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Evidence--Judgments--Admissability and Effect of a Criminal Conviction in a Subsequent Civil Action (Walther v. News Syndicate Co., 276 App. Div. 169 (1st Dep't 1949))

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upon the children and the community.[20] Subsequent to this final word by the Supreme Court, it has been held that "released time" is constitutional unless characterized by elements rendering it otherwise, that its constitutionality must be tested by its particular factual aspects, that absences for such purposes are to be handled in the same manner as requests for absence on holy days or for any other legitimate cause, and that such a program can only be condemned on a finding that it is in aid of religion.[21]

As a general rule, therefore, the constitutionality of "released time" depends upon the facts of each particular program. A comparison of the facts of the *McCollum* case and the principal case shows the basis of each holding. In the former case there was (1) no underlying enabling state statute, (2) religious training took place in the public school building, (3) school officials supervised the religious teacher, (4) pupils were segregated in school according to religion, and (5) pupils were solicited in school for the instructions; whereas in the instant case, (1) there is an enabling statute, (2) instruction takes place off the school premises on private property, (3) the particular denomination selects its own religious instructor and curriculum, (4) there is no segregation according to religion (those wishing instruction are merely dismissed one hour earlier one day each week), and (5) there is no solicitation of pupils (parents sign a request, furnished by the religious group, that the child be dismissed, which request is presented to the school authorities at the beginning of the semester).

The "released time" program in New York City, being free from objectionable aspects, is therefore not a violation of the First Amendment. This decision is in accord with the view of the majority of the state courts, the law as laid down by the United States Supreme Court, and is a restatement of the general rule that "released time" programs are not per se unconstitutional.

EVIDENCE — JUDGMENTS — ADMISSIBILITY AND EFFECT OF A CRIMINAL CONVICTION IN A SUBSEQUENT CIVIL ACTION. — In an action for personal injuries sustained in an automobile accident, plaintiff's counsel inquired of the defendant operator whether he had been convicted of "dangerous driving" [1] in connection with circum-

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have in the execution . . . that close judicial scrutiny is demanded. . . ." *Id.* at 225.

[20] See note 15 *supra.*

[21] Lewis v. Spaulding, 193 Misc. 66, 85 N. Y. S. 2d 682 (Sup. Ct. 1948).

[1] The traffic regulations define "dangerous driving" as "driving, using or operating any vehicle or appliance or accessory thereof (1) in a manner which unreasonably interferes with the free and proper use of a private or public street or a footwalk thereof, (2) or unreasonably endangers the users thereof,

stances relative to the accident. The trial court allowed the question over the objection and exception of defense counsel, and the witness was obliged to admit such a conviction. On appeal, plaintiff contended that even if it should be decided that the defendant had been deprived of his right of privilege as a witness under Section 355 of the New York Civil Practice Act,[2] still, no reversible error had been committed. It was argued that plaintiff had the right to establish the fact of appellant's prior conviction by introducing the certificate of such conviction into evidence at the trial. Hence, it was reasoned, no right of the defendant had been prejudiced by requiring him to testify to the fact of his prior conviction. *Held,* a record of conviction for a traffic infraction after trial on a not guilty plea is inadmissible against a defendant in a civil suit arising out of the same occurrence, nor is he subject to interrogation in respect to such conviction to establish a charge of negligence. *Walther v. News Syndicate Co.,* 276 App. Div. 169, 93 N. Y. S. 2d 537 (1st Dep't 1949).

"The question of admissibility in a civil case and weight to be accorded a judgment of conviction in criminal or quasi-criminal[3] proceedings has been frequently before the courts."[4] Generally, it has been held that such judgments are not admissible in subsequent civil suits as evidence of the facts upon which they were rendered.[5] This has always been the rule in England[6] and in the majority of American states.[7] However, ancient and established as the rule may

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(3) or the driver himself, (4) or any occupant of the vehicle he operates, (5) or property." NEW YORK CITY POLICE DEPARTMENT TRAFFIC REGULATIONS Art. 3, § 20. Although the definition is textually similar to that of the misdemeanor of "reckless driving," N. Y. VEHICLE AND TRAFFIC LAW § 58, "dangerous driving" is not a crime. N. Y. PENAL LAW § 2.

