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Criminal Law -- Pleas and Defenses -- Nolo Contendere

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liance is usually placed upon the so-called "right of privacy"[31] or "right to be let alone."[32]

The conflict is not a new one. Heraclitus of Ephesus wrote, in 500 B.C.: "The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license."[33] The *Pollak* case demonstrates once more the interpretive pliability of our Constitution in dealing with that problem—whatever the setting. The Bill of Rights "can keep up with anything an advertising man or an electronics engineer can think of."[34]

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Criminal Law—Pleas and Defenses—Nolo Contendere

Answers to a recent inquiry directed to many of the solicitors and judges of North Carolina reveal an astonishing variety of opinions as to the significance of the plea of nolo contendere.[1] There are almost

[29] See Zeni, *Wiretapping—The Right of Privacy versus the Public Interest*, 40 J. CRIM. L. 476 (1949).

[30] See Sidis v. F-R Pub. Corp., 113 F. 2d 806 (2d Cir.), *cert. denied*, 311 U. S. 711 (1940); and Jones v. Herald Post Co., 230 Ky. 227, 18 S. W. 2d 972 (1929).

[31] The "right of privacy" has been defined as "the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short, it is the right to be left alone." Rhodes v. Graham, 238 Ky. 225, 228, 37 S. W. 2d 46, 47 (1931).

[32] Justice Jackson uses this phrase in his dissent in the *Murdock* case, *supra* at 166.

[33] Quoted by Palmer in *Liberty and Order: Conflict and Reconciliation*, 32 A. B. A. J. 731, 732 (1946).

[34] Pollak *et al.* v. Public Utilities Comm'n of D. C., 191 F. 2d 450, 456 (D. C. Cir. 1951). In "determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses." United States v. Classic, 313 U. S. 299, 316 (1941). "In considering this question, then, we must never forget that it is a constitution we are expounding." M'Culloch v. Maryland, 4 Wheat. 316, 407 (U. S. 1819).

Addendum: The supreme court opinion reversing the court of appeals in the *Pollak* case was handed down after this note went to press. 20 L. W. 4343, May 26, 1952.

[1] In November, 1952, the editor of this REVIEW wrote fifty-five judges and solicitors of the recorder's and superior courts and requested that they send the REVIEW a statement setting forth their opinion (without any research) as to the significance, essential requirements, and effects of the plea nolo contendere as used in North Carolina. We wish to express our appreciation to the twenty judges and solicitors who replied to this request for their contribution to this note.

In these twenty replies, some fifty-nine or sixty different points of view were expressed. The differences between some of the views are only shaded, but the opinions on some points are diametrically opposed to the law as laid down by the supreme court.

Some of the views which do not seem to have judicial sanction are as follows: "I have never looked into the law but have depended upon a general impression"; "I am not guilty but cannot contend with the State"; the defendant "is, therefore, admitting that the evidence is sufficient to warrant a conviction, although he is rather weakly saying that he is not admitting he is guilty"; "the defendant says

as many impressions as there are individuals. Some said the plea is an admission of the facts and charges; others said the plea is an admission of nothing. Some said that the same punishment would result from a plea of nolo contendere as would result from a plea of guilty; others said there are many advantages to the plea. Still others said the plea is equivalent to a plea of guilty, while others said the State must prove its case beyond a reasonable doubt once the plea of nolo contendere is entered.[2]

This variety of impressions was not altogether unexpected in view of the limited and sometimes indefinite treatment of the plea nolo contendere by the supreme court.[3] This discrepancy in concepts by the trial courts necessarily results in a mutifarious application of the law.

