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HOLLINGTON *v.* F. HEWTHORN AND COMPANY, LIMITED, AND ANOTHER.

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May 7, 11, 12, 28.

Evidence — Admissibility — Conviction — Motor-cars in collision — Negligence alleged against defendant driver—Evidence of conviction of defendant driver of careless driving—Res inter alios acta—Statement by person interested—Death of driver of plaintiff's car after action brought—Evidence of statement made by driver of plaintiff's car to police on day of collision—"Statement made . . . . at a time "when proceedings were pending or anticipated"—Evidence Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *s.* 1, *sub-s.* 3.

In an action arising out of a collision between two motor-cars on the highway in which the plaintiff alleged negligence on the part of the defendant driver the plaintiff sought to give evidence of —(*a*) a conviction of the defendant driver of careless driving, contrary to s. 12, sub-s. 1, of the Road Traffic Act, 1930, at the time and place of the collision, and (*b*) of a statement made to a police constable by the driver of the plaintiff's car (who had died after action brought) after the collision and after the constable had warned him, in accordance with s. 21 (*a*) of the Act, that the question of prosecuting him for reckless, dangerous, or careless driving would be considered :—

Held, (*a*) that, both on principle and authority, evidence of the conviction was inadmissible.

In the Estate of Crippen [1911] P. 108 ; *Partington* v. *Partington and Atkinson* [1925] P. 34 ; and *O'Toole* v. *O'Toole* (1926) 42 T. L. R. 245, overruled on this point.

(*b*) that, whether or not a statement made to a police officer, who is inquiring into the facts of a road accident, is admissible under s. 1, sub-s. 1, of the Evidence Act, 1938, depends, under s. 1, sub-s. 3, of the Act, on whether the person making it is a "person interested" and on whether proceedings are pending or anticipated which would involve a dispute as to any fact which the statement might tend to establish, regarding which no inference is necessarily to be drawn from the giving of the warning under s. 21 of the Road Traffic Act, 1930, that warning being of a different nature from the warning given to a suspected person under the judges' rules, as in *Robinson* v. *Stern* [1939] 2 K. B. 260, but in the present case the terms of the statement justified the inference that the person making it anticipated civil proceedings at least, and it was, therefore, rightly held to be inadmissible.

Decision of Hilbery J., ante p. 27, on these points affirmed, but on the facts reversed.

APPEAL from Hilbery J.

The plaintiff, Robert Henry Hollington, the owner of a motor-car, sued as the administrator of the estate of his son, Basil Thomas Edmund Hollington, who had died after action

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brought, and on his own behalf, claiming damages in respect of a collision which occurred at Abridge, Essex, on April 5, 1940, between the plaintiff's car, driven by B. T. E. Hollington, and a car owned by the first defendants, F. Hewthorn & Co., Ld., and driven by the second defendant, Ernest Arthur Poll. The defendants denied negligence on the part of the second defendant and pleaded contributory negligence. Owing to the death of B. T. E. Hollington, the plaintiff was unable to adduce any direct evidence of the accident, and he tendered in evidence, in addition to evidence as to the position and condition of the two vehicles after the collision, (*a*) a conviction of the defendant, Poll, for careless driving at the time and place of the collision, under s. 12 of the Road Traffic Act, 1930; (*b*) a statement made by B. T. E. Hollington to a police constable after the collision, and after the constable had warned him, in accordance with s. 21 (*a*) of the Act, that the question of prosecuting him for reckless, dangerous, or careless driving would be considered. Hilbery J. ruled that neither was admissible—(*a*) as being res inter alios acta; (*b*) as having been made at a time when proceedings were "anticipated," and, therefore, being expressly excluded by s. 1, sub-s. 3, of the Evidence Act, 1938 (1). On a submission of "no case" by the defendant, who called no evidence, Hilbery J. ruled that the plaintiff had established a prima facie case of negligence, and gave judgment in his favour for 100*l.* on his claim as administrator, and for 90*l.* 17*s.* 6*d.* on his own claim. The defendants appealed.

Casswell K.C. and *Holroyd Pearce* for defendants. There was no evidence to justify an inference of negligence by the defendant, Poll.

