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cation caused him to commit suicide.[24] In this area we see the courts extending liability beyond the normal rules of causation to enforce the legislature's desire to discourage this type of activity.

It would appear from a study of the cases in this area that the courts, realizing that "proximate cause" was an inadequate test in determining defendant's liability, limited its effect in certain cases by adopting the "irresistible impulse" test of the *Daniels* case to serve as an escape hatch from harsh and unjust results. However, the latter test is inadequate also, because of the practical difficulty of determining the victim's state of mind at the time of the suicide. Therefore, it seems that courts, instead of wrestling with the nebulous concepts of "proximate cause" and "irresistible impulse", would contribute much toward clarifying this area of law by acknowledging the fact that suicide is a remote consequence, to which liability should attach only where public policy and common sense dictates that liability should attach. This would require a clear pronouncement by the courts of the type of acts that would allow liability to be imposed for the remote consequence of suicide. It seems that this should be limited to acts which are intentionally wrongful or criminal. This does not preclude the courts from finding suicide too remote a consequence for certain criminal or intentionally wrongful acts. It merely limits the imposition of liability to this narrowed area. Under this analysis the Court was apparently correct in the instant case in overruling defendant's demurrer since the act of conversion is an intentionally wrongful act. However, the courts should recognize a more practical basis of liability instead of subjecting plaintiffs to the difficult task of proving such things as irresistible impulse."

JAMES M. BUCKLEY

ADMISSIBILITY OF A PLEA OF GUILTY TO A TRAFFIC INFRACTION IN A CIVIL SUIT BASED ON THE SAME FACTS

> "... A traffic infraction is not a crime, and the penalty or punishment imposed therefore shall not be deemed for any purpose a penal or criminal penalty or punishment, and shall not affect or impair the credibility as a witness, or otherwise, of any person convicted therefore."[1]

Since *Schindler v. Royal Insurance Co.*,[2] New York courts have permitted the admission of a prior criminal conviction, when logically relevant in a civil suit as *prima facie* evidence of the facts upon which it is based. However, traffic infractions, not being classified as crimes in New York, have been the

24. See, Anno. 11 A.L.R.2d 751, 765.

1. New York Vehicle & Traffic Law, § 2(29). It must be pointed out that some traffic violations are not infractions but come under the heading of misdemeanors or felonies.

2. 258 N.Y. 310, 179 N.E. 711 (1932).

subject of much confusion and uncertainty in the law of evidence.[3] *Walther v. News Syndicate Co.*[4] held that a record of conviction for a traffic infraction after trial on a plea of not guilty is inadmissible as evidence against a defendant in a civil action arising out of that traffic infraction. That Court, by way of *dictum,* said that where there is a plea of guilty to a traffic infraction, it may be admitted in a civil suit as a declaration or admission against interest. Since that time, trial courts have enforced this *dictum,* and it has been referred to in further *dicta* by lower courts.[5] The validity of this *dictum* has been directly raised in *Ando v. Woodberry,*[6] where the First Department in a three-two decision repudiated it and held a plea of guilty to a traffic infraction is inadmissible in a civil action arising out of that infraction.

New York, as early as 1820,[7] departed from the general prevalent view[8] that a conviction in a criminal action could not be brought into evidence to establish the truth of the facts on which it was rendered in a subsequent civil action where relevant. Jurisdictions that do not allow the conviction to be brought into evidence base their rule of exclusion on some or all of the following reasons: dissimilarity in objects, in issues, in results, in procedures, or in parties in the two actions, as well as a lack of privity and mutuality.[9] It has also been argued that the principal obstacles to admissibility are the hearsay and opinion rules.[10] Virginia has formulated a separate rule by admitting a previous conviction as conclusive evidence, giving to it the force of an estoppel, where a convicted criminal attempts to take advantage of a "right" which arose with the crime that he committed.[11] The modern trend is toward the admittance of the prior conviction as persuasive evidence.[12]

The New York law of admitting convictions in a criminal case for their probative value in a civil suit arising out of the same facts can be condensed into the following rules:

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3. Stanton v. Major, 274 App. Div. 864, 82 N.Y.S.2d 134 (3d Dep't 1948); Roach v. Yonkers R.R. Co., 242 App. Div. 195, 271 N.Y. Supp. 289 (2d Dep't 1934); Same v. Davison, 253 App. Div. 193, 1 N.Y.S.2d 374 (4th Dep't 1937).

4. 276 App. Div. 169, 93 N.Y.S.2d 537 (1st Dep't 1949).