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in effect that in his own mind there is justification for his acts or omissions, of which the State complains, but he does not wish to contend with the Solicitor"; "a 'gentleman's plea of guilty' "; "defendants who avail themselves of the plea . . . enter such plea as a 'face saver.' They consider this plea as more respectable"; "defense lawyers sometimes believe that it sounds better to their clients or that the psychological effect is better"; "a plea of this type somewhat negatives the sting of a plea of guilty, and leaves the public with a little better impression"; the defendant is "asking for the presentation of the evidence with the purpose and thought in mind of showing mitigation"; "this technical plea lets the Judge hear the facts and pass upon the merits of the case"; "I consider it to be a plea of guilty conditioned upon the evidence for the State being legally sufficient to sustain a verdict of guilty"; "I have always required the State to prove its case after a plea of nolo contendere"; the plea "carries the requirement that the state make out its case against the defendant beyond a reasonable doubt before the defendant is adjudged guilty"; "when the facts produced by the State are not legally sufficient to support a verdict of guilty, I find the defendant not guilty upon the plea"; "at the conclusion of State's evidence if I felt that the State has failed to prove its case I enter a verdict of not guilty"; "too many trial judges . . . seem to accept such a plea as a plea of guilty. I have always required the State to prove its case after a plea of nolo contendere"; "solicitors uniformly accept the plea when tendered"; "I have almost always accepted pleas of nolo contendere when offered; and I have never noticed that the form of the plea has made any difference in the punishment or otherwise"; "the major effect of an attorney entering a plea of nolo contendere would be to protect the defendant's right in a trial when counsel is unable to produce a legitimate defense and where there is a possibility that a defense may be developed either factually or technically from the State's evidence"; "The plea of Nolo Contendere is often used, without sanction of law, as a time saving device in criminal procedure"; "Where the facts in a criminal case are not in dispute, or, if in dispute, the State's case is weak or frivolous, and defendant is willing to accept the Court's version of the law or reaction to the facts, the defendant will sometimes enter his plea of Nolo Contendere and abide the judgment of the Court—hoping that the Court will exercise his discretion to permit the plea to be withdrawn, and further hoping that upon intimation of the Court the Solicitor will take a Nolle Prosequi or suffer a directed verdict of Not Guilty. This device of course saves time and is generally looked upon by the Court with favor"; and "This plea is quite frequently used when both the Solicitor and defendant's counsel are willing for the Court to hear the facts without the intervention of a jury. In such instance an agreement will be reached that the defendant will enter a plea of nolo contendere and let the Judge hear the facts. If the Judge is of the opinion that the facts are sufficient to indicate that the defendant is guilty the plea will stand as entered. If the Judge is of a contrary opinion the plea will be stricken out and a nol pros will be taken. This use of the plea quite often expedites the work of the Court."

[2] *Ibid.*

[3] See cases cited in footnotes 44 through 55 *infra.*

At early common law the formal plea *non vult*, or nolo contendere, was referred to as an implied confession.[4] While English authority is somewhat scant, such as is seems consistently to agree that the plea of nolo contendere amounted to an implied confession of guilt.[5] There was also agreement that the plea was permissible only in cases where the indictment was for an offense less than capital;[6] that it could be

[4] LAMBARD, EIRENARCHA: OR OF *The Office of the Justices of Peace* 511 (4th revised, 1599) (This manual published in London 353 years ago cites Year Book entries relative to the plea in both the ninth and eleventh year of the reign of Henry IV (1407 and 1409). The section pertinent to this note reads as follows: "The party being thus brought in (or otherwise yeelding himself) to answere: Justice requireth, that hee be heard to speake, and therefore he may (as his case will serve) either confesse, or deny, the offence wherewith he is burdened.

"And this Confession is of two sorts, Free, or Forced: and that former is of two kindes also, absolute or after a manner.

"In the free and open (or absolute) confession hee taketh the fault upon him, and yeeldeth himselfe simply to such paine as [the] court wil inflict for it.

"And this free confession is of great force in the law: for if it be upon an enditement of Batterie, and (after such confession had for the Queene) the partie beaten will also bring his Action of Trespasse for his owne damage: then shall the defendant be concluded by his former confession upon the enditement, so that he shal not be received to say the contrary. 9.H.4.8 & 11.H.4.65.

"But the other (which I call confession after a maner) is only a not denying, in which the partie doth cunningly, and (after a sort) take the fault upon him, without plainly confessing himselfe guiltie thereof: as where hee putteth himselfe in *Gratiam Regina, & petit admittiper finem*, without any more, or sometime (by Protestation that he is not guilty) pledth his pardon: and such a confession (if I may so call it) doth not so cóclude him, but that he may afterward plead Not guiltie in any Action brought against him, 9.H.6.60 *Cur.* & 11.H.4.65. And yet M.20.R 2 (as D Statham reporteth) the case is generally set down, that if he once mak a fine, he that be estopped by it. Neverthelesse I thinke, that the distinction (which I have layed) will reconcile the variance.").

[5] 1 BURN, JUSTICE OF THE PEACE AND PARRISH OFFICER 345 (1766) ("An *implied* confession is, where a defendant in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine; which submission the court may accept of if they think fit, without putting him to a direct confession."); 1 CHITTY, THE CRIMINAL LAW *431 ("An *implied confession* is where, in a case not capital, a defendant does not directly own himself to be guilty, but tacitly admits it by throwing himself on the king's mercy, and desiring to submit to a small fine, which the court may either accept or decline, as they think proper. If they grant the request, an entry is made to this effect, that the defendant 'non vult contendere cum domina regina et posuit se in gratiam curiae,' without compelling him to a more direct confession. The difference in effect between an implied, and an express confession is, that after the latter, not guilty cannot be pleaded to an action of trespass for the same injury; whereas it may at any time be done after the former. But no confession, however large and explicit, will prevent the defendant from taking exception in arrest of judgment to faults apparent in the record; for the judges must ex officio take notice of them, and any one, as amicus curiae, may point out the exceptions."); 4 COMYNS, DIGEST OF THE LAWS OF ENGLAND 404 (4th ed. 1793) ("So a man may *ponere se in gratiam regis*, and pray that he be admitted by fine."); 2 HAWKINS, PLEAS OF THE CROWN 466 (8th ed. 1824) ("An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine: in which case, if the court think fit to accept of such submission, and make an entry that the defendant *posuit se in gratiam regis*, without putting him to a direct confession, or plea (which in such cases seems to be left to discretion), the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall be where the entry is *quod cognovit indictamentum.*"); LAMBARD, *op. cit. supra* note 4.