Denning K.C. and *Harold Simmons* for plaintiff. There are three questions which may fall for decision: (1.) Whether on the whole case it was a legitimate inference that the defendant was negligent. If so, there is an end of the matter. If not, (2.) Whether a conviction of the defendant of careless driving was admissible at common law; and (3.) Whether the statement made to the police by the deceased was admissible

(1) By s. 1, sub-s. 3, of the Evidence Act, 1938: "Nothing "in this section shall render "admissible as evidence any state- "ment made by a person inter- "ested at a time when proceedings "were pending or anticipated "involving a dispute as to any "fact which the statement might "tend to establish."

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under the Evidence Act, 1938. As to (1.) Hilbery J. was entitled to draw the inference which he drew, and the question is only whether it could legitimately be drawn, not whether this court would have drawn it. With regard to (2.), Hilbery J. ruled that the conviction was inadmissible as res inter alios acta. It is true that it would create no estoppel, but it is submitted that it was admissible in chief as prima facie evidence of the defendant's negligence. From the beginning of the eighteenth century a conviction was held admissible in subsequent civil proceedings so long as it was not founded on the evidence of the party suing. The exception was due to the fact that to admit the conviction in such a case would have been an indirect way of circumventing the disability of the party as a witness. Differences of opinion on this subject, however, are found among the greatest names. Gilbert C.B., who died in 1726, states the rule as above in his work on Evidence, 2nd ed., p. 30, sub tit. "Verdicts given in evidence." That was the standard work throughout the eighteenth century, and it is highly praised by Blackstone (Commentaries, 8th ed., bk. III., c. 23, p. 367). In *Gibson* v. *M'Carty* (1) Lord Hardwicke rejected evidence of a conviction because it might have rested on the evidence of the party. It is true that in *Rex* v. *Warden of the Fleet* (2) this class of evidence was said to be inadmissible, but in all the books that case is not referred to, and in *Rex* v. *Lyme Regis* (3) Buller J. said "12 Mod. is not a book of any authority." On the other hand, Buller's Nisi Prius, 7th ed., p. 245, puts the matter too favourably to the plaintiff when it refers to a conviction as *conclusive* evidence. That it clearly is not. [They referred to Peake on Evidence, Preface to 2nd ed., 1804; *Smith* v. *Rummens* (4); *Hathaway* v. *Barrow* (5); *Wilkinson* v. *Gordon* (6); *Blakemore* v. *Glamorganshire Canal Co.* (7); *Justice* v. *Gosling* (8).]

The disability of parties and their spouses was taken away by the Evidence Acts, 1851 and 1853, but, as the accused person could not give evidence in a criminal cause till 1898, it might have been said before that date to be unfair to allow evidence of a conviction to be given. In *In the Estate of Crippen* (9)

(1) (1736) Cases temp. Hardwicke 311.
(2) (1699) 12 Mod. 337.
(3) (1779) 1 Doug. 79, 83.
(4) (1807) 1 Camp. 9, 11.
(5) (1807) 1 Camp. 151.
(6) (1824) 2 Addams, 152, 160, 161.
(7) (1835) 2 C. M. & R. 133.
(8) (1852) 12 C. B. 39.
(9) [1911] P. 108.

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evidence that a husband had been convicted of murdering his wife was admitted, rightly, it is submitted, as evidence not only of the fact of conviction, but of the murder. *In the Estate of Crippen* (1) was followed by Ridley J. in *Mash* v. *Darley* (2), which was affirmed on different grounds. *Partington* v. *Partington and Atkinson* (3) and *O'Toole* v. *O'Toole* (4) are difficult to reconcile with the view that a conviction is inadmissible. A verdict of acquittal might also be admissible, but, owing to the burden of proof resting on the prosecution, its weight might be less. The verdict of a coroner's jury is not admissible: *Barnett* v. *Cohen* (5), which is merely cited to distinguish it. [They also cited *Rex* v. *General Medical Council. Ex parte Spackman* (6) and the notes to *The Duchess of Kingston's Case* (7).] There is another branch of the law that supports the plaintiff's contention that the conviction of the defendant is admissible. When a felony is committed which also inflicts a civil wrong, no civil action can be brought by the person injured until the felon has been prosecuted: see *Smith* v. *Selwyn* (8) and *The Amerika* (9). It is submitted that where the person injured has been so delayed in bringing his civil action that an important witness has died, he must be able to rely on the conviction obtained on the witness's evidence, as prima facie evidence in his action. For a conviction not to be admissible in such a case would be contrary to justice. Cases which are said to be exceptions to the general rule that convictions are not admissible in a civil actions as being res inter alios acta are *Davis* v. *Nest* (10), *Eaton* v. *Swansea Waterworks Co.* (11) and *Petrie* v. *Nuttal* (12). These cases are, however, really examples of the general rule that a conviction is prima facie evidence in a civil action. The decision of a judicial tribunal, after going thoroughly into the evidence, and after full opportunity for the prisoner to give evidence, must be admissible in evidence. Since *Harvey* v. *Regem* (13) was decided in 1901, there has been a universal tendency to admit a conviction as prima facie evidence.