5. People v. Formato, 286 App. Div. 357, 363-364, 143 N.Y.S.2d 205, 211 (3d Dep't 1955), aff'd 309 N.Y. 979, 132 N.E.2d 894 (1956); Michitsch v. Stimfel, 7 Misc. 2d 960, 164 N.Y.S.2d 246 (Sup. Ct. 1957).

6. 9 A.D.2d 125, 192 N.Y.S.2d 414 (1st Dep't 1959).

7. Maybee v. Avery, 18 Johns (N.Y.) 352 (1820).

8. Chantango v. Abaroa, 218 U.S. 476 (1910); Carlisle v. Killebrew, 89 Ala. 329, 6 So. 756 (1889); Horn v. Cole, 203 Ark. 361, 156 S.W.2d 787 (1941); Silva v. Silva, 297 Mass. 217, 7 N.E.2d 601 (1937); Summers v. Bergner & Engle Brewing Co., 143 Pa. 114, 22 Atl. 707 (1891).

9. 30A Am. Jur. Judgments § 475 (1958).

10. Hinton, Judgment of Conviction; Effect on a Civil Case, 27 Ill. L. Rev. 195 (1932). This reasoning was challenged in 5 Wigmore, Evidence § 1671(a) (3d Ed. 1940).

11. Eagle Star & British Dominion Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927); See Note 39 Va. L. Rev. 995 (1953). Schindler v. Royal Ins. Co., 258 N.Y. 310, 179 N.E. 711 (1932) suggested that the New York Legislature codify this rule but the New York Law Revision Commission ruled against it.

12. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951); Sovereign Camp, W. O. W. v. Gunn, 229 Ala. 508, 158 So. 192 (1934); Tucker v. Tucker, 101 N.J. Eq. 72, 137 Atl. 404 (1927).

(a) a conviction of a crime is *prima facie* evidence of the facts on which it was based.[13]
(b) an acquittal in a prior action is excluded from being offered in proof for the reason that in a conviction there is a finding that the accused has been proven guilty beyond a reasonable doubt, but an acquittal is simply a holding that prosecution has failed to discharge this burden.[14]
(c) A plea of guilty in a criminal action is admissible as an admission against interest.[15]
(d) A plea of *nolo contendere*[16] is not allowed in New York.[17]

Where does the conviction on a traffic infraction fit into the overall picture? Beside giving a traffic infraction a special place in the realm of statutory violations,[18] the New York Legislature has seen fit to distinguish the traffic infraction from other offenses by providing that a witness shall not "be required to disclose a conviction for a traffic infraction, as defined by the vehicle and traffic law, nor shall conviction therefor affect the credibility of such witness in any action or proceeding."[19] The majority in the instant case recognizing that this provision "relating to 'convictions' (does) not govern the admissibility of pleas' of guilty to traffic infractions in civil actions as admissions against interest," went on to adopt the reasoning of the *Walther* case[20] (which Court, in turn, based its reasoning on *Hart v. Mealey*)[21] to the effect that since "By the enactment of . . . Section 355 of the Civil Practice Act . . . the legislature recognized the weakness of a traffic infraction as proof of facts which may have been involved", this was an expression of public policy[22] which seems to go beyond the mere question of privilege or credibility of a witness and shows that a plea in a traffic court to a traffic infraction "is utterly lacking in probative value."

By pointing out the differences between traffic infractions and other crimes, the Court in the instant case was able to dismiss a prior holding of the Fourth Department in *Same v. Davison*[23] which held that defendant's conviction on a plea of guilty to a traffic infraction was admissible in a negligence action arising out of the same occurrence as *prima facie* evidence of the facts. In the *Same* case, the Court merely cited the *Schindler* case as authority and

13. Schindler v. Royal Ins. Co., supra note 11.
14. Only a preponderance of the evidence is necessary in a civil suit. However, the failure of the State to prove guilt may show some evidence that the accused was in fact not guilty. See Feinstein v. Brooklyn Edison Co., 42 N.Y.S.2d 16 (Sup. Ct. 1943).
15. Stanton v. Major, supra note 3, in which there was a prior conviction of reckless driving which is a misdemeanor under Section 58 of the New York Vehicle & Traffic Law.
16. A plea of *nolo contendere* is a plea of guilt only for the purposes of the action where pleaded.
17. People v. Daiboch, 265 N.Y. 125, 191 N.E. 859 (1934).
18. Supra note 1.
19. N.Y. Civ. Prac. Act § 355.
20. Supra note 4.
21. 287 N.Y. 39, 38 N.E.2d 121 (1941).
22. See Sims v. Union News Co., 284 App. Div. 335, 131 N.Y.S.2d 837 (1st Dep't 1954), where the court said "The case of the traffic infraction occupies a special place of its own; and under the public policy of the State it has no effect beyond the immediate motor vehicle penalty or disability incurred."
23. Supra note 3.

did not distinguish between the conviction of a traffic infraction and that of a crime.[24] Since the *Schindler* case applied only to prior *criminal* convictions, it was unjustified to use it as controlling authority for the admissibility of a traffic infraction conviction.

