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The Plea of Nolo Contendere

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Comments and Casenotes

THE PLEA OF *NOLO CONTENDERE*

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The twentieth century has seen the revival of the use of the plea of *nolo contendere* in criminal proceedings[1] after the plea had fallen into disuse and was apparently headed for oblivion. Generally speaking, the plea of *nolo contendere* is an implied confession which admits the facts charged in the indictment and thus is similar to a guilty plea. However, the *nolo* plea admits the facts for the sole purpose of the criminal prosecution. Therefore, unlike a guilty plea, it cannot be used as an admission in a subsequent civil suit.

The plea had it origin in the English common law, and the classic statement indicating its characteristics is found in Hawkins:

> "An implied confession is when 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 defendant *prosuit 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 if the entry is *quod cognovit indictamentum.*"[2]

Thus, it seems that in England the plea was originally in the nature of a petition for mercy, and the courts still have a tendency to reduce punishment when a *nolo* plea is entered.[3]

There is no reported use of the plea in England since 1702,[4] and the plea has apparently been discarded there. However, the *nolo* plea has found refuge in America. The use of the plea in this country has not brought about any radical departure from the Hawkins definition, although some problems have arisen concerning the use and effect of the plea. The renaissance of the plea is particularly

1. For a general discussion of the plea, see Annot., 89 A.L.R.2d 540 (1963), supplementing 152 A.L.R. 253 (1944); 14 Am. Jur. *Criminal Law* § 275 (1938); and 22 C.J.S. *Criminal Law* § 425 (1961).

2. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 466 (8th ed. 1824) cited in Hudson v. United States, 272 U.S. 451 (1926).

3. See, *e.g.,* Hudson v. United States, 272 U.S. 451 (1926), where the Court states at p. 457: "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. But such a restriction made mandatory upon the court by positive rule of law would only hamper its discretion and curtail the utility of the plea."

4. Regina v. Templeman, 1 Salk 55 (Q.B. 1702), appears to be the last reported use of the plea.

evident in criminal anti-trust prosecutions where a growing number of defendants have used the plea in recent years.[5]

By making a plea of *nolo contendere* the defendant has an opportunity to mitigate his punishment and avoid the stigma of a guilty plea. Additionally, he avoids the time and expense involved in defending a criminal prosecution. Equally important to the defendant is the knowledge that the plea does not estop him to deny the facts in a subsequent civil suit arising out of the same facts.

I. APPLICABILITY

The plea of *nolo contendere* is recognized in the federal courts[6] and in the majority of the states.[7] However, it has been held in some states that if the plea is not provided by statute, it is not available to a defendant.[8]

Although courts have accepted a *nolo* plea in cases involving abortion,[9] arson,[10] assault,[11] espionage,[12] larceny,[13] and rape,[14] the determination of the applicability of the *nolo* plea to a particular crime is a difficult problem. It can be stated generally that the plea is more likely to be accepted to a misdemeanor charge than to a charge of a felony.[15] Also, both federal and state courts are in clear agreement that the plea cannot be made to an indictment for a capital offense unless specifically allowed by statute.[16] This limitation

5. See Lenvin and Meyers, *Nolo Contendere: Its Nature and Implications,* 51 YALE L.J. 1255 (1941–42).

6. Rule 11 of the Federal Rules of Criminal Procedure states: "A defendant may plead not guilty, guilty, or, with the consent of the court, *nolo contendere.*"