[6] 1 BURN, *op. cit. supra* note 5; 1 CHITTY, *op. cit. supra* note 5; 2 HAWKINS, *op. cit. supra* note 5.

accepted or rejected at the discretion of the court;[7] and that once accepted an entry was so made in the record[8] without compelling a more direct confession or plea.[9] The only real advantage of the implied confession over an express confession was that the defendant, by submitting to the court in the criminal action, was not estopped to deny his guilt in a subsequent civil action for trespass based on the same facts,[10] whereas he would be estopped had he made an express confession to the indictment.[11] But no confession, express or implied, could deny the defendant his right to make exceptions in arrest of judgment to defects apparent in the record.[12]

In America, nolo contendere is not always considered a plea in the strict sense of the word.[13] It has been referred to as a compromise between the state and the defendant.[14] There are several jurisdictions in which the plea is not recognized or allowed,[15] while in the federal courts, and at least one state, statutory provisions have been made for the plea.[16]

A majority of the jurisdictions seem to agree that the plea amounts to an implied confession of guilt.[17] One federal district court has said

[7] 1 BURN, *op. cit. supra* note 5; 1 CHITTY, *op. cit. supra* note 5; 4 COMYNS, *op. cit. supra* note 5 ("But where the confession proceeds from fear or ignorance, the judge may refuse the confession."); 2 HAWKINS, *op. cit. supra* note 5.

[8] Queen v. Templeman, 1 Salk. 55, 91 Eng. Rep. 54 (1702) (". . . for the entry upon a confession [The North Carolina supreme court interpreted this phrase in State v. Oxendine, 19 N. C. 435, 437 (1837) as follows: ". . . that is to say, an implied confession by submission."] is only *non vult contendere cum domina Regina & pon. se in gratiam Curiae.*"); 1 CHITTY, *op. cit. supra* note 5; 2 HAWKINS, *op. cit. supra* note 5.

[9] Rex v. Williams, Comb. 19, 90 Eng. Rep. 317 (1686) ("He pleaded the common plea, *quod non vult contendere cum domino Rege*, and was fined."); 1 BURN, *op. cit. supra* note 5; 1 CHITTY, *op. cit. supra* note 5; 2 HAWKINS, *op. cit. supra* note 5.

[10] Queen v. Templeman, 1 Salk. 55, 91 Eng. Rep. 54 (1702) ("Upon a motion to submit to a small fine, after a confession of the indictment which was for assault, Holt Chief Justice took a difference where a man confesses an indictment, and where he is found guilty; in the first case a man may produce affidavits to prove *son assault* upon the prosecutor in mitigation of the fine; otherwise where the defendant is found guilty"); 1 CHITTY, *op. cit. supra* note 5; 4 COMYNS, *op. cit. supra* note 5 at p. 404 ("And such confession does not conclude him."); 2 HAWKINS, *op. cit. supra* note 5.

[11] Queen v. Templeman, 1 Salk. 55, 91 Eng. Rep. 54 (1702); 1 CHITTY, *op. cit. supra* note 5; 2 HAWKINS, *op. cit. supra* note 5; 4 LAMBARD, *op. cit. supra* note 4.

[12] 1 CHITTY, *op. cit. supra* note 5.

[13] Hudson v. United States, 272 U. S. 451, 455 (1926).

[14] Hocking Valley Ry. Co. v. United States, 210 Fed. 735, 738 (6th Cir. 1914); State v. LaRose, 71 N. H. 435, 438, 52 Atl. 943, 945 (1902).

[15] People v. Miller, 264 Ill. 148, 106 N. E. 191 (1914); Mahoney v. State, 197 Ind. 335, 149 N. E. 444 (1925); State v. Kiewel, 166 Minn. 302, 207 N. W. 646 (1926); People v. Daiboch, 265 N. Y. 125, 128, 191 N. E. 859, 860 (1934).

[16] FED. R. CRIM. P. 11; GA. CODE ANN. §27-1408 (Cum. Supp. 1951).