[2] N. Y. CIV. PRAC. ACT § 355. "A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish the fact that he owes a debt or is otherwise subject to a civil suit. This provision does not require a witness to give an answer which will tend to accuse himself of a crime or to expose him to a penalty or forfeiture; nor does it vary any other rule respecting the examination of a witness, *nor shall any witness be required to disclose a conviction for a traffic infraction, as defined by the vehicle and traffic law, nor shall conviction therefor affect the credibility of such witness in any action or proceeding.*" (Italics supplied.)

[3] The term quasi-criminal embraces all offenses, which are neither crimes nor misdemeanors. See 2 POPE, LEGAL DEFINITIONS 1328.

[4] Walther v. News Syndicate Co., 276 App. Div. 169, 93 N. Y. S. 2d 537, 542 (1st Dep't 1949).

[5] Chantangco v. Abaroa, 218 U. S. 476 (1910); Stone v. United States, 167 U. S. 178 (1897); New York Life Ins. Co. v. Murdaugh, 94 F. 2d 104 (4th Cir. 1938); Washington National Insurance Co. v. Clement, 192 Ark. 371, 91 S. W. 2d 265 (1936); Krowka v. Colt Patent Fire Arm Mfg. Co., 125 Conn. 705, 8 A. 2d 5 (1939); Hampton v. Westover, 137 Neb. 695, 291 N. W. 93 (1940).

[6] Hollington v. F. Hewthorn & Co., [1943] K. B. 27; Jones v. White, 1 Strange 68, 93 Eng. Rep. 389 (K. B. 1717); The King v. The Warden of the Fleet, 12 Mod. 338, 88 Eng. Rep. 1363 (K. B. 1699).

[7] Helms v. State, 4 Div. 98, 45 So. 2d 170, *cert. denied,* 4 Div. 603, 45 So.

be, it has not gone without criticism,[8] alteration,[9] and dissent.[10] Indeed, even in those jurisdictions where courts emphatically declare allegiance to the exclusion rule, exceptions have often penetrated its armor of precedent.[11]

Most piercing of the criticisms advanced by the assailants of the exclusion doctrine is that a refusal to admit evidence of an antecedent conviction in subsequent civil proceedings is to deny to the record verdict of a competent court its just and rightful dignity.[12] This, it is charged, begets injustice and fosters criticism and distrust for our judicial system.[13] Further, they insist that one against whom a verdict has been rendered in a court, and under circumstances where his every right has been zealously preserved, should be estopped to deny to that verdict its full effect.[14] That these arguments have had their effect on judicial thinking is evident in the growing number of those who are renouncing the exclusion rule to seek a less stringent doctrine.[15]

On the other hand, the advocates of strict exclusion have shown equal vigor in their defense of the established rule.[16] They argue that to admit evidence of a prior conviction in ancillary civil litigation is to deny to the defendant mutuality of estoppel (1) by reason of the fact that a plaintiff, who was not a party to the prior proceedings cannot be bound by the determinations made in them,[17] and

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2d 171 (Ala. 1950); Stevens v. Duke, 42 So. 2d 361 (Fla. 1949); Wilkes v. Dinsman, 7 How. 89 (U. S. 1849). See note 5 *supra*. *Accord,* United States v. One 1942 Plymouth Sedan Auto, 89 F. Supp. 884 (E. D. Tenn. 1950); Smith v. White, 216 S. W. 2d 672 (Texas 1948).

[8] "Logic *compels* a relaxation of the long followed earlier rule of complete exclusion." North River Ins. Co. v. Militello, 100 Colo. 343, 67 P. 2d 625, 626 (1937). (Italics supplied.)

[9] *See* Bealor v. Hahn, 132 Pa. 242, 19 Atl. 74 (1890) (conviction of a husband on a charge of deserting his wife held "persuasive" evidence of the fact of desertion in subsequent civil litigation).

[10] See note 24 *infra*.

