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(a) - Introductory

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Chapter 43 - Judgments

Section 3. - Judgments as Evidence Against Strangers

(a) - Introductory

43-76 It has already been seen (at paras 43-01 et seq.) that all judgments are conclusive as to their nature and effect, and (at paras 43-10 et seq.) that the effect of a judgment in rem is conclusive as to the state of things thereby declared or decreed, and that these effects cannot be controverted by anyone, whether a party to the relevant proceedings or not. In some cases however it has been sought to rely on a previous decision as affecting a non-party on a wider basis. In such cases, the question is not whether the judgment is *binding*, but whether it is or is not admissible in evidence. The most common situations in civil cases where a party wishes to prove a previous finding are (a) where a claimant in an action in tort wishes to prove criminal conduct amounting to the tort by relying on the defendant's conviction for the offence which that conduct constitutes; (b) where a conviction is prayed in aid as justification by a defendant in a defamation suit; and (c) where the spouse of a person cited as co-respondent in proceedings, where a divorce is granted, on the ground of adultery, wishes to rely on that finding of adultery in his or her own divorce proceedings. Strangely, perhaps, there have been few discussions of this problem in civil cases involving the similar fact rule, where the problem might reasonably be expected to have arisen. The paradigm example in criminal cases is probably the case of the man accused of handling where the Crown wishes to prove that the goods were stolen by reference to the conviction of the thief for stealing them. Legislation, considered below, has made convictions available in many situations where they, or the facts on which they were based, are relevant to prove a fact in issue. This is so both in civil cases (as a result of the Civil Evidence Act 1968) and in criminal cases (as a result of the Police and Criminal Evidence Act 1984). The starting point for an understanding of the present law must still be the common law which underlies the statutory exceptions.

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(b) - At common law

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Chapter 43 - Judgments

Section 3. - Judgments as Evidence Against Strangers

(b) - At common law

43-77 At common law a judgment in personam (whether delivered in civil or criminal proceedings) is no evidence of the truth either of the decision or of its grounds (whether findings of fact or the legal consequences of those findings [529]), between strangers, or a party and a stranger,
[530]

except upon questions of public and general interest; in bankruptcy, administration and patent cases, to a limited extent; or when so operating by contract, admission or acquiescence.

Footnotes

529 *Ward v Savill [2021] EWCA Civ 1378* at [83], [86].

530 *Hollington v F Hewthorn & Co Ltd [1943] K.B. 587.* The rule in *Hollington* is about the admissibility in English proceedings of findings and decisions of courts and tribunals in proceedings between different parties; it has no application as between different stages of proceedings between the same parties: *Crypto Open Patent Alliance v Wright [2021] EWHC 3440 (Ch)*; *Bailey v Bailey [2022] EWFC 5; [2022] 2 F.L.R. 829* at [17].

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(i) - Principle

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Chapter 43 - Judgments

Section 3. - Judgments as Evidence Against Strangers

(b) - At common law

(i) - Principle

Against strangers

43-78 This rule was finally settled in *Hollington v F Hewthorn & Co Ltd*[531] although there were decisions to the contrary effect,[532] and the reasons for the rule have not always been perceived. Such judgments, when tendered against strangers, are sometimes said to be excluded as opinion evidence[533] sometimes as hearsay[534]; but more commonly on the ground of res inter alios acta (or judicata) alteri nocere non debet (things done (or judgment) between strangers should not affect another party), it being considered unjust that someone should be affected, and still more be bound, by proceedings in which he could not make defence, cross-examine or appeal.[535] This, however, though a legitimate ground for refusing conclusiveness to such judgments, seems no satisfactory reason for denying them admissibility, since it is to be remembered that the objection of res inter alios acta will not suffice to exclude other and less solemn acts of strangers if relevant to the issue.[536] It may be, however, that the weight to be accorded to a previous judgment (legitimately held not to be conclusive) is peculiarly difficult to assess without reconsidering the evidence on which it was based, and that consequently, if relevant, such evidence should be presented again.[537] A further explanation for the rule that is sometimes stated is that if a person is not to be bound by the acts of strangers, neither should they be given in evidence against them.[538] But there is no necessary connection between the two, and even a person's own acts, though generally admissible against them if relevant, are in the vast majority of cases not conclusive.

For stranger against parties

43-79 At common law, judgments in personam are said not to be evidence for a stranger even against a party, because their operation would thus not be mutual.

The principal authority which settled the common law was the decision of the Court of Appeal in *Hollington v F Hewthorn & Co Ltd*.[539] In that case, the court's principal objection was that the previous conviction was no more than the expression of the opinion of the tribunal as to the guilt of the accused, and as such was irrelevant at the second trial. The court also stressed the difficulty of identifying the conduct which was the subject-matter of the conviction.[540] It also took the practical view that findings of fact in, for example, motoring cases in magistrates' courts or in undefended divorce proceedings may be qualitatively different from certain other adjudications. The case has been criticised, and it has even been said that it is generally considered to have been wrongly decided.[541] It is thought, however, that these three objections are forcible ones, and that a relaxation of the rule against hearsay in respect of former testimony would have been the most satisfactory way of dealing with the problem of the dead witness (which arose in *Hollington v F Hewthorn & Co Ltd* itself). This was achieved by Pt I of the Civil Evidence Act 1968 (see now Civil Evidence Act 1995); but the legislature accepted the view that these provisions by themselves would not be sufficient.[542]

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Whichever policy is regarded as preferable, it is submitted that there are intelligible reasons for that adopted by the courts, and the various factors which have been outlined in this paragraph provide a composite rationale for the doctrine (which is still effective in relation to a wide range of verdicts) which was not sufficiently articulated before *Hollington v F Hewthorn & Co Ltd*. Notwithstanding criticisms of the decision which have high authority,[543] and the fact that the courts of several Commonwealth countries have declined to follow it,[544] *Hollington v F Hewthorn & Co Ltd* was treated as clear authority by the Privy Council in *Hui Chi-ming v R*.[545]

