UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 34 | Number 3 Article 2

4-1-1956

Nolo Contendere in North Carolina

Edward Lane-Reticker

NOLO CONTENDERE IN NORTH CAROLINA

EDWARD LANE-RETICKER*

In his opinion in *Fox v. Scheidt*,[1] Mr. Justice Parker noted that the plea of nolo contendere[2] passed out of use in England early in the Eighteenth Century, but that "recent years have brought about a renaissance of the plea of nolo contendere in the United States, especially in the Federal Courts where, it is said, thousands of defendants have entered the plea to indictments and criminal informations charging them with violating the anti-trust and income tax laws, because of the attractiveness of certain of its features for the defendant."

The recent renaissance of the plea is by no means confined to the federal courts. Of twenty-one cases involving the plea which have reached the Supreme Court of North Carolina, fifteen have been decided in the last ten years, and ten of these have been decided in the last five years. If the frequency with which an issue is raised on appeal is a fair index of the frequency with which it is injected into litigation, it may be assumed that the use of the plea of nolo contendere is many times more common today than it was twenty, or even ten, years ago.

In view of the increase in the use of the plea of nolo contendere, the development of the plea in North Carolina should be of interest.[3] For the purposes of discussion, a division will be made between cases which discuss the incidents of the plea in the case in which it is entered and cases which consider the effect of the plea in other proceedings.

THE INCIDENTS OF THE PLEA IN THE CASE IN WHICH IT IS ENTERED

In *State v. Oxendine*,[4] the first instance found in which a case involving nolo contendere reached the Supreme Court, a free Negro submitted[5] to an indictment for assault and battery. A statute[6] required that, in the case of a free Negro or free person of color who had been convicted of a criminal offense and who was unable to pay the fine imposed, the court direct the sheriff to hire the defendant out for the payment of the fine. From the judgment ordering him hired out under this

* Assistant Director, Institute of Government, University of North Carolina, Chapel Hill, North Carolina.

[1] 241 N. C. 31, 84 S. E. 2d 259 (1954).

[2] "I do not wish to contend." *Non vult* [*contendere*] is the same plea expressed in the third person singular.

[3] For a general discussion of the plea, see Note, 30 N. C. L. REV. 407 (1952) and authorities there cited.

[4] 19 N. C. 435 (1837).

[5] The court regarded submission as the equivalent of a plea of nolo contendere.

[6] N. C. Laws, 1831, c. 13.

statute, the defendant appealed on constitutional grounds. The Court avoided a discussion of the constitutional issues and reversed the judgment of the trial court on the ground that the defendant, having pleaded nolo contendere, had not been convicted, and that the statute, by its terms, applied only to convicted defendants.[7]

In the light of later decisions, three aspects of the *Oxendine* case should be especially noted: (1) the holding that there was no conviction, (2) the fact that the judgment successfully attacked was entered in the same criminal case as the plea of nolo contendere, and (3) the fact that the hiring-out was mandatory under the statute.[8] As to the first aspect, the holding that there was no conviction could be accepted, if at all, only with major reservations and qualifications. The second and third aspects, or either of them, would probably dictate a contrary result in North Carolina today.

Other decisions have made it clear that a plea of nolo contendere is equivalent to a plea of guilty for the purposes of punishment[9] and that, as in the case of a plea of guilty, it is not necessary for the court to determine guilt or innocence before sentencing.[10] Like a plea of guilty, a plea of nolo contendere waives irregularities in a warrant for a misdemeanor.[11]

At one time a statute authorized the use of nolo contendere as a conditional plea.[12] Upon acceptance of the plea, the judge was to hear the evidence. If satisfied that the defendant was not guilty, he was to strike the plea of nolo contendere and to enter a verdict of not guilty. This statute was held repugnant to the constitutional guarantee of trial by jury[13] in *State v. Camby*.[14]

The fact that a hearing has been held and evidence introduced after submission of the plea has sometimes been the basis of a defendant's contention that he has not been properly tried. In *State v. Beasley*,[15] the defendant pleaded nolo contendere to a gambling offense. Upon request the solicitor introduced evidence to acquaint the court with the nature of the offense, and to enable the court to fix the sentence. The de-

[7] The court did not avoid the constitutional problem for long. See State v. Manuel, 20 N. C. 144 (1838).

[8] Mandatory in the sense that the court, having determined the defendant's inability to pay the fine, was required to direct the sheriff to hire him out.

