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## Use of Record of Criminal Conviction in Subsequent Civil Action Arising From the Same Facts as the Prosecution

The overwhelming majority of courts considering the issue without the aid of pertinent legislation[1] have held that a record of a prior criminal conviction may not be used against a convicted person in subsequent civil proceedings arising from the same facts as the criminal prosecution but to which the state is not a party.[2] It is

1. There are a number of statutes controlling the use which may be made of the record of a criminal conviction in a subsequent civil proceeding. Some give it great weight. See, *e.g.*, ALA. CODE tit. 7, § 412 (1958) ("between parties and privies thereto . . . [the record of conviction] is conclusive as to matters directly in issue."). Some give it no weight. See, *e.g.*, OHIO REV. CODE ANN. § 1.16 (Page 1953) (prohibiting use of a record of prior conviction even as evidence in a civil action brought by a person injured by a criminal act). Some provide that convictions on traffic charges are inadmissible. See, *e.g.*, MICH. COMP. LAWS § 257.731 (1948). There is a basis for distinguishing convictions for violation of traffic ordinances from other convictions on the ground that a traffic offender is often unwilling to contest the charges to the utmost of his ability, since the expense and inconvenience of litigation frequently exceed the penalty for conviction. Rule 63(20) of the Uniform Rules of Evidence, in fact, provides for the admission of the record of a prior felony only.

2. The term "conviction" is used herein only in reference to the verdict of a judge

admissible neither as evidence of the facts underlying it, nor as the basis of an estoppel preventing the convicted party from relitigating those issues which must have been decided against him in the criminal trial for the judge or jury to have found him guilty.[3] Consequently, a man convicted of arson for burning his own property may nevertheless succeed in collecting the proceeds of his fire insurance policy, unless the insurer can prove the origin of the destruction unassisted by the record of conviction.[4] Similarly, one found guilty of criminal assault may successfully defend a subsequent tort action brought by the complaining witness in the criminal trial which led to the conviction if the plaintiff is unable to make a convincing case without the use of the record of that conviction in his civil suit.[5]

A few courts rely upon the hearsay rule to exclude a record of prior conviction even as evidence of the facts which must have been found in the criminal trial.[6] Technically, the record of a prior judgment does fall within the usual definition of hearsay insofar as it is used to demonstrate the findings of fact supporting it, for it is evidence of assertions made outside the civil trial, offered to show the truth of the matters alleged, and deriving its probative value partially from the credibility and capacity of the absent asserter.[7] However, the numerous exceptions to the hearsay rule demonstrate

or a jury when the criminal defendant has pleaded innocent. The questions which arise when one party seeks to use, in a later civil case, the record of a criminal conviction where the other party pleaded guilty or nolo contendere in the former trial are outside the scope of this note. Likewise, the text contains no discussion of the problems inherent in attempting to determine which issues raised in the criminal trial were necessarily decided by the fact finder in reaching a verdict. For a brief treatment, see generally von Moschzishen, *Res Judicata*, 38 YALE L. J. 299, 332 (1929). Furthermore, this note does not deal with the situation in which the state or federal government which prosecuted the criminal litigation is also a party to a subsequent civil proceeding emanating from the same facts, as for example where a defendant convicted of tax fraud is later sued for the amount of unpaid taxes referable to his misconduct. Cases of this type are discussed in Note, 64 MICH. L. REV. 317 (1965).

3. 2 BLACK, JUDGMENTS § 529 (1891); FREEMAN, JUDGMENTS § 319 (1st ed. 1873); JONES, EVIDENCE § 589 (3d ed. 1924); MCCORMICK, EVIDENCE § 295 (1954); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 878-80 (1952).

4. See McSweeney v. Utica Fire Ins. Co., 224 F.2d 327 (4th Cir. 1955) (dictum); Fire Ass'n of Philadelphia v. Coomer, 158 S.W.2d 355 (Tex. Civ. App. 1942); Bobereski v. Insurance Co. of the State of Pa., 105 Pa. Super. 585, 161 Atl. 412 (1932) (dictum); Girard v. Vermont Mut. Fire Ins. Co., 103 Vt. 330, 154 Atl. 666 (1931).

5. See Krowka v. Colt Patent Fire Arms Mfg. Co., 125 Conn. 705, 8 A.2d 5 (1939); Nowak v. Orange, 349 Pa. 217, 36 A.2d 781 (1944).

