Fordham Law Review

Volume 30 | Issue 4 Article 7

1962

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THE AFFIRMATIVE USE OF PRIOR CONVICTIONS IN SUBSEQUENT CIVIL SUITS IN NEW YORK

American courts have advanced three distinct solutions to the problem of whether the judgment of a prior *criminal* conviction is admissible in a subsequent *civil* proceeding based on the same facts or event. The majority rule is that such evidence should be excluded altogether and as such cannot be pleaded or offered in evidence in any subsequent civil action arising out of the same facts.[1] At least one jurisdiction, however, has held a judgment of conviction not only admissible as evidence but conclusive proof as to the commission of the act constituting the crime, thus making the matter res judicata and leaving only the question of damages to be determined in a civil action.[2] A few jurisdictions, New York among them, hold that a prior criminal conviction is admissible as prima facie proof of the facts involved.[3] Although this is a minority view, there is increasing support for this principle in statutory recognition,[4] comment by writers[5] and the trend in recent case law.[6]

New York Decisions

The New York rule was first stated in 1820 in the case of *Maybee v. Avery*.[7] In an action for slander, plaintiff alleged that the defendant had accused him of stealing. The court held that defendant could offer evidence that the plaintiff had been convicted of stealing as prima facie proof of the defense of truth. In 1932 the court of appeals, relying on *Maybee*, reiterated this reasoning in *Schindler v. Royal Ins. Co.*[8] There, plaintiff brought suit on an insurance policy to recover for loss by fire. The insurance company pleaded, as a defense, the insured's prior conviction for filing a false and fraudulent statement of loss.[9] The court held such evidence to be admissible as prima facie

1. Annot., 18 A.L.R.2d 1287 (1951); 130 A.L.R. 690 (1941); 80 A.L.R. 1145 (1932); 31 A.L.R. 261 (1921).

2. Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927). But see Aetna Cas. & Sur. Co. v. Anderson, 200 Va. 385, 105 S.E.2d 869 (1958). New York at one time considered the prospect of adopting the Virginia rule but the legislature decided that to admit the conviction as prima facie proof of the facts was the better rule. N.Y. Law Rev. Comm. Rep. 391 (1939).

3. 18 A.L.R.2d 1287, 1289 (1951); Annot., 31 A.L.R. 261, 275 (1921).

4. 38 Stat. 731 (1914), 15 U.S.C. § 16 (1958). See also Model Code of Evidence rule 521 (1942); Uniform Rules of Evidence rule 63(20) (1953).

5. Bush, Criminal Convictions as Evidence in Civil Proceedings, 29 Miss. L.J. 276 (1958); Cowen, The Admissibility of Criminal Convictions in Subsequent Civil Proceedings, 40 Calif. L. Rev. 225 (1952); Note, 17 Cornell L.Q. 493 (1932). Contra, Note, 27 Ill. L. Rev. 195 (1932).

6. Connecticut Fire Ins. Co. v. Ferrara, 277 F.2d 388 (8th Cir. 1960); Rosenberger v. Northwestern Mut. Life Ins. Co., 176 F. Supp. 379 (D. Kan. 1959); Elliot v. A. J. Smith Contracting Co., 358 Mich. 398, 100 N.W.2d 257 (1960).

7. 18 Johns. R. 352 (N.Y. 1820); accord, Greenberg v. Winchell, 136 N.Y.S.2d 877 (Sup. Ct. 1954).

8. 258 N.Y. 310, 179 N.E. 711 (1932).

9. N.Y. Pen. Law § 1202 (misdemeanor conviction after trial).

proof of the facts. Six years later, the court, in *Matter of Rechtschaffen*,[10] extended the *Schindler* rule, admitting proof that a husband had been adjudged to be a disorderly person by reason of having abandoned his wife.[11] This was evidence of a judgment, penal in nature as distinguished from a conviction of a crime,[12] offered by petitioner to prevent issuance of letters of administration to cross-petitioner, the husband.[13]

The *Schindler* and *Rechtschaffen* cases are authorities for admitting prior criminal convictions and judgments penal in nature as prima facie evidence when used defensively against the wrongdoer who is seeking affirmative relief in a civil action. The court of appeals, however, has never been faced with the question of whether a prior criminal conviction is admissible as prima facie proof of the plaintiff's cause of action.[14] For want of a definitive answer from the court of appeals there have been conflicting opinions written by the lower New York courts.