[9] Stat v. Parker, 220 N. C. 416, 17 S. E. 2d 475 (1941). See State v. Stansbury, 230 N. C. 605, 55 S. E. 2d 79 (1949).

[10] State v. Ayers, 226 N. C. 579, 39 S. E. 2d 607 (1946).

[11] State v. Tripp, 236 N. C. 320, 72 S. E. 2d 660 (1952). A plea of nolo contendere formerly served as waiver of a bill of indictment. Public Laws, 1907, c. 71; formerly codified as N. C. GEN. STAT. § 15-140; now rewritten to provide for express waiver by Session Laws, 1951, c. 726.

[12] N. C. Public Laws, 1933, c. 23.

[13] NORTH CAROLINA CONSTITUTION, art. V, sec. 13.

[14] 209 N. C. 50, 182 S. E. 699 (1395).

[15] 226 N. C. 580, 39 S. E. 2d 607 (1946).

fendant's appeal was based on the ground that the evidence so introduced failed to prove a crime. In a per curiam decision, the Court held that the defendant's appeal was groundless since the guilt of the accused was not at issue.

The nature and purpose of the hearing held in *State v. Shepherd*[16] was not so clear. The record stated that the defendant through counsel "enters a plea of nolo contendere [to forgery and uttering, and embezzlement] and permits the court to hear the evidence and find the facts." A hearing before the court at which both sides offered evidence followed. At its conclusion, the court announced that the defendant was guilty of at least two of the charges on his own testimony. Nothing more appearing, this procedure would seem to be precisely that condemned as unconstitutional by the *Camby* case. However, the trial court also stated that it had "rendered no verdict" and was pronouncing judgment on "the defendant's plea of nolo contendere." Chief Justice Stacy conceded that there was doubt as to the "intent, scope, and purpose" of the hearing before the trial court and that the record seemed contradictory; but he affirmed the judgment below, pointing out that the defendant had made no attempt to withdraw his plea of nolo contendere. "Thus, the case pivots on an interpretation of the record with something to be said on both sides and the defendant required to show error against a presumption of regularity." The fact situation in *State v. Jamieson,*[17] is almost identical to that in the *Shepherd* case and its per curiam decision is to the same effect.

In *State v. Horne,*[18] the defendant, who pleaded nolo contendere to a charge of larceny, was successful in persuading the Supreme Court to reverse a road sentence. Unlike the defendants in the *Shepherd* and *Jamieson* cases, he was not represented by counsel. The defendant first told the solicitor he would plead not guilty, and later that "he would enter a plea of nolo contendere and let the judge hear the evidence and render such judgment as the facts might warrant." After hearing some of the evidence, the court observed that it was more a case of embezzlement than of larceny. The court said it would permit the defendant, if he wished, to withdraw his plea of nolo contendere to the larceny indictment and direct the solicitor to obtain a bill for embezzlement. The defendant elected to stand on his plea of nolo contendere, perhaps misled by the court's observation into believing that he would be acquitted of that charge. The records states that the court "after hearing the evidence adjudged the defendant guilty and sentenced him to serve a term

[16] 230 N. C. 605, 55 S. E. 2d 79 (1949).
[17] 232 N. C. 731, 62 S. E. 2d 52 (1950).
[18] 234 N. C. 115, 66 S. E. 2d 665 (1951).

of four months" on the roads.[19] Since the defendant was apparently confused as to the effect of his plea and the meaning of the court's remarks, was offered only a conditional opportunity to withdraw his plea, and was without counsel,[20] reversal of the judgment was dictated by considerations of fair play.

The hearing in *State v. Cooper*,[21] a prosecution for asault with a deadly weapon with intent to kill and resulting in serious injury, was held to be for the purpose of fixing sentence. The defendant's contentions that the State's evidence failed to prove his guilt, or, at most, proved him guilty of assault without intent to kill, was rejected. Admission of evidence that defendant had previously discharged a firearm in a public eating place was held to have been proper in the presentencing hearing, although such evidence, the Court concedes, would not have been admissible in a trial on the merits.

In *State v. McIntyre*,[22] the record showed that the defendant entered a plea of nolo contendere to a charge of reckless driving and speeding, and that "upon hearing the evidence the court adjudged the defendant guilty" and imposed sentence. The defendant was not represented by counsel. Despite the apparent similarity to the *Horne* case, the Court affirmed the judgment. Although the defendant in this case was not represented by counsel, the record does not suggest that he was misled or confused as to the nature of his plea. In fact, there is a specific finding of the trial court to the contrary. The hearing in this case is characterized as a hearing to determine whether the plea of nolo contendere should be accepted,[23] rather than as a hearing prior to sentencing.