6. Only a few cases expressly state that a record of prior conviction is hearsay evidence. *E.g.*, Manning v. Watson, 108 Cal. App. 2d 705, 239 P.2d 688 (1952). A number of courts imply that such a record is hearsay when they receive it into evidence as an admission against interest (an exception to the hearsay rule) if it is based on a guilty plea. See Rednall v. Thompson, 108 Cal. App. 2d 662, 239 P.2d 693 (1952); Ando v. Woodberry, 8 N.Y.2d 165, 230 N.Y.S.2d 74, 168 N.E.2d 520 (1960); *cf.* Burbank v. McIntyre, 135 Cal. App. 482, 27 P.2d 400 (1933). A comment to Uniform Rule of Evidence 63(20) also implies that a record of a prior conviction is hearsay.

7. See MCCORMICK, EVIDENCE § 225 (1954).

that it is not an incontrovertible principle which must be followed unswervingly.[8] Its primary purpose is to safeguard a litigant's right to challenge the accuracy and completeness of testimony introduced against him by cross-examining the witness upon whose credibility its worth depends.[9] Since the testimony underlying a guilty verdict in the criminal trial was subject to cross-examination during the criminal proceeding, some courts have held that the record of that verdict is sufficiently trustworthy to be admissible as evidence of the underlying findings of fact.[10]

The remaining courts which hold records of prior conviction inadmissible for evidentiary purposes rely upon the doctrine of mutuality, as do all which refuse to use such records to estop convicted parties from relitigating issues which were necessarily decided against them in the criminal trial. The mutuality principle, which is premised upon the belief that the adversary system can be operated equitably only if a litigant has the opportunity to challenge any allegation as often as it is raised against him by an opponent with whom he has not previously contested it,[11] holds that a party is not bound by a fact determined against him in previous litigation unless the opponent seeking to bind him was also his adversary in the previous trial.[12] Strict adherence to this precept automatically pre-

8. See generally *id.* §§ 230-99.

9. *Id.* § 224, at 458. See generally *id.* §§ 223-29; 5 WIGMORE, EVIDENCE § 1362 (3d ed. 1940).

10. *E.g.*, North River Ins. Co. v. Militello, 104 Colo. 28, 88 P.2d 567 (1939); Wolff v. Employers Fire Ins. Co., 282 Ky. 824, 140 S.W.2d 640 (1940); Schindler v. Royal Ins. Co., 258 N.Y. 310, 179 N.E. 711 (1932). Uniform Rule of Evidence 63(20) would permit the use of the record of a prior felony conviction as evidence of the findings of fact underlying it.

11. One of the earliest statements of the premises upon which the doctrine of mutuality rests is found in the Duchess of Kingston's Case, 20 State Tr. 355 (House of Lords 1776): "it would be unjust to bind any person who could not be admitted to make a defence or to examine witnesses, or to appeal from a judgment he might think erroneous."

The mutuality rule appears to have taken its name from this reasoning: The adversary system implies that *A* has a right to litigate an issue as many times as it is raised against him by a party with whom he has not already contested the point; this right will always be protected if *B* cannot raise an estoppel unless he was privy to the prior adjudication; privity can always be assured if the alignment of parties in the former trial was such that, had the issue in question been decided in favor of *A*, *A* could now fairly estop *B* from relitigating; therefore, "mutuality" of estoppel guarantees *A*'s right to litigate the issue against those who raise it against him for the first time.

12. See, *e.g.*, New York & Cuba Mail S.S. Co. v. Continental Ins. Co., 32 F. Supp. 251 (S.D.N.Y. 1940), *rev'd on other grounds*, 117 F.2d 404 (2d Cir. 1941); Washington Nat'l Ins. Co. v. Clement, 192 Ark. 371, 91 S.W.2d 265 (1936); North River Ins. Co. v. Militello, 104 Colo. 28, 88 P.2d 567 (1939) (no estoppel, but record admitted as evidence); Wolff v. Employers Fire Ins. Co., 282 Ky. 824, 140 S.W.2d (1940) (no estoppel, but record admitted as evidence); Silva v. Silva, 297 Mass. 217, 7 N.E.2d 601 (1937); Durham Bank & Trust Co. v. Pollard, 256 N.C. 77, 123 S.E.2d 104 (1961); Smith v. New Dixie Lines Inc., 201 Va. 466, 111 S.E.2d 434 (1959); Aetna Cas. & Sur. Co. v. Anderson, 200 Va. 385, 105 S.E.2d 869 (1958). *Cf.* Elder v. New York & Pa. Motor Express, Inc., 284 N.Y. 350, 31 N.E.2d 188 (1940); BLACK, JUDGMENTS § 529 (1891); 1 FREEMAN, JUDGMENTS § 428 (5th ed. 1925); MCCORMICK, EVIDENCE § 295 (1954); 39 VA. L. REV. 995, 996 (1953).

cludes an individual's using the record of any prior conviction in a later civil suit brought by or against the convicted person, for the latter has previously litigated with the state, not with his present opponent.

While the reasoning behind the mutuality rule may have some appeal in the estoppel context, it has none, at least in theory, when the question is merely the admissibility of the record of a prior conviction as evidence. Unlike the use of a record of conviction as the basis of an estoppel, the introduction of the record as evidence does not foreclose the person against whom it is offered from denying the truth of its underlying findings of fact; he can still contest them with evidence of his own. Nevertheless, a practical consideration supports the exclusionary rule. Once a civil jury learns that a party before it has been convicted of a crime arising from events the occurrence of which he is attempting to deny, the jury is likely to be so prejudiced that it will accept the evidence of conviction as conclusive proof of the findings of fact supporting it.[13] From a realistic point of view, therefore, those courts which approve the reasoning behind the mutuality rule would be inclined to prohibit the introduction for any purpose of a record of criminal conviction into subsequent litigation.

Some courts do not accept the foregoing views on the mutuality doctrine or the rationale behind the views. The 1927 decision of the Virginia Supreme Court in *Eagle, Star & British Dominions Ins. Co. v. Heller*[14] was one of the first opinions holding that a record of a criminal conviction could estop a party to a civil suit from relitigating certain issues necessarily decided against him in a prior criminal trial, even though all parties to each trial were not the same. The court ruled that his conviction for arson precluded the owner from denying that he had burned his inventory when he sued to collect the insurance proceeds. The California Supreme Court reached a like result in *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*[15] However, there is a significant difference in the reasoning of the two courts in departing from the traditional approach. The Virginia tribunal acknowledged that, while the mutuality doctrine is gen-

"The rule of collateral estoppel may be described as a compromise between the interests of the litigant in pressing his claim and the interest of the public in bringing an end to one man's litigation. Under it one man may have his day in court, but only one day, against another. But the rule does not go so far as to make the finding in one man's case in a personal action a conclusion of ultimate truth. A law suit is not a laboratory experiment for the discovery of physical laws of universal application but a means of settling a dispute between litigants." Hornstein v. Kramer Bros. Freight Lines, 133 F.2d 143, 145 (3d Cir. 1943).

13. See Bobereski v. Insurance Co. of the State of Pa., 105 Pa. Super. 585, 161 Atl. 412 (1932). See generally 50 YALE L. J. 499 (1941).

14. 149 Va. 82, 140 S.E. 314 (1927).

15. 58 Cal. 2d 601, 25 Cal. Rptr. 559, 375 P.2d 439 (1962).

erally viable, if a person convicted of a crime seeks thereafter to *gain* from his criminal activities, rigid adherence to a general rule and to some judicial expressions would be a reproach to the administration of justice.[16] In the light of this statement, *Heller* must be considered a narrow exception to the usual rule, explained by the court's distaste for the result it might have had to reach if it had followed the weight of authority.

The rationale in *Teitelbaum* was broader. Justice Traynor's opinion did not mention the fact that a convicted person was the *plaintiff* in the civil case brought to enforce a claim arising from criminal conduct. The court went to the heart of the matter by denying that there was any reasonable basis for applying the mutuality rule in *any* case, except insofar as it requires that the person against whom an estoppel is asserted have been a party to the prior action.[17] This single restriction was felt to be all that is necessary to guarantee a party due process of law, and to more than due process he was apparently not thought entitled.

That *Teitelbaum* has not been limited to its facts is apparent from *Newman v. Larsen*,[18] in which a California intermediate appellate court relied upon Justice Traynor's opinion in holding that a defendant previously convicted of criminal assault was bound by the allegations in the criminal complaint necessarily found to have been true by the criminal jury. The defendant, therefore, was not permitted to deny that he had assaulted the plaintiff, who had been the prosecuting witness in the former trial. The court apparently saw no significance in the fact that the effect of the estoppel in *Newman* was not merely to deny the convicted party the fruits of his crime, but rather to set the stage for the assessment of personal-injury damages against him.

*Hurtt v. Stirone*[19] resembles *Teitelbaum* and *Heller* as well as *Newman* in its result. In *Hurtt* the Pennsylvania Supreme Court held that a trustee in bankruptcy, suing to recover money which the defendant had allegedly extorted from the bankrupt, could introduce the record of the defendant's conviction of the federal offense of obstructing interstate commerce by means of extortion[20] to estop him from denying the wrongful taking, where the bankrupt had been the complaining witness in the federal case. In *Hurtt* the defendant had already reaped the proceeds of the crime, and the plaintiff was simply trying to regain money of which the bankrupt

16. 149 Va. 82, 111, 140 S.E. 314, 323 (1927).

17. Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 606, 25 Cal. Rptr. 559, 561, 375 P.2d 439, 441 (1962).

18. 225 Cal. App. 2d 22, 36 Cal. Rptr. 883 (1964).

19. 416 Pa. 493, 206 A.2d 624 (1965).

20. The federal offense arose under the Hobbs Anti-Racketeering Act, 18 U.S.C. § 1951 (1964). See generally Stirone v. United States, 361 U.S. 212 (1960).

had been deprived. Hence, the case is similar to *Newman* in that estoppel was used as an offensive weapon by a civil plaintiff, but also analogous to *Teitelbaum* and *Heller* in that only the profit of the crime was at stake.

One can hardly object to the outcome in either *Heller* or *Teitelbaum*. Unjust enrichment was avoided, and the public welfare advanced, by preventing a criminal from profiting from his illegal conduct. Furthermore, by sanctioning the use of a record of conviction to bar recovery in a subsequent civil action, these decisions are likely to reduce the number of suits brought by criminals to enforce "rights" purportedly arising from their unlawful activity. *Newman* and *Hurtt*, however, raise serious questions, for whereas *Heller* and *Teitelbaum* foreclosed the plaintiffs' recovery and maintained the status quo, *Newman* and *Hurtt* made the convicted defendants judgment debtors. They put the fruits of a state's *criminal* enforcement process at the disposal of potential *civil* plaintiffs who might otherwise be reluctant to sue. Persons suffering minor injuries as the result of criminal violence who would be willing to bear the medical expense themselves will be advised that a lawsuit is an easy and economical alternative if the defendant has been successfully prosecuted. Insurance companies will find it profitable to litigate more subrogation claims arising from criminal acts. Thus, in a jurisdiction following *Hurtt* or *Newman* there could be an increase in the number of suits brought to issue, at least on the question of damages, even if there were no doubt of a convicted person's civil liability.[21]

Assuming that the courts should be prepared to absorb any added workload, the question remains whether, in extending de facto the criminal process to include incontestable civil liability, *Hurtt* and *Newman* have not established an inflexible rule detrimental to social objectives in the post-conviction rehabilitation of offenders. The criminal process is aimed in part at preventing the guilty from profiting from their crimes, and legislation often permits a criminal court to condition probation upon a convicted defendant's making "restitution" to his victim.[22] There is a significant difference,

21. A plaintiff should be more willing to go to trial if the only issue is damages. Since he cannot lose on the liability issue he should be less inclined to accept a settlement than if there were a chance that the defendant would be found not liable and he would collect nothing. It might also be expected that, if the litigation is limited to the damage issue, the relative merits of the parties' claims will not come before the jury and that, therefore, compromise verdicts are precluded.

22. See, *e.g.*, 18 U.S.C. § 3651 (1964); MICH. COMP. LAWS § 771.3 (1948); WIS. STAT. § 57.01(1) (1963). The general role of the judiciary in the probation process is discussed in Notes, 59 COLUM. L. REV. 311 (1959); 39 COLUM. L. REV. 1185, 1197 (1939). See PROSSER, TORTS § 2, at 7 (1964); PERKINS, CRIMINAL LAW 21, (1957). The latter author states that the often-heard phrase "crimes against the person" is but a shorthand way of describing an offense against the state arising from the harm to the citizen. *Ibid.* See also People v. Gilliam, 141 Cal. App. 2d 749, 297 P.2d 468 (1956), noting that a person accused of a

however, between the method of fulfilling a probation order and that of executing a civil judgment. The criminal court can control the satisfaction of the guilty party's liability in order to reconcile his responsibility with rehabilitation policies. On the facts of *Hurtt*, for example, if the convicted defendant no longer retained the money he had extorted, he would not be forced to give up the few assets he might own to recompense his victim. The court has broad discretion in determining the amount due and in fixing the conditions of payment.[23] For example, it could order periodic contributions beginning only after the defendant has secured a steady job and is able to provide for his family's comfort. If a subsequent change in conditions warranted lesser or greater installments, the terms of probation could be modified accordingly or even canceled entirely. In short, the sentencing court would retain enough control over the execution of its decree to adjust the demands upon the probationer to his circumstances. A civil judgment obtained with the aid of the record of previous conviction, however, need not be based upon a determination which takes account of the difficulties facing the defendant as he tries to become reassimilated into society. Furthermore, once the judgment is docketed, it can be executed by attachment or garnishment as quickly as possible. Even though some of his property may be exempt from execution and a portion of his earnings protected against garnishment, the very fact that an unalterable obligation hangs over him cannot fail to have an adverse psychological impact upon the defendant, especially if he has recently been released from prison.[24] With the knowledge that any earnings not needed for subsistence will go to his judgment creditor, a person who has recently demonstrated strains of moral or social instability is unlikely to be motivated to strive for economic independence. If this is so, not only will the judgment remain unsatisfied, but the defendant may continue to be a burden on society.

*Newman* presents the same problem of execution control and raises an additional difficulty as well. While the civil plaintiff in *Hurtt* sought to recover only what the defendant had wrongfully gained, his counterpart in the California case demanded compensation for personal injuries (including, presumably, an amount for

"crime against property" is really prosecuted in the interest of the state and not in that of the individual whose property was involved.

French criminal law does permit the interests of both the public and the victim of criminal activity to be considered simultaneously. See the French Code of Criminal Procedure, as amended January 1963, at arts. 2, 3, 371, 372, 385, in 7 THE AMERICAN SERIES OF FOREIGN PENAL CODES (1960), allowing the victim to intervene in the criminal prosecution and litigate his claim for damages.

23. See authorities cited note 22 *supra*.

24. The debtor exemption laws of twenty-two representative jurisdictions are analyzed (and criticized) in Joslin, *Debtor's Exemption Laws: Time for Modernization*, 34 IND. L.J. 355 (1959).

pain and suffering), measured not by what the defendant had gained but rather by the strength of the impression of plaintiff's discomfort left with the jury. Any justification for the practical extension of the criminal process in *Hurtt* found in the public policy against allowing a criminal to profit from his crime is, therefore, absent in *Newman*. Certainly public policy favors an injured person's receiving compensation from the one who harmed him; yet it is far from clear that the criminal process is intended to foster this social goal.[25] Indeed, at least one court has construed state probation legislation as precluding a criminal judge from conditioning probation upon the defendant's restoring more than the value of what he had actually received from his victim.[26] Recalling that the criminal process exists to punish the offender and to discourage him from future violations of the law, one might suggest that, insofar as it promotes these goals, a civil suit for compensation is an ideal complement to a criminal trial. However, the sentence imposed by the criminal court should be entirely sufficient to punish and deter. If it has not been in *some* cases, its potential deficiency in similar instances in the future could better be avoided by rethinking the procedures surrounding the determination and execution of the sentence itself rather than by imposing, in effect, conclusive civil liability upon *all* convicted lawbreakers.

While it would be difficult to maintain that the results in either *Hurtt* or *Newman* are unfair from the convicted party's point of view, the problems each case raises suggest that the results may be socially unwise. Even if it is thought desirable to relate compensation of the victim to the criminal process, any attempt to do so should be left to the legislature, which can best recognize and define conflicting policies and take precautions to ensure that some policies will not be given effect at too great an expense to others.

25. It should be noted that when a defendant is ordered to "make restitution" to his victim under the legislation discussed in the text this obligation is imposed as a condition of probation, *i.e.*, in lieu of imprisonment. The rules enunciated in *Hurtt* and *Newman*, on the other hand, may be invoked against the convict who has spent a significant period in prison.

26. People v. Prell, 299 Ill. App. 130, 19 N.E.2d 637 (1939). *But see* People v. Good, 287 Mich. 110, 282 N.W. 920 (1938).