7. Young v. People, 53 Colo. 251, 125 P. 117 (1912); Krowka v. Colt Patent Fire Arm Mfg. Co., 125 Conn. 705, 8 A.2d 5 (1939); State v. Febre, 156 Fla. 149, 23 So. 2d 270 (1945); Nelson v. State, 87 Ga. App. 39, 75 S.E.2d 39 (1953); Louisiana State Bar Assoc. v. Connolly, 206 La. 883, 20 So. 2d 168 (1944); Cohen v. State, 235 Md. 62, 200 A.2d 368 (1964); State v. Perkins, 129 Me. 477, 149 Atl. 148 (1930); Chester v. State, 107 Miss. 459, 65 So. 510 (1914); Nebraska State Bar Assoc. v. Stanosheck, 167 Nebr. 192, 92 N.W.2d 194 (1958); *In re* Berardi, 23 N.J. 485, 129 A.2d 705 (1957); State v. Barley, 240 N.C. 253, 81 S.E.2d 772 (1954); Commonwealth v. Shrope, 264 Pa. 246, 107 Atl. 729 (1919); State v. McElroy, 71 R.I. 379, 46 A.2d 397 (1946); Roach v. Commonwealth, 157 Va. 954, 162 S.E. 50 (1932); State v. Page, 112 Vt. 326, 24 A.2d 346 (1942); State *ex rel.* Clark v. Adams, 144 W.Va. 771, 111 S.E.2d 336 (1959); Brozosky v. State, 197 Wis. 446, 222 N.W. 311 (1928); McNab v. State, 42 Wyo. 396, 295 P. 278 (1931).

8. May v. Lingo, ... Ala. ..., 167 So. 2d 267 (1964); *In re* Eaton, 14 Ill. 2d 338, 152 N.E.2d 850 (1958); Mahoney v. State, 196 Ind. 335, 149 N.E. 444 (1925); Federal Deposit Ins. Corp. v. Cloonan, 165 Kan. 68, 193 P.2d 656 (1948); State v. Kiewel, 166 Minn. 302, 207 N.W. 646 (1926); People v. Daiboch, 265 N.Y. 125, 191 N.E. 859 (1934); and Laughlin v. Lamar, 205 Okla. 372, 237 P.2d 1015 (1951).

9. State *ex rel.* Gehrmann v. Osborne, 79 N.J. Eq. 430, 82 Atl. 424 (1912).

10. Teslovich v. Fireman's Fund Insurance Co., 110 Pa. Super. 245, 168 Atl. 354 (1933).

11. Orabona v. Linscott, 49 R.I. 443, 144 Atl. 52 (1928).

12. Farnsworth v. Sanford, 33 F. Supp. 400 (D. Ga., 1940).

13. Collins v. Benson, 81 N.H. 10, 120 Atl. 724 (1923).

14. Johnson v. Johnson, 78 N.J. Eq. 507, 80 Atl. 119 (1911).

15. 14 Am. Jur. *Criminal Law* § 276 (1938).

16. Hudson v. United States, 272 U.S. 451 (1926); Commonwealth v. Shrope, 264 Pa. 246, 107 Atl. 729 (1919); and Roach v. Commonwealth, 157 Va. 954, 162 S.E. 50 (1932). But see State v. Martin, 92 N.J.L. 436, 106 Atl. 385 (1919). Section 2A: 113-3 of N.J. STAT. ANN. provides that "Nothing herein contained shall prevent the accused from pleading *non vult* or *nolo contendere* to the indictment [for murder]; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree."

seems to follow as a matter of course from Hawkins' definition of the plea's applicability to "cases not capital". The theory of the limitation is that capital cases are so serious that an implied confession should not be allowed to "rise to the degree of certainty which would make it the equivalent of an express confession."[17]

It is now settled that the *nolo* plea can be accepted by the federal courts in felony indictments. This question was presented for the first time in *Tucker v. United States*,[18] which held, "[T]he rule affords no grounds for entertaining the plea, either in cases of felony, requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any term, with or without fine."[19] This position was changed by the Supreme Court in *Hudson v. United Sates*,[20] where the defendants were allowed to plead *nolo contendere* to a charge of using the mails to defraud, a felony punishable by fine or imprisonment, or both, and were sentenced to imprisonment for a year and a day. The Supreme Court held that the statement in Hawkins' definition — "desiring to submit to a small fine" — was illustrative only and not a condition binding on the court.

