Volume 36
Issue 3 *Dickinson Law Review - Volume 36, 1931-1932*

3-1-1932

Nolo Contendere in Pennsylvania

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way, it follows that the mere ownership of the golf course would not impute such liability for injury to one struck by a golf ball driven by a player on the course.[11]

Although the game of golf has been played for many years by hundreds of thousands of our residents, serious accidents have been so few that there is very little precise authority to help the courts.[12] However, if our own conception of the few decided cases is correct, there appears to be no reason for confusing the issues by relieving the defendant from liability on the theory that there was an assumption of risk by the injured party. Liability in all such cases should be sustained only on the ground that there was a breach of some duty which one party owes to another, whereby the latter suffers injury, which was such a consequence as under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to follow from his act. Only where such a breach of duty is found does assumption of risk become involved.

Alexander Denbo.

NOLO CONTENDERE IN PENNSYLVANIA

There has been somewhat of a conflict of authority as to the propriety of the plea of nolo contendere in Pennsylvania where defendant is indicted for any crime which is greater in degree than a misdemeanor.

It is the purpose of the writer to explain herein the purpose of entering such plea and when it may be entered in Pennsylvania so far as the cases have decided. Nolo contendere is synonymous with non vult contendere (third person) and non volo contendere (first person).

"The so-called plea of 'nolo contendere' is not a plea in the strict sense of that term in the criminal law, but a formal declaration by accused that he will not contend with the prosecuting authority under the charge. It is

[11]Schlenger v. Weinberg, 150 Atl. (N. J.) 434 (1930).
[12]Toohey v. Webster, 117 Atl. (N. J.) 838 (1922).

said to be somewhat in the nature of a compromise between the state and the defendant."[1]

Literally the translation from the Latin is "I will not contest it." "The early records of this ancient plea state the fact to be that the defendant is unwilling to contest the question with the crown, and therefore throws himself upon the mercy of the court. Non vult contendere cum domina regina, et ponuit se in gratium curiae."[2]

An implied confession, or as it is termed, a plea of nolo contendere "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."[3]

The plea of nolo contendere has the same effect in a criminal case as a plea of guilty, to the extent that a judgment and sentence may be pronounced upon it as if upon a verdict of guilty.[4]

"The difference between it and a plea of guilty appears simply to be that, while the latter is a confession binding defendant in other proceedings, the former has no effect beyond the particular case.[5] It is an implied confession of guilt only and cannot be used against defendant as an admission in any civil suit for the same act.[6] An illustration of this would be the following: Suppose D injures, by negligently driving his automobile, one P. On being arraigned for reckless driving D enters a plea of nolo contendere. Later P, in a civil action, sues D for damages as a result of D's negligence. If D had pleaded guilty to the indictment, this admission of guilt could be shown in the civil contest; but since he pleaded nolo contendere he admitted impliedly his guilt only for the purpose of the criminal prosecution and this implied admission of his guilt cannot be shown by P, or any other person suing D civilly

[1] 16 C. J. 406.
[2] Regina v. Templeman, 1 Salk. 55, 91 Reprint 54.
[3] Commonwealth v. Horton, 9 Pick. (Mass.) 206.
[4] 1 Chitty Cr. Law, 428.
[5] 16 C. J. 404.
[6] Commonwealth v. Ferguson, 44 Pa. Super. Ct. 626 (1910).

for damages arising out of the reckless driving.

The first case in Pennsylvania where this plea is discussed at any length is *Buck v. Commonwealth.*[7] In this case the defendant had been placed on trial as an accessory to a highway robbery. The two principals had pleaded nolo contendere to their respective indictments but had not yet been sentenced. The Commonwealth, during the trial of the defendant Buck had been allowed, over the objection of the counsel for the defendant, to introduce the pleas of nolo contendere by the principals as proof of the guilt of the principals. The Commonwealth contended that this evidence was competent because the legal effect of the plea is the same as the plea of guilty.

The Supreme Court, per Paxson, J., held that the admission of this evidence was error. He said "The plea of nolo contendere is a mild form of pleading guilty. The advantage, however, which may attend this plea is, that when accompanied by a protestation of the defendant's innocence it will not conclude him in a civil action from contesting the facts charged in the indictment."

The Court apparently was aware that at common law this plea was allowed only where the punishment for the offense was a fine. This knowledge is imputed from the fact that the opinion cited Wharton's American Criminal Law, sect. 533, wherein it is said, "(Plea of nolo contendere) has the same effect as a plea of guilty so far as concerns the proceedings upon the indictment, and a defendant who is sentenced upon such a plea to *pay a fine* is convicted of the offense for which he is indicted."

No comment is made in the *Buck* case concerning the propriety of the plea where the defendant is charged with a felony. The Court admitted that the plea was an implied confession but held that a confession by the principal is not admissible upon the trial of the accessory to prove the guilt of the principal. It was also said that this plea could be withdrawn at any time before sentence.