[17] United States v. Norris, 281 U. S. 619 (1930); People *ex. rel.* Attorney General v. Edison, 100 Colo. 574, 69 P. 2d 246 (1937); Commonwealth v. Marion, 254 Mass. 533, 150 N. E. 841 (1926); Neibling v. Terry, 352 Mo. 396, 177 S. W. 2d 502 (1944); State v. Court of Special Sessions of Essex County, 132 N. J. L. 44, 38 A. 2d 577 (1944); Ferguson v. Reinhart, 125 Pa. Super. 154, 190 Atl. 153 (1937); State v. McElroy, 71 R. I. 379, 46 A. 2d 397 (1946); Schad v. McNinch, 103 W. Va. 44, 136 S. E. 865 (1927).

by way of dictum that the plea does not technically admit the allegations, "but merely says that the defendant does not choose to defend. . . ."[18]

It has been held that the plea in one respect is similar to a demurrer in that it admits all the facts well pleaded;[19] thus, where the indictment alleged that the defendant was a second offender, the court held the plea to be an admission of that allegation and imposed a more severe penalty applicable to second offenders.[20] Substantive defects in the indictment, however, are not cured by entry of the plea,[21] *i.e.*, the plea does not waive any right which the defendant would have had under a plea of guilty.[22]

Originally the plea seems only to have been accepted where the defendant was charged with a misdemeanor.[23] In *Tucker v. U. S.*[24] the court held that the plea could be used only where the punishment may be by fine alone, *i.e.*, if the criminal statute made imprisonment mandatory the plea could not be entered. But some jurisdictions hold that upon acceptance of the plea the court is not restricted to the imposition of a small fine and that "putting oneself on the mercy of the court" is merely an appeal for mercy—not a plea—but a petition.[25] There seems to be general agreement that the plea will not be permitted when the indictment is for a capital offense.[26]

In *Hudson v. United States*[27] the Court rejected the concept laid

[18] United States v. Wierton Steel Co., 62 F. Supp. 961, 962 (N. D. W. Va. 1945).

[19] State v. O'Brien, 18 R. I. 105, 25 Atl. 910 (1892); Brozosky v. State, 197 Wis. 446, 222 N. W. 311 (1928).

[20] Brozosky v. State, 197 Wis. 446, 222 N. W. 311 (1928).

[21] Commonwealth v. Bienkowski, 137 Pa. Super. 474, 9 A. 2d 169 (1939).

[22] Hocking Valley Ry. Co. v. United States, 210 Fed. 735 (6th Cir. 1914).

[23] Tucker v. United States, 196 Fed. 260 (7th Cir. 1912); Shapiro v. United States, 196 Fed. 268 (7th Cir. 1912); Blum v. United States, 196 Fed. 269 (7th Cir. 1912).

[24] 196 Fed. 260 (7th Cir. 1912).

[25] Hudson v. United States, 272 U. S. 451 (1926); Brozosky v. State, 197 Wis. 446, 222 N. W. 311 (1928).

[26] Tucker v. United States, 196 Fed. 260 (7th Cir. 1912); Conmmonwealth v. Shrope, 264 Pa. 246, 250, 107 Atl. 729, 730 (1919) (The court here said, "The law is scrupulous to a degree in such cases to throw about the accused every reasonable protection, and requires that before conviction his guilt must be established by evidence which excludes all reasonable doubt." An implied confession cannot rise to the required degree of certainty.); Roach v. Commonwealth, 157 Va. 954, 162 S. E. 50 (1932).

[27] 272 U. S. 451-457 (1926) (Here the question before the court was "whether a United States court, after accepting a plea of nolo contendere, may impose a prison sentence." The petitioners contended the plea was conditioned on a lighter penalty; "that therefore the court may not accept the plea to an indictment charging a crime punishable by imprisonment only, and if accepted, where the crime is punishable by imprisonment or fine or both, it may not accept the plea and ignore the condition by imposing a prison sentence." The court said, "We think it clear, therefore that the contention now pressed upon us not only fails of support in judicial decisions . . . , but its historical background is too meager and inconclusive to be persuasive in leading us to adopt the limitation as one recognized by the common law.").

down in *Tucker v. United States*[28] that the plea could not be accepted where punishment *must* be by imprisonment with or without a fine. But Justice Stone said in dictum that, "Undoubtedly a court may, in its discretion, mitigate the punishment on a plea of *nolo contendere* and feel constrained to do so whenever the plea is accepted with the understanding that only a fine is to be imposed."[29]

The acceptance or rejection of the plea lies wholly within the discretion of the court;[30] the plea is not available as a matter of right;[31] and the acceptance must be unqualified.[32] An acceptance requires an entry in the record specifically stating that the plea has been accepted.[33]

Upon acceptance, "It is not the province of the judge to adjudge the defendant guilty or not."[34] Evidence may be heard by the court only for the purpose of determining the degree of punishment to be imposed.[35] If after hearing the evidence so as to determine the sentence, the court is convinced that the defendant is not guilty, the court should advise the defendant to withdraw his plea and stand a jury trial.[36] Generally, however, a judgment of conviction follows the plea the same as it does the plea of guilty.[37]

Once the plea is accepted, it is within the discretion of the presiding

[28] 196 Fed. 260 (7th Cir. 1912).

[29] Hudson v. United States, 272 U. S. 451, 457 (1926).

[30] Singleton v. Clemmer, 166 F. 2d 963 (D. C. Cir. 1948); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1939); State v. LaRose, 71 N. H. 435, 52 Atl. 943 (1902).