Consequently it is safe to say that in England the rule still applies in all cases not covered by a common law exception (see paras 43-82 to 43-85) or the various statutory exceptions (see paras 43-86 et seq.).[546] Thus the conviction of A for theft would prior to the coming into force of the Police and Criminal Evidence Act 1984 have been inadmissible as against B where the latter was charged with handling the goods which A had stolen.[547]

In *Al-Hawaz v The Thomas Cook Group Ltd*,[548] the scope of the rule in *Hollington v F Hewthorn & Co Ltd* was challenged. It was argued that the decision is only binding authority on the admissibility of previous *criminal* convictions. Whilst accepting that this originally would have been correct, the court held that the decision had been applied to *civil* judgments in subsequent cases by higher courts. Moreover, the reasoning of *Hollington* is logically applicable to earlier civil judgments; both criminal and civil judgments are technically expressions of opinion and inadmissible as such. The court affirmed that the principles adumbrated in *Hollington* remain applicable to findings in earlier civil cases as well as earlier criminal cases. See *R. (PM) v Hertfordshire County Council*[549] where, citing passages from Ch.43 of Phipson, the court held that the local council was not entitled to simply adopt the decision of the First-tier Tribunal as to the age of the claimant, as the council was a stranger to those proceedings. The *Hollington* principles were affirmed in relation to civil judgments by Christopher Clarke LJ (obiter) in the Court of Appeal in *Hoyle v Rogers* where he said:

> "As the judge rightly recognised the foundation on which the rule must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ("the trial judge"), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard."[550]

The rule in *Hollington v F Hewthorn & Co Ltd* does not, however, apply in inquisitorial or regulatory proceedings.[551]

Footnotes

531 See above; and see *Natal Land Co v Good (1868) L.R. 2 P.C. 121* at 133; *R. v Kingston (Duchess) (1776) 29 How. St. Tr. 355*. Applied in *Daniel v St George's Healthcare NHS Trust [2016] EWHC 23 (QB)*, which cited this paragraph from Phipson with approval (see [40]). *Hollington* was also applied by the Privy Council in *Calyon v Michailaidis [2009] UKPC 34*; the Court of Appeal in *Rogers v Hoyle [2014] EWCA Civ 257; [2015] Q.B. 265*; and by Sir Ross Cranston in *JSC BTS Bank v Ablyazov [2017] EWHC 2906 (Comm)*, who noted at [29] that the rule in *Hollington* turns on "fairness".

532 See, e.g. *Partington v Partington [1925] P. 34*; *Crippen [1911] P. 108*.

533 *R. v Fontaine Moreau, 11 Q.B. 1033*; *Hui Chi-ming v R. [1992] 1 A.C. 34 PC* at 43, "amounted to no more than evidence of the opinion of that jury".

534 This explanation seems to have influenced Hoffmann J in *Land Securities Plc v Westminster City Council [1993] 4 All E.R. 124 Ch D* at 127.

535 *R. v Kingston (1776) 1 Leach 146; 20 How. St. Tr. 538n*; *Ward v Savill [2021] EWCA Civ 1378* at [86].

536 cf. *Hill v Clifford [1907] 2 Ch. 236*.

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537 *Land Securities Plc v Westminster City Council [1993] 4 All E.R. 124 Ch D.*

538 Stark, Evidence, 4th edn, pp.83–85.

539 *Hollington v F Hewthorn & Co Ltd [1943] K.B. 587.*

540 cf. para.43-30; and cf. *Tebbutt v Haynes [1981] 2 All E.R. 238 CA*.

541 *Hunter v Chief Constable of the West Midlands [1982] A.C. 529* at 543, per Lord Diplock. See also Lord Hoffmann's comment in *Arthur JS Hall & Co v Simons [2002] 1 A.C. 615* at 702 that the Court of Appeal in *Hollington* was "generally thought to have taken the technicalities of the matter much too far".

542 See the 15th Report of the Law Reform Committee, Cmnd.3391 where these criticisms were rejected. But see *(1968) 31 M.L.R. 58 (M. Dean)*; and see *Levene v Roxhan [1970] 1 W.L.R. 1322 CA*, where the third difficulty referred to in fact arose. See further comment, at para.43-91.

543 See *Hollington v F Hewthorn & Co Ltd [1943] K.B. 587*; see also Spencer Bower and Handley, Res Judicata, 5th edn (London: LexisNexis, 2019) at 11.03 to 11.04.

544 Including courts in New Zealand (*Jorgensen [1969] N.Z.L.R. 961*), Canada (*Demeter v British Pacific Life Insurance (1984) 13 D.L.R. (4th) 318*, Australia (*Mickelberg v Director of Perth Mint [1986] W.A.R. 365*), Malaysia (*Anwar Bin Ibrahim v Abdul Khalid [2001] 5 M.L.J. 47*) and Singapore (*Chiu v PP [2015] 4 S.L.R. 922 CA*).

545 *Hui Chi-ming v R [1992] 1 A.C. 34* at 42–43.

546 See, e.g. *Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV [1984] 1 W.L.R. 271* at 280; *Land Securities Plc v Westminster City Council [1993] 4 All E.R. 124 Ch D*; *R. v D, R. v J [1996] Q.B. 283 CA* at 288.

547 See *R. v Turner (1832) 1 Moo. C.C. 347*.

548 *Al-Hawaz v The Thomas Cook Group Ltd 27 October 2000*, New Law Online case 2001019305 (considered in *Secretary of State for Trade & Industry v Bairstow (No.1) [2004] Ch. 1*).

549 *R. (on the application of PM) v Hertfordshire County Council [2010] EWHC 2056.*

550 *Hoyle v Rogers [2014] EWCA Civ 257; [2015] 1 Q.B. 265* at [29].