First Department

In *Walther v. News Syndicate Co.*[15] the plaintiff offered in evidence the conviction of the defendant's servant, obtained after a trial for a traffic infraction,[16] as part of the proof required to recover from defendant under the doctrine of respondeat superior. The court excluded the evidence, distinguishing *Schindler* and *Rechtschaffen* on the ground that the evidence there was offered defensively and not to establish the plaintiff's cause of action. But the court also emphasized the fact that it was here dealing with a conviction for a traffic infraction rather than a criminal conviction as in *Schindler*.[17] The *Walther* court was careful to note "the narrow scope" of its decision, holding only that the servant's conviction was inadmissible in a civil action to establish the plaintiff's cause of action against the master.[18] The court posed and left unanswered two questions. First, is a defendant's guilty plea to a traffic violation admissible as an admission to support a cause of action in a civil

10. 278 N.Y. 336, 16 N.E.2d 357 (1938).

11. N.Y. Code of Crim. Proc. § 899(1).

12. Adjudication of a "disorderly person" under N.Y. Code of Crim. Proc. § 899(1) is not a criminal conviction because the violation is neither a misdemeanor nor a felony. People v. Phillips, 284 N.Y. 235, 30 N.E.2d 488 (1940).

13. N.Y. Deced. Est. Law § 87(c) provides that no distributive share of the estate of a decedent shall be allowed "to a husband who has neglected or refused to provide for his wife, or has abandoned her."

14. Ando v. Woodberry, 8 N.Y.2d 165, 168 N.E.2d 520, 203 N.Y.S.2d 74 (1960) held a conviction on a plea of guilty for a traffic infraction admissible as an admission in a subsequent civil action.

15. 276 App. Div. 169, 93 N.Y.S.2d 537 (1st Dep't 1949).

16. N.Y. City Traffic Reg. art. III, § 20. A caveat to keep in mind is that some traffic violations are misdemeanors and hence crimes, e.g., N.Y. Vehicle & Traffic Law §§ 1190, 1192, while others are not crimes, but rather, are termed traffic infractions. See N.Y. Vehicle & Traffic Law § 155.

17. It is submitted that the conviction in Walther, under N.Y. City Traffic Reg. art. III, § 20 although not a crime, is analogous to the conviction in Rechtschaffen. See note 12 supra.

18. 276 App. Div. 169, 175-76, 93 N.Y.S.2d 537, 544 (1st Dep't 1949).

proceeding? This was answered by the court of appeals in *Ando v. Woodberry*,[19] where the evidence was held admissible. Second, should proof of conviction after trial of a *crime*, as distinguished from a traffic infraction, be admissible as prima facie proof against the defendant in a later civil action? This was answered in the affirmative by the first department in *Sims v. Union News Co.*[20] *Sims* extended *Schindler* to allow evidence of a prior conviction of a crime as affirmative prima facie proof against the employer of the convicted party.[21]

Thus the first department has limited *Schindler* only insofar as *Walther* has held a conviction after trial for a traffic infraction inadmissible as affirmative evidence. The *Walther* court in "the absence of controlling authority" felt itself free to determine the question on principle. The court reasoned that the rule of public policy declared in Section 335 of the Civil Practice Act[22] and the inferior probative value of traffic court convictions were persuasive reasons for excluding such evidence. Yet, in *Ando v. Woodberry*[23] a majority rejected both arguments stating that section 335 relates only to the impeachment of a witness and not to the probative value of a prior conviction for a traffic violation, and that the inferior probative value of traffic convictions is a consideration which goes to the weight but not to the admissibility of the evidence. It is true, however, that *Ando* dealt with a traffic conviction after a plea of guilty, as opposed to a conviction after trial, and that the *Ando* court expressly stated that the specific issue involved in *Walther* had yet to come before it.[24] Nevertheless, it would seem that *Ando*, by clearly rejecting the reasoning upon which *Walther* was decided, has effectively destroyed its authority.

Second Department

The second department, despite some of its earlier decisions, has been less hesitant to extend the *Schindler* rule. Shortly after *Schindler* was decided, the second department, in *Roach v. Yonkers R.R.*,[25] denied plaintiff the affirma-

19. 8 N.Y.2d 165, 168 N.E.2d 520, 203 N.Y.S.2d 74 (1960). The conviction was for violations of N.Y. Vehicle & Traffic Law §§ 1160, 1162 (traffic infraction).

20. 284 App. Div. 335, 131 N.Y.S.2d 837 (1st Dep't 1954).

