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NOTES AND COMMENTS

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Will a judgment of conviction rendered in a criminal prosecution be admitted in evidence by the Colorado courts in a purely civil action to establish the truth of the facts on which such judgment was rendered? The answer to this question necessarily involves a careful consideration of two Colorado cases.[1] The earlier of the two, wherein such evidence was admitted, was decided in 1937. The latter case, decided in 1955, held such evidence to be inadmissible. The purpose of this discussion is to attempt to propound from the two decisions a rule of future practical applicability.

In *North River Inc. Co. v. Militello*,[2] the insured pleaded not guilty and was convicted on a charge of burning the insured property. Before trial on the criminal charge the insured sued the insurance company to recover on the policy. The record of the criminal action, then pending on review, was admitted in evidence in the civil action for the purpose of impeaching the credibility of the insured. After judgment on the insured's conviction had become final the insurance company moved in arrest of, and to vacate the judgment rendered for the insured in the civil action, upon the ground that the conviction as affirmed was a final and irrevocable determination of the fact that the property had been destroyed in fraud of the insurer, precluding recovery against the defendant company. The motion was overruled by the trial court. However, the Supreme Court held that denial of the motion was error, vacated the judgment, and entered an order for a new trial. In doing so, the Court said that logic compelled a relaxation of the long-followed rule of complete exclusion of evidence of a criminal conviction in such cases, and that greater weight should be given to the evidence when the fact of guilt was established beyond reasonable doubt in a trial in which the accused was surrounded by all the safeguards afforded by law. Moreover, the Court felt that this was particularly true when the occasion, as in the instant case, bore a close relation to an inter-party matter in that the defendant in the criminal action was convicted of defrauding the insurance company by the identical

1 In this connection, it is interesting to note that Mr. Justice Holland was the author of both opinions.

2 100 Colo. 343, 67 P. 2d. 625 (1937).

act resulting in the loss upon which he predicated his claim for recovery against the same company. The Court stated: [3]

> The record of conviction in the criminal case was admissible in evidence in this case, and when so admitted carried proof of the conviction to be considered as prima facie evidence of the fact that plaintiff destroyed or caused to be destroyed the property for which he now seeks to recover judgment in the amount of the insurance thereon. It is such presumptive proof as to shift the burden to him to establish his innocence thereof. When the established fact of guilt was presented upon the first opportunity, as here, it was sufficient to vitiate the civil judgment otherwise established.

By virtue of the *Militello* decision, it would seem that Colorado had in 1937, joined what Professor McCormick terms "the growing minority" of jurisdictions which have come to insist that "common sense and consistency of adjudication require that a judgment of conviction, offered against the person convicted in a later civil action involving some of the same issues (should) be admitted as evidence of the facts on which the judgment was based."[4]

The *Militello* case rested tranquilly in the Colorado Reports until 1955, when one Moyle sued defendant Brown for the wrongful

3 100 Colo. 343 at p. 347, 67 P. 2d. 625 at p. 627 (1937).
4 McCormick on Evidence, p. 618 (1954).

death of Moyle's minor son, alleging that Brown had caused the death of the child by driving an automobile in such a wantonly reckless manner as to strike the child, who was riding a bicycle on a public street.[5] At the trial, copies of an information charging Brown with manslaughter in the killing of the child, and a copy of the verdict finding him guilty of that charge were admitted over the objection of Brown, who had entered a plea of not guilty in the criminal action. The trial court, relying on the *Militello* case, directed a verdict for the plaintiff, leaving only the question of damages to the jury. The Supreme Court reversed on the ground that the admission of copies of the information and of the verdict finding Brown guilty of manslaughter was error. The Court stated:[6]

> The courts are almost unanimous in ruling that such evidence, *being evidence of the conviction of a traffic charge* of manslaughter *based on the operation of an automobile* in a civil case is inadmissible. (Emphasis supplied).

The only case law cited in support of the proposition that evidence of the prior criminal conviction was inadmissible was the West Virginia case of *Interstate Dry Goods v. Williamson*[7] and the A. L. R. annotation to that case.[8] Oddly enough, the *Williamson* case, to be discussed in more detail hereafter, *in no way involved the operation of an automobile.* The annotation following the case does state that the general rule "supported by the great weight of authority" is that a judgment of conviction or acquittal rendered in a criminal prosecution cannot be given in a purely civil action, to establish the truth of the facts on which it was rendered. However, in a more recent annotation by the same authority, it is stated that while the earlier cases justified the statement of a general rule of exclusion, the modern tendency seems to be to abandon any such general rule applicable to all criminal judgments. Moreover, it is stated that an increasing number of decisions have approved the admission of such evidence on the ground that the safeguards afforded the accused under criminal procedure are greater than those

5 Vol. 8, C. B. A. Ad. Sh. No. 4, p. 131; 290 P. 2d. 1105 (1955).
6 Vol. 8, C. B. A. Ad. Sh. No. 4 at p. 132, 290 P. 2d. 1105 at p. 1106 (1955)
7 91 W. Va. 156, 112 S. E. 301, 31 A. L. R. 258 (1922). (The report of the Moyle case, as it appears in the Advance Sheets, cites only the A. L. R. annotation *following* the West Virginia case. However, the West Virginia case itself is cited in the Moyle opinion as reported in 290 P. 2d. 1105 at p. 1106.)
8 31 A. L. R. 261.

in a civil action and that the convicted party therefore has no cause for complaint when evidence of his criminal conviction is admitted in the civil action. The latter annotation further points out that it may reasonably be argued that evidence of convictions for *minor* traffic violations should be excluded where the safeguards afforded the accused may be more or less perfunctory, and a moderate fine may be accepted as a matter of convenience.[9]

Concerning minor traffic violations, the 1953 Colorado Revised Statutes has a specific provision which is found under the chapter entitled *Automobiles and Other Motor Vehicles* and which reads as follows:[10]

> No record of the conviction of any person for any violation of this article shall be admissible as evidence in any court in any civil action.