On the second question, whether the statement made to the

(1) [1911] P. 108.
(2) [1914] 1 K. B. 1; in C. A. [1914] 3 K. B. 1226.
(3) [1925] P. 34.
(4) (1926) 42 T. L. R. 245.
(5) [1921] 2 K. B. 461.
(6) [1942] 2 K. B. 261.
(7) (1776) 2 Sm. L. C., 13th ed., 644, 667.
(8) [1914] 3 K. B. 98.
(9) [1917] A. C. 38, 50.
(10) (1833) 6 Car. & P. 167.
(11) (1851) 20 L. J. (Q. B.) 482.
(12) (1856) 25 L. J. (Ex.) 200.
(13) [1901] A. C. 601.

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police was admissible, Hilbery J. went too far in holding that after an accident on the highway proceedings must be anticipated. The existence of "knock for knock" agreements between insurance companies normally comes in to prevent proceedings. A statement made by a party before he has an opportunity of thinking out his case may be of great value. Further, s. 1, sub-s. 3, of the Evidence Act, 1938, does not say "when proceedings were . . . . reasonably anticipated" and the proceedings "anticipated" must be anticipated by the person making the statement, and involve a dispute as to some fact dealt with in the statement. *Robinson* v. *Stern* (1) is clearly distinguishable from the present matter. There there was a caution under the judges' rules, and when a constable has made up his mind to prefer a charge and so administers that caution it is clear that proceedings are anticipated. The statutory warning under s. 21 (*a*) of the Road Traffic Act, 1930, however, is very different. It is merely that the question of a prosecution "will be considered," and no one can then say whether consideration will lead to proceedings or not. It does not without more involve an inference that proceedings are anticipated. Where a witness is alive, the question whether he anticipated proceedings can be investigated as a question of fact, but where he is dead his statement should not be excluded without strict proof that proceedings were anticipated.

Casswell K.C. in reply. The plaintiff is asking the court to make a revolutionary change in the law of evidence as it has stood for two-and-a-half centuries. The issue before the magistrates who convicted the defendant, Poll, was a different issue from that before Hilbery J. Any principle laid down for the admission of evidence ought not to cover a case where the res is different. It is not sufficient to say "pars rei is the same." If a conviction is to be admissible, the best evidence of it must be given. The best evidence would be to call as a witness each magistrate who would say: "I heard So-and-so say such and such"—which would be hearsay—"and as a result I formed the opinion that the "defendant was negligent"—thereby arrogating to himself the decision of the very question which the civil court has to decide. *Rex* v. *Warden of the Fleet* (2) is a full report, unlike the rest of the cases in 12 Modern Reports, and, moreover, it is reprinted in Cases determined by Sir John Holt,

(1) [1939] 2 K. B. 260. (2) 12 Mod. 337; Holt, 133.

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1698–1710. The case is an authority that a conviction of battery is not evidence in an action for trespass for the same battery. [He referred to *Rex* v. *Horton* (1), and *Reg.* v. *Fontaine Moreau* (2).] The principle of *In the Estate of Crippen* (3) is not necessarily applicable in the King's Bench Division, and has been doubted even in the Probate, Divorce and Admiralty Division by Hill J., who followed it in the undefended case of *O'Toole* v. *O'Toole* (4), relying on *Partington* v. *Partington and Atkinson* (5). At best it amounts merely to a doubtful relaxation of the ordinary rule in a special class of case. As to the second point, if the judge had looked at the statement made by the deceased man, he would have found that a reasonable inference to be drawn from it was that he must have anticipated proceedings. Apart from *Robinson* v. *Stern* (6), the only authority appears to be *Plomien Fuel Economiser Co.* v. *National Marketing Co.* (7), which deals with interest, not anticipation.

Cur. adv. vult.

