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STUDENT NOTES

A JUDGMENT OF CONVICTION AS EVIDENCE IN A SUBSEQUENT CIVIL ACTION

The orthodox common law rule precludes the admission in a civil suit of a prior conviction as tending to prove the facts upon which it rests.\textsuperscript{1} A plethora of reasons has been adduced explaining this exclusionary doctrine.\textsuperscript{2} Professor Wigmore\textsuperscript{3} ably contends that the fundamental objection to admissibility is that by its intrinsic nature a judgment is incapable of being employed as evidence. His analysis leads to the conclusion that the use of a judgment in a later suit is the lending of the court's executive aid irrespective of the merits of fact.\textsuperscript{4} Regardless of the grounds assigned for exclusion, it has been effected generally without resort to principles of evidence.\textsuperscript{5}

The patent injustice resulting in many instances from the strict application of the general rule has provoked much criticism\textsuperscript{6} and a tendency on the part of the courts, in keeping with the modern practice of liberalizing the rules of evidence,\textsuperscript{7} to admit a prior conviction as tending to prove the facts upon which it is based.\textsuperscript{8} A Virginia case\textsuperscript{9} strikingly illustrates the indefensible consequence which may be worked by applying the orthodox rule. In that suit a party recovered in the lower court under a fire in-

\textsuperscript{1} Chafee, The Progress of the Law. Evidence, (1922) 35 Harv. L. Rev. 428, 440; 2 Freeman on Judgments (5th ed. 1925) \S 653; Interstate Dry Goods Stores v. Williamson, 31 W. Va. 355, 112 S. E. 301, 31 A. L. R. 258 (1922), where it was held in an action for conversion that the defendant's conviction for larceny was inadmissible.

\textsuperscript{2} See Note (1924) 31 A. L. R. 261, 264, where the following, among various grounds for exclusion suggested by the cases, are listed: "... lack of mutuality and dissimilarity of object, issues, procedure, and degree and elements of proof."

\textsuperscript{3} 2 Wigmore on evidence (1904) \S 1347.

\textsuperscript{4} Ibid. \S 1347. It is argued here that the effect of a judgment is closely analogous to that of an alias execution.

\textsuperscript{5} In The Estate of Crippen, [1911] p. 108, in which is found an excellent discussion and ultimate rejection of the theory that a prior conviction is not evidence but is \textit{res inter alios acta}.

\textsuperscript{6} See Notes in (1932) 12 B. U. L. Rev. 548; (1932) 17 Corn. L. Q. 493; (1932) 27 Ill. L. Rev. 195; (1932) 80 U. of Pa. L. Rev. 1164; and (1928) 14 Va. L. Rev. 398.

\textsuperscript{7} Chafee, op. cit. supra n. 1.


\textsuperscript{9} See also Note (1920) 33 Harv. L. Rev. 850.

sur ance policy covering a stock of goods, after he had been convicted of wilfully burning the same stock of goods with intent to defraud the insurer. The decision was reversed in the appellate court which held, in a widely-noted opinion, that the prior conviction was an absolute bar to the maintenance of the civil action.  

Since some courts have enlarged the original concept of the common law by considering a conviction as proper evidence, it becomes important to analyze the problem in relation to accepted principles of evidence. Can admissibility be justified when identity of issue exists between the criminal and civil actions and there is consequently no doubt but that the conviction has great probative weight?  

It is a classic principle of evidence that all logically relevant data is admissible in evidence unless excluded by some rule of law. As far as this problem is concerned the logical relevancy is manifest when the issue of fact is the same in both proceedings. Since this is true are there any rules of law which exclude the prior conviction? It has been suggested that both the hearsay and opinion rules bar the admission of a prior judgment of conviction.  