However, in the *Moyle* case the prior crime was manslaughter. The fact that, while in the commission of that crime, Brown may or may not also have been guilty of one or more minor traffic violations, would seem to be merely incidental insofar as the applicability of the foregoing statutory provision is concerned. Possibly the Court entertained this view, since the *Moyle* opinion makes no reference whatever to the above statute.

The *Williamson* case, previously referred to as being the only case law cited in the *Moyle* opinion, held that in a civil suit to recover the value of certain property stolen from the plaintiff, the record of a conviction of the defendant of the larceny of the property was not competent evidence to establish the fact that the defendant stole the property. The most remarkable aspect of the *Williamson* case is that at the time the Supreme Court of West Virginia considered the question *the criminal conviction had already been reversed and the prosecution dropped altogether by the prosecutor.*[11] Consequently, this holding would appear to be rather dubious authority for the rule of exclusion, since the fact was that there was then no existing judgment of conviction for the Court to exclude.

The *Moyle* decision does not expressly overrule the *Militello* case. On the contrary, the *Militello* case is not mentioned in the

9 18 A. L. R. 2d. 1289, 1290.
10 13-4-140, '53 C. R. S.
11 91 W. Va. 156, 112 S. E. 391 at p. 302, 31 A. L. R. 258 at p 259, 260 (1922)

Moyle opinion, despite the fact that in a very well-written brief to the Supreme Court counsel for Moyle relied heavily on the earlier holding. Since the *Moyle* opinion does not refer to the *Militello* decision, it follows that both rules must now be the law in Colorado. That being so, it becomes necessary to distinguish two rules which, at first blush, appear to be contradictory.

Regardless of the language in the *Moyle* opinion, it is not probable that the Court intended to convey the impression that the crime of manslaughter is a minor traffic violation. Nor is it likely that the Court intended to infer that merely because the instrumentality used in the commission of such crime was an automobile, that the crime is therefore magically transformed into a minor traffic violation. The reason usually advanced for the rule of exclusion where a traffic violation is involved is that the traffic court proceeding is generally somewhat perfunctory, and the judgment rendered is often the result of expediency or compromise.[12] In the *Moyle* case the prior criminal conviction of Brown came only after a trial by jury in a court of record.[13] The criminal trial was neither perfunctory nor was the verdict the result of expediency or compromise. Therefore, the reason for the rule in regard to traffic cases would seem to be absent here, even if it be conceded that manslaughter with an automobile is nothing more than a minor traffic violation.

The leading cases which have adopted the rule of admissibility have generally involved the situation where a convicted criminal, as the plaintiff, seeks by a civil action to take advantage of his own wrong. Consequently, there has been some tendency to regard the rule as limited to that particular state of facts.[14] It is to be observed that in the *Militello* case the convicted criminal was the plaintiff and was seeking to recover on an insurance policy covering the building which he had been convicted of burning. On the other hand, in the *Moyle* case the convicted criminal was the defendant and was endeavoring to avoid the payment of damages arising from his criminal act. It is often said that sound public policy will not

12 18 A..L R. 2d. 1289, 1290. See also the commentary found in the Uniform Rules of Evidence, Rule 63 (20).
13 Criminal File No. C-1366, District Court in and for Adams County.
14 18 A. L. R. 2d. 1289.

permit a wrongdoer to profit by his own wrong. This rule is clearly applicable to the facts of the *Militello* case and probably justifies the admission of evidence of the prior criminal conviction. It is arguable that the rule is not applicable to the *Moyle* case because Brown was not seeking to "profit" but was merely defending against a civil action brought by the injured party. The troublesome question which this argument raises is: *Has not the convicted criminal "profited" if he is saved from paying the damages attendant to his criminal act?*

Nevertheless, as previously stated, there is some tendency in cases of this nature to admit the evidence of a prior conviction when the criminal is seeking to *collect* damages but to exclude such evidence where the criminal is attempting to avoid *paying* damages. While the logic behind this view may be debatable, the fact remains that some courts are inclined to place this limitation upon the rule of admissibility.

Assuming that our Supreme Court intended by the *Moyle* ruling to join the ranks of those courts who enforce the above-discussed limitation, then that decision merely limits the scope and application of the *Militello* case. If so, the two cases may be said to stand for the following proposition: Where a convicted criminal sues to collect damages for an injury resulting from his crime, the record of his prior criminal conviction will be admitted in the subsequent civil action as evidence of the fact that he committed the crime, the reason for the rule being that public policy will not permit a wrongdoer to profit by his own wrong. But where the convicted criminal is sued by the party injured as the result of the crime, such evidence will not be admitted because the wrongdoer will not be deemed to be seeking to profit by his own wrong.

One further distinction between the two cases under consideration probably deserves notice: In the *Militello* case the crime involved (arson) was one requiring a specific affirmative criminal intent; whereas, in the *Moyle* case, the crime in question (manslaughter) was not one requiring actual intent. This distinction would seem to be of little legal significance, unless the question of admissibility of evidence in such a situation is to be determined on the basis of the degree of badness of the party concerned. No cases from other jurisdictions have been found which express any such distinction. However, it may be that the Supreme Court of Colorado was impressed with the difference in the degree of culpability between Militello and Moyle and therefore decided the two cases on some theory of moral turpitude. Nevertheless, the later case does not give any indication that such a distinction was intended.

This discussion began with the stated purpose of resolving from the *Moyle* and *Militello* cases a rule capable of general application. The foregoing analysis seems to indicate that no such rule can be formulated—only future decisions by the Colorado courts can determine the true rule in Colorado.