The state courts are in disagreement as to whether the plea can be accepted on felony indictments. Of those states which recognize the plea, it is settled in four that the plea can be made on a felony indictment.[21] Two other states[22] have limited the applicability of the plea to misdemeanors. The limitation of the plea to cases of misdemeanors appears more in keeping with Hawkins' definition, which states that the defendant is willing "to submit to a small fine". The commentators seem to agree with this position.[23]

II. ACCEPTABILITY

In jurisdictions where the plea is recognized, courts are in agreement that the plea cannot be entered by the defendant as a matter of right, and that acceptance of the plea is discretionary with the court,[24] as is the withdrawal of a *nolo* plea and substitution of another plea.[25]

17. Commonwealth v. Shrope, 264 Pa. 246, 250, 107 Atl. 729, 730 (1919).
18. 196 F. 260 (7th Cir. 1912).
19. *Id.* at 267.
20. 272 U.S. 451 (1926).
21. 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. 246, 107 Atl. 729 (1919); and *In re* Lanni, 47 R.I. 158, 131 Atl. 52 (1925).
22. Williams v. State, 130 Miss. 827, 94 So. 882 (1922); and Roach v. Commonwealth, 157 Va. 954, 162 S.E. 50 (1932). In the latter case, the court stated, "[U]nder the prevailing law in this state a plea of *nolo contendere* cannot be accepted in a felony case." 162 S.E. at 52.
23. See, *e.g.*, ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 1903 (1903); and BISHOP, NEW CRIMINAL PROCEDURE § 802.2 (4th ed., 1895).
24. Hudson v. United States, 272 U.S. 451 (1926); Mason v. United States, 250 F.2d 704 (10th Cir. 1957); United States v. Lair, 195 F. 47 (8th Cir. 1912); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1939); Cohen v. State, 235 Md. 62, 200 A.2d 368 (1964); Commonwealth v. Horton, 26 Mass. 206 (1829); and Williams v. State, 130 Miss. 827, 94 So. 882 (1922).
25. Withdrawal of the plea has been allowed in Lott v. United States, 367 U.S. 421 (1961) and Sullivan v. United States, 348 U.S. 170 (1954). *Contra,* United

Since the acceptance of the plea is discretionary with the court, there is only a small number of cases in which the acceptability of the plea has been litigated. In *United States v. Jones*,[26] defendants wanted to plead *nolo contendere* to avoid providing evidence which could be used against them in potential civil litigation. The court adopted a liberal approach in accepting the plea, stating, ". . . in the absence of some reason why a defendant should not have the benefit of the plea, the Court will ordinarily allow it to be entered."[27]

Later cases have not adhered to the liberal approach of *Jones*. The case of *United States v. Bagliore*[28] stated that, "although the general policy of this Court is hostile to the acceptance of such a plea (*nolo contendere*), circumstances surrounding the event and the condition of the defendant frequently make a strong appeal to the exercise of the Court's discretion."[29] The *Bagliore* court accepted the plea, saying that, "in the trial of a criminal action, mental disorder and abnormality existing at the time of the act charged appears to be a just and equitable reason for accepting a plea of *nolo contendere*."[30]

In *United States v. Chin Doong Art*,[31] the defendant and others were charged with conspiracy to violate the criminal laws of the United States with respect to entry, residence, and citizenship. A first trial ended in a deadlocked jury, and the defendant applied for permission to enter a *nolo* plea. In support of his application the defendant argued that a second trial would involve many additional witnesses, that he would be spared harsh and unnecessary results by a plea of *nolo*, and that he had been a prominent citizen.

In denying the *nolo* plea, the court concluded that "the primary purpose of accepting a plea of *nolo* is to promote the administration of justice. This means justice not only for the defendant but also for the public. The Court cannot permit its action with respect to a plea of this type breed contempt for law enforcement."[32] The court indicated that it would not accept a *nolo* plea "unless the situation is an extraordinary one,"[33] and that the presence of moral turpitude in a case is a factor in determining the acceptability of the plea.[34] Since the government had to prove its case beyond a reasonable doubt, the court concluded that although the case would be difficult and protracted, this factor alone did not *per se* present an exceptional circum-

States v. Central Supply Ass'n, 74 F. Supp. 388 (N.D. Ohio 1947). Rule 32(d) of the Federal Rules of Criminal Procedure provides that motions to withdraw a plea of *nolo contendere* may be made before sentence is imposed.

