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The Nature and Consequences of the Plea of Nolo Contendere

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The last session of the Nebraska legislature made available as a part of the criminal procedure of the state the plea of *nolo contendere,* or *non vult.* This was done by amending Section 29-1819 of the Nebraska Statutes to read as follows:

> If the issue on the plea in bar be found against the defendant, or if upon arraignment the accused offers no plea in bar, he shall plead "guilty," "not guilty," or "nolo contendere;" but if he pleads evasively or stands mute, he shall be taken to have pleaded "not guilty."
>
> The accused may, at any time before conviction, enter a plea of nolo contendere with the consent of the court. The court may refuse to accept the plea, and shall not accept the plea without first determining that the plea is made voluntarily with an understanding of the nature of the charge.[1]

The plea of *nolo contendere* originated in England, although it has long since disappeared from the jurisprudence of that jurisdiction.[2] The English judicial history of the plea seems to have been largely derivative from a statement in Hawkins' *Pleas of the Crown* to the following effect:

> 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 in an action for the same fact, as he shall be where the entry is *quod cognovit indictamentum.*[3]

Most other common law sources derive their description of the consequences of the plea from this brief section of Hawkins' work. The plea is now available in the United States in the Federal courts[4] and in at least 27 states[5] (including Nebraska). Its existence has been expressly denied in the courts of five states,[6] albeit usually by dictum.

[1] L.B. 135, Neb. Legis., 65th Sess. (1953). The first paragraph is word for word the same as the old Neb. Rev. Stat. § 29-1819 (Reissue 1948), except that "'guilty,' 'not guilty,' or 'nolo contendere'" replaces "'guilty' or not guilty.'" The second paragraph is entirely new.

[2] The last reported English use of the plea seems to have been in Regina v. Templeman, 1 Salk. 55 (Q.B. 1702).

[3] 2 Hawkins, A Treatise of the Pleas of the Crown 466 (8th ed. 1824).

[4] Fed. R. Crim. P. 12(a).

[5] Alabama, Arkansas, California, Connecticut, Colorado, Delaware, Florida, Georgia, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. See cases cited in Note, 152 A.L.R. 253 (1944), and supplemental decisions thereto.

[6] Illinois, Indiana, Kansas, Minnesota, and New York.

In several respects evident in Hawkins' description the plea of *nolo* should be compared with the plea of guilty. For one thing, Hawkins limits the applicability of the plea to "cases not capital." The reason for this unavailability in capital cases was stated by the Pennsylvania court as follows:

> 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 of guilt cannot give rise to the degree of certainty which would make it the equivalent of an express confession.[7]

The principle thus expressed has been universally accepted as a characteristic of the plea. Some question might be raised as to whether the Nebraska statute carries over this limitation; for the statute, without reference to whether the case is capital or not, states: "[the defendant] shall plead 'guilty,' 'not guilty,' or 'nolo contendere.'" It might be argued that the failure to delimit capital from non-capital cases makes the plea available in all cases arising subject to the criminal procedure of the state, prescribed in the chapter of the statutes of which this section is a part. This argument, however, seems superficial, for of course the words "nolo contendere" in the statutes would mean nothing to the lawyer were it not for the fact that a plea, with certain characteristics, existed at common law bearing that name. Insofar as the plea provided for in the statutes means anything beyond what may spring to mind from a translation of the Latin phrase, that meaning must be sought in the common-law characteristics which have accreted to the plea. Among these characteristics was non-availability in capital cases. Its meaning in the statute should involve the same consequence unless a clear contrary intention can be found. At any rate, since both the statute and the common law make acceptance of the plea discretionary with the court, the reasons stated by the Pennsylvania court, quoted above, should motivate the court to exercise its discretion soundly by denying the entry of the plea.

The next significant portion of Hawkins' description that is important to analysis of the plea is the statement that the defendant makes the plea "desiring to submit to a small fine." A division of opinion has arisen as to whether this quotation amounts to a limitation on the availability of the plea, or simply expresses the hope or motivation of the defendant in entering it. Many early authorities seemed to believe it to be the former, considering that upon a *nolo* plea the court could not impose punishment more severe than a fine.[8] This

[7] Commonwealth v. Shrope, 264 Pa. 246, 107 Atl. 729 (1919).