In *Commonwealth v. Holstine*[8] the defendant pleaded

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[7]107 Pa. 486 (1884).
[8]132 Pa. 357 (1890).

nolo contendere to an indictment charging him with the unlicensed sale of liquor. The Court followed the *Buck* case in that this plea was substantially a plea of guilty and decided that "We may therefore safely pass by the somewhat elaborate argument to show that the defendant was not guilty."

In *Commonwealth v. Jackson*[9] it was said, citing *Buck v. Commonwealth,* "While the plea of nolo contendere when accompanied by a protestation of innocence will not preclude a defendant in a civil suit from contesting the facts charged in the indictment, it has the same effect as a plea of guilty, so far as the indictment is concerned, and when judgment has been entered on the plea the record is competent evidence of the fact of conviction."

A plea of guilty can be put in without leave of the court, but a plea of nolo contendere can only be made with the consent of the court.[10] In this case the court notes that at one time in England the plea was accepted only in cases where a fine was imposed, but goes on to say that "In none of the above cited American cases is it decided that if the court accepts the plea, and the offense is punishable by imprisonment, the defendant may not be sentenced to imprisonment. On the contrary the sentence under consideration in *Commonwealth v. Holstine*[11] was to imprisonment."

The most illuminating and determinative case in Pennsylvania is that of *Commonwealth v. Shrope* [12] wherein the defendant, to an indictment charging him with murder, pleaded nolo contendere. Mr. Justice Stewart, after a review of all the Pennsylvania authorities and some of the authorities from other states, attempts to state the law of Pennsylvania on this subject.

It is stated unequivocally in the above case that the plea of non vult contendere is never allowable in capital cases. "The reason for this limitation becomes apparent when we consider the extreme penalty that follows a con-

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[9]248 Pa. 530 (1915).

[10]Commonwealth v. Ferguson, 44 Pa. Super. Ct. 626 (1910).

[11]132 Pa. 357 (1890).

[12]264 Pa. 246 (1919).

viction in what we call capital cases. 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 degree of certainty which would make it the equivalent of an expressed confession."

The Court says that *Buck v. Commonwealth,*[13] allowing the plea to an indictment for a felony (highway robbery), does not rule the point because that case was appealed to the Supreme Court solely on the ground that the plea was incompetent as evidence to prove guilt, not on the question of the propriety of its entry where the defendant is indicted for a felony.

The Court in its quotation from the note following *Tucker v. U. S., 41 L. R. A. (N.S.) 70* seemingly approves and deems correct the statement:—"Constrained to this interpretation of the narrow purpose and use of the plea at common law, by the express provisions of the rule thus handed down, we believe extension of the allowance to include even misdemeanors for which imprisonment must be imposed is unauthorized,—however desirable it may seem,—without statutory provision therefor."

Mr. Justice Stewart at the conclusion of the opinion was careful to state that they were deciding nothing but the impropriety of the plea in capital offenses. However this may be, the practical effect of this opinion has been to cast some doubt as to its propriety in any case of felony and in a Montgomery County court in 1928,[14] the judge, deciding whether to accept the plea in a case charging statutory rape, expressed the doubt created by *Commonwealth v. Shrope* and refused to accept the plea.

Conclusion

The plea is not allowable where defendant is charged with a capital offense.[15]

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[13]107 Pa. 486 (1884).

[14]Commonwealth v. McGowan, 12 D. & C. 286.

[15]Commonwealth v. Shrope, 264 Pa. 246 (1919).

Most likely it will not be accepted in cases where defendant is indicted for a felony because *Commonwealth v. Buck*[16] is not authority and dictum in *Commonwealth v. Shrope*[17] decides it is improper.

It seems it is allowable where defendant is charged with a misdemeanor, although the punishment may be fine or imprisonment or both.[18]

Surely it may be pleaded in Pennsylvania where the defendant is charged with a light misdemeanor punishable only by a fine.[19]

A defendant may not plead nolo contendere to an indictment for statutory rape.[20] Is the conclusion of the court correct? It is based only on the dictum contained in the *Shrope* case. Why should any distinction be made as to the propriety of this plea where the indictment charges a felony and where it charges a misdemeanor? The criterion seems to be the magnitude or severity of the punishment, not the degree of the crime. Since it is true that convictions for misdemeanors sometimes carry with them greater punishments than convictions for felonies, it ought to follow as a matter of logic, that this plea is proper regardless of whether the indictment charges a felony or a misdemeanor so long as the punishment is not capital, since the plea has been permitted where the punishment imposed was imprisonment.[21]

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VIOLATION OF A STATUTE OR ORDINANCE AS EVIDENCE OF NEGLIGENCE

Today, more and more, we find that legislatures are enacting statutes defining duties which at common law

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[16]107 Pa. (1884).

[17]264 Pa. 246 (1919).

[18]Commonwealth v. Holstine, 132 Pa. 357 (1890).

[19]Commonwealth v. Shrope, 264 Pa. 246 (1919; Tucker v. U. S., 41 L. R. A. (N.S.) 70.

[20]Commonwealth v. McGowan, 12 D. & C. 286.

[21]Commonwealth v. Holstine, 132 Pa. 357 (1890).