[11] The principal exceptions to the non-admissibility rule are made (1) in those cases where it becomes material to prove the existence of such judgment in the criminal case, as where the ancillary civil suit is for malicious prosecution, and (2) in actions to recover penalties where the same are conditioned on the conviction of the defendant. *See* Interstate Dry Goods Stores v. Williamson, 91 W. Va. 156, 112 S. E. 301, 302 (1922).

[12] *See* Sovereign Camp W.O.W. v. Gunn, 227 Ala. 400, 150 So. 491, 492 (1933).

[13] *See* Schindler v. Royal Insurance Co., 258 N. Y. 310, 313, 179 N. E. 711, 712 (1932).

[14] 80 U. OF PA. L. REV. 1164 (1932).

[15] New York & Cuba Mail S.S. Co. v. Continental Ins. Co. of New York City, 117 F. 2d 404, 411 (1941). "The older cases generally excluded such evidence (prior convictions); now however, there is an apparently increasing number of cases holding to the contrary." See Note, 50 YALE L. J. 499 (1940).

[16] For arguments against admissibility, see Hinton, *Judgment of Conviction; Effect on a Civil Case,* 27 ILL. L. REV. 195 (1932). For a reprint and criticism of Professor Hinton's views, see 5 WIGMORE, EVIDENCE § 1671a (3d ed. 1940).

[17] In Silva v. Silva, 297 Mass. 217, 7 N. E. 2d 601 (1937), a proceeding

(2) because a verdict of acquittal would not, in most instances, be competent proof in defendant's favor.[18] The latter of these contentions seems without merit.[19] More persuasive are some of the other rationales urged in defense of the doctrine. These are that as between criminal proceedings and their ancillary civil actions, there are dissimilarities of persons,[20] objects,[21] and procedure.[22] The frequency with which courts reiterate these latter arguments as bases for their adherence to the exclusion rule is indicative of their merit.[23] Indeed, only one American court has chosen to utterly reject this reasoning and overthrow completely the doctrine of inadmissibility.[24]

Instead, there has developed a minority rule, which although it rejects the tenets of strict exclusion, does not yet confer upon the antecedent criminal verdict the dignity of *res judicata*. Under this minority doctrine, the prior *conviction* is given weight as prima facie evidence,[25] while in conformity with the established rule, verdicts of acquittal are denied admissibility.[26] Such is [27] and has been the rule in New York from an early time.[28] However, in those cases where the antecedent conviction has been for the violation of an ordinance or traffic regulation, even those courts, which are committed to the minority view, have continued to apply the rule of strict exclusion.[29] Here, the courts, recognizing the weakness of such verdicts as proof of the facts which they purport to determine,[30] have been reluctant

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contesting a divorce decree, evidence as to the conviction of the husband for non-support was held inadmissible even though the conviction was for failure to support the wife within the period of alleged desertion for which the divorce decree was granted. The court pointed to the lack of mutuality in that nothing decided in the criminal proceedings could have bound the wife, who was not a party to them.

[18] Powell v. Wiley, 125 Ga. 823, 54 S. E. 732 (1906); Chernes v. Rosenwasser, 181 App. Div. 837, 169 N. Y. Supp. 38 (2d Dep't 1918). *But cf.* United States v. Salem, 244 Fed. 296 (S. D. N. Y. 1917).

[19] ". . . a judgment of acquittal is only a determination that guilt has not been established beyond a reasonable doubt, although a preponderance of evidence might point thereto." Schindler v. Royal Insurance Co., 258 N. Y. 310, 313, 179 N. E. 711, 712 (1932).

[20] Kusnir v. Pressed Steel Car Co., 201 Fed. 146 (S. D. N. Y. 1912); Myers v. Maryland Casualty Co., 123 Mo. App. 682, 101 S. W. 124 (1907).

[21] *See* Interstate Dry Goods Stores v. Williamson, 91 W. Va. 156, 112 S. E. 301, 302 (1922).

[22] Jay v. State, 15 Ala. App. 255, 73 So. 137, 138, *cert. denied,* 198 Ala. 691, 73 So. 1000 (1916).