1943. May 28. The judgment of the court was read by GODDARD L.J. who, after stating the facts and reviewing the evidence, continued: The plaintiff not only seeks to uphold the judgment for the reasons given by Hilbery J., but he also contends that evidence tendered by him was wrongly excluded. He, therefore, asks that, if this court should find that there was no evidence to support the judgment, there should be a new trial at which evidence tendered by him and rejected could be given. Hilbery J. held that the plaintiff had established a case. We are unable to agree that this inference was justified. On the evidence which was before him we do not think that a finding of negligence against the defendant can be supported.

The evidence which was rejected by the judge and which Mr. Denning contends ought to have been received was, first, a certificate that the defendant, Poll, had been convicted of driving without due care and attention on the day and in the parish in question, and, secondly, the signed statement made by the deceased driver to the police constable soon after the accident, which, it is said, is made evidence by the Evidence

(1) (1817) 4 Price 150.
(2) (1848) 11 Q. B. 1028.
(3) [1911] P. 108.
(4) 42 T. L. R. 245.
(5) [1925] P. 34.
(6) [1939] 2 K. B. 260.
(7) [1941] Ch. 248.

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Act, 1938. Hilbery J. rejected the first on the ground that it was res inter alios acta, and he held that he was precluded from admitting the second by the judgment of this court in *Robinson* v. *Stern* (1).

Dealing first with the conviction, Mr. Denning contends that, as he has to prove negligence as part of his case, he is entitled to put in the conviction, not as conclusive, but as prima facie evidence that the defendant was driving negligently. He admits that he must prove by oral evidence, if it is not admitted, that the defendant is the person who was convicted, and also, as we understand his argument, that he would in some manner have to identify the negligence of which the defendant was convicted with that which caused the accident. The conviction will then still not be an estoppel, and it will be open to the defendant to show, if he can, that he ought not to have been convicted or that the negligence of which he was convicted did not cause the accident, but Mr. Denning says that the fact of his conviction is prima facie evidence that the defendant was guilty of negligence.

Many years ago in *Isherwood* v. *Oldknow* (2) Lord Ellenbrough, when considering the maxim "Communis error facit "jus," said that it was more true to say that "Communis "opinio is evidence of what the law is," and the first observation we would make on this part of the case is that it has been the invariable practice of the judges for many years, certainly for so long as any member of the court has been in the profession, to reject this class of evidence, so that nowadays counsel have ceased to tender it in accident cases. It is, of course, no reflection on counsel in this case that they contended for its admission, because here there is the unfortunate fact that the material witness is dead and they had to consider whether there was evidence which, according to the rules of law, was admissible, whatever the prevailing practice might be, but where it is clear that over a long period there has been a unanimous opinion, not only of most modern text-book writers, but among judges of first instance, that some particular class of evidence is inadmissible, the court should be slow to differ from it unless it can be clearly shown that the communis opinio, which we are satisfied has hitherto prevailed, is based on wrong premises.

Before dealing with the authorities, let us consider the question in the light of the principles of modern law relating

(1) [1939] 2 K. B. 260. (2) (1815) 3 M. & S. 382, 396.

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to evidence and see whether they support the admissibility of the conviction on such an issue as arises in this case. We say "of modern law" because in former days, it is fair to say, the law paid more attention to the competency of witnesses than to the relevance of testimony. We are apt to forget that it was not only the parties who were incompetent, but also any person who was or could be interested in the question at issue, so that parties would sometimes go to court with releases already executed under seal ready to be tendered to a witness to free him from any possible obligation that might prove an objection to his giving evidence. It was not till the Evidence Act, 1843, that interested witnesses, other than the parties, their husbands and wives, were rendered competent, and by the Evidence Act, 1851, the parties, and by the Evidence Amendment Act, 1853, their spouses, were at last enabled to give evidence. The law being what it was before these statutes were passed, it is not surprising to find Sir FitzJames Stephen saying, in his Digest of the Law of Evidence, 12th ed., p. 217, Note XVIII., that the law of competency "was formerly the most, or nearly "the most important and extensive branch of the law of "evidence," and that rules of incompetency are "nearly "the only rules of evidence treated of in the older authorities." But, nowadays, it is relevance and not competency that is the main consideration, and, generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded.