A very recent case is *State v. Barbour*.[24] The defendant had pleaded nolo contendere to two counts of assault, one of simple assault and one of assault with a deadly weapon. The trial court found a verdict of guilty on the first count but not guilty on the second. Raising the ques-

[19] *Cf.* State v. Shepherd, 230 N. C. 605, 55 S. E. 2d 79 (1949), in which the record stated that judgment was imposed on the plea of nolo contendere.

[20] For admirers of judicial wit in general and Chief Justice Stacy's in particular, his comment on this point is reproduced verbatim: "The defendant was *inops consilii* during the trial. True, it was made to appear to the court that 'the defendant had studied law and had applied to take the examination to be permitted to practice in North Carolina.' Nevertheless, he was undertaking to appear for himself which affords some measure of his prudence and sagacity." State v. Horne, 234 N. C. 115, 116, 66 S. E. 2d 665, 666 (1951).

[21] 238 N. C. 241, 77 S. E. 2d 695 (1953).

[22] 238 N. C. 305, 77 S. E. 2d 698 (1953).

[23] As this case makes clear, the plea of nolo contendere is not a matter of right. Its acceptance is always within the discretion of the court. For this reason it has sometimes been said that the nolo contendere is not a plea in the strict sense of the term. 14 AM. JUR., *Criminal Law* § 275 (1938).

[24] 243 N. C. 265, 90 S. E. 2d 388 (1955).

tion of its own motion,[25] the Supreme Court saw in this procedure clear indication that the trial court had tried issues of fact without a jury and reversed the conviction.

State v. Barley[26] was a prosecution of a taxi driver for a prohibition violation. The defendant's attorney entered a plea of nolo contendere over the defendant's objection. After hearing the testimony of the arresting officer, the court sentenced the defendant to three months in jail and placed him on probation for twelve months. The defendant then took the stand and said that he had not authorized the plea and that he had contended from the beginning that he was not guilty. (The attorney withdrew as counsel for the defendant.) The court thereupon sentenced him to twelve months on the road, apparently superseding its previous sentence. The Supreme Court held that the defendant was entitled to a jury trial on the issue of his guilt and was not bound by the plea which his attorney entered over his objection.

A consideration of the cases above justifies certain generalizations. In the case in which it is entered, a plea of nolo contendere is equivalent to a plea of guilty for purposes of the punishment that may be adjudged, waiver of procedural irregularities, and dispensing with the necessity of proving the guilt of the accused. It is not a conditional plea and may not be used as a device to permit the trial court to determine issues of fact without a jury. However, despite the decision in the *Camby* case and frequent reaffirmation of its rule by the Supreme Court, there is still some tendency on the part of bench and bar to regard the plea as conditional. While the Supreme Court has tolerated a certain amount of ambiguity in the record as to the nature of the hearings held upon a plea of nolo contendere, it has reversed convictions when it has appeared affirmatively that the defendant was misled or that the court tried the case.

Considerable difficulty might be avoided if trial courts would undertake to make sure that defendants who offer pleas of nolo contendere understand that they are submitting to punishment to the same extent as if they had pleaded guilty. It should also be made clear that any hearing held after a plea of nolo contendere has been submitted is for the purpose of aiding the court in determining whether to accept the plea, or, if the plea has been accepted, for the purpose of aiding the court in fixing an appropriate sentence. The record should show that judgment was given on the plea of nolo contendere and not upon a verdict found after hearing the facts. If upon the hearing held to fix sentence or determine whether the plea should be accepted, the court

[25] The defendant's only assignment of error was that the sentence imposed exceeded the statutory maximum.

[26] 240 N. C. 253, 81 S. E. 2d 772 (1954).

should become doubtful of the defendant's guilt and decide that the plea of nolo contendere is improvident, the defendant should be allowed to withdraw his plea and enter a plea of not guilty. The court should not make a finding of not guilty while the plea of nolo contendere stands.

Two more cases remain for consideration before turning to a discussion of the effect of a plea of nolo contendere in a proceeding other than the one in which the plea is entered. Both involve motions in the cause made subsequent to the original disposition of the case. In *State v. Burnett*,[27] defendant had been indicted for operating a bawdy house and had pleaded nolo contendere. Prayer for judgment was continued on payment of costs. At a later term of court, the solicitor renewed his motion for judgment. Upon evidence of continued operation of the bawdy house, the defendant was sentenced to a twelve-month jail sentence. The contention on appeal was that acceptance of the plea of nolo contendere precluded any sentence beyond that imposed when the plea was accepted. The Court rejected this contention and held that the plea of nolo contendere is equivalent to a plea of guilty for this purpose and that pronouncement of judgment upon the renewed motion was proper.