26. 119 F. Supp. 288 (S.D. Cal. 1954).

27. *Id.* at 290.

28. 182 F. Supp. 714 (E.D.N.Y. 1960).

29. *Id.* at 716.

30. *Ibid.* The court also pointed out that "A plea of *nolo contendere* has advantages to a criminal defendant and, like a plea of guilty, it is also beneficial to the Government in dispensing with the necessity of a trial."

31. 193 F. Supp. 820 (E.D.N.Y. 1961).

32. *Id.* at 823.

33. *Id.* at 822.

34. *Ibid.*

stance.[35] The court conceded that the defendant's good record and prominence as a citizen should be considered in his favor.[36]

Other considerations are present in the determination of the acceptability of a *nolo* plea in anti-trust litigation. In Section 5 of the Clayton Act,[37] Congress has given private persons injured by violations of the anti-trust laws the benefit of proceedings instituted by the government. In a suit for treble damages under the Clayton Act,[38] the injured party may use a final judgment or decree in the government's case as prima facie evidence against the same defendants.[39] However, it has been held[40] that a *nolo* plea is a consent decree entered before any evidence is taken and thus comes within the proviso to Section 5 which states, "that this section shall not apply to consent judgments or decrees entered before any testimony has been taken. . . ."[41]

In *United States v. Standard Ultramarine & Color Co.*,[42] a criminal prosecution under the Sherman Act,[43] the court refused to accept a *nolo* plea. The court placed emphasis on the fact that Congress by the Clayton Act sought to encourage individuals to aid in the enforcement of the anti-trust laws.[44] In setting up guidelines for acceptance of the plea, the court remarked:

> "In deciding whether the public interest will be better served by acceptance or rejection of the plea each case must be governed by its own facts. Some, but by no means all, the factors to be considered, or at least those which this Court deems relevant, are: the nature of the claimed violations; how long persisted in; the size and power of the defendants in the particular industry; the impact of the condemned conduct upon the economy; whether a greater deterrent effect will result from conviction rather than from acceptance of the plea — obviously these will vary from case to case."[45]

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35. *Ibid.*
36. *Ibid.*
37. 38 Stat. 730 (1914), as amended, 15 U.S.C. § 16 (1963).
38. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1963).
39. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(a) (1963), provides: "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15(a) of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15(a) of this title." For application of the statute, see Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).
40. Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1939).
41. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(a) (1963), note 39 *supra.*
42. 137 F. Supp. 167 (S.D.N.Y. 1955).
43. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1-7 (1963).
44. 137 F. Supp. 167, 172. The court stated: "It [section 5 of the Clayton Act] was fashioned as a powerful weapon to aid private litigants in their suits against anti-trust violators by reducing the almost prohibitive costs and staggering burdens of such litigation in making available to him the results of the Government's successful action, whether an equity suit or a criminal prosecution."
45. *Ibid.*

The court concluded, "If violators may expiate their wrongdoing by payments of token fines — by accepting the proverbial 'slap on the wrist' — and to boot, avoid the impact of section 5 [of the Clayton Act], then a powerful deterrent to law violation has been removed."[46]

The *Standard Ultramarine* court had no difficulty in distinguishing *United States v. Cigarette Merchandisers Ass'n., Inc.*[47] In *Cigarette Merchandisers* a *nolo* plea was accepted to the criminal indictment. However, in that instance the government had filed a civil suit for an injunction in addition to the criminal indictment. The *Standard Ultramarine* court pointed out that, ". . . in the event the Government is successful [in the civil suit] the decree will be available to private parties. In the instant case, no such civil suit was instituted."[48]

Thus, it seems that the acceptability of the plea is not susceptible to reliable prediction. Since discretionary areas of the law such as this are seldom thoroughly reviewed at the appellate level, it seems unlikely that the problem will be clarified. The only concrete statement that can be offered is that if acceptance of the plea would be of benefit to the defendant as well as to the public, there is a greater possibility that the plea will be accepted.