In the *Walther* case, the First Department squarely faced the issue of whether the fact of a conviction for a traffic infraction after trial on a not guilty plea is admissible against a defendant in a civil suit arising out of the same occurrence. The Court felt that evidence of a conviction of violating a traffic regulation would be "likely to impair the right of a defendant to a fair trial on the issue of civil negligence." This would also be contrary to the public policy espoused as to traffic violations which has previously been aluded to in this note.

The Court in the *Ando* decision thought that the significance of the *Walther* case "is that every one of the grounds supplied why a traffic conviction after trial should not be admissible applies equally to the plea of guilty in a traffic infraction case."

Before we approach the problem of what weight an impartial jury would give, or should give, to a guilty plea to a traffic violation, let us examine what weight does the average motorist give to an appearance before court on a traffic violation. Many times a plea of guilty is the most convenient form for the busy defendant—regardless of whether he believes he is guilty or not. A New York City Traffic Court magistrate has estimated that forty percent of the motorists who appeared in his court pleaded guilty despite the fact that they honestly believed they were innocent.[25] An accused finds it difficult to produce evidence that creates a reasonable doubt as to his guilt, and, therefore. for the sake of expediency a guilty plea is entered.[26]

Many defendants feel that they do not have a chance to prove their innocence. Judges, in the hustle and bustle of today's life spend little time in evaluating a defendant's plea and reaching a decision.[27] Illustrating the pressures prevalent in our metropolitan traffic courts, a leading authority has written, "The evidence of police officers and witnesses alike was cut short, defendants were waved away by the judge while still giving their excuses and the judgment of the court was given with one eye on the clock. This type of trial all too often left convicted defendants with the impression that they never had a chance."[28] That a defendant will usually make a plea rather than stand trial is borne out by the following statistics of the dispositions of courts of

24. Supra note 2.

25. Sontheimer, Traffic Courts—Blot on American Justice, McCall's, June 1956, p. 27.

26. A Baltimore traffic judge has stated that ninety-five percent of his cases enter pleas of guilty. Scherr, Teen Age Traffic Court, 31 Transactions, National Safety Congress, 56 (1952).

27. Nearthon, Fair Trial in Traffic Court, 41 Minn. L. Rev. 577 (1957).

28. Warren, Traffic Courts (1942), the fourth volume in the Judicial Administration series. In regard to the time to be allotted to an individual. defendant, Warren cites the all time record for hearing cases—one New York City Magistrate heard 1016 cases in two and one-half hours!

inferior jurisdiction in cities in New York State (outside the City of New York) for the period July 1, 1958 through July 1, 1959. Of the 487,102 motor vehicle offenses which were heard, 458,710 or 94 percent were disposed of by pleas, whereas only 2,514 were disposed of by trial and 25,878 were dismissed before completion of trial.[29]

The above discussion of the problems facing an accused violator on his appearance in traffic court is not meant to be a full discussion of the problems inherent in that court. It is merely meant to point up the probative value of the guilty plea when it is later brought into evidence at a civil trial. An attempt was made to point out that a plea of guilty does not necessarily mean that the defendant was guilty of the alleged traffic infraction.

Guilty pleas to traffic infractions have been admitted[30] and excluded[31] in subsequent civil proceedings in other jurisdictions. Some states have enacted statutes which prohibit the admissibility of evidence of a prior traffic conviction in a subsequent civil suit.[32] Cases interpreting these statutes have held that a plea of guilty to a traffic conviction is deservant of the same weight as a conviction after a plea of not guilty and therefore should be excluded.[33]

Should a defendant be held to an admission of guilt in all subsequent proceedings in respect to the facts involved? If the plea is admitted, it does not establish the fact of the violation, but it is an admission of the party that the fact is true.[34] Where a guilty plea is introduced, it may be explained.[35] However, the danger lies in the fact that a jury will give a prior conviction so much weight as to be prejudicial. It must be conceded that the probative value of a guilty plea to a traffic infraction is small. Whenever we admit evidence to go to the jury we assume that the general knowledge and experience of a jury will enable them to rationalize as to the probative effect of the proffered evidence. But where the plea of guilty is allowed in evidence, the courts may very well be haunted with the thought that the jury will give it so much weight as to be prejudciial. And if there is any miscarriage of justice in traffic court, it would work a double hardship to give this adjudication any weight whatever in a subsequent civil proceeding. It should also be pointed out that the decision of the Court in the instant case is a necessary and logical extension of the *Walther* decision, for it seems to be unreasonable to require a defendant to

29. 5th Annual Report of the Judicial Conference, Table 32 (1960).