Is it, then, relevant to an issue whether the defendant, by negligent driving, collided with and thereby injured the plaintiff, to prove that he had been convicted of driving without due care and attention on the occasion when the plaintiff was injured? As stated above, Mr. Denning admits that he would have to identify the negligent driving which formed the subject of the charge with that which caused the injury to the plaintiff, for the record of the conviction itself would show no more than that the defendant was convicted for so driving on a certain day and in a certain parish or place. In truth, the conviction is only proof that another court considered that the defendant was guilty of careless driving. Even were it proved that it was the accident that led to the prosecution, the conviction proves no more than what has just been stated. The court which has to try the claim for damages knows nothing of the evidence that was

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before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision. Moreover, the issue in the criminal proceedings is not identical with that raised in the claim for damages. Assume that evidence is called to prove that the defendant did collide with the plaintiff, that has only an evidential value on the issue whether the defendant, by driving carelessly, caused damage to the plaintiff. To link up or identify the careless driving with the accident, it would be necessary in most cases, probably in all, to call substantially the same evidence before the court trying the claim for personal injuries, and so proof of the conviction by itself would amount to no more than proof that the criminal court came to the conclusion that the defendant was guilty. It is admitted that the conviction is in no sense an estoppel, but only evidence to which the court or a jury can attach such weight as they think proper, but it is obvious that once the defendant challenges the propriety of the conviction the court, on the subsequent trial, would have to retry the criminal case to find out what weight ought to be attached to the result. It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth, it is because his opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not. The well recognized exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant. Another rule of general application is that only the best evidence is admissible. Where the only witness to a fact is dead, a party is often placed in great difficulty, but, with certain well-settled exceptions, the death of a witness does not on that account render admissible evidence that would be objectionable if he were still alive. These exceptions are (1.) dying declarations, in the case only of murder or manslaughter; (2.) declarations in the course of business or professional duty; (3.) declarations against interest; (4.) declarations by testators as to contents of their wills in certain cases; (5.) declarations as to public and general rights, but

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not as to particular facts from which a right or custom can be proved; and (6.) certain declarations as to pedigree. To these must be added certain statutory provisions as to putting in depositions taken under the Indictable Offences Act, 1848, and also statements now made evidence under the Evidence Act, 1938, but none of these matters relate to the subject that we have now to consider, and the fact that the plaintiff's son has since died affords no ground for allowing a conviction, which would not have been evidence had he been alive, to be now put in. Hilbery J. rejected the conviction on the ground that it was res inter alios acta, which is the reason generally given for not admitting that class of evidence. No doubt, it is difficult for a layman to understand why it is that if A prosecutes B, say, for doing him grievous bodily harm, and subsequently brings an action against him for damages for assault, this doctrine should apply so that he cannot use the conviction as proof that B did assault him. The "alios" can only be the Crown who, in the case of what is commonly called a private prosecution, is no more than the nominal prosecutor. It is for this reason that we have stressed the question of relevancy, and, indeed, it is relevancy that lies at the root of the objection to the admissibility of the evidence. Other reasons can, of course, be given for the rule, and in other cases would have great force. A judgment obtained by A against B ought not to be evidence against C, for, in the words of the Chief Justice in the *Duchess of Kingston's Case* (1), "it would be unjust to bind any person who could not be "admitted to make a defence, or to examine witnesses or to "appeal from a judgment he might think erroneous: and "therefore . . . . the judgment of the court upon facts found, "although evidence against the parties, and all claiming "under them, are not, in general, to be used to the prejudice "of strangers." This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case. A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually

(1) (1776) 2 Sm. L. C., 13th ed., 644.

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affects when the existence of that state is a fact in issue. Thus, if A sues B, alleging that owing to B's negligence he has been held liable to pay x*l.* to C, the judgment obtained by C is conclusive as to the amount of damages that A has had to pay C, but it is not evidence that B was negligent: see *Green* v. *New River Co.* (1), and B can show, if he can, that the amount recovered was not the true measure of damage.