551 *H (A Minor) (Adoption: Non-patrial), Re [1982] Fam. 121*; *Richardson-Ruhan v Ruhan [2017] EWHC 2739 (Fam)* at [12]; *Towuaghantse v General Medical Council [2021] EWHC 681 (Admin)* at [30]–[31].

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(c) - Acquittals

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Chapter 43 - Judgments

Section 3. - Judgments as Evidence Against Strangers

(c) - Acquittals

43-80 The bulk of the authorities comprises cases involving previous convictions as evidence in subsequent civil cases, but under the rule an acquittal or a holding in a civil suit that a person is not liable or not guilty of adultery should equally be irrelevant, save in so far as the rules of estoppel apply. Although there are dicta directly on point to the effect that an acquittal in criminal proceedings for a sexual offence is admissible in favour of the defendant in subsequent affiliation proceedings, [552] they can hardly stand with the decision and dicta in *Hollington v F Hewthorn & Co Ltd* [553]; and there is a decision in favour of the correct principle. [554]

In criminal cases, however, a body of authority has developed which supports admitting evidence of previous acquittals in some circumstances. In *R. v Hay* [555] the accused confessed to two unrelated offences (arson and burglary) which were tried separately. At his trial for arson, he alleged that the confession had been fabricated and was acquitted. At his subsequent trial for burglary he insisted that the prosecution should put in the whole confession, not just the portions of it which related to the burglary, and that he should then be permitted to introduce evidence of his previous acquittal and to call witnesses supporting an alibi for the time of the arson. The Court of Appeal held that the defence was entitled to have the whole confession statement before the jury and that this then triggered the rule that the prosecution must not challenge the correctness of a previous acquittal. [556] Not only did this make the fact of the acquittal admissible it also obliged the judge to direct the jury that the acquittal was *conclusive* evidence that Hay had not in fact committed the arson that he was alleged to have confessed to committing. [557] The entitlement to such a direction made the alibi evidence irrelevant. The fact that the evidence was to be treated as *conclusive* reveals that the Court of Appeal was applying the special *Sambasivam* rule, which binds the Crown in a way that is somewhat similar to an issue estoppel, rather than creating a new exception to *Hollington v Hewthorn Ltd*.

43-81 Subsequent cases, however, have treated *Hay* [558] as having established a rule that previous acquittals may be raised in cross-examination where they reflect on the credibility of prosecution witnesses, in particular, police witnesses. Thus, in *R. v Cooke* [559] the Court of Appeal held that where the prosecution relied on admissions allegedly made by Cooke to a particular police officer, that officer could be cross-examined on the fact that he had testified that two others had made admissions about related offences during the same series of interviews but they had been acquitted at a separate trial. Difficulties arise with treating a previous acquittal as relevant to the credibility of a witness in the previous trial when it is not clear whether the acquittal in fact proceeded on the rejection of the witness's evidence or on some other basis. In cases where the subsequent jury would have to speculate over the reasons for the previous acquittal the Court of Appeal has held that a trial judge can properly exclude the evidence of the previous acquittal if the risk of jury distraction and speculation outweighs the interest of the accused. [560] In a subsequent case the Court of Appeal laid down a slightly different approach for achieving similar results, stating that an acquittal in a trial where a police officer had previously testified would only be sufficiently relevant to be raised in cross-examination of the same police officer as to credit in a subsequent trial if it could be shown that his or her evidence had been disbelieved in the previous trial. [561]

The Court of Appeal also held that if a police officer being cross-examined on a previous acquittal gave answers unfavourable to the defence, since the matter went solely to credit, evidence could not be called to contradict the witness. [562] The court's attention was not drawn to the question whether in such a situation the judge might be obliged to direct that the acquittal *conclusively* established the innocence of the person acquitted. It is submitted that such a direction would certainly be necessary if the cross-examination related to a previous acquittal of the same accused.

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Whilst the cases which have allowed previous acquittals to be used to challenge a witness's credibility have largely been decided without any reference to *Hollington v Hewthorn Ltd*,[563] it is submitted that there are good reasons why the general principle should be ignored in this context. The principal reason is that, although usually it would be appropriate for a fact-finder to consider relevant evidence for themselves rather than relying on the opinion of a previous court as to what that evidence establishes, where the evidence is about collateral matters and relevant only to credit it is convenient to rely on the previous court's opinion rather than re-opening those matters.

Footnotes

552 *Packer v Clayton (1932) 97 J.P. 14*.

553 *Hollington v F Hewthorn & Co Ltd [1943] K.B. 587 CA*.

554 *Virgo v Virgo (1894) 69 L.T. 460*. See also *Kasanovic v Savapru [1962] V.L.R. 321*.

555 *R. v Hay (1983) 77 Cr. App. R. 70 CA*.

556 *Sambasivam v Public Prosecutor [1950] A.C. 458 PC*.

557 See also, *R. v Gall (1990) 90 Cr. App. R. 64 CA*, where at the accused's trial for wounding E an eyewitness gave evidence that the accused had attacked G during the same incident despite the fact that the accused had previously been acquitted of wounding G. The Court of Appeal held that in such circumstances the jury had to be instructed that it had been *conclusively* established that the accused had not attacked G.

558 *Hay (1983) 77 Cr. App. R. 70 CA*.

559 *R. v Cooke (1987) 84 Cr. App. R. 286 CA*.

560 *R. v H (1990) 90 Cr. App. R. 440 CA*; *R. v Gale [1994] Crim. L.R. 208 CA*.

561 *R. v Edwards [1991] 2 All E.R. 266 CA* at 276. In both this case and *R. v H (1990) 90 Cr. App. R. 440 CA*, the judgment of the Court of Appeal was given by Lord Lane CJ, but *H* was not cited to the court in *Edwards* (nor was *Hollington v Hewthorn Ltd*).

562 *R. v Edwards [1991] 2 All E.R. 266* at 278.

563 *Hollington v Hewthorn Ltd [1943] K.B. 587 CA*.