[31] Tucker v. United States, 196 Fed. 260 (7th Cir. 1912); Caminetti v. Imperial Mut. Life Ins. Co., 59 Cal. App. 2d 476, 139 P. 2d 681 (1943); Commonwealth v. Ingersoll, 145 Mass. 381, 14 N. E. 449 (1888); State v. Martin, 92 N. J. L. 436, 106 Atl. 385 (1919); Commonwealth v. Shrope, 264 Pa. 264, 107 Atl. 729 (1919); Orabona v. Linscott, 49 R. I. 443, 144 Atl. 52 (1928); Schad v. McNinch, 103 W. Va. 44, 136 S. E. 865 (1927); State v. Suick, 195 Wis. 175, 217 N. W. 743 (1928).

[32] Commonwealth v. Rousch, 113 Pa. Super. 182, 172 Atl. 484 (1934).

[33] Commonwealth v. Ingersoll, 145 Mass. 381, 14 N. E. 449 (1888) (Here the police court failed to make such an entry in the record. Held on appeal, error not to let the defendant plead anew.); (When the record is not clear as to whether or not the plea was accepted, future litigation may result, for example: In Ferguson v. Reinhart, 125 Pa. Super, 154, ——, 190 Atl. 153, 154 (1937), there was an action for malicious prosecution in which plaintiff wanted to introduce the indictment and judgment in the criminal action and at the same time exclude his plea of nolo contendere on grounds that the court did not accept his plea. The court said the plea was either accepted or declined—if declined, then the criminal proceedings had not been concluded and the present action would not lie; if accepted, then plaintiff could not have been found not guilty.).

[34] Commonwealth v. Rousch, 113 Pa. Super. 182, ——, 172 Atl. 484, 485 (1934).

[35] Tucker v. United States, 196 Fed. 260 (7th Cir. 1912); *Contra*, State v. Hopkins, 4 Boyce (27 Del.) 306, 307, 88 Atl. 473, 474 (1913) ("He pleads non vult; that is, he throws himself upon this court to say whether or not he is guilty of an infraction of this law.").

[36] Commonwealth v. Rousch, 113 Pa. Super. 182, 172 Atl. 484 (1934).

[37] United States v. Norris, 281 U. S. 619 (1930); People v. Daiboch, 265 N. Y. 125, 191 N. E. 859 (1934); Commonwealth *ex. rel.* Hice v. Ashe, 166 Pa. Super. 35, 70 A. 2d 479 (1950); Schad. v. McNinch, 103 W. Va. 44, 136 S. E. 865 (1927); Brozosky v. State, 197 Wis. 446, 222 N. W. 311 (1928).

judge to determine whether the defendant may withdraw his plea,[38] and it was held no abuse of discretion to refuse to allow a withdrawal where the decision to enter the plea had been determined by "the flip of a coin."[39]

The only advantage to the defendant by entering the plea nolo contendere is that generally the judgment in a criminal action, after the plea, will not be admitted in a subsequent civil action as an admission of the crime for which he was previously tried.[40] But a majority of states will permit the introduction of the former judgment to show a conviction as distinguished from an admission.[41]

[38] Farnsworth v. Zerbst, 97 F. 2d 255 (5th Cir. 1938); United States v. Anthracite Brewing Co., 11 F. Supp. 1018 (M. D. Pa. 1934); State v. Siddall, 103 Me. 144, 68 Atl. 634 (1907); Commonwealth v. Ingersoll, 145 Mass. 381, 14 N. E. 449 (1888); *In re* Lanni, 47 R. I. 158, 131 Atl. 52 (1925); *Contra*, Wright v. State, 75 Ga. App. 764, 44 S. E. 2d 569 (1947) (By statutory construction the plea may be withdrawn in Georgia at anytime before the pronouncement of a judgment.).

[39] Farnsworth v. Sanford, 115 F. 2d 375 (5th Cir. 1940).

[40] Hudson v. United States, 272 U. S. 451 (1926); Caminetti v. Imperial Mut. Life Ins. Co., 59 Cal. App. 2d 476, 139 P. 2d 681 (1943); Krowka v. Colt Patent Fire Arm Mfg. Co., 125 Conn. 705, 8 A. 2d 5 (1939); Esarey v. Buhner Fertilizer Co., 117 Ind. App. 291, 69 N. E. 2d 755 (1946); White v. Creamer, 175 Mass. 567, 56 N. E. 832 (1900); Neibling v. Terry, 352 Mo. 396, 177 S. W. 2d 502 (1944); Teslovich v. Fireman's Fund Ins. Co., 110 Pa. Super. 245, 168 Atl. 354 (1933); Schad v. McNinch, 103 W. Va. 44, 136 S. E. 865 (1927); *cf.* Honaker v. Howe, 19 Grant. (Va.) 50, 54 (1869) (Here the plaintiff was not allowed to introduce evidence to show that the defendant was fined only a nominal sum in the criminal action so as to enhance the damages in the civil action.).