We now turn to the authorities. Mr. Denning first relies on certain passages in Gilbert on Evidence, described by Blackstone as an excellent treatise which it is impossible to abstract or abridge without losing some beauty and destroying the chain of the whole: Commentaries, 8th ed., bk. III., chap. 23, p. 367. The author had long judicial experience as Lord Chief Baron, both in Ireland and in England, and his writings have always been held in high repute. This book, however, has, from the point of view of the modern lawyer, the disadvantage already referred to that it deals so much more with competency than any other subject. On the point we are now discussing the learned author lays down that a verdict on an indictment shall not be given in evidence if found only on the oath of the party in the cause, for that would enable him to give evidence indirectly on his own behalf, but he maintains that, if the verdict was found partly on other evidence, it is admissible and ought to sway in the determination of the same fact, whether the verdict be on an indictment or action. It may be diminished in point of authority, he says, by showing that it was in part founded on the oath of the party, and the jury are to respect it no further than they presume it given on the credit of the other witnesses. The learned author cites no authority for this opinion other than stating: "This is the practice ex relatione Mr. Phipps "1700" (which was only two years after Gilbert was called to the bar), and it would seem to confront a jury with an impossible task. The editor of the seventh edition of Buller's Nisi Prius evidently took the view that a verdict obtained even in part on a party's evidence, could not be admitted: see p. 245, note (*a*), and it is fair to say that he gave no clear assistance on the matter one way or the other. The note to which refeience has just been made and for which Bridgman, who edited the seventh edition is responsible, says: "the effect "of verdicts in criminal cases on the civil rights of the parties

(1) (1792) 4 Term Rep. 589.

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"does not appear to be clearly settled." (1). This was the view of the author of Peake on Evidence, as is shown in his preface to the second edition published in 1808, and at p. 46 he sums up the cases to which he has referred in the earlier pages by saying that they seem to show that such evidence is in no case admissible although he says "this is opposed "to the dictum of Gilbert." Starkie, writing in 1833, says (2nd ed., vol. i., p. 235): "As a general rule it seems that a "verdict or judgment in a criminal case is not evidence of "the fact upon which the judgment was founded, in a civil "proceeding." For this he cites *Rex* v. *Warden of the Fleet* (2). It is true that Modern Reports have been said to be of little or no authority, but this case is also reported in almost precisely the same terms in the volume of reports that bears the name of Sir John Holt, and, unlike many of the cases in this series, this is a full report and, as we have just said, is treated as an authority by Starkie. In the case as reported it was laid down by the full court in a trial at bar that a conviction could be no evidence against the warden on a debt on a bond, nor for the prisoner in false imprisonment against the warden, because it would not be between the same parties, for conviction at the suit of the King for battery cannot be given in evidence in an action for trespass for the same battery. The next case is *Gibson* v. *M'Carty* (3), where the admission of a conviction was opposed on the ground that it might have been obtained on the evidence of the party. Lord Hardwicke, then Lord Chief Justice of the King's Bench, rejected the evidence on this ground, but referred to a case relating to the family of the Hilliards. The case he had in mind is evidently *Hillyard* (sic) v. *Grantham* (4), in which he had been counsel and to which he refers in some detail in *Brownsword* v. *Edwards* (5). In that case he said that at trial in the King's Bench on a question of legitimacy the sentence of a consistory court that the father and mother

(1) *Reporter's Note.* In *Boileau v. Rutlin* (1848) 2 Ex. at p. 677, Parke B. stated with reference to Buller's Nisi Prius that "the "treatise was written by Lord "Bathurst, though published in "the name of Mr. Justice Buller."

(2) 12 Mod. 337; Holt, 133. This is the folio volume of "Cases determined by Sir John "Holt, 1688–1710," published 1738. There are two other, and much later, series of "Holt's "Reports," Nisi prius, published 1818 by F. L. Holt, and Equity cases, by William Holt, 1845.

(3) Cases temp. Hardwicke, 311.

(4) (Unrep.)

(5) (1751) 2 Ves. Sen. 245.

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had lived in fornication was rejected, "first because it was a "criminal matter and could not be given in evidence in a "civil cause, and, secondly, because it was res inter alios "acta and could not affect the issue." The importance of this is that it would seem that, when ruling on the evidence in *Gibson* v. *M'Carty* (1), Lord Hardwicke had in mind the doctrine that res inter alios acta could not be relevant to the issue. *Blakemore* v. *Glamorganshire Canal Co.* (2) shows that the earlier cases, while based on nice considerations as to competency of witnesses, might all have been decided on the ground that the evidence tendered was res inter alios acta and so inadmissible. The judgment in that case was delivered by Parke B., and is a clear authority against the admission of this class of evidence. So, too, is the passage in the opinion of Blackburn J., delivered to the House of Lords in *Castrique* v. *Imrie* (3), where he says, without any qualification, that "a "judgment of conviction on an indictment for forging a bill "of exchange, though conclusive as to the prisoner being a "convicted felon, is not only not conclusive, but is not even "admissible evidence of the forgery in an action on the bill."