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(i) - Other exceptions

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Section 3. - Judgments as Evidence Against Strangers

(c) - Acquittals

(i) - Other exceptions

43-82 There are certain other exceptions to the common law rules, whereby judgments are admissible in evidence (and merely as evidence) against third parties. Some cases are properly to be considered as falling under the head of public inquisitions but there are others. It must be remembered that the statutory provisions which abrogate the rule in civil and criminal cases are of far greater practical importance.

Public rights

43-83 Judgments and verdicts upon public or general rights are not only conclusive between parties and privies, but prima facie evidence of the matter decided between strangers or a party and a stranger. They are not, however, conclusive in the latter cases, for the general reasons already stated. [564] In *Petrie v Nuttall* [565] the court remarked, indeed, that such a judgment was "possibly conclusive" and this was adopted by Stephen. [566] These propositions are all open to doubt. It has been held that a conviction for non-repair of a road is conclusive against a parish of its liability to repair [567] ; whilst it has been said that an acquittal does not establish any precise fact and is not evidence of non-liability. [568]

Such evidence is sometimes regarded as a species of judgment in rem, [569] but is more usually considered as in the nature of, though stronger than, reputation. It is not, however, receivable in other cases in which reputation is evidence, e.g. in matters of pedigree. Nor are interlocutory judgments, awards, and claims not prosecuted to verdict or judgment, as we have seen, admissible as reputation though they may be as acts of ownership.

Bankruptcy, administration, divorce, patents

43-84 In bankruptcy, administration and winding-up proceedings judgments have always, even at common law, been received as prima facie proof of debt even against strangers. [570] To guard against fraud, collusion and the miscarriage of justice, however, the court may, on the hearing of a bankruptcy petition, [571] inquire into the consideration for a judgment debt, and if necessary reject the judgment, either at the instance of the trustee, or of the debtor [572] ; even though the High Court had refused to set it aside [573] ; and even though no fraud was alleged, but only a compromise which was not considered fair and reasonable. [574] So also as to money-lending transactions. [575] And when the only evidence of debt was a judgment obtained since the bankruptcy, the proof was rejected. [576] Mere irregularity in form, however, will not upset the judgment. [577] For bankruptcy cases in which the parties have been precluded or not, on the ground of election, from bringing subsequent actions, see *Bremner*, [578] *Crook, Ex p. Collins*. [579]

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In divorce proceedings, a finding against the petitioner or respondent in a previous suit may be given in evidence though between different parties,[580] but it is not conclusive, and a party against whom adultery has been found may deny it in a subsequent suit in which he is a petitioner.[581]

In patent actions, a judgment as to the construction of the specification, though not strictly an estoppel, will generally be conclusive in other actions concerning the same patent, even though between different parties, unless new facts are adduced.[582] But proof may be given that what was not formerly an anticipation is so now[583] or that the same terms have acquired a change of meaning.[584]

Contract, admissions, acquiescence

43-85 A stranger to a judgment may also be bound by it if he has expressly so contracted. Thus, if A contracts to indemnify B against any damages recoverable against the latter by C, and B has bona fide defended the action and paid the amount, the judgment will be conclusive of A's liability. But this does not apply where B has no contract with, but merely a claim against, A for such indemnity.[585] A record is also sometimes received in favour of a stranger against one of the parties, as an admission by such party in a judicial proceeding, with respect to a certain fact. This is no real exception, however, to the rule requiring mutuality for an estoppel, since the record is not received as a judgment conclusively establishing the fact, but merely as a declaration by the party which is prima facie evidence thereof; it belongs therefore to the subject of admissions rather than judgments. So, not appealing against an adverse judgment may operate as an admission by the party of its correctness.[586] A stranger to a judgment may also be estopped, not directly, but by his acquiescence therein.[587]

In *Al-Hawaz v The Thomas Cook Group Plc*,[588] the court rejected the submission that a failure to appeal a decision could be received as evidence of an admission of the correctness of that decision in subsequent proceedings. Keene J (as he then was) found that *Eaton v Swansea Water Works*[589] was not authority for this general proposition but was confined to the context of easements where acquiescence might be an issue in the case. To hold otherwise would be fundamentally to undermine the rule in *Hollington* in any case where there had been no appeal.

Footnotes

564 See also, para.43-76.

565 *Petrie v Nuttall (1855) 11 Ex. 569*.

566 Stephen, Digest of the Law of Evidence, 12th edn (London: Macmillan, 1948), art.44, illust. Cf. sed quaere, and cf. *R. v Lordsmere (1886) 54 L.T. 766; 16 Cox 65*.

567 *R. v St Pancras (1793) 1 Peake 220*.

568 *R. v Wick St Lawrence (1853) 5 B. & Ad. 526*; *Cooke v Shell (1793) 5 T.R. 255*; and see *Kinnis v Graves (1898) 19 Cox C.C. 42*.

569 *Neill v Devonshire (1877) 8 App. Cas. 135* at 147.

570 *Ex p. Anderson (1885) 14 Q.B.D. 606* (bankruptcy); *Harvey v Wilde (1872) L.R. 14 Eq. 438* (administration).

571 Though not on a mere application to set aside a bankruptcy notice, *Easton, Ex p. Dixon (1893) 10 Morr. 111; 9 T.L.R. 408*.

572 *Ex p. Lennox (1886) 16 Q.B.D. 315*; *Ex p. Flatau (1889) 22 Q.B.D. 83; G, 44 S.J. 345–346*; *Boaler v Power [1910] 2 K.B. 229*.

573 *Miller (1893) 67 L.T. 601*; *Fraser [1892] 2 Q.B. 633*.

574 *Hawkins, Ex p. Troup [1895] 1 Q.B. 404*.

575 *A Debtor [1903] 1 K.B. 705*.

576 *Ex p. Bonham (1885) 14 Q.B.D. 606*; *Tollemache (1885) 14 Q.B.D. 606*.