There are two reasons suggested for the hesitancy of courts to accept a *nolo* plea. First, it is suggested that the plea is frequently the result of a compromise between the prosecutor and the defendant, and the court would rather not be party to such compromise.[49] This argument is not too convincing, however, since the court may give maximum punishment even under a *nolo* plea.[50] Second, there is an argument that the accused is either guilty or not guilty.[51] This reasoning can be rebutted successfully since the reported decisions hold that the fact of conviction is the same after a *nolo* plea as after a guilty plea.[52] It should be pointed out, however, that the cases are not in agreement as to whether a *nolo* conviction is sufficient to disqualify an applicant under a statutory license scheme, which excludes applicants who have been convicted of a crime.[53]

III. EFFECTS IN THE CASE

It is generally agreed that the acceptance of a plea of *nolo contendere* has the same effect as a plea of guilty.[54] Imposition of sentence

46. *Ibid.*

47. 136 F. Supp. 214 (S.D.N.Y. 1955).

48. 137 F. Supp. 167, at 174. See also United States v. Safeway Stores, 20 F.R.D. 451 (N.D. Tex. 1957).

49. See Lenvin and Meyers, *supra* note 5, at 1268.

50. See quote from Hudson v. United States, 272 U.S. 471 (1926), *supra* note 3.

51. See Lenvin and Meyers, *supra* note 5, at 1268.

52. In United States v. Reisfeld, 188 F. Supp. 631 (D. Md. 1960), the court stated, "It is generally held that a plea of *nolo contendere* followed by judgment amounts to a conviction." 188 F. Supp. at 632.

53. See notes 66–70 *infra* and accompanying text.

54. Lott v. United States, 367 U.S. 421 (1961); United States v. Lair, 195 F. 47 (8th Cir. 1912); United States v. Reisfeld, 188 F. Supp. 631 (D. Md. 1960); Connelly v. Balkcom, 213 Ga. 497, 99 S.E.2d 817 (1957); Neibling v. Terry, 352 Mo. 396, 177 S.W.2d 502 (1944); State v. D'Amico, 167 A.2d 542 (R.I. 1961); and Ellsworth v. State, 258 Wisc. 636, 46 N.W.2d 746 (1951).

is all that remains to be done following acceptance of the plea,[55] since, ". . . in the face of the plea no issue of fact exists, and none can be made while the plea remains of record."[56] It has been held that only testimony bearing on the issue of punishment can be offered after the plea has been accepted.[57]

The plea admits, for the purposes of the case, all the facts well pleaded[58] and waives all defects in the proceedings of which the defendant could have availed himself by a plea in abatement, a demurrer, or a motion to quash.[59] However, "ordinarily a plea of *nolo contendere* leaves open for review . . . the sufficiency of the indictment."[60] Thus, entry of the plea does not preclude the defendant from moving in arrest of judgment on the theory that there are defects in the indictment or that the indictment does not charge him with a punishable offense.

IV. CONSEQUENCES OUTSIDE THE CASE

The most important ramifications of the plea of *nolo contendere* are found outside the case in which the plea is entered. Although the plea acts as an admission of guilt for the purpose of the case, it is uniformly recognized that the plea does not estop the defendant to deny the facts upon which the prosecution was based in a subsequent civil suit.[61] Disregarding the practical considerations such as mitigation of punishment and saving of time, here lies the only real distinction between the *nolo* plea and the plea of guilty.