Turning now to the cases on which Mr. Denning relies, in *Wilkinson* v. *Gordon* (4), Sir John Nicholl, dealing with the question whether the record of a conviction could be admitted to prove a bigamy, said: "I apprehend the true "rule to be that a record of conviction is evidence of the "same fact in a civil cause, only that it is not conclusive "evidence," and for this he cited Gilbert on Evidence. This was a case in the Prerogative Court and decisions at Doctors' Commons were not binding on the courts at Westminster. The decision was given in 1824, and so was before the judgment of the Court of Exchequer in *Blakemore's* case (2). Moreover, the exact contrary was ruled in 1858 by Sir Cresswell Cresswell as judge ordinary, in *March* v. *March* (5), where, in giving leave to prove a divorce case based on bigamy by affidavit evidence, he said: "Remember that bigamy must be proved. "Proof of the conviction of bigamy will not suffice." It may frequently happen that where bigamy or any other crime has to be proved in a civil proceeding, the prisoner on his trial had pleaded guilty. Proof of the confession by a witness present at the trial is admissible because an admission can

(1) Cas. temp. Hardwicke, 311.
(2) 2 C. M. & R. 133.
(3) (1870) L. R. 4 H. L. 414, 434.
(4) 2 Addams, 152, 161.
(5) (1858) 28 L. J. (P. & M.) 30.

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always be given in evidence against the party who made it. In the present case, had the defendant before the magistrates pleaded guilty or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved, but not the result of the trial.

It remains to deal with three more recent cases, all in the Probate, Divorce and Admiralty Division. The first is *In the Estate of Crippen* (1), where the administration of the estate of an intestate wife was sought, passing over the legal personal representative of her husband, who had been convicted of murdering her. Sir Samuel Evans P. admitted the conviction as proof that he had murdered her. The only point that was actually decided was that the fact that the husband was a convicted felon was a sufficient special circumstance to justify passing over his personal representative, and so far the decision is beyond criticism, but the President went on to consider the cases, some of which have already been cited in this judgment, and came to the conclusion that he could admit the conviction as prima facie proof that the husband had murdered his wife. The convenience of the decision is obvious, but we cannot agree that the authorities support it. It is difficult to understand how the learned President regarded the judgment of Bramwell L.J. in *Leyman* v. *Latimer* (2), which he quoted but apparently disregarded. That was a libel action, and the words complained of were that the plaintiff was a convicted felon, which was strictly true, but later in the libel he was called also a felon editor. To justify the last words, the lord justice said that the defendants must show that the plaintiff had actually committed felony, and then said: "It is plain from the numerous authorities cited "in Taylor on Evidence . . . . that a conviction for felony is "res inter alios acta, and of itself is no evidence in any civil "proceeding that the person convicted has committed a felony." One would have thought this was a sufficiently clear ruling by a very high authority. Nor can we agree with the view that the President took of the passage in the opinion of Blackburn J. in *Castrique* v. *Imrie* (3), already cited. With all respect to the opinion of the learned President, we do not think that the authorities justified him in admitting the conviction as proof that the husband had murdered his wife. The next case is *Partington* v. *Partington and Atkinson* (4).

(1) [1911] P. 108.
(2) (1878) 3 Ex. D. 352, 354.
(3) L. R. 4 H. L. 414, 434.
(4) [1925] P. 34.

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There a husband, who had previously been found to have been guilty as a co-respondent, petitioned for divorce. Counsel for the co-respondent in the husband's suit put in the decree in the former suit, apparently without objection, and the petitioner's counsel appear to have accepted that it was some evidence against him, though not an estoppel. The authorities we have been considering were not cited, and the matter seems to have been treated as a matter of practice. Horridge J. admitted the decree as some evidence, though not as an estoppel, and allowed the petitioner to give evidence denying the adultery which had been found against him in the previous suit. Then, in *O'Toole* v. *O'Toole* (1), Hill J. admitted proof of a conviction of the respondent of perjury in swearing that he had not had connexion with a certain woman as evidence that he had committed adultery with her. Hill J. obviously had considerable doubt on the matter, but thought *Partington's* case (2) justified him in admitting the evidence. In our opinion, these three cases go beyond and are contrary to the authorities and ought not to be followed in future.