21. Accord, People v. Minuse, 273 App. Div. 457, 459, 78 N.Y.S.2d 309, 312 (1st Dep't 1948) (dictum) (a conviction in the federal court for conspiracy to violate the federal "blue sky" law held admissible as affirmative prima facie evidence of conspiracy in an action by the attorney general of the state to enjoin same).

22. N.Y. Civ. Prac. Act § 355 provides that no witness shall be required "to disclose a conviction for a traffic infraction, . . . nor shall conviction therefor affect the credibility of such witness in any action or proceeding." This section has been interpreted as legislative recognition of the weakness of traffic infractions as proof of the facts involved. Hart v. Mealey, 287 N.Y. 39, 38 N.E.2d 121 (1941). But see Ando v. Woodberry, 8 N.Y.2d 165, 168, 168 N.E.2d 520, 522, 203 N.Y.S.2d 74, 77 (1960), where this section was clearly construed to apply solely to the credibility of witnesses.

23. 8 N.Y.2d 165, 168 N.E.2d 520, 203 N.Y.S.2d 74 (1960).

24. Id. at 170, 168 N.E.2d at 523, 203 N.Y.S.2d at 78.

25. 242 App. Div. 195, 271 N.Y. Supp. 289 (2d Dep't 1934).

tive use of a criminal conviction. *Roach* was followed by *Max v. Brookhaven Dev. Corp.*[26] There, evidence of a traffic conviction after a plea of guilty was affirmatively offered. This should have been allowed in evidence under the doctrine of admissions, but the court nevertheless felt itself bound by the reasoning of the *Roach* case and rejected the evidence. In *Giessler v. Accurate Brass Co.*,[27] however, the second department did an abrupt about-face and allowed the defendant's criminal conviction after trial for carrying on a nuisance[28] as prima facie proof in an action to enjoin the nuisance and for damages. The court expressly overruled the *Roach* case insofar as it conflicted with *Rechtschaffen*. The extension was reaffirmed in the 1960 decision of *Uzenski v. Fitzsimmons*.[29]

Third Department

In *Barnum v. Morresey*,[30] to prove defendant's negligence, the plaintiff attempted to elicit from a witness the fact that the defendant was convicted, on a plea of guilty, for a traffic violation.[31] The court, citing no authority, held the evidence admissible as an admission. In a later case, *Stanton v. Major*,[32] it appeared that the defendant, after conviction on a plea of guilty to a traffic violation,[33] was sued for civil damages arising from the accident. The plaintiff submitted a certified copy of the defendant's conviction as evidence of negligence. The court held that the conviction was properly introduced as prima facie evidence of the facts involved. It is significant to note that in *Stanton*, just as in *Barnum*, the conviction was admissible as an admission. The case, however, was appealed on the allegedly erroneous charge to the jury that "it might consider the record and plea as prima facie evidence of negligence."[34] Again without citation of authority, the third department found the charge to be a correct statement of the law. Since the admission rule adequately explains the *Stanton* decision, it would appear that the case does not, and was not, intended to express any opinion concerning the *Schindler* doctrine.

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26. 262 App. Div. 907, 28 N.Y.S.2d 845 (2d Dep't 1941) (memorandum decision).

27. 271 App. Div. 980, 68 N.Y.S.2d 1 (2d Dep't 1947) (memorandum decision); accord, Silverman v. Abraham, 22 Misc. 2d 707, 198 N.Y.S.2d 514 (Sup. Ct. 1960) (an assault conviction after a plea of guilty admissible as affirmative prima facie proof of plaintiff's cause of action); DeMarco v. Young, 192 N.Y.S.2d 387 (Sup. Ct. 1959) (a misdemeanor traffic conviction after trial admissible as affirmative prima facie proof of plaintiff's cause of action); Smith v. Minissale, 190 Misc. 114, 75 N.Y.S.2d 645 (Sup. Ct. 1947) (not clear whether misdemeanor traffic conviction was after trial or was based on plea of guilty, but conviction held admissible as affirmative prima facie proof of plaintiff's cause of action); Alders v. Grow, 75 N.Y.S.2d 647 (Sup. Ct. 1947) (an assault conviction after trial admissible as affirmative prima facie proof of plaintiff's cause of action).

28. N.Y. Pen. Law § 1532 (misdemeanor).

29. 10 App. Div. 2d 890, 201 N.Y.S.2d 358 (2d Dep't 1960) (memorandum decision).

30. 245 App. Div. 798, 280 N.Y. Supp. 899 (3d Dep't 1935) (memorandum decision).