[8] 2 Bishop, New Criminal Procedure § 802 (2d ed. 1913); Honaker v. Howe, 60 Va. 50 (1869); Tucker v. United States, 196 Fed. 260 (7th Cir. 1912).

is still the view of some courts, which will not admit the plea for offenses in which imprisonment is mandatory, and will limit punishment to a fine if the plea is accepted to an offense for which fine and imprisonment are alternative penalties.[9] Another view will not allow the plea where imprisonment is mandatory, but where punishments of fine and imprisonment are both possible the court is not by its acceptance of the plea restrained from imposing the latter.[10] But the Federal[11] and majority state view[12] permits the court to accept the plea and impose imprisonment in any case regardless of possible punishments prescribed, except of course in capital cases.

Another element apparent in Hawkins' discussion of the plea is the discretion of the court in accepting or refusing its entry. There is no dispute about this characteristic; the plea may not be entered as a matter of right.[13] The new Nebraska statute carries over this limitation. And when the plea has once been properly accepted, its withdrawal and the substitution of another plea is similarly in the court's discretion.[14]

When the plea has been properly accepted in a criminal case, its incidents so far as that action is concerned are the same as on a plea of guilty.[15] The court may impose sentence on the plea without more, judgment following plea as a matter of course as on a guilty plea.[16] It is beyond the province of the court once the plea is entered to make any determination of the defendant's guilt. Evidence may be adduced for the limited purpose of fixing the proper sentence, but not for a determination of the facts as to guilt or innocence.[17] And the plea must be accepted unqualifiedly if at all; it cannot be accepted subject

[9] Roach v. Commonwealth, 157 Va. 954, 162 S.E. 50 (1927); Williams v. State, 130 Miss. 827, 94 So. 882 (1923).

[10] Schad v. McNinch, 103 W. Va. 44, 136 S.E. 865 (1927); Brozosky v. State, 197 Wis. 446, 222 N.W. 311 (1928).

[11] Hudson v. United States, 272 U.S. 451 (1926); Farnsworth v. Sanford, 33 F. Supp. 400 (N.D. Ga. 1940).

[12] Re Lanni, 47 R.I. 158, 131 Atl. 52 (1925); State v. Martin, 92 N.J.L. 436, 106 Atl. 385 (1919); Commonwealth v. Shrope, 264 Pa. 246, 107 Atl. 729 (1919); Commonwealth v. Horton, 9 Pick. 206 (Mass. 1829). In several other cases imprisonment has been imposed for serious offenses in which the question of limitation to fine was never raised. See, e.g., State v. Perkins, 129 Me. 477, 149 Atl. 148 (1930) (extortion).

[13] Caminetti v. Imperial Mutual Life Ins. Co., 59 Cal. App.2d 476, 139 P.2d 681 (1943); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D.D.C. 1939); State v. Suick, 103 W. Va. 44, 136 S.E. 865 (1927); Doughty v. De Amoreel, 22 R.I. 158, 46 Atl. 838 (1900).

[14] United States v. Norris, 281 U.S. 619 (1930); Fox v. State, 112 Fla. 104, 150 So. 228 (1933).

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

[16] Fischer v. Schilder, 131 F.2d 334 (10th Cir. 1942); State v. Suick, 195 Wis. 175, 217 N.W. 743 (1928).

[17] Crowley v. United States, 113 F.2d 334 (8th Cir. 1940); Commonwealth v. Rousch, 113 Pa. Super. 182, 172 Atl. 484 (1934); State v. Osborne, 79 N.J. Eq. 430, 28 Atl. 424 (1912). But cf. Roitman v. United States, 41 F.2d 519 (7th Cir. 1930).

to the right to consider and determine the facts.[18] By the *nolo* plea a defendant waives all formal defects in the proceeding of which he might have availed himself by a plea to the merits, a plea in abtement, a demurrer or a motion to quash.[19] He can, however, raise any inherent fatal defects apparent in the record, as that the indictment charges no offense[20] or is seriously defective,[21] or shows on its face that the offense charged is barred by the statute of limitations.[22] The court may also, of its own motion, strike the plea and dismiss in such circumstances.[23]

The element in Hawkins' description which forms the most useful feature of the plea derives from the statement that "the defendant shall not be estopped" to deny his guilt in a subsequent civil action based on the same facts. The reference to "estoppel" is inaccurate so far as the modern law of evidence is concerned: a more useful frame of reference would be "admission" rather than "estoppel." The rule is that a plea of guilty may be put into evidence in a subsequent civil action as proof of the fact of guilt of the offense to which the plea is responsive, on the theory that a plea of guilty is an admission against interest.[24] It is not actually an estoppel, and the fact of guilt of which it is evidence may be refuted by the defendant;[25] but it is admissible for whatever probative value may be accorded it by the trier of facts. A *nolo* plea, on the other hand, being an implied admission for the purposes of the criminal case only, is not admissible as proof of the facts on which it was based in a subsequent civil action.[26] For this reason, the plea is often utilized in criminal antitrust actions by corporations which are willing to accept the criminal sanctions rather than undergo the expenses of lengthy antitrust litigation, but wish to avoid leaving themselves wide open to private civil treble damage actions.