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577 *Beauchamp [1904] 1 K.B. 572*.
578 *Bremner (1875) L.R. 10 Ch. App. 379*.
579 *Crook, Ex p. Collins 66 L.T. 29*.
580 *Ruck v Ruck [1896] P. 152*; *Little v Little [1927] P. 224*.
581 *Partington v Partington [1925] P. 34*.
582 *Edison v Holland (1888) 6 R.P.C. 243*; *Pneumatic Co v Leicester Co (1900) 16 R.P.C. 531 HL*.
583 *Shaw v Day (1895) 11 R.P.C. 185* at 189.
584 *Betts v Menzies (1859) 10 H.L.C. 117*.
585 *Parker v Lewis (1874) L.R. 8 Ch. App. 1035*; *Ex p. Young, Re Kitchin (1881) 17 Ch. D. 668*.
586 *Eaton v Swansea Water Works (1851) 17 Q.B. 267*; *R. v Fairie (1857) 6 E. & B. 486*.
587 *Lart [1896] 2 Ch. 788*; *Mohan v Broughton [1900] P. 56*; *Ex p. Vagg [1899] 2 I.R. 383*; *Mercantile Co v River Plate Co [1894] 1 Ch. 578*; *Wilkinson v Blades [1896] 2 Ch. 788*; *Young v Holloway [1895] P. 87*.
588 *Al-Hawaz v The Thomas Cook Group Plc [2000] All E.R. (D) 1568* (considered in *Secretary of State for Trade & Industry v Bairstow (No.1) [2004] Ch. 1*).
589 *Eaton v Swansea Water Works (1851) 17 Q.B. 267*.

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(d) - Under the Civil Evidence Act 1968

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(d) - Under the Civil Evidence Act 1968 [590]

Replace footnote 585 with: "There are certain other statutory exceptions to the rule in *Hollington v Hewthorn*: see, e.g. Medical Act 1983; Dentists Act 1984; Army Act 1955 s.200; Air Force Act 1955 s.200; Proceeds of Crime Act 2002 ss.240–241 (*Director of the Assets Recovery Agency v Virtosu [2008] EWHC 149 (QB); [2009] 1 W.L.R. 2808*). The rules of most professional bodies provide that previous judgments and findings may be admitted in evidence (see e.g. the General Medical Council (Fitness to Practise) Rules Order of Council 2004 r.34(1)), which puts beyond doubt the fact that the rule in *Hollington v Hewthorn* does not apply in inquisitorial or regulatory proceedings; *Towuaghantse v General Medical Council [2021] EWHC 681 (Admin)* at [31]."

43-86 The rule in *Hollington v Hewthorn* was the subject of the Fifteenth Report of the Law Reform Committee. [591] The Committee's recommendations are largely reflected in the provisions of the Civil Evidence Act 1968.

Footnotes

590 There are certain other statutory exceptions to the rule in *Hollington v Hewthorn*: see, e.g. Medical Act 1983; Dentists Act 1984; Army Act 1955 s.200; Air Force Act 1955 s.200. The rules of most professional bodies provide that previous judgments and findings may be admitted in evidence (see e.g. the General Medical Council (Fitness to Practise) Rules Order of Council 2004 r.34(1)), which puts beyond doubt the fact that the rule in *Hollington v Hewthorn* does not apply in inquisitorial or regulatory proceedings; *Towuaghantse v General Medical Council [2021] EWHC 681 (Admin)* at [31].

591 Cmnd.3391.

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(i) - Previous convictions in subsequent civil cases (other than defamation)

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Section 3. - Judgments as Evidence Against Strangers

(d) - Under the Civil Evidence Act 1968 [590]

(i) - Previous convictions in subsequent civil cases (other than defamation) [592]

43-87 Broadly,
593

s.11(1) provides that any subsisting conviction by a UK court (or a court-martial
594

) is admissible in subsequent "civil proceedings",
595

to prove that the offence was committed by the person convicted, whenever it is relevant to do so. A "subsisting" conviction for these purposes is one which has not been quashed on appeal
596

but if an appeal is pending, the court may adjourn the civil proceedings so that the issue of the admissibility of the conviction may abide the outcome.
597

Convictions which lead to probation or discharge are admissible.
598

By contrast, convictions by a foreign court are not rendered admissible by the Civil Evidence Act 1968 and remain inadmissible either as evidence of the guilt of the defendant or any fact found as part of the basis for the conviction.
599

It has been suggested that s.11, even though not expressly, is directed to dealing only with the convictions of defendants, and that "it is scarcely possible to conceive of a civil action in which a plaintiff could assist his own cause by relying on his own conviction". [600] It is submitted that this is incorrect. First, the provision is not limited to the convictions of defendants. Rather, it expressly contemplates that a conviction may be used to establish the commission of an offence by a person who is not a party to the subsequent civil proceedings. Although the primary object of this provision is to enable a claimant to rely on evidence of the conviction of one for whose acts the defendant is vicariously liable that is not the only purpose it serves. Secondly, it is not in fact difficult to think of cases where a claimant might wish to rely on his own conviction. For instance, proving his own conviction might provide a way to establish that he (or indeed the victim of the offence of which he was convicted) was at a certain place on a certain day. The "information, complaint, indictment or charge sheet" on which the conviction was founded is admissible to identify the facts on which any such conviction was based. [601] This provision is expressed to be without prejudice

to the reception of any other "admissible" evidence to that end,[602] which includes the transcript of relevant evidence or of a summing-up by the trial judge taken by a court shorthand writer.[603]

By s.11(2) it is provided (in effect) that the conviction establishes a presumption that the convicted person committed the offence which operates until it is rebutted by being disproved on the balance of probabilities.[604] There are two significant disputes, however, over how this provision should be interpreted. The first dispute is over what weight, if any, should be attached to the inference from a conviction, if a party does try to prove on the balance of probabilities that the offence was not committed. The second dispute is over the effect of a strategy of attacking the legitimacy of the conviction, rather than directly seeking to prove that the offence was not committed.