31. N.Y. Vehicle & Traffic Law § 1192 (misdemeanor).

32. 274 App. Div. 864, 82 N.Y.S.2d 134 (3d Dep't 1948) (memorandum decision).

33. N.Y. Vehicle & Traffic Law § 1190 (misdemeanor).

34. 274 App. Div. 864, 82 N.Y.S.2d 135 (3d Dep't 1948) (memorandum decision).

Two trial term supreme court decisions in the third department also dealt with the problem. In *Loeper v. Roberts*,[35] the plaintiff offered the defendant's conviction of a traffic infraction[36] as affirmative proof of his negligence. The court, citing no authority, held the evidence inadmissible. The opinion does not reveal whether the conviction was after trial or on a plea of guilty. If the conviction was on a plea of guilty, the case is overruled by *Ando v. Woodberry*,[37] but if the conviction was after trial it parallels *Walther v. News Syndicate Co.*,[38] which is itself weakened by *Ando*. In *McDowell v. Birchett*[39] the court accepted the defendant's traffic conviction on a plea of guilty as prima facie proof of negligence. The court disposed of the issue with the brief statement that "such negligence is *prima facie* established by the defendant's conviction. . . ."[40] It made no mention of the admission theory.

Fourth Department

In *Everdyke v. Esley*,[41] the *Schindler* decision was followed to permit proof of plaintiff's criminal conviction for defensive purposes. In *Glaiser v. Troanovitch*,[42] the plaintiff attempted to establish defendant's negligence under the doctrine of respondeat superior using the conviction, on a plea of guilty, of defendant's servant for violating a labor statute.[43] The court excluded the evidence as an admission of a servant not binding on the defendant master because it was not part of the *res gestae*.[44] The court did not go into the question whether the *Schindler* doctrine could be extended to affirmative use. In *Same v. Davison*,[45] the fourth department approved the admission of evidence of a criminal conviction[46] after a guilty plea to establish affirmatively defendant's negligence. The court, however, reversed on other grounds leaving the pronouncement on the admissibility of such evidence a dictum.[47] Again, because the conviction was on a plea of guilty, the case admits of the possibility

35. 199 Misc. 1095, 106 N.Y.S.2d 158 (Sup. Ct. 1951).

36. N.Y. Vehicle & Traffic Law § 511 (misdemeanor).

37. 8 N.Y.2d 165, 168 N.E.2d 520, 203 N.Y.S.2d 74 (1960).

38. 276 App. Div. 169, 93 N.Y.S.2d 537 (1st Dep't 1949).

39. 126 N.Y.S.2d 78 (Sup. Ct. 1953).

40. Id. at 79.

41. 258 App. Div. 843, 15 N.Y.S.2d 666 (4th Dep't 1939) (memorandum decision).

42. 264 App. Div. 940, 36 N.Y.S.2d 281 (4th Dep't 1942) (memorandum decision).

43. N.Y. Labor Law § 167 (misdemeanor).

44. See Molino v. City of New York, 195 App. Div. 496, 186 N.Y. Supp. 742 (1st Dep't 1921); Vadney v. United Traction Co., 188 App. Div. 365, 177 N.Y. Supp. 114 (3d Dep't 1919).

45. 253 App. Div. 123, 1 N.Y.S.2d 374 (4th Dep't 1937) (per curiam) (dictum).

46. Id. at 124, 1 N.Y.S.2d at 375.

47. See Merkling v. Ford Motor Co., 251 App. Div. 89, 96, 296 N.Y. Supp. 393, 402 (4th Dep't 1937). In a dictum the court said that a conviction for a violation of a traffic ordinance "is no proof of liability" in a civil action on the same event and thus is inadmissible. But this court relied on Roach v. Yonkers R.R., 242 App. Div. 195, 271 N.Y. Supp. 289 (2d Dep't 1934) which was later overruled. See note 27 supra and accompanying text.

that the evidence was allowed because it constituted an admission. Yet the court, citing *Schindler* and apparently to avoid making the guilty plea decisive, stated that the evidence was "'*prima facie* evidence of the facts involved.'"[48] This would appear to indicate approval of such evidence when used affirmatively.

MAJORITY RULE V. NEW YORK RULE

The reasons traditionally advanced in support of the majority rule of exclusion are:

1. The parties to a criminal action differ from the parties to a civil action;[49] the State or People prosecute the criminal action while the person whose right or rights have been violated maintains the civil action. On the other hand, proponents of the New York rule argue that, despite the difference in the parties to the two actions, the defendant has had in the criminal prosecution every opportunity, including appeal, to defeat the case against him.