In *State ex rel. Woods v. Thrower*,[62] the defendant was convicted on a *nolo* plea of a felony (tax evasion) while holding office as Commissioner of the City of Dothan. Subsequently, a proceeding in the nature of quo warranto was brought against Thrower on the theory that under certain statutes he was disqualified from holding office because of the prior conviction. The Alabama court held that since Thrower's conviction was based on a *nolo* plea it had no effect outside the criminal case.

A most interesting and paradoxical result has been reached by the Pennsylvania court in applying this principle. *Teslovich v. Fireman's Fund Insurance Company*[63] was a suit on an insurance policy to re-

55. United States v. Denniston, 89 F.2d 696 (1937).
56. United States v. Norris, 281 U.S. 619 (1930).
57. State v. Barbour, 243 N.C. 265, 90 S.E.2d 388 (1955).
58. Lott v. United States, 367 U.S. 421 (1961).
59. In Cohen v. State, 235 Md. 62, 200 A.2d 368 (1964), at 68, the court said, "By pleading *nolo contendere,* he [appellant] waived his right to object to the alleged procedural defects and his right to have them considered on appeal." The federal courts have accepted this view also, see, *e.g.,* Dillon v. United States, 113 F.2d 334 (8th Cir. 1940), at 339, where the court stated, "The appellants have no standing, in view of their pleas of *nolo contendere,* to argue that they did not have a fair trial. By entering their pleas they precluded a trial." But see State v. Barbour, note 57 *supra.*
60. Brotherhood of Carpenters v. U.S., 330 U.S. 395, 412 (1947).
61. United States v. Norris, 281 U.S. 619 (1930); United States v. Reisfeld, 188 F. Supp. 631 (D. Md. 1960); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1939); State *ex rel.* Woods v. Thrower, 272 Ala. 344, 131 So. 2d 420 (1961); and Teslovich v. Fireman's Fund Insurance Co., 110 Pa. Super. 245, 168 Atl. 354 (1933).
62. 272 Ala. 344, 131 So. 2d 420 (1961).
63. 110 Pa. Super. 245, 168 Atl. 354 (1933).

cover damages to property which the defendant had insured. The plaintiff had been convicted of arson on a *nolo* plea, and the insurance company offered to prove the entry of the plea to establish that the plaintiff had caused the fire to defraud the company. The court concluded that the conviction under the plea of *nolo contendere* could not be used against the plaintiff as an admission in any civil suit concerning the same act.

There is, however, a growing minority of courts which have allowed a judgment of conviction after a trial to be admitted in a later civil case involving the same issues, as evidence of the facts on which the judgment was based.[64] It is conceivable that states following this minority view may permit a previous *nolo* conviction, in addition to previous convictions after trial, to be admitted in a subsequent civil suit.

Outside the realm of the immunity discussed above, the consequences of the plea vary little from the consequences of a plea of guilty. It has been held that a conviction under a *nolo* plea is regarded as the same as a conviction under a guilty plea for purposes of multiple offender statutes.[65]

However, the effect of a conviction under a *nolo* plea on the qualifications of an individual for a license issued by the state is unsettled. Under a North Carolina statute calling for revocation of a driver's license upon conviction of driving while under the influence of intoxicating liquor, it has been held 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 from operating motor vehicles upon the highways. . . ."[66]

In a similar situation the Georgia court has reached an opposite conclusion.[67] In New Jersey it has been held that a judgment and commitment following a *nolo* plea did not amount to conviction within contemplation of a statute authorizing the State Board of Medical Examiners to suspend or revoke licenses upon conviction,[68] but a later case indicates a possible change in the state's position. In *In re*

64. See MCCORMICK, EVIDENCE § 295 (1954), citing Fidelity Phoenix Fire Ins. Co. v. Murphy, 226 Ala. 226, 146 So. 387 (1933); North River Ins. Co. v. Militello, 100 Colo. 343, 67 P.2d 625 (1937); and Eagle, Star and British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927). 5 WIGMORE, EVIDENCE § 1671(a) (1940), states the general rule that a judgment in another case, finding a fact in issue in a subsequent suit, is ordinarily not receivable in a subsequent suit. However, Wigmore suggests that it is unreasonable and impractical to ignore the evidential use of a judgment in another proceeding involving the same fact as in the subsequent suit and lists the insurance policy-arson situation as an example where the prior judgment should not be ignored.

65. See, *e.g.*, United States *ex rel.* Bruno v. Reimer, 98 F.2d 92 (2d Cir. 1938).

66. Fox v. Scheidt, 241 N.C. 31, 84 S.E.2d 259, 263 (1954).

67. Nelson v. State, 87 Ga. App. 39, 75 S.E.2d 39 (1953).

68. Schireson v. State Board of Medical Examiners, 130 N.J.L. 570, 33 A.2d 911 (1943).

Berardi,[69] a conviction of a misdemeanor for tax evasion was held to be sufficient grounds for revocation of a detective license, the court stating:

> "While it is true that the plea of *nolo contendere* is not binding in a collateral civil proceeding for the same wrong and the defendant is not estopped in the same proceeding to deny his guilt, . . . nevertheless proof of such plea is receivable in evidence in a proceeding under a statute enacted under the police power where the test or standard is the good character, competency, or the integrity of the applicant or licensee."[70]

The reported decisions seem to indicate a trend that a *nolo* plea is a conviction in the licensing area, and thus a distinction between the *nolo* plea and a plea of guilty appears here to be fading away.

A similar problem has arisen concerning the admissibility of a *nolo* conviction to attack the credibility of a witness in a subsequent suit. In *State v. Herlihy,*[71] the defendant was indicted for keeping intoxicating liquors. Defendant took the stand in his own defense, and evidence of a former conviction under a *nolo* plea was introduced for the purpose of impeaching the credibility of the defendant. It was argued that evidence of his former conviction was not admissible, since under the *nolo* plea there had not been an adjudication of the defendant's guilt. However, the court rejected this contention and allowed the *nolo* conviction to be used for impeachment purposes. An opposite result was reached in *Wright v. State,*[72] where it was held that evidence of the conviction of a witness in a federal court based on a plea of *nolo contendere* was not admissible in a criminal case in an Alabama court for the purpose of discrediting the witness. Since it is generally held that the acceptance of a *nolo* plea is a conviction, it would seem that the conviction should be available for impeachment purposes.[73]

V. THE PLEA IN MARYLAND

The Maryland Rules of Procedure recognize the availability of the plea of *nolo contendere* in Rule 720. This rule gives the accused the right to plead, "with the consent of the court, *nolo contendere.*" Thus, Maryland is in agreement with the theory that entry of the plea is discretionary with the court. Rule 723 sets up the procedure to be followed in making application to enter the plea and also points out the effect of the plea. According to Rule 723, a *nolo* plea "has the effect of submitting the defendant to punishment by the court." Although the rule does not specifically state whether the entry of a

69. 23 N.J. 485, 129 A.2d 705 (1957).
70. *Id.* at 710.
71. 102 Me. 310, 66 Atl. 643 (1906).
72. 38 Ala. App. 64, 79 So. 2d. 66 (1954).
73. See Annot., 146 A.L.R. 867 (1943), for a general discussion of use of the *nolo* conviction for impeachment purposes. It has been held that a conviction of perjury on a *nolo* plea does not render the defendant incompetent to testify, Fidelity-Phoenix Fire Ins. Co. of New York v. Murphy, 231 Ala. 680, 166 So. 604 (1936).

nolo plea is a conviction, it appears that since the plea is an implied confession of guilt, subjects the defendant to punishment, and otherwise has the same effects as a conviction under a guilty plea or a conviction after a trial, Maryland would consider the entry of a plea a conviction.

Like the statutes of many other states, the Maryland Rules do not give any indication of the kinds of cases in which the plea is available. The three cases involving *nolo* pleas decided by the Court of Appeals shed little light on this matter. In *Fellner v. Bar Association,*[74] a *nolo* plea was allowed to a charge of inserting slugs in city parking meters. In *Cohen v. State*[75] and *Lifshutz v. State,*[76] the plea was accepted to an indictment for conspiracy to obtain money by false pretenses. Thus, it appears arguable that the plea should be available in Maryland, subject to the discretion of the court, to indictments for non-capital felonies and misdemeanors. However, one author has indicated that the plea is available only in misdemeanors.[77]

There are no readily available statistics to determine the frequency with which the plea is used in Maryland. Judging from the fact that only three cases have reached the Court of Appeals on this point, it seems probable that its use is rare. The apparent frequent use of the plea may be explained by a statutory provision[78] which could be used as a substitute for the *nolo* plea. This provision allows the trial judge to place the accused on probation without finding a verdict.[79]

CONCLUSION

The usefulness of the plea of *nolo contendere* cannot be evaluated in abstract terms. Whether the plea is of any value in the administration of justice depends upon the circumstances of each individual case. For this reason it seems wise to leave the determination of the acceptability of the plea to the discretion of the trial judge.

It seems that when there are important public policy considerations involved the plea can be used to advantage. One commentary has stated:

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74. 213 Md. 243, 131 A.2d 729 (1957).
75. 235 Md. 62, 200 A.2d 368 (1964).
76. 236 Md. 428, 204 A.2d 541 (1964).
77. GINSBERG & GINSBERG, CRIMINAL LAW AND PROCEDURE IN MARYLAND 372 (1940). The authors do not cite any authority for their statement.
78. MD. CODE ANN. Art. 27, § 641 (1957).
79. The 1963 Annual Report of State's Attorney's Office of Baltimore City indicates that of 4,926 criminal indictments brought to trial, 278 were disposed of by probation before verdict. The 1962 Report indicates that 269 of 4,450 total indictments were disposed of by probation before verdict. See Mutter, "Probation In The Criminal Court of Baltimore City", 17 MD. L. REV. 309 (1957). At p. 314, the author states: "Probation before conviction (similar to probation without verdict) is a relatively recent innovation intended to bring legal and social philosophy closer together in the area of rehabilitation of criminal offenders. The practice has been to provide the aforementioned type of probation to individuals whom the Court feels are deserving of some protection from the stigma of a criminal record. However, in receiving this probation, the individual 'consents' to abide by such conditions as those imposed in probation in the ordinary course. It is important to note that probation before conviction is not intended to be a compromise verdict."

> "There are many situations, of which anti-trust prosecution is one, where the crime is considered *malum prohibitum* rather than *malum in se,* and in such situations the prosecutor is often inclined to agree to the interposition of the *nolo* plea. This realistic policy dispenses with lengthy and expensive trials. A law enforcement agency having concurrent equitable and criminal power, like the Federal Anti-trust Division, frequently follows an indictment with a civil complaint, thereby seeking appropriate injunctive relief against the continuance of the offense charged in the indictment. Thus, the closing out of criminal cases by a *nolo* plea is simply preliminary to getting down to the job of eradicating the improper practices. At the same time, the pleader has paid his debt to society for past offenses and it can hardly be said that in making a *nolo* plea the accused leaves the question of his guilt undetermined."[80]

The fact that the plea is to some extent in the nature of a plea for mercy should not adversely affect the plea's usefulness. Since acceptance of the plea does not preclude the court from imposing the maximum sentence allowed by statute, it would seem that the nature of the plea is necessarily a reason for denying it.

The reasoning of the cases seems to suggest, however, that unless there are some public policy considerations favoring the plea, it should be refused. It would appear, however, that the acceptance of the plea could be allowed almost as a matter of course in minor violations, such as traffic offenses, without adversely affecting the administration of justice.

It is apparent that the statutes and rules of court regulating the use of the plea are in need of revision, which will provide more definite standards for determining its availability and total effect. This would eliminate much speculation and guess-work in regard to the plea.

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80. Lenvin and Meyers, *supra* note 5, at 1268. (Italics added.)