge and experience will enable them to determine roughly at least its probative force—in the metaphor of the courts, to weigh it and balance it against other evidence. Privately we may doubt the capacity of the jury to evaluate ordinary evidence. We may be skeptical as to whether they really attempt it in the majority of cases. We may suspect that most verdicts represent a "hunch" or a compromise in which logic and experience played a minor rôle. But if we give the jury an impossible task the case might as well be decided by the toss of coin. Manifestly there is no way in a given case of determining the probative value of a conviction to establish the truth of the propositions on which it was based. If there were no other evidence we might indulge in a presumption and so settle the matter. But if there is other evidence on the questions what effect should be given to the fact that another jury on an unknown state of the evidence arrived at a given conclusion? The present jury, if it really considers the matter, must either blindly accept the conclusion of the first jury or ignore it because there is no rational alternative. Few courts today would approve an instruction telling a jury to weigh a "presumption" with or against evidence, for the simple reason that the thing is impossible. Any attempt to weigh the conviction involves the same difficulty. It would seem therefore that the "archaic" precedents may not be so bad after all.

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11. *United States Life Ins. Co.* v. *Vocke* (1889) 129 Ill. 557.

12. *Spiegel House Furnishing Co.* v. *Ind. Comm.* (1919) 288 Ill. 422. *Bird* v. *Keep* [1918] 2 K. B. D. 692.