2. The criminal proceeding is brought to vindicate a public right and the civil action determines private rights and liabilities.[50] Yet, where a criminal violation rests on interference with a private right does not the conclusion that the accused is guilty necessarily include a finding that a private right has been transgressed? To say that the conviction is not proof of the infringement upon the private right would seem to conclude that the conviction is not proof of guilt beyond a reasonable doubt.

3. The varying degrees and elements of proof in the two trials forbid allowing the criminal conviction to be decisive of the facts in the civil action.[51] It is indeed surprising to find this reason offered to support exclusion. If the evidence exposes the guilt of the accused beyond a reasonable doubt, can there be any doubt that there is prima facie proof of liability by a preponderance of the evidence? It is axiomatic that the greater includes the lesser.

4. The admissibility of such prior criminal convictions as evidence is a violation of both the hearsay rule and the opinion rule since the finding of the jury or judge is obviously nothing more than a conclusion from the testimony produced at trial.[52] But the hearsay difficulty is overcome when it is recalled that the only cogent basis for the hearsay rule is the impossibility of cross-examination to determine what weight, if any, should be given to the testimony. Yet, the party against whom the conviction is offered was present at the criminal trial and was confronted by the witnesses against him, with the right to cross-examine them.[53] As to the opinion rule objection: it may be that the conviction represents the opinion of the judge or jury, but is it not a reliable and trustworthy opinion formed by those acting under a duty imposed by law?[54]

48. 253 App. Div. 123, 124, 1 N.Y.S.2d 374, 375.
49. Myers v. Maryland Cas. Co., 123 Mo. App. 682, 101 S.W. 124 (1907).
50. Interstate Dry Goods Stores v. Williamson, 91 W. Va. 156, 112 S.E. 301 (1922).
51. Ibid.
52. Note, 27 Ill. L. Rev. 195, 197 (1932).
53. Note, 41 Harv. L. Rev. 241, 243-44 (1927).
54. Ibid.

Furthermore, is it not a common practice to allow as evidence the findings of those required by law to make official investigations?[55]

5. Two arguments may be classified as practical considerations. One proposes that admissibility of a prior criminal conviction would unnecessarily extend the duration of the civil trial because the convicted person must be accorded an opportunity to explain the circumstances of his conviction in an effort to rebut the evidence. Against this consideration should be weighed the usually high probative value of such evidence[56] and the possibility that it may be the only evidence available. The other argument urges against admissibility because of the fear that the jury will be unduly prejudiced and will be unable to weigh objectively the value of such proof. To this contention Judge Fuld, in *Ando v. Woodberry*,[57] answered:

> To the claim that the jury will be unduly prejudiced by the introduction of a plea of guilt [or of a criminal conviction] despite the opportunity to explain it away, we content ourselves with the statement that this underestimates the intelligence of jurors and overlooks their awareness of those very circumstances said to destroy the meaning and significance of the plea [or conviction].[58]

CONCLUSION

The New York rule that a prior conviction is admissible as prima facie proof in a subsequent civil proceeding based on the same facts has found varied application in the lower courts. The first department has held a prior traffic conviction after trial inadmissible as affirmative proof in a subsequent civil action. The second department has held a prior criminal conviction after trial admissible as prima facie proof regardless of how it is used. The third department has never had occasion to hold a prior conviction after trial admissible as affirmative prima facie proof, while the fourth department has held a prior conviction after trial admissible as prima facie proof but only when used defensively. The conflict has resulted because the courts have narrowly construed the *Schindler* rule and have limited its application to the defensive use of the evidence. Logic dictates that if proffered evidence has probative value it matters not whether it be offered by the defendant to support his defense or by the plaintiff to support a cause of action. Until we have a more authoritative decision by the court of appeals it would appear more reasonable to apply the *Schindler* rule liberally.

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55. An example of this is a lunacy inquisition. See Annot., 7 A.L.R. 568 (1920). See also 2 Wigmore, Evidence § 1346 at 1019 (2d ed. 1923), where the noted authority claims the problem is not one of evidence but rather of "lending of the [other] Court's executive aid, on certain terms, to a claimant or a defendant, without investigation of the merits of fact."

56. Chafee, The Progress of the Law, 1919-1922—Evidence (pt. 2), 35 Harv. L. Rev. 428, 440 (1922).

57. 8 N.Y.2d 165, 168 N.E.2d 520, 203 N.Y.S.2d 74 (1960).

58. Id. at 171, 168 N.E.2d at 524, 203 N.Y.S.2d at 79.