43-88 The first dispute divided the Court of Appeal in *Stupple v Royal Insurance Co Ltd*.[605] Buckley LJ was of the view that the introduction of the conviction was only a trigger which activated the presumption, and that it was then for the other party to try to prove that the offence was not committed on the balance of probabilities. Lord Denning MR, by contrast, thought that the conviction was "a weighty piece of evidence of itself" which the other party would have to overcome in seeking to prove that the offence was not committed. Buckley LJ justified his view on the ground of the difficulty of assessing the weight to be given to any particular conviction. There is great force in this concern, particularly since the judges who heard the appeal in *Stupple* were agreed that the trial judge[606] had been in error in reconsidering the correctness of the jury's verdict (on the criminal burden) on the evidence before it in the criminal trial, and Buckley LJ's approach has been followed on at least one occasion.[607] However, it is suggested that the wording of the statute supports the view of Lord Denning MR; for s.11(1) expressly provides that "the fact that a person has been convicted of an offence … shall … be admissible in evidence for the purpose of proving … that [the person convicted] committed that offence," and the presumption of the correctness of the conviction is raised by the next subsection. Three points may be made. First, s.11(1) could exist perfectly well even if s.11(2) did not. Its meaning would then clearly be that favoured by Lord Denning MR, and it is hard to see why the addition of a further subsection should change that meaning. Secondly, "the fact" of a conviction is, by s.11(1) admissible "*in evidence*"[608] and the interpretation of Buckley LJ would deprive it of evidential effect as a fact. Finally, an instructive comparison is provided by s.13 where the conviction *does* have a trigger effect and no other. In that section the admissibility and effect of the conviction are dealt with together by one subsection.[609]

Some support for Lord Denning MR's interpretation may also be garnered from Lord Diplock's speech in *Hunter v Chief Constable of West Midlands Police*.[610] There he said that:

> "[t]he burden of proof of 'the contrary' that lies on a defendant under s.11 is the ordinary burden in a civil action, i.e. proof on a balance of probabilities, although in the face of a conviction after a full hearing this is likely to be an uphill task".[611]

Both the reference to the "uphill task" and the apparent distinction between "a conviction after a full hearing" and "one entered on a plea of guilty accompanied by a written explanation in mitigation",[612] suggest that convictions do not merely trigger a presumption but have weight as evidence. This means that future courts will have to confront the difficulty of weighing the evidential effect of particular convictions.

If Lord Denning MR's view on the first dispute is accepted then this reduces the importance of the second dispute. This is because doubts over the reliability of a conviction can be addressed in deciding how much weight to attach to it. If, instead, the view is accepted that a conviction is a mere trigger for a presumption then it is not clear what a party would gain by attacking the reliability of the conviction rather than directly addressing the issue of commission.[613] In *CXX v DXX*[614] the view of Lord Denning MR in *Stupple v Royal Insurance Co Ltd*[615] was followed, namely a conviction is weighty piece of evidence in itself.

43-89 One further difficult question which has arisen concerns whether a person may challenge his own previous conviction even if he can present no evidence other than that which was considered by the criminal court. In *Hunter v Chief Constable of West Midlands Police*[616] Lord Diplock stated that the:

> "wide variety of circumstances in which s.11 may be applicable includes *some* in which justice would require that no fetters should be imposed on the means by which a defendant may rebut the statutory presumption". [617]

He then went on to hold, however, that it would be an abuse of process for a person to bring an action which amounted to a collateral attack [618] on his own previous conviction *unless* he had fresh evidence which "entirely changes the aspect of the case".

In *Brinks Ltd v Abu-Saleh (No.1)*, [619] Jacob J treated this case as making clear that it would be an abuse of process for *a defendant* to seek to relitigate the question whether he had committed the crime of which he had been convicted if he did not have any new or fresh evidence. Consequently, he held that defendants who wanted to argue that they had not committed the crimes that they had been convicted of committing but who could not point to new evidence which could "entirely change the aspect of the case" did not have any arguable defence to an application for summary judgment. This reasoning was not followed, however, by Brian Smedley J in *J v Oyston*. [620] He held that it would be "manifestly unfair" to hold that it was an abuse of process for Oyston to try and show that he had not committed rape and indecent assault even though he apparently had no evidence beyond that which had already been considered at his trial or by the Court of Appeal in dismissing his appeal against conviction. He suggested that it could only be an abuse of process to *initiate* a civil claim which amounted to a collateral attack. [621] It is submitted that, on balance, the view of Brian Smedley J should generally be preferred. If a defendant is prepared to testify that they did not commit the offence alleged it should not be an *abuse of process* for them to assert what they believe to be true in proceedings that they did not initiate. A different view may be taken, however, if there is some basis for concluding that the defendant does not believe in their own innocence and are merely raising the matter in order to prolong proceedings, or to put witnesses through the discomfort of having to repeat their evidence.

The provisions of s.11 are far from easy to operate, and it may be doubted whether they promote more, or more just, settlements in civil cases. It may also be that cases of careless driving (where the section's impact is likely to be most relevant) are more often contested in the criminal courts than would otherwise be the case, at some cost to the community in terms of time and money. Insurers, who largely control the way in which motorists conduct such cases, have a great inducement to try to avert the conviction which will weigh heavily in civil settlement negotiations.

In *CXX v DXX* [622] the two conflicting lines of authority reflected in *Brinks Ltd v Abu-Saleh* [623] and *J v Oyston* [624] were considered. The view in Phipson and *J v Oyston* was followed: a defendant to civil proceedings may assert in good faith that he did not commit an offence for which he has been convicted without that being an abuse of process. The position is different if there is some basis for concluding that the defendant does not believe in his own innocence and he merely raises the matter in order to prolong proceedings or to put witnesses at the discomfort of having to repeat their evidence.