There is one further observation we may make on this part of the case. The contention that a conviction or other judgment ought to be admitted as prima facie evidence is usually supported on the ground that the facts have been investigated and the result of the previous investigation is, therefore, at least some evidence of the facts that thereby have been established. To take the present case, it could be said that the conviction shows that the magistrates were satisfied on the facts before them that the defendant was guilty of negligent driving. If that be so, it ought to be open to a defendant who had been acquitted to prove it, as showing that the criminal court was not satisfied of his guilt, although the discussion by text-book writers and in the cases all turn on the admissibility of convictions and not of acquittals. If a conviction can be admitted, not as an estoppel, but as prima facie evidence, so ought an acquittal, and this only goes to show that the court trying the civil action can get no real guidance from the former proceedings without retrying the criminal case. Without dealing with every case and text-book that were cited in the argument, we are of opinion that, both on principle and authority, the conviction was rightly rejected.

Before parting with this question, we may add that in a

(1) (1926) 42 T. L. R. 245. (2) [1925] P. 34.

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note in the Law Quarterly Review, vol. xlii., p. 144, it is suggested that these three cases in the Probate Division can be supported by the application of the maxim "Omnia "præsumuntur rite esse acta." The author of the note would limit the admissibility as prima facie evidence of judgments which are res inter alios acta to those cases in which the State has an interest in seeing that the truth of the facts necessary to support the judgments is established, that is to say, convictions and decrees nisi, and this, he contends, is required as a matter of common sense. If such an exception is made, it ought to be by legislation and not by judicial decision. In any case, it is a very debatable point whether more weight ought to be given to a conviction or a decree nisi than to any other judgment. The King's Proctor does not, and cannot, investigate every case in which a decree nisi is granted. With the enormous increase in divorce cases that has taken place in the last twenty years, it would be impossible to inquire into more than a very small proportion, nor do we see that there is any more reason why the decision of a criminal court, whether a court of summary jurisdiction, quarter sessions or assizes, should be considered of greater evidential value than one given in a court exercising civil jurisdiction. If a conviction of murder is admissible, so must one be of a motoring or licensing offence, and to say that the State has an interest in summary convictions of this sort so as to attribute particular value to them as evidence, seems to us, with all respect, to be more theoretical than practical. In many, perhaps in most, cases the correctness of the conviction would not be questioned, but where it is, its value can be assessed only by a retrial on the same evidence. However convenient the other course may be, it is, in our opinion, safer in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal.

The last point that arises is whether the statement made by the deceased to the police constable ought to have been admitted under the provisions of the Evidence Act, 1938. Hilbery J., without looking at the statement, refused to admit it, holding that the question of its admissibility was concluded by the judgment of this court in *Robinson* v. *Stern* (1). The question turns on s. 1, sub-s. 3, of the Act

(1) [1939] 2 K. B. 260.

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which renders inadmissible a statement by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish. *Robinson* v. *Stern* (1) did not decide that a statement made to a constable who is inquiring into the facts of a road accident can never be admitted. It depends on whether the person making it is interested, as, no doubt, ordinarily the driver of a car involved in the accident would be, and also on whether proceedings are pending or anticipated. To enable the court to decide on the admissibility of the statement, the court is permitted, by s. 1, sub-s. 5, to look at it, and then draw any reasonable inference from its form and contents. That is what this court did in the case cited, and they drew the inference that the defendant in that case must have anticipated proceedings. We have looked at the statement that was tendered in evidence in the present case, and counsel have agreed that the warning required by s. 21 of the Road Traffic Act, 1930, was given to the deceased before he made it. In the circumstances of this case, we do not draw any inference from that fact. It was not the same sort of warning, nor were the circumstances in which it was given the same, as in *Robinson* v. *Stern* (1). Here we find from the statement that the defendant at first practically admitted that the accident was his fault, but some time afterwards came and said it was the fault of the deceased. In these circumstances we think that the deceased must have anticipated the likelihood at least of civil proceedings and, consequently, the statement was not admissible. The result is that the defendant's appeal succeeds; and there is no ground for sending the case back for a new trial. Judgment will be entered for the defendant with costs here and below.

Appeal allowed.

Solicitor for defendants: *P. A. Gascoin.*
Solicitors for plaintiff: *Leader, Henderson & Leader.*

(1) [1939] 2 K. B. 260.

J. W. H.