[41] United States *ex. rel.* Bruno v. Reimer, 98 F. 2d 92 (2d Cir. 1938) (A former sentence under a plea of *non vult* was held to be a sentence and conviction within the meaning of the deportation statute.); United States v. Dasher, 51 F. Supp. 805 (E. D. Pa. 1943) (A prior conviction after a plea of nolo contendere admitted in evidence where defendant is charged with a second violation of the Fair Labor Standards Act.); State v. Lang, 63 Me. 215, 220 (1874) ("As an admission, it [the plea nolo contendere] would be *prima facie* proof only, as between the respondent and third persons; but, between the respondent and the State, it would be conclusive."); Neibling v. Terry, 352 Mo. 396, 398, 177 S. W. 2d 502, 504 (1944) ("A person who has been convicted may be, by statute, disqualified from voting, from serving as a juror, from holding office, from testifying as a witness, from practicing a profession, and so on.

" 'Convicted' is generally used in its broad and comprehensive sense meaning that a judgment of final condemnation has been pronounced against the accused . . . a judgment of conviction follows a plea of nolo contendere as a matter of course."); State v. Fagin, 64 N. H. 431, 432, 14 Atl. 727, 728 (1888) (Defendant pleaded nolo contendere and was sentenced, and in a subsequent criminal action the court said ". . . the decisive thing is not the former plea, but the former judgment."); Commonwealth *ex. rel.* District Attorney v. Jackson, 248 Pa. 530, 535, 94 Atl. 233, 235 (1916) ("If this were a civil action based on the facts charged in the indictment, the fact of conviction would not conclude defendants. But this action is merely one to enforce a statutory provision of the school code, which says that forfeiture of office shall follow a conviction for stated offenses."); State v. Estes, 130 Tex. 425, 432, 109 S. W. 2d 167, 171 (1937) (In a disbarment proceeding it was held, "The term 'conviction' referred to in the statute is not restricted to a conviction procured upon entry of a particular plea. . . ."); State v. Moss, 108 W. Va. 692, 152 S. E. 749 (1930) (Prior conviction after plea of nolo contendere admitted in subsequent action for moonshining.); *Contra*, People *ex rel.* Attorney General v. Edison, 100 Colo. 574, 69 P. 2d 246 (1937) (In disbarment proceeding, defendant who pleaded nolo contendere to perjury charges in the federal court is not precluded from denying guilt.); *In re* Smith, 365 Ill. 11, 5 N. E. 2d 227 (1936) (In

In North Carolina, so much of the common law as has not been abrogated or repealed by statute, is in full force and effect;[42] therefore, the implied confession, or plea nolo contendere, is still used extensively throughout the state.[43]

The first case of record in North Carolina involving a submission to the court by the accused was decided by the supreme court in 1837.[44] At that time a statute existed which provided for the hiring out to anyone who would pay the fine of any free Negro *convicted* and sentenced to pay a fine which he was unable to pay. One X, a free Negro, was indicted and "appeared and submitted" to the court. He was fined $15.00 which he was unable to pay. The court ordered that he be hired out by the sheriff. X appealed, alleging that the act under which he was hired out was unconstitutional. The supreme court refused to rule on the constitutionality of the act and instead held it did not extend to anyone who submitted to the court; that a conviction at common law could take place only in two ways: "upon confession, or verdict, or where the trial was by battle, upon recreancy. . . . By confession is meant express confession" of the crime with which he is charged, and since X had submitted to the court, there was no conviction.[45] Thus it seems that the North Carolina court at an early date adopted the common law relative to an implied confession.

Subsequently the court has held that "a plea of *nolo contendere* does not amount to a 'conviction or confession in open court' of a felony";[46] that the plea is equivalent to a plea of guilty in so far as it gives the court power to punish;[47] that when accepted, sentence is imposed as upon a plea of guilty;[48] that the only advantage is that the

disbarment proceeding, the former conviction under plea of nolo contendere was not admissible as an admission (there was no statutory provision involved here).); Louisiana State Bar Ass'n. v. Connolly, 206 La. 883, 20 So. 2d 168 (1944) (Prior conviction not allowed in a disbarment proceeding.); Schireson v. State Board of Medical Examiners, 130 N. J. L. 570, 575, 33 A. 2d 911, 914 (1943) (". . . the record of the judgment and commitment . . . following his plea of *nolo contendere* to the charges of the indictment, do not amount to a conviction" such as would warrant the revocation of a license to practice medicine where the statute authorized revocation for conviction of a crime involving moral turpitude.); *In re* Stiers, 204 N. C. 48, 50, 167 S. E. 382, 383 (1932) (In disbarment proceeding, held: ". . . a plea of *nolo contendere* does not amount to a 'conviction or confession in open court' of a felony." The proceeding was brought in this case under the provisions of chapter 64 of the Public Laws of 1929 which provided, that "After conviction of a felony showing him to be unfit to be trusted . . . he must be disbarred by the court. . . .") ; see 12 N. C. L. REV. 369.