Footnotes

590 There are certain other statutory exceptions to the rule in *Hollington v Hewthorn*: see, e.g. Medical Act 1983; Dentists Act 1984; Army Act 1955 s.200; Air Force Act 1955 s.200. The rules of most professional bodies provide that previous judgments and findings may be admitted in evidence (see e.g. the General Medical Council (Fitness to Practise) Rules Order of Council 2004 r.34(1)), which puts beyond doubt the fact that the rule in *Hollington v Hewthorn* does not apply in inquisitorial or regulatory proceedings; *Towuaghantse v General Medical Council [2021] EWHC 681 (Admin)* at [31].

592 Civil Evidence Act 1968 s.11.

593 Subject to the provisions of s.13 (which relate to defamation actions): see s.11(3).

594 Defined in s.11(6) of the Act (as amended).

595 Defined in s.18(1) of the Act.

596 *Raphael [1973] 1 W.L.R. 998*. For another view, see *A. Zuckerman (1971) 87 L.Q.R. 21*; but cf. the wording of s.13(3) of the Act.

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597 *Raphael [1973] 1 W.L.R. 998*.

598 See s.11(5) of the Act.

599 *Daley v Bakiyev [2016] EWHC 1972 (QB)*; *Benyatov v Credit Suisse Securities (Europe) Ltd [2022] EWHC 135 (QB); [2022] 4 W.L.R. 54* at [239], [352]–[356] (there was no appeal on this point to the Court of Appeal: *[2023] EWCA Civ 140* at [23]); In *W-A (Children: Foreign Conviction), Re [2022] EWCA Civ 1118; [2022] 3 W.L.R. 1235* (notwithstanding obiter dicta of Peter Jackson LJ at [35]).

600 *Hunter v Chief Constable [1982] A.C. 529 HL; [1981] 3 All E.R. 727* at 735E, per Lord Diplock.

601 Civil Evidence Act 1968 s.11(2)(b).

602 Civil Evidence Act 1968 s.11(2)(b).

603 *Taylor v Taylor [1970] 1 W.L.R. 1148 CA*. In *Brinks Ltd v Abu-Saleh (No.2) [1995] 4 All E.R. 74 Ch D*, Rimer J held that a transcript of the judge's summing-up had to be admitted under a hearsay exception (see now Civil Evidence Act 1995, discussed in Ch.29).

604 Civil Evidence Act 1968 s.11(2)(a): see *Wauchope v Mordecai [1970] 1 All E.R. 417 CA*; *Stupple v Royal Insurance Co Ltd [1971] 1 Q.B. 50 CA*.

605 *Stupple v Royal Insurance Co Ltd [1971] 1 Q.B. 50 CA*.

606 His judgment is reported at *[1970] 1 All E.R. 390*.

607 *Wright v Wright (1971) 115 S.J. 173; The Times, 15 February 1971*.

608 Emphasis added.

609 In *Phoenix Marine Inc v China Ocean Shipping Co [1999] 1 Lloyd's Rep. 682* at 685, Moore-Bick J stated that he preferred the view of Lord Denning MR and Phipson to that of Buckley LJ and Cross & Tapper.

610 *Hunter v Chief Constable of West Midlands Police [1982] A.C. 529*.

611 *Hunter v Chief Constable of West Midlands Police [1982] A.C. 529*.

612 A situation mentioned earlier in the same paragraph of the speech.

613 But compare the view of *A. Zuckerman (1971) 87 L.Q.R. 21*.

614 *CXX v DXX [2012] EWHC 1535 (QB)*. Applied in *E v Franks [2018] EWHC 1765 (QB)* at [28].

615 *Stupple v Royal Insurance Co Ltd [1971] 1 Q.B. 50*.

616 *Hunter v Chief Constable of West Midlands Police [1982] A.C. 529 HL*.

617 *Hunter v Chief Constable of West Midlands Police [1982] A.C. 529 HL* (emphasis added).

618 For the collateral attack doctrine see, generally, para.43-58.

619 *Brinks Ltd v Abu-Saleh (No.1) [1995] 1 W.L.R. 1478 Ch D*.

620 *J v Oyston [1999] 1 W.L.R. 694 QBD*.

621 *J v Oyston [1999] 1 W.L.R. 694 QBD* at 700. See also, *Nawrot v Chief Constable of Hampshire Police, The Independent, 7 January 1992 CA (Civ Div)*, Transcript No.1205 of 1991 (followed in *J v Oyston [1999] 1 W.L.R. 694*).

622 *CXX v DXX [2012] EWHC 1535 (QB)*.

623 *Brinks Ltd v Abu-Saleh (No.1) [1995] 1 W.L.R. 1478*.

624 *J v Oyston [1999] 1 W.L.R. 694*.

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(ii) - Previous findings of adultery

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Chapter 43 - Judgments

Section 3. - Judgments as Evidence Against Strangers

(d) - Under the Civil Evidence Act 1968 [590]

(ii) - Previous findings of adultery

43-90 By s.12 [625] of the 1968 Act it is provided that a "subsisting" [626] finding in any matrimonial proceedings that a person has committed adultery is admissible as evidence "that he committed the adultery to which the finding relates". [627] Moreover, a "subsisting" finding of paternity in affiliation proceedings or other relevant court proceedings, [628] is similarly available to prove that the person against whom the finding was made was the father of that child. [629] These provisions apply even when the allegation was not contested in the first instance, [630] and there are rules analogous to those relating to conviction in respect of the mode of proving the facts on which the finding of adultery or paternity was based, [631] and as to the effect of the finding as evidence. [632] Three points may be noted. First, there is the important practical consequence that a finding of adultery against a co-respondent or a woman named is now evidence of that adultery in subsequent divorce proceedings brought or contested by the spouse of that co-respondent or woman named. Secondly, these provisions will tend to diminish the number of cases where A is found guilty of adultery with B, and in later proceedings, B not guilty of adultery with A; but, as there is no corresponding provision in relation to findings *against* adultery or paternity, a verdict in favour of A in the above example will not be available to assist B. Thirdly, findings of adultery are available only where they arise in "matrimonial proceedings". [633] This is defined [634] to exclude findings by magistrates' courts. However, the same limitation is not placed on the definition of "relevant proceedings" with regard to findings of paternity. [635]

Footnotes

590 There are certain other statutory exceptions to the rule in *Hollington v Hewthorn*: see, e.g. Medical Act 1983; Dentists Act 1984; Army Act 1955 s.200; Air Force Act 1955 s.200. The rules of most professional bodies provide that previous judgments and findings may be admitted in evidence (see e.g. the General Medical Council (Fitness to Practise) Rules Order of Council 2004 r.34(1)), which puts beyond doubt the fact that the rule in *Hollington v Hewthorn* does not apply in inquisitorial or regulatory proceedings; *Towuaghantse v General Medical Council [2021] EWHC 681 (Admin)* at [31].