But the situation is different where it is the fact of conviction rather than the fact of guilt that is relevant. For example, where a

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

[19] State v. Alderman, 81 N.J.L. 549, 79 Atl. 283 (1911); State v. O'Brien, 18 R.I. 105, 25 Atl. 910 (1892).

[20] United States v. Kerper, 29 F.2d 744 (D.C. Cir. 1928), aff'd, 281 U.S. 619 (1930); Commonwealth v. Bienkowski, 137 Pa. Super. 474, 9 A.2d 169 (1939).

[21] Commonwealth v. Grey, 2 Gray 501 (Mass. 1854).

[22] United States v. Anthracite Brewing Co., 11 F. Supp. 1018 (D.D.C. 1934).

[23] State v. Page, 112 Vt. 326, 24 A.2d 346 (1942).

[24] Wesnieski v. Vanek, 5 Neb. (Unof.) 512, 99 N.W. 258 (1904); 4 Wigmore, Evidence § 1059 (3d ed. 1940).

[25] 4 Wigmore, Evidence §§ 1059, 1066 (3d ed. 1940).

[26] White v. Creamer, 175 Mass. 567, 56 N.E. 832 (1900); People v. Edison, 100 Colo. 574, 69 P.2d 246 (1937) (subsequent disbarment proceeding); Fidelity-Phenix Fire Ins. Co. v. Murphy, 231 Ala. 680, 166 So. 604 (1936); Teslovitch v. Fireman's Fund Ins. Co. of San Francisco, 110 Pa. Super, 245, 168 Atl. 354 (1933); Collins v. Benson, 81 N.H. 10, 120 Atl. 724 (1923); State v. La Rose, 71 N.H. 435, 52 Atl. 943 (1902) (subsequent criminal action).

multiple-offender statute makes a prior conviction the basis of increased penalty upon a subsequent offense, or where a statute makes conviction of a felony the basis for the denial or revocation of some sort of license or dealership, or where a form given an individual to complete requires him to state whether he has ever been convicted of a crime, the judgment or sentence amounts to a conviction even though it is entered on a *nolo* plea.[27] It also, of course, amounts to a prior conviction entitling the defendant to a plea in bar for double jeopardy upon a subsequent prosecution for the same offense.[28]

A similar problem involves the use of the results of the criminal proceeding in which the plea was entered in a subsequent civil action, not as proof of the fact of guilt, but as evidence to impeach the credibility of the former defendant if he takes the stand as a witness. In this situation, as in those above-mentioned, it is primarily the fact of conviction rather than the fact of guilt that is usable. It is the record of the conviction of the crime, not the plea, that is introduced to impeach.[29] The witness' guilt of the offense is not retried as an issue in the subsequent action, although some courts permit the witness to explain the circumstances surrounding the crime to show that his wrongdoing was not of such a serious character as the fact of his conviction, standing alone, would indicate.[30] For this reason, the majority of courts have held that a conviction for the purpose of impeaching a witness results from judgment or sentence on a *nolo* plea, the same as on any other.[31] There is, however, some authority to the contrary, holding the judgment inadmissible;[32] and one questionable case has said that proof of entry of the plea alone, without proof of judgment, punishment or other further action taken pursuant to the plea, amounts

[27] Neibling v. Terry, 352 Mo. 396, 177 S.W.2d 502 (1944); People v. Daiboch, 265 N.Y. 125, 191 N.E. 859 (1934); State v. Suick, 195 Wis. 175, 217 N.W. 743 (1928).

[28] United States v. Glidden Co., 78 F.2d 639 (6th Cir.), cert. denied, 296 U.S. 652 (1935).

[29] 3 Wigmore, Evidence § 980 (3d ed. 1940).

[30] Authorities are collected in Note, 166 A.L.R. 211 (1947).

[31] State v. Herlihy, 102 Me. 310, 66 Atl. 643 (1906); Berlin v. United States, 14 F.2d 497 (3d Cir. 1926); Pfotzer v. Aqua Systems Inc., 162 F.2d 779 (2d Cir. 1947); Commonwealth v. Sciullo, 169 Pa. Super. 318, 82 A.2d 695 (1951); Haley v. Brady, 177 Wash.2d 775, 137 P.2d 505 (1943); State v. Radoff, 140 Wash. 202, 248 Pac. 405 (1926); State v. Vanasse, 42 R.I. 278, 107 Atl. 85 (1919).