State v. McKay[28] was a seduction case. The defendant had pleaded nolo contendere. Prayer for judgment had been continued on his agreement to a consent-compromise judgment requiring him to make installment payments to the prosecutrix. Over a year after the judgment was entered the defendant married the prosecutrix and subsequently made a motion in the cause to have the judgment set aside, relying on the provision of C. S. 4339[29] to the effect that marriage is a bar to further prosecution. The trial court refused to grant the motion and the Supreme Court affirmed. The Court said the "statute clearly indicates that the marriage must be before the party is *adjudged guilty* for defendant to get the benefit of the statute." [Emphasis supplied.] The point in the case important to the development of the plea of nolo contendere is that the Court clearly regarded the plea as the equivalent of conviction for the purpose of the statute.

The Effect of the Plea in Other Proceedings

The first North Carolina case directly to raise the issue of the effect of a plea of nolo contendere in a proceeding other than the one in

[27] 174 N. C. 796, 93 S. E. 473 (1917).
[28] 202 N. C. 470, 163 S. E. 586 (1932).
[29] Now codified as N. C. Gen. Stat. § 14-180 (1953): "If any man shall seduce an innocent and virtuous woman under promise of marriage, he shall be guilty of a felony, and upon conviction shall be fined or imprisoned at the discretion of the court, and be imprisoned in the State prison not exceeding the term of five years: . . . Provided further, that marriage between the parties shall be a bar to further prosecution hereunder. . . ."

which it is entered was *In re Stiers*,[30] a disbarment proceeding under a statutory provision now repealed.[31] The attorney involved had pleaded nolo contendere in a federal district court to ten counts of embezzlement, had been fined, placed on probation, and suspended from practice in that court. Thereupon, the superior court solicitor, following the mandate of the statute, presented in superior court a certified copy of indictment, judgment, and docket entries from the federal court. After argument, the court rendered the following judgment, "Upon the foregoing record, the court is of the opinion that the plea of nolo contendere does not amount to a confession of a felony and therefore dismisses this proceeding." Judgment was affirmed on two grounds, (1) that the State had no right of appeal under the statute, and (2) that the plea of nolo contendere did not amount to a "conviction or confession in open court." The trial court in its judgment had said only that the plea did not amount to a confession. The Supreme Court added that it did not amount to a conviction.

The next case in this line is *State v. Thomas*.[32] The defendant pleaded guilty to prohibition violations in Edgecombe County Recorder's Court. He was given a two-year suspended sentence and placed on probation for five years. One of the conditions of his probation was that he "violate no penal law of any State or of the Federal Government and be of general good behavior." A few months later he entered a plea of nolo contendere in another court to a charge of operating a motor vehicle while his driver's license was suspended. The probation officer reported this occurrence to the Edgecombe court and petitioned for suitable disposition of the case. The Edgecombe court found that the plea of nolo contendere to the offense of driving while license was suspended constituted a violation of the conditions of the defendant's probation and ordered the suspended sentence into effect. The superior

[30] 204 N. C. 48, 167 S. E. 382 (1933).

[31] Public Laws, 1929, c. 64; repealed by Public Laws, 1933, c. 210, s. 20. It provided: "No attorney-at-law shall be disbarred for crime unless after conviction or confession in open court, State or Federal, of a criminal offense showing him to be unfit to be trusted in the duties of his profession. After conviction of a felony showing him to be unfit to be trusted in the duties of his profession he must be disbarred by the court; and if any attorney be convicted of, or confesses to the commission of a felony of such nature in a State court, the presiding judge of such court (or if any attorney be convicted in a Federal court, it shall be the duty of the solicitor of the district in which such attorney is practicing to secure a certified copy of the judgment entered and present the same to the judge holding the courts in said district), shall cause a judgment to be entered and docketed in the office of the Clerk of the Superior Court in which such attorney is convicted, or in which such attorney is practicing, disbarring said attorney, and the Clerk of the Superior Court in which the same is docketed shall forthwith transmit a certified copy of said judgment to the Clerk of the Supreme Court, whereupon the Supreme Court shall revoke the license and the right of such attorney to practice law in the State."

[32] 236 N. C. 196, 72 S. E. 2d 525 (1952).

court affirmed the judgment but the Supreme Court reversed, saying that it "seemed reasonable and logical that such plea ought not to be used against the defendant as an admission in any other criminal action." Therefore, it held that the plea of nolo contendere to the charge of operating a motor vehicle while under suspension could not be used against the defendant as an admission on the question of whether or not he had violated the condition of his suspended sentence. "Proof of such violation, if any, must be made independently of such plea, or of evidence or admission by defendant that such plea was made."[33]

The three remaining cases of this type all involve driver's licenses and were all decided in 1954. The first in *Winesett v. Scheidt*.[34] The petitioner had pleaded nolo contendere to a charge of drunken driving. Instead of proceeding to revoke his license under G. S. § 20-17 (2),[35] the Department of Motor Vehicles attempted to suspend it under G. S. § 20-16(a)1, which in pertinent part reads:

> "The Department shall have authority to suspend the license of any operator . . . upon a showing by . . . satisfactory evidence that the licensee . . . has committed an offense for which mandatory revocation of license is required upon conviction."

Upon notification of the suspension, the petitioner requested a hearing as provided by G. S. § 20-16(c). The only evidence before the hearing officer at the hearing was the record that the petitioner had pleaded nolo contendere to the drunken driving charge. The hearing officer overruled petitioner's objection to the use of this evidence and concluded that it was sufficient to establish commission of the offense. This position was maintained by the Department on the appeal to superior court, which ruled that its action in suspending the license was without authority of law and that the petitioner was entitled to its return.

The Supreme Court upheld the superior court, holding that the plea was not competent evidence as an admission of guilt, nor sufficient evidence to sustain the license suspension. It should be noted that the issues had been framed at the hearing to make it clear that the Department was acting under a statutory provision that required it to show commission of the offense, rather than conviction, and that the Depart-

[33] Conceding that the plea should not be admissible as an admission that the defendant drove while under suspension, *quaere:* whether it ought not to have been admissible as some evidence that the defendant had not been of "general good behavior." Or suppose that the condition of the suspended sentence had included a stipulation that the defendant not plead nolo contendere to any criminal charge?

[34] 239 N. C. 190, 79 S. E. 2d 501 (1954).

[35] "The Department shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for . . . Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug." N. C. GEN. STAT. § 20-17(2) (1953).

ment's only proof of the commission of the offense was the plea of nolo contendere.[36]

In a concurring opinion, Mr. Justice Parker agreed that the plea could not be used as attempted by the Department of Motor Vehicles, but said that the Department had a duty to revoke the petitioner's license under G. S. § 20-17.[37] He reasoned that such action would be part of the same case in which the plea had been entered and not a different proceeding:

> "Mandatory revocation is part of the punishment for driving an automobile while under the influence of intoxicating liquor. When the court in Pasquotank County accepted the defendant's plea of nolo contendere, G. S. 20-24, subsection (a),[38] required it to take up the license of the petitioner and forward the same together with a record of the plea to the Department. Upon receipt of such license and record by the Department, G. S. 20-17 requires a mandatory revocation of the defendant's license.[39] Such mandatory revocation by the Department seems to me as much the performance of a ministerial duty in the petitioner's case in Pasquotank County, as the Clerk of the Court in Pasquotank County entering the judgment of the court in the case in the Minutes of that Court. I think it is the same case, the same proceeding, the same forum."[40]

In *Fox v. Scheidt*,[41] Mr. Justice Parker, applying the reasoning of his concurring opinion in the *Winesett* case, delivered the opinion of the court. The petitioner had been convicted of drunken driving in 1949, and his license had been revoked for one year.[42] In 1952, after an operator's license had been reissued to him, he pleaded nolo contendere to a charge of a second offense of drunken driving. The Department of Motor Vehicles, upon receiving a record of the entry and acceptance

[36] *Cf.* State v. Thomas, 236 N. C. 196, 72 S. E. 2d 525 (1952). The *Thomas* and *Winesett* cases are basically the same. In the former, a plea of nolo contendere was held inadmissible to prove a violation of law and hence of the condition of the suspended sentence; in the latter the plea was held inadmissible to prove the commission of an offense.

[37] See note 35 *supra*.

[38] ". . . Whenever any person is convicted of any offense for which this article makes mandatory the revocation of the operator's or chauffeur's license of such person by the Department, the court in which such conviction is had shall require the surrender to it of all operators' and chauffeurs' licenses then held by the person so convicted and the court shall thereupon forward the same, together with a record of such conviction, to the Department." N. C. GEN. STAT. § 20-24 (a) (1953).

[39] See note 35 *supra*.

[40] Winesett v. Scheidt, 239 N. C. 190, 197, 79 S. E. 2d 501, 506 (1954).

[41] 241 N. C. 31, 84 S. E. 2d 259 (1954).

[42] N. C. GEN. STAT. § 20-19 (c) (1953).

of the plea, revoked his license for three years.[43] In 1954, apparently encouraged by the outcome of the *Winesett* case, the petitioner sought the issuance of an operator's license. The Department refused, basing its refusal on the ground that his license was in a state of revocation because of his plea of nolo contendere in the 1952 drunken driving case. Upon petition in superior court, the Department was ordered to return the license to the petitioner. Upon appeal by the Department, the Supreme Court reversed the court below. While the decision follows the reasoning of the concurring opinion in the *Winesett* case, it goes somewhat further in that it introduces the element of legislative intent:

> "The legislative intent and purpose is clear that in every case of a conviction—and a plea of nolo contendere is equivalent to a conviction by a jury for the purposes of that case—of driving a motor vehicle while under the influence of intoxicating liquor the driver shall be punished, and shall be prevented fom operating motor vehicles upon the highways to the hazard of other citizens. The General Asembly meticulously specified that the trial court shall take up the defendant's license in court, and forward it to the Department."[44]

The court approved the imposition of the three-year revocation under G. S. § 20-19(d),[45] which, it will be noted, refers to a "second conviction" of drunken driving, rather than a conviction of a second offense of drunken driving, the charge to which the petitioner had pleaded nolo contendere. Thus the imposition of the three-year revocation would seem to be based on the cumulative effect of the 1949 conviction and the 1952 plea of nolo contendere. If so, the question naturally arises as to what the result would have been had the petitioner pleaded nolo contendere in 1949 and been convicted in 1952. A rigid application of the "same case" test would apparently lead to a result opposite to that in the actual case. On the other hand, it seems doubtful at least that legislative intent and purpose would be served by making the imposition of a longer revocation depend on whether it was the first or second case in which the plea of nolo contendere was entered.

Mintz v. Scheidt[46] follows the *Fox* case and regards it as controlling. The petitioner had pleaded nolo contendere to a charge of manslaughter and the Department of Motor Vehicles had revoked his license, ap-

[43] N. C. GEN. STAT. § 20-19 (d): "When a license is revoked for a second conviction of driving under the influence of intoxicating liquor or a narcotic drug, the period of revocation shall be three years."

[44] Fox v. Scheidt, 241 N. C. 31, 36, 84 S. E. 2d 259, 263 (1954).

[45] See note 43 *supra*.

[46] 241 N. C. 268, 84 S. E. 2d 882 (1954).

parently under the provisions of G. S. § 20-17(1).[47] However, the notice of revocation sent to the petitioner did not specify the statutory authority, and upon the petitioner's request the Department granted him a hearing.[48] In a letter to the petitioner's attorneys, the Department of Motor Vehicles said the hearing was being granted pursuant to G. S. § 20-16(c).[49] This statement was apparently an inadvertence on the part of the Department, but the petitioner built his case on it. He claimed that the hearing "pursuant to the provisions of Section 20-16(c) of the General Statutes" established the fact that the Department was suspending his license under G. S. § 20-16 instead of revoking it under G. S. § 20-17, and thus his case was governed by the *Winesett* rather than the *Fox* decision. The court, however, said that the Department had a duty to revoke the license under G. S. § 20-17. The hearing granted was without authority of law, but neither the hearing nor the letter estopped the Department from asserting that it had taken action under the mandatory provisions of the state.[50]

The Future of the Plea

It may be argued with some persuasiveness that the plea of nolo contendere serves no useful purpose today and should be abolished by statute. The advantage of the plea is most frequently said to be that, unlike a plea of guilty, it cannot be used against the defendant as an admission in a subsequent civil case.[51] But for that matter neither may a

[47] "The Department shall forthwith revoke the license of any operator or chauffuer upon receiving a record of such operator's or chauffeur's conviction for . . . manslaughter (or negligent homicide) resulting from the operation of a motor vehicle." N. C. Gen. Stat. § 20-17 (1) (1953).

[48] There is no statutory provision for a hearing when a license is revoked.

[49] "Upon *suspending* the license of any person *as hereinbefore in this section authorized,* the Department . . . shall afford him an opportunity for a hearing. . . . Upon such hearing the Department shall either rescind its order of suspension, or good cause appearing therfor, may extend the suspension of such license. . . ." [Emphasis added.] N. C. Gen. Stat. § 20-16 (c) (1953).

[50] The Court also held that the lower court lacked jurisdiction of the petitioner's appeal and that the proceedings were void *ab initio.* The Court had previously said that the right of appeal under N. C. Gen. Stat. § 20-25 applies only when the action of the Department is discretionary, and not when it is mandatory. *In re* Wright, 228 N. C 584, 46 S. E. 2d 696 (1948).

[51] Even a plea of guilty is no more than an admission in a subsequent civil case. In State v. Burnett, 174 N. C. 796, 797, 93 S. E. 473, 474 (1917), the Court, citing a Massachusetts case, said: "The only advantage in a plea of nolo contendere gained by the defendant is that it gives him the advantge of not being estopped to deny his guilt in civil action based upon the same facts. Upon a plea of guilty entered of record, the defendant would be estopped to deny his guilt if sued in a civil proceeding." The foregoing language was quoted in *In re* Stiers, 204 N. C. 48, 167 S. E. 382 (1933); State v. Thomas, 236 N. C. 196, 72 S. E. 2d 525 (1952); and Winesett v. Scheidt, 239 N. C. 190, 79 S. E. 2d 501 (1954). Nevertheless, there are no North Carolina cases holding that a plea of guilty acts as an estoppel in a subsequent civil proceeding. Admissibility is one thing; conclusiveness, quite another.

conviction upon a plea of not guilty be so used.[52] Thus it would seem that a defendant could accomplish the same purpose by pleading not guilty. If he doesn't care to defend himself, he need not put in any evidence. However, such a practice would require the solicitor to put in evidence and make a case against the defendant. Thus, the plea of nolo contendere saves times and has some tendency to expedite judicial business.

Assuming that the plea of nolo contendere has a utility in a modern criminal procedure and that it will be retained, further judicial clarification would be desirable. The effect of the plea in the case in which it is entered has been made reasonably clear in North Carolina. For this purpose, the plea has all the effects of a plea of guilty.[53] Only the *Oxendine* case would seem opposed, a case which has been ignored since it was decided.

There is still some doubt, however, as to the effect of the plea in subsequent cases. This doubt exists in part because of a failure to draw an adequate distinction between the use of the plea in a subsequent proceeding as an admission of guilt and the use of a conviction based on the plea (or the plea as the equivalent of a conviction) in a subsequent proceeding, not as an admission of guilt, but for some other purpose. As a matter of evidence, it is clear that the plea of nolo contendere is very different from a plea of guilty. A plea of guilty might be said to be the ultimate admission. It says, "I did it." The plea of nolo contendere says only, "I do not care to discuss it." It is not an admission of anything. It would seem clear that the plea of nolo contendere should not be admitted into evidence as an admission of guilt in any subsequent case, civil or criminal.

As to a conviction based upon a plea of nolo contendere (or a plea of nolo contendere as the equivalent of a conviction), there seems to be no reason why it should be regarded differently from any other conviction. So regarded, it would not be admissible in an ordinary civil case.[54] However, the fact of conviction could be used under statutes such as those providing that administrative penalties must or may be

[52] Swinson v. Nance, 219 N. C. 772, 15 S. E. 2d 284 (1941). On cross-examination, the defense attorney attempted to ask one of the plaintiffs in an action for negligence growing out of an automobile accident if he had not been convicted of reckless driving as a result of the accident. The plaintiff would have answered in the affirmative. Exclusion of the evidence of conviction was held proper. While the evidence was offered for the purposes of impeachment, it would seem that the exclusion of the evidence, had it been offered on the issue of the plaintiff's negligence, should follow *a fortiori*. *Cf.* Warren v. Pilot Life Insurance Co., 215 N. C. 402, 2 S. E. 2d 17 (1939).

[53] See page 281, *supra*.

[54] Swinson v. Nance, 219 N. C. 772, 15 S. E. 2d 284 (1941). This is the view of the great majority of courts. See 5 WIGMORE, EVIDENCE § 1671 (a) (3d ed. 1940).

imposed upon conviction of certain offenses or series of offenses. This line of reasoning would give to the defendant pleading nolo contendere the traditional advantage of the plea, without frustrating the legislative intent behind modern statutes providing for the imposition of administrative penalties in addition to criminal penalties or providing for increased criminal penalties in cases of recidivism.[55] *Neibling v. Terry*[56] contains an excellent discussion of this distinction.