Apropos of the opinion doctrine it may be said that the verdict in a criminal action is nothing more than the opinion of the jury gained from testimony produced at the trial. But it is seriously doubted if the opinion rule can be considered a very formidable barrier to admissibility. The reason for the opinion doctrine is utterly lacking. It is obvious that there is no superfluity in the evidence sought to be admitted. This evidence may be of the utmost value, — in fact the only evidence obtainable. Since there is no fundamental reason for the exclusion of evidential data on the ground of opinion, save that of sparing the court and jury  

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10 (1928) 12 MINN. L. REV. 546; (1928) 6 N. C. L. REV. 333; and (1928) 14 VA. L. REV. 398.  
11 Note (1924) 31 A. L. R. 275; (1928) 57 A. L. R. 490, which list cases adopting the heterodox view.  
12 CHAPEE, op. cit. supra n. 1.  
13 Thayer, Presumptions and the Law of Evidence (1889) 3 HARV. L. REV. 143; 1 WIGMORE ON EVIDENCE § 10.  
14 A penetrating comment by Professor Hinton is found in (1932) 27 ILL. L. REV. 195.  
15 Ibid.  
16 Ibid.  
17 2 WIGMORE ON EVIDENCE § 1918.
loss of time through consideration of unnecessary testimony, a reason that does not apply in this instance, the opinion rule cannot be regarded as a serious barrier to the admission of the evidence sought to be introduced.

Likewise, the hearsay rule is hardly an insuperable bar to the admission of a former conviction as evidence. It is granted that if the hearsay doctrine is applied with puritanical strictness the admissibility of the prior judgment runs counter to its principles, since they exclude judgments unless obtained in a proceeding between the parties to the present trial. The hearsay doctrine, however, is honeycombed with numerous exceptions. Is there any applicable to this situation? It would seem that the exception for public documents would admit the record of judgment if the issue in the civil suit is the fact of conviction. But it is doubtful if this exception or any other orthodox one will permit the admission of the judgment as evidence of the facts upon which it is based. It is submitted, however, that since the person against whom the conviction is offered was the accused in the former trial, it ought to be admitted under an exception to the hearsay rule because he has had full opportunity to cross-examine and be confronted by witnesses under oath whose testimony led to the verdict. Professor Chafee supports this reasoning and has suggested a new exception to the hearsay doctrine for "solemn adjudications" generally. Judicial sanction was given this suggested rationale of the problem in the first case holding that a prior conviction is admissible in evidence, where it was said: "... Where the matter in dispute is a question of public right, all persons standing in the same situation are affected by it, ... and any individual may avail himself of the conviction."

It is believed that justice and expediency, and in some cases necessity, require the admission of a judgment of conviction regardless of what technique the court adopts to justify it, and ir-

19 1 Wigmore, loc. cit. supra n. 3. The hearsay doctrine excludes evidence otherwise admissible because it has not satisfactorily met the tests of being under oath, subject to cross-examination and confrontation of witnesses.
20 2 Wigmore on Evidence § 1346.
21 3 ibid. § 1630.
22 Chafee, op. cit. supra n. 1, at 440.
respective of the weight given such evidence. England has recognized an exception to the general rule and has favored admission since the Crippen case. The party to the civil action against whom the conviction is sought to be introduced had his day in court, with full opportunity to examine and cross-examine witnesses and to appeal from the judgment, under the most favorable conditions to himself because of the requirement that the guilt of the accused shall be proved beyond any reasonable doubt in a criminal action.

—Charles Wise.

24 The purpose of this note is to consider the problem of admissibility and it is not within its scope to deal with the weight such evidence shall have after being admitted. It may be said in general that with the exception of the Eagle, Star & British Dominions Ins. Co. v. Heller case, supra n. 8, both American and English authorities hold that a judgment of conviction as evidence is not conclusive. The case of Schindler v. Royal Fire Ins. Co., supra n. 8, suggests the desirability of such evidence being conclusive but says that it should be made so by legislative action. It would seem to the writer, that the only logically sound position is to consider a judgment of conviction conclusive and binding in a subsequent civil proceeding. Furthermore, there are practical disadvantages in treating this evidence as prima facie only, inasmuch as it is impossible for the jury to weigh a "presumption" satisfactorily. The jury is faced with the practical dilemma of considering the conviction either as conclusive or else of no measurable value, since it is impossible to inquire into matters like the evidence or demeanor of witnesses of the former criminal action.

25 In The Estate of Crippen, supra n. 5.

26 Of course, the degree of proof required in a civil proceeding is simply that of a preponderance of the evidence.