[42] N. C. GEN. STAT. (1943) §4-1.

[43] See note 1 *supra*.

[44] State v. Oxendine, 19 N. C. 435 (1837).

[45] The court then continues quoting extensively from 2 HAWKINS c. 31 §§1 and 2, *op. cit. supra* note 5.

[46] *In re* Stiers, 204 N. C. 48, 50, 167 S. E. 382, 383 (1932).

[47] State v. Jamieson, 232 N. C. 731, 62 S. E. 2d 52 (1950); State v. Ayers, 226 N. C. 579, 39 S. E. 2d 607 (1946); State v. Parker, 220 N. C. 416, 17 S. E. 2d 475 (1941); State v. Burnett, 174 N. C. 796, 93 S. E. 473 (1917).

[48] State v. Parker, 220 N. C. 416, 17 S. E. 2d 475 (1941); State v. Burnett, 174 N. C. 796, 93 S. E. 473 (1917).

defendant is not estopped to deny his guilt in a civil action based on the same facts;[49] that within the limits of the statute the court may, in its discretion, fix the punishment;[50] that when the court asks the solicitor to offer evidence so that it may know the nature of the offense in order to fix the punishment, the guilt of the accused is not at issue and the solicitor does not have to make out a case;[51] that the plea constitutes a formal declaration that the defendant will not contend with the solicitor;[52] that it is tantamount to a plea of guilty for the purposes of the particular action;[53] that "the court acquired full power to pronounce judgment against the accused for the crime charged in the indictment . . . when it permitted the State to accept the plea tendered by" the defendant;[54] and that the law does not sanction a conditional plea of nolo contendere wherein the court passes upon the guilt or innocence of the defendant.[55]

North Carolina, as well as other jurisdictions, has followed the early common law by allowing the plea in cases less than capital. This practice continues although many crimes now classified as less than capital were considered capital crimes at the time the doctrine originated, and at which time the plea would not have been accepted as it is today.

At one time the courts seem to have been concerned about the policy of accepting the plea,[56] weighing the character and reputation of the accused against the risk of losing rights of citizenship in case of a plea of guilty. If it were decided that the ends of justice could be best served by allowing the plea, an entry of its acceptance was then made in the record.[57] But today the plea seems to be accepted in most of our trial courts as a matter of course,[58] and apparently the entry of acceptance of the plea by the state or by the court is omitted from the record as often as it is included.[59]

[49] *In re* Stiers, 204 N. C. 48, 50, 167 S. E. 382, 383 (1932) ("a disbarment proceeding is of a civil nature"); State v. Burnett, 174 N. C. 796, 93 S. E. 473 (1917).
[50] State v. Parker, 220 N. C. 416, 17 S. E. 2d 475 (1941).
[51] State v. Beasley, 226 N. C. 580, 39 S. E. 2d 607 (1946).
[52] State v. Stansbury, 230 N. C. 589, 55 S. E. 2d 185 (1949).
[53] *Ibid.*
[54] *Id.* at 590, 55 S. E. 2d at 187.
[55] State v. Horne, 234 N. C. 115, 66 S. E. 2d 665 (1951); Chapter 23, Public Laws 1933, as amended by chapter 469, provided for the waiver of a jury in certain criminal actions by the entry of a conditional plea of guilty, or nolo contendere. This act was held unconstitutional as a violation of the N. C. CONST. Art. 1, sec. 13, *e.g.*, State v. Camby, 209 N. C. 50, 182 S. E. 715 (1935).
[56] *Op. cit. supra* notes 30, 31, and 32.
[57] *Op. cit. supra* notes 8 and 33.
[58] *Op. cit. supra* note 1.
[59] Transcript of Record, p. 7, State v. Ayers, 226 N. C. 579 (1946) (plea accepted by the State); Transcript of Record, p. 8, State v. Jamieson, 232 N. C. 731 (1950) (plea accepted by the court); Transcript of Record, p. 5, State v. Parker, 220 N. C. 416 (1941) (plea accepted by the court); There does not seem to have been any record of acceptance by either the State or the court in the following cases: State v. Horne, 234 N. C. 115 (1951); State v. Shepherd, 230 N. C. 605 (1949); State v. Stansbury, 230 N. C. 589 (1949); State v. Beasley, 226 N. C. 580 (1946).