The "same case" doctrine which has been developed in the *Winsett, Fox,* and *Mintz* cases has so far produced the same result as that suggested above. The difficulty with this doctrine is that it seems to be based on the mandatory nature of the administrative action.[57] Thus, if the imposition of the administrative penalty is required upon conviction, the penalty is regarded as being action in the same case in which the plea of nolo contendere is submitted. There is the strong suggestion that if the administrative penalty was authorized, but not required, upon conviction, its imposition would not be regarded as part of the same case, and that therefore it could not be imposed if the conviction was based on a plea of nolo contendere.[58] Such a case might arise under G. S.

[55] See Note, 12 N. C. L. REV. 369 (1934).

[56] 352 Mo. 396, 177 S. W. 2d 502 (1944). The court said, in part (at 398, 177 S. W. 2d at 503-504): "We think that the confusion in the cases considering convictions on pleas of nolo contendere results from a judicial practice of clothing the judgment of conviction with the characteristics of the plea or in speaking of the plea and the conviction as one and the same. For example, there are cases which hold that a judgment of conviction on a plea of nolo contendere may not be used as an admission of guilt. But a judgment of conviction could never be used as such an admission, regardless of the nature of the plea. It is the plea of guilty which carries the evidentiary force as an admission, not the judgment of conviction entered on the plea. Ordinarily a judgment of conviction is not proof of anything in a civil proceeding except the mere fact of its rendition. By statute, in certain instances, a judgment of conviction has been given force because of the fact of its rendition. In such instances the judgment of conviction is made a basis for enforcing a statutory disability. Such statutes in no wise authorize the use of a conviction as an admission to be used to establish liability in a civil suit."

[57] The *Fox* and *Mintz* cases also look for support to N. C. GEN. STAT. § 20-24 (a), requiring the court to pick up the license certificate upon a conviction for which revocation is mandatory. However, this provision can scarcely be regarded as controlling since it is only an administrative detail. Surrender of the license certificate could be accomplished in a number of ways and is not to be confused with revocation of the license.

[58] It should be noted that a case involving this fact situation has not been before the court. *State v. Thomas,* 236 N. C. 195, 72 S. E. 2d 525 (1952) and *Winesett v. Scheidt,* 239 N. C. 190, 79 S. E. 2d 501 (1954), which may be thought to involve the question, do not actually turn on the issue of whether a plea of nolo contendere could be considered equivalent to a conviction for the purpose of discretionary action. In the *Thomas* case, the question was apparently conceived as being whether the plea of nolo contendere was evidence of a violation of the law. In the *Winesett* case, the question was whether the plea was evidence of the commission of an offense. Since a plea of nolo contendere is not an admission, it would seem clear that both cases would have been decided as they were even without reference to the "same case" theory. *In re* Stiers, 204 N. C. 48, 162 S. E. 2d 382 (1933) would of course heave been decided differently had the fact of conviction, rather than admission or confession, been looked to; but it seems that it would

§ 20-16(a)9,[59] which authorizes discretionary suspension of an operator's or chauffeur's license upon two convictions of speeding more than 55 m.p.h. It seems doubtful that the legislative intent of the Driver's License Act would be carried out by allowing the plea of nolo contendere to be a refuge for the speeder, especially when it has already been decided that it is not for the drunken driver.[60]

License suspensions and revocations are not civil cases in the traditional sense.[61] The statutes authorizing them are in many cases designed to allow the imposition of administrative penalties in addition to criminal penalties upon conviction of certain offenses. It is to be hoped that North Carolina will not allow the operation of such statutes to founder on a legal technicality, especially when such a result is not compelled by logic or authority.

---

also have been decided differently under the "same case" doctrine, since disbarment was mandatory.

[59] "The Department shall have authority to suspend the license of any operator or chauffeur . . . upon a showing by its records or other satisfactory evidence that the licensee . . . has, within a period of 12 months, been convicted of two or more charges of speeding in excess of fifty-five (55) and not more than seventy-five (75) miles per hour. . . ." N. C. GEN. STAT. § 20-16 (a) 9 (1953).

[60] See discussion of the *Fox* case, page 280 *supra*.

[61] In this connection, it is interesting to note that none of the North Carolina cases dealing with the effect of the plea in subsequent proceedings are civil cases in the sense of being controversies between private litigants.