[23] See note 5 *supra.*

[24] Eagle Star & British Dominion Ins. Co. v. Heller, 149 Va. 82, 140 S. E. 314 (1927). *Accord,* Poston v. Home Ins. Co., 191 S. C. 314, 4 S. E. 2d 261 (1939).

[25] Wolff v. Employers Fire Ins. Co., 282 Ky. 824, 140 S. W. 2d 640 (1940).

[26] See note 18 *supra.*

[27] Giessler v. Accurate Brass, Inc., 271 App. Div. 980, 68 N. Y. S. 2d 1 (2d Dep't 1947).

[28] Maybee v. Avery, 18 Johns. 532 (N. Y. 1820).

[29] *See* Zenuk v. Johnson, 114 Conn. 383, 158 Atl. 910 (1932); *cf.* Page v. Phelps, 108 Conn. 572, 143 Atl. 890 (1928).

[30] 80 U. OF PA. L. REV. 1164 (1932).

to alter the established doctrine.[31] Writers in legal periodicals have shared this view.[32]

The decision in the instant case squarely aligns New York courts with this latter view; and although it cannot be said that New York precedent clearly supports the ruling,[33] Justice Callahan has found ample justification for his expressed conclusion. It is his contention, adopted from the case of *Hart v. Mealy*,[34] that in its enactment of Section 355 of the New York Civil Practice Act [35] the state legislature ". . . recognized the weakness of evidence of a traffic infraction as proof of the facts which may have been involved." [36] Further, he asserts that ". . . the rule of public policy thus declared seems to go beyond the mere question of privilege or credibility of a witness." [37] Inasmuch as receipt of the certificate of conviction is tantamount to obliging a witness to testify to the prior verdict against him, the logic and force of the conclusion reached in the instant case is compelling.[38]

EVIDENCE—WHEN NEGATIVE TESTIMONY RAISES AN ISSUE FOR THE JURY.—Plaintiff's intestate was killed in a collision with a train owned and operated by defendant. Decedent stopped her car at a crossing, allowed an eastbound train to pass, and then proceeded. The car was struck by a westbound train. The crew on the west-

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[31] General Exchange Ins. Corp. v. Sherby, 165 Md. 1, 165 Atl. 809 (1933).

[32] Note, 50 YALE L. J. 499.

[33] In an action arising out of an intersection collision, judgment of conviction of the defendant for violation of an ordinance in exceeding speed limit at the time of the accident was held admissible as prima facie evidence of the facts involved. Same v. Davison, 253 App. Div. 123, 1 N. Y. S. 2d 374 (4th Dep't 1937). *But see* Merkling v. Ford Auto, 251 App. Div. 89, 96, 296 N. Y. Supp. 393, 401 (4th Dep't 1937).

[34] 287 N. Y. 39, 38 N. E. 2d 123 (1941).

[35] See note 2 *supra*.

[36] Walther v. News Syndicate Co., 276 App. Div. 169, 174, 93 N. Y. S. 2d 537, 543.

[37] *Ibid.*

[38] N. Y. VEHICLE & TRAFFIC LAW § 70, subd. 11, provides: "Upon the conviction of any person . . . of a violation of any of the provisions of this chapter or of any lawful ordinance, except a parking ordinance, made by local authorities in relation to traffic . . . the trial court or the clerk thereof shall within forty-eight hours certify the facts of the case to the commissioner, who shall record the same in his office. *Such certificate shall be presumptive evidence of the facts therein.*" (Italics supplied.) It has been urged (14 BROOKLYN L. REV. 246) that this provision of the Vehicle and Traffic Law precludes the court from ruling as it has in the instant case. However, the single provisions of a given statute must be read in their relation to the whole of the statute. [Merkling v. Ford Auto, 251 App. Div. 89, 94, 296 N. Y. Supp. 393, 399 (4th Dep't 1937).] So read, the above provision of Section 70 would seem to be applicable only in those cases where the Commissioner of Motor Vehicles is proceeding to revoke the operating license of an offending driver.