[32] Olszewski v. Goldberg, 223 Mass. 27, 111 N.E. 404 (1916). State v. Conway, 20 R.I. 270, 38 Atl. 656 (1897), and Krowka v. Colt Patent Fire Arm Co., 125 Conn. 705, 8 A.2d 5 (1939), have been cited as authority for this proposition, but it is submitted that they do not support it. The former case is based on the absence of any clear proof that judgment of conviction had been entered on the plea, and the latter is based on a characterization of the offense involved in the previous crime as not involving moral turpitude.

to a conviction.[33] Another case from the same jurisdiction has also reached a doubtful result, in the situation where the witness being impeached is also a party in the subsequent action. This case held, in accord with the general view, that judgment rendered on the plea is a conviction admissible for impeachment, but said further that the impeaching effect is twofold: (1) It discredits the witness generally, in that one convicted of a crime would be likely to lie, and (2) It discredits his denial of wrongdoing in the present action by showing that he has previously made a statement inconsistent with the position he now asserts.[34] It is submitted that the second effect mentioned is inharmonious with the nature of the *nolo* plea, for by pleading *nolo contendere* in the first action the defendant has made no statement at all of what the facts actually are; he has merely expressed disinclination to contest the charge with the state, and suffered punishment to be levied against him.[35] It is for this reason that the plea is universally held not to be usable as an admission in a subsequent action, and the same reason should prevent an interpretation of the plea of *nolo contendere* as making a statement or admission inconsistent with any that the witness may now assert, when impeachment is attempted.

Whether the plea of *nolo contendere* serves any useful function in a system of state criminal procedure is a debatable question. Several states have eliminated the plea from their practice,[36] and the court of another state in which the plea is used has questioned its desirability in modern practice.[37] The American Law Institute's Code of Criminal Procedure expressly abolishes all pleas other than guilty or not guilty,[38] and England, in which the plea had its origin and early development, has long since dispensed with its use. On the other hand, the nonadmissibility of the plea in collateral civil proceedings may often be a characteristic which will induce a defendant, who would otherwise plead not guilty and undergo a trial rather than provide an admission usable by his expected adversary in a subsequent civil action, to save both his time and that of the prosecuting authorities by entering a *nolo* plea. The example which comes most readily to mind would involve a motorist who has been cited for violation of traffic laws relating to an automobile accident concerning which he (or his insurer) anticipates litigation. The defendant would be unwilling to plead guilty because such a plea would be admissible and amount to strong evidence

[33] State v. Henson, 66 N.J.L. 601, 50 Atl. 468, 616 (1901). Contra: Collins v. Benson, 81 N.H. 10, 120 Atl. 724 (1923); State v. Conway, 20 R.I. 270, 38 Atl. 656 (1897).

[34] Johnson v. Johnson, 78 N.J. Eq. 507, 80 Atl. 119 (1911).

[35] See cases cited supra note 26.

[36] Supra note 6.

[37] Commonwealth v. Shrope, 264 Pa. 246, 107 Atl. 729 (1919).

[38] A.L.I. Code of Criminal Procedure § 209 (1930).

in any lawsuit concerning the accident. He would rather go through the formality of pleading innocent and being found guilty by the court, except that such a procedure would take more time, often requiring the defendent to appear in court twice—once to make the plea and once, when the arresting officer is present, to undergo the trial. Entry of the *nolo* plea would accomplish the objectives of both the state and the defendant, and at the same time obviate the necessity of the more time-consuming procedure. Of course, if the offense for which the defendant is prosecuted were a felony, and a lawsuit were likely to arise from the same facts as those which gave rise to the crime, a different problem would be presented to the defendant, for although neither the plea[39] nor the conviction[40] could be admitted to establish the facts, proof of the conviction would, in Nebraska, be admissible to impeach the credibility of the defendant if he should become a witness.

At any rate, it is difficult to visualize how the existence of the *nolo* plea can be harmful to the dispensing of criminal justice, for the right to reject the entry of the plea is always vested in the sound discretion of the court. And it is not at all inconceivable that to some offenses a defendant, even though innocent, might desire to plead *nolo contendere* rather than undergo the burdens and expense of trial, if he could leave himself free to maintain his innocence elsewhere. He ought to be permitted this choice. For these reasons, it is submitted that the plea of *nolo contendere* is a useful addition to Nebraska's criminal procedure.

PATRICK W. HEALEY, '55

[39] See cases cited supra note 26.
[40] Lillie v. Modern Woodmen, 89 Neb. 1, 130 N.W. 1004 (1911).