30. Olk v. Marquardt, 203 Wis. 479, 234 N.W. 773 (1931); Weiss v. Wasserman, 91 N.H. 164, 15 A.2d 861 (1940); Kock v. Elkins, 71 Ida. 50, 225 P.2d 457 (1950).

31. Zenuck v. Johnson, 114 Conn. 383, 158 Atl. 910 (1932); Sothern v. Van Dyke, 114 N.J.L. 1, 174 Atl. 877 (1934).

32. Minn. St. 1941, § 169.94(1) and (2). Utah C.A. 1953, § 41-6-170. Colorado R.S. 1953, § 13-4-140.

33. Warren v. Marsh, 215 Minn. 615, 11 N.W.2d 528 (1943); Utah Farm Bureau Ins. Co. v. Chugg, 6 Utah 2d 399, 315 P.2d 277 (1957); Ripple v. Brack, 132 Col. 226, 286 P.2d 625 (1955).

34. Lipmann Bros. Inc. v. Hartford Acc. & Indem. Co., 149 Me. 199, 100 A.2d 246 (1953).

35. Race v. Chappell, 304 Ky. 788, 202 S.W.2d 626 (1947); Morrissey v. Powell, 304 Mass. 268, 23 N.E.2d 411 (1939).

vigorously defend what he considers to be a hopeless cause solely for the reason that in this way he will be assured that his being found guilty to a traffic infraction will not be brought into evidence in a later civil suit.

The Court in the instant case has cast aside legal niceties in order to render a decision that is significant in its practical approach to a problem that has harrassed many civil magistrates, not to mention countless defense counsel. In the harsh realities of today's courtroom procedure, technical concepts must give way to practical solutions, and *Ando v. Woodberry* does just that.

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DOUBLE JEOPARDY: PROSECUTION FOR UNDERLYING FELONY FOLLOWING ACQUITTAL FOR FELONY-MURDER.

The petitioner, in *People ex rel. Santangelo v. Tutuska,*[1] brought a writ of *habeas corpus* while awaiting trial for burglary and attempted robbery. He based his writ on the ground that the charges in the indictment would subject him to double jeopardy, in that he had previously been tried and acquitted of murder in the first degree on a felony-murder theory in which indictment the underlying felonies were the burglary and robbery for which he was presently indicted.

In New York the prohibition against twice placing an individual in peril for a single offense is embodied in several provisions of the law.[2] Since it has been held that Section 1938 of the Penal Law embodies,[3] if not perhaps extends, the constitutional immunity against double jeopardy,[4] the Court considered and rejected the petitioner's contention under that section. The Court dismissed petitioner's writ holding that robbery or burglary, unlike assault which is inherent in every murder, is a separate and distinct crime, a crime that may be committed without committing the crime of murder.

Although courts agree that to try a defendant twice for the same offense is deplorable, they have considerable difficulty, due to the large number of statutory offenses, in determining whether or not given sets of facts supporting two or more charges are, in law, the same offense.[5]

Section 1938 prohibits not only a second prosecution for the same offense,

1. 19 Misc. 2d 308, 192 N.Y.S.2d 350 (Sup. Ct. 1959).

2. N.Y. Const., art. 1, § 6, "No person shall be subject to be twice put in jeopardy for the same offense"; N.Y. Code of Crim. Proc. § 9, "No person can be subject to a second prosecution for a crime for which he has been prosecuted and duly convicted or acquitted."; N.Y. Penal Law § 1938.

3. Section 1938 of the Penal Law provides that "An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions, but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision."

4. People v. Snyder, 241 N.Y. 81, 148 N.E. 796 (1925); People v. Repola, 280 App. Div. 735, 117 N.Y.S.2d 283 (1st Dep't 1952), aff'd, 305 N.Y. 740, 113 N.E.2d 42 (1953).

5. See: Kirchheimer, The Act, The Offense, and Double Jeopardy, 58 Yale L.J. 513 (1949); Note 7 Brooklyn L.R. 79 (1938).