625 As amended.

626 cf. Civil Evidence Act 1968 s.11(1).

627 Civil Evidence Act 1968 s.12(1)(a).

628 Defined in Civil Evidence Act 1968 s.12(5).

629 Civil Evidence Act 1968 s.12(1)(b).

630 Civil Evidence Act 1968 s.12(1).

631 Civil Evidence Act 1968 s.12(2)(b), (4); see *Practice Direction [1969] 2 All E.R. 873*.

632 Civil Evidence Act 1968 s.12(2)(a): see *Sutton v Sutton [1970] 1 W.L.R. 183*.

633 Civil Evidence Act 1968 s.12(1)(a).

634 Civil Evidence Act 1968 s.12(5).

635 Civil Evidence Act 1968 s.12(5).

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(ii) - Previous findings of adultery, UKBC-PHIPSON 459383793 (2024)

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(iii) - Conclusiveness of convictions in actions for defamation

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Chapter 43 - Judgments

Section 3. - Judgments as Evidence Against Strangers

(d) - Under the Civil Evidence Act 1968 [590]

(iii) - Conclusiveness of convictions in actions for defamation

43-91

> "In an action for libel or slander in which the question whether the plaintiff did or did not commit a criminal offence is relevant to an issue arising in the action, proof that at the time when that issue falls to be determined, he stands convicted of that offence shall be conclusive evidence that he committed that offence; and his conviction thereof shall be admissible in evidence accordingly." [636]

Where there is more than one claimant, proof of the conviction of one claimant is conclusive evidence against the other, or others, that the person convicted committed the offence. [637] A person "stands convicted" for these purposes "if but only if there subsists against him a conviction of that offence by or by or before a court in the United Kingdom or by a court-martial there or elsewhere". [638] Although the effect of the conviction differs from that of a conviction tendered under s.11, the admissibility of evidence to prove that the conviction occurred and to prove the facts on which it was based are governed by provisions incorporating or analogous to those under the earlier section. [639] However, even where a defendant can rely on s.13 to establish that the claimant in a defamation action committed a particular offence, if it is desired to strike out the claim as an abuse of the process of the court it must be shown that the only defamatory statement alleged is that the offence was committed. [640]

Under the old law, it was possible for a defamation action to involve the retrial of a criminal case, whether the defendant had been acquitted or convicted. [641] There thus existed the possibility of conflicting civil and criminal verdicts, most startlingly illustrated in *Loughans v Odhams Press*, [642] where the defendant's plea of justification was found on the balance of probabilities to be good, that is that he was guilty of the murder of which he had been acquitted. Although the Law Reform Committee advocated the removal of all such conflicts, [643] the Act gives conclusive effect only to convictions. Acquittals remain, not merely not conclusive, but inadmissible. In view of the burden of proof in criminal cases and the desirability of maintaining free speech, this seems the best compromise.

Footnotes

590 There are certain other statutory exceptions to the rule in *Hollington v Hewthorn*: see, e.g. Medical Act 1983; Dentists Act 1984; Army Act 1955 s.200; Air Force Act 1955 s.200. The rules of most professional bodies provide that previous judgments and findings may be admitted in evidence (see e.g. the General Medical Council (Fitness to Practise) Rules Order of Council 2004 r.34(1)), which puts beyond doubt the fact that the rule in *Hollington v Hewthorn* does not apply in inquisitorial or regulatory proceedings; *Towuaghantse v General Medical Council [2021] EWHC 681 (Admin)* at [31].

636 Civil Evidence Act 1968 s.13(1) (as amended by Defamation Act 1996 s.12(1)).

637 Civil Evidence Act 1968 s.13(2A).

638 Civil Evidence Act 1968 s.13(3).

639 Civil Evidence Act 1968 s.13(2), (4).

640 *Levene v Roxhan [1970] 1 W.L.R. 322 CA*.

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641 See, e.g. *Barclays Bank v Cole [1967] 2 Q.B. 738*; *Hinds v Sparks [1964] Crim. L.R. 717*; *Loughans v Odhams Press, The Times 14 February 1963*.

642 See, e.g. *Barclays Bank v Cole [1967] 2 Q.B. 738*; *Hinds v Sparks [1964] Crim. L.R. 717*; *Loughans v Odhams Press, The Times 14 February 1963*.

643 Cmnd.3391, paras 26-33.

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(e) - Under the Police and Criminal Evidence Act 1984 sections 73–75

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Chapter 43 - Judgments

Section 3. - Judgments as Evidence Against Strangers

(e) - Under the Police and Criminal Evidence Act 1984 sections 73–75

43-92 Sections 73, 74 and 75 of the Police and Criminal Evidence Act 1984 have a substantial effect on the admissibility in criminal proceedings of convictions in other cases. Section 73 of the Act provides means of proving a conviction, although it expressly reserves the power to use any other existing method of doing so. The substantive part of these provisions is contained in s.74 and s.75(1). These are as follows [644]:

Section 74

"74.—

(1) In any proceedings, [645] the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom or by a Service court outside the United Kingdom shall be admissