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Criminal Law -- Effect of a Plea of Nolo Contendere

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the direction of which is decidedly questionable, when it holds that a retired judge is still in office to such an extent that a diminution after an increase is banned, notwithstanding the reduced salary remains in excess of the salary payable when the incumbent took office. Furthermore, the provision in that act for the appointment of a successor, who would be in fact in office, and whose "subsistence" could not be controlled by the legislature, would seem to be inconsistent with the theory that his predecessor was still "in office,"[14] and would seem to furnish adequate comfort to those who fear for the independence of our judiciary.

The wisdom of such a decision is rendered more doubtful in view of the emergency which prompted the legislation diminishing the retired pay of federal judges. "The interpretation of constitutional provisions is to be made in view of the history of the times, the evil to be remedied, and the purpose to be accomplished,"[15]—a timely rule of construction which the court in the instant case seems to have ignored.

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Criminal Law—Effect of a Plea of Nolo Contendere.

The defendant was convicted in New Jersey under a plea of nolo contendere to an indictment for false pretense. He was subsequently convicted in New York on a plea of guilty to an indictment for forgery, and, on information brought of the former conviction, was sentenced under the second offender statute. On appeal, *held,* that a conviction under a plea of nolo contendere is not such a conviction as to come within the contemplation of the second offender statute.[1]

The plea of nolo contendere is of common-law origin,[2] and may

ice on the bench, and the President shall . . . appoint a successor; . . . but a judge so retiring may nevertheless be called upon by the senior circuit judge of his circuit and be by him authorized to perform such judicial duties . . . as such retired judge may be willing to undertake. . . .").

[14] *Supra* note 13; *cf.* Board v. Lee, 76 N. J. L. 327, 70 Atl. 925 (1908) (The court said, "to assert that a term of office of a deceased or an impeached officer continues, is to assert that there may be two terms of office running together, although the office can be filled but by a single person." It would seem that the same could be said of a resigning or retiring judge.); N. C. CODE ANN. (Michie, 1931) §3884a (North Carolina retirement statute). Investigation discloses no North Carolina cases similar to the principal one where judges, retired pursuant to that statute, bring action to recover a portion of their salaries withheld by the state.

[15] Fargo v. Powers, 220 Fed. 217 (E. D. Mich. 1914).

[1] People v. Daiboch, 269 N. Y. S. 321 (1934). (Three-to-two decision.)

[2] Hudson v. U. S. 272 U. S. 451, 47 Sup. Ct. 127, 71 L. ed. 347 (1926); Tucker v. U. S., 196 Fed. 260 (C. C. A. 7th, 1912); Regina v. Templeman, 1

be invoked by the defendant in criminal cases: (a) where he is unwilling to confess his guilt, but does not wish to go to trial, and submits without more to the imposition of sentence by the court;[3] (b) where he wishes to avoid the use of the conviction in a subsequent civil action for damages growing out of the same act;[4] (c) in the hope of obtaining a lighter punishment by saving the time and expense of a regular trial; and, in the instant case, (d) to avoid a longer sentence for a second offense.

Textbooks,[5] supported by a few cases,[6] take the view that the plea is confined to cases involving light misdemeanors, punishable by fine alone. This seems to be based upon an ambiguous statement in Hawkins' *Pleas of the Crown,* to the effect that the defendant throws himself on the mercy of the court and desires to submit to a small fine.[7] It has been explicitly rejected by the Supreme Court of the United States[8] and by at least two other jurisdictions,[9] and in the majority of cases the courts have ordered imprisonment on the plea of nolo contendere without any discussion of the matter.[10] One court holds that it is not allowable in a capital case;[11] another by statute

Salk. 55, 91 Eng. Rep. 54 (1702). The common law rules govern in the federal courts, and in many of the states, in the absence of statutes or controlling decisions. In Illinois, Indiana, Minnesota, and New York the plea of nolo contendere is not allowed. People v. Miller, 264 Ill. 148, 154, 106 N. E. 191 (1914); Mahoney v. State, 197 Ind. 335, 149 N. E. 447 (1925); State v. Kiewel, 166 Minn. 302, 207 N. W. 646, 647 (1926); People v. Daiboch, *supra* note 1. In Massachusetts, by statute, a defendant cannot be adjudged guilty on a plea of nolo contendere unless it appears by the record that the plea was received with the consent of the prosecutor. Comm. v. Adams, 72 Mass. 359 (1856).

[3] Tucker v. U. S., *supra* note 2; Comm. v. Horton, 9 Pick. 206 (Mass. 1829).

[4] Tucker v. U. S., *supra* note 2; White v. Creamer, 175 Mass. 567, 56 N. E. 832 (1900); State v. Henson, 66 N. J. L. 601, 50 Atl. 468 (1901); State v. Conway, 20 R. I. 270, 38 Atl. 656 (1897). A plea of guilty may be used in a civil suit.

[5] 2 BISHOP, NEW CRIMINAL PROCEDURE (2d ed. 1913) 624; BYRNE, FEDERAL CRIMINAL PROCEDURE (1916) 125; *cf.* 1 CHITTY, CRIMINAL LAW (4th Am. ed. 1841) 430; CLARK, CRIMINAL PROCEDURE (2d ed. 1918) 430 (both limiting the plea of nolo contendere to "cases not capital").

[6] Tucker v. U. S., *supra* note 2 (a leading case).

[7] 2 HAWKINS' PLEAS OF THE CROWN (8th ed.) c. 31, §466.

[8] Hudson v. U. S., *supra* note 2.

[9] Comm. v. Ferguson, 44 Pa. Sup. Ct. 626 (1910); Brozosky v. State, 197 Wis. 446, 222 N. W. 311 (1928).

[10] Philpot v. State, 65 N. H. 250, 20 Atl. 955 (1890); Comm. v. Holstine, 132 Pa. 357, 19 Atl. 273 (1890); In re Lanni, 47 R. I. 158, 131 Atl. 52 (1925). State v. Burnett, 174 N. C. 796, 93 S. E. 473 (1917) recognizes the court's power to sentence the defendant to imprisonment, although that point was not necessary to the decision.

[11] Comm. v. Shrope, 264 Pa. 246, 107 Atl. 729 (1919).

does not allow it in cases of felony;[12] but at least one state holds that even in an indictment for murder its allowance is at the discretion of the trial court.[13]

In no case, either of misdemeanor or of felony, can it be entered as a matter of right, but is entirely within the sound discretion of the court.[14] Once accepted it cannot be withdrawn in favor of a plea of not guilty except by permission of the court,[15] and the plea becomes an implied confession, equivalent to a plea of guilty to every material element of the indictment well pleaded.[16] It is not necessary for the court to adjudge the defendant guilty, for that follows by necessary legal inference from the implied confession.[17] After the plea has been entered, evidence may be received for the purpose of mitigation or aggravation of punishment.[18] By pleading nolo contendere the defendant waives all formal defects in the proceeding of which he could have availed himself by a plea to the merits, a plea in abatement, a demurrer, or a motion to quash.[19] Nolo contendere does not, however, preclude the defendant from moving in arrest of judgment upon the ground that the indictment is defective.[20] In North Carolina, by a recent statutory provision, under the plea of nolo contendere, the court may hear the evidence of the state, and if, on its conclusion, the judge is not satisfied beyond a reasonable doubt that the defendant is guilty, he may cause the plea to be stricken out, and a verdict of not guilty entered.[21]

The conclusiveness of the plea is recognized in cases of the following type. A conviction founded upon a plea of nolo contendere is conclusive as against a subsequent criminal prosecution for the

[12] Roach v. Comm., 157 Va. 954, 162 S. E. 50 (1932).
[13] State v. Martin, 92 N. J. L. 436, 106 Atl. 385 (1919).
[14] Comm. v. Horton, *supra* note 3; State v. Henson, *supra* note 4; State v. Suick, 195 Wis. 175, 217 N. W. 743 (1928).
[15] Com. v. Ingersoll, 145 Mass. 381, 14 N. E. 449 (1888); State v. Sidall, 103 Me. 144, 68 Atl. 634 (1907); State v. Alderman, 81 N. J. L. 549, 79 Atl. 283 (1911). The ruling of the lower court will not be reversed except in the case of the abuse of that discretion. In re Lanni, *supra* note 10.
[16] U. S. v. Lair, 195 Fed. 47 (C. C. A. 8th, 1912) *certiorari* denied, 229 U. S. 609, 33 Sup. Ct. 464, 57 L. ed. 1350 (1912); State v. Sidall, *supra* note 15; State v. O'Brien, 18 R. I. 105, 25 Atl. 1910 (1892).
[17] U. S. v. Lair, *supra* note 16; Comm. v. Ingersoll, *supra* note 15; Brozosky v. State, *supra* note 9; State v. Burnett, *supra* note 10.
[18] Young v. People, 53 Colo. 251, 125 Pac. 117 (1912); Comm. v. Horton, *supra* note 3; Reg. v. Templeman, *supra* note 2.
[19] State v. Alderman, *supra* note 15.
[20] Comm. v. Northampton, 2 Mass. 116 (1806); Comm. v. Grey, 2 Gray 501, 61 Am. Dec. 476 (Mass. 1854).
[21] N. C. CODE ANN. (Michie Supp. 1933) §4636 (a).

same offense;[22] and such conviction is within the contemplation of a statute which provides that one convicted of larceny shall be liable to the owner of the property for twice the value thereof.[23] A record of the conviction of a defendant under a plea of nolo contendere is admissible as evidence of the guilt of that defendant in an action against a third party;[24] and such a record is also admissible for the purpose of impeaching the credibility of the defendant as a witness.[25]

Other cases involving the identical point of the principal case reach an opposite result, and hold that a conviction under a plea of nolo contendere is admissible as substantive evidence on which the conviction of defendant as a second offender can rest.[26]

If the defendant pleads guilty to a criminal charge, the conviction thereunder certainly comes within the second offender statute; if he pleads not guilty, and is convicted, it is likewise conclusive. There seems to be no logical reason why a judgment of conviction following a plea of nolo contendere should not constitute a prior conviction, or as conclusive evidence of a prior offense, as a judgment entered upon a plea of guilty, or upon a verdict of the jury. As stated by one court, "The decisive thing is not the former plea, but the former judgment. The judgment recovered by the state is not a compromise in the sense of being something less than a conviction. It could have been entered on no other ground than the defendant's guilt."[27] As the dissenting opinion in the instant case pointed out, to hold that the defendant was not a second offender because he pleaded nolo contendere would be giving effect to form rather than substance, and would defeat the very purpose and intent of the statute.

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Evidence—Impeachment of Defendant's Reputation Witness by Record of Defendant's Prior Conviction.

Witnesses testified to their knowledge of the good reputation of a defendant charged with passing counterfeit bills. On cross-examina-

[22] State v. Lang, 63 Me. 215, 220 (1874). In North Carolina, evidence of such conviction is not admissible in a disbarment proceeding, as it is a civil suit. *In re* Stiers, 204 N. C. 48, 167 S. E. 382 (1933).

[23] Barker v. Almy, 20 R. I. 367, 39 Atl. 185 (1898).

[24] U. S. v. Hartwell, Fed. Cas. No. 15,318 (1869); Comm. v. Horton, *supra* note 3.

[25] State v. Herlihy, 102 Me. 310, 66 Atl. 643 (1906); Johnson v. Johnson, 78 N. J. Eq. 507, 80 Atl. 119 (1911). *Contra:* Olzewski v. Goldberg, 223 Mass. 27, 28, 111 N. E. 404 (1916); Collins v. Benson, 81 N. H. 10, 120 Atl. 724 (1923).

[26] State v. Fagin, 64 N. H. 431, 432, 14 Atl. 727 (1888); State v. Suick, *supra* note 14; Brozosky v. State, *supra* note 9.

[27] State v. Fagin, *supra* note 26, at 728.