While the only real advantage at the common law was that the defendant was not estopped to deny his guilt in a subsequent action for trespass,[60] today he can deny, in subsequent actions unheard of at the early common law, not only his guilt, but also the fact that judgment of conviction was rendered against him.[61]

In most states, when a defendant being tried in a court of limited jurisdiction[62] enters a plea of either guilty or nolo contendere, he will be thereafter bound by such entry upon an appeal to a court of general jurisdiction, but North Carolina abrogated this doctrine by statute in 1947.[63]

It may be said in conclusion that the only benefit derived by the State in allowing the plea of nolo contendere seems to be the expedition of trial, while the defendant has everything to gain[64] and very little to lose.[65] The constitutional provision which prevents former criminals from voting,[66] or from holding office,[67] and similar statutory provisions which prevent such persons from serving as jurors,[68] can be rendered ineffective where the trial courts act as perfunctorily in allowing the plea as they seem to in North Carolina.[69] Also statutes which require the revocation of certain licenses upon *conviction* of certain crimes[70] would seem to be nullified by the entry of the plea in the criminal action.[71]

A plea for embodying some of the concepts usually attributed to nolo contendere, however, has a definite place in our legal system so as to

[60] *Op. cit. supra* note 10.
[61] *Op. cit. supra* note 41.
[62] J. P. courts, police courts, municipal courts, recorder's courts, etc.
[63] N. C. GEN. STAT. (1951 Supp.) §15-177.1.
[64] *Op. cit. supra* notes 10, 40, 41, 46 and 49.
[65] *Cf.* Honaker v. Howe, 19 Gratt. (Va.) 50, 56 (1869) (In an action for assault and battery, a defendant cannot show that he has already been punished criminally, for the same act, after a plea of nolo contendere, so as to mitigate damages.).
[66] N. C. CONST. Art. VI, §2 ("No person who has been convicted, . . . of any crime the punishment of which now is, or may hereafter be, imprisonment in the State's Prison, shall be permitted to vote. . . .").
[67] N. C. CONST. Art. VI, §8 ("The following classes of persons shall be disqualified for office: . . . all persons who shall have been convicted or confessed their guilt . . . of any treason or felony, or of any other crime for which the punishment may be imprisonment in the penitentiary. . . .").
[68] N. C. GEN. STAT. (1951 Supp.) §9-1 ("There shall be excluded from said [jury] lists all those persons who have been convicted of any crime involving moral turpitude. . . .").
[69] *Op. cit. supra* note 1.
[70] N. C. GEN. STAT. (1951 Supp.) §20-16 (gives the Department of Motor Vehicles power to revoke licenses of certain operators); N. C. GEN. STAT. (1951 Supp.) §20-17 ("The department shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's *conviction* [emphasis ours] for any of the following offenses . . . :").
[71] The court held in State v. Oxendine, 19 N. C. 435 (1837) that a conviction at common law could take place only in two ways: upon confession, or verdict; and in *In re* Stiers, 204 N. C. 48, 167 S. E. 382 (1932) the court held that "a plea of *nolo contendere* does not amount to a 'conviction or confession in open court' of a felony."

protect, in certain cases, the respectable citizen who may sometimes become technically guilty of a violation of a criminal law, but who should not be subjected to certain penalities intended to apply only to those who wilfully or maliciously violate the law. At least one state has recognized the need for such a plea and has provided for the same by statute.[72]

In view of the prevailing inconsistency in the administration of the law in the trial courts of North Carolina under the plea nolo contendere,[73] it would seem wise for the General Assembly to specifically state when and under what conditions the plea nolo contendere may be entered, and when it will not be permissible. Or, it may be better to abolish the plea altogether, and in its stead provide for a plea of guilty with a prayer for relief. Should the court grant the relief, the defendant would not be denied certain prerogatives which he may otherwise lose. Thus the desirable benefits of the plea would be preserved without leaving the way open for undeserving convicts to profit by the inadvertence of the trial courts.

WILLIAM L. MILLS, JR.*

Domestic Relations—Father's Duty to Support Minor Children—Termination of Duty Upon Death of Father

The question whether the obligation of the father to provide necessary support for his minor children terminates at his death or extends to his estate was first presented in North Carolina in the case of *Elliott v. Elliott*.[1] Deceased father had been twice married, and at the time of his death was residing with his second wife and children born of that marriage, plaintiffs in this action.[2] Deceased was solvent and left a will devising the bulk of his realty[3] to the adult children of the first marriage. To the six minor children of his second marriage, including one who was then *in ventre sa mere,* deceased bequeathed the total

[72] GA. CODE ANN. §27-1408 (Cum. Supp. 1951) (The Georgia Appellate court interpreted the purpose for this statute in Wright v. State, 75 Ga. App. 764, 765, 44 S. E. 2d 569, 570 (1947), saying, "The General Assembly, no doubt, had in mind that these penalties [loss of prerogatives], in addition to the punishment provided for by law as to the respective offenses charged, would often be too drastic in specific instances; that oft times the degree of wrong surrounding the circumstances of one defendant would be so much less than that surrounding another, and yet the facts be such that no valid defense to the crime could be interposed . . . the General Assembly doubtless regarded a plea of guilty as too harsh, as applied to a person of good moral character and standing in his community, he being technically guilty of a crime, without a valid defense. . . .").

[73] *Op. cit. supra* note 1.

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[1] 235 N. C. 153, 69 S. E. 2d 224 (1952).

[2] Deceased's second wife was a party plaintiff only in the capacity of next friend to her minor children. She sought nothing for her own support.

[3] A 78 acre farm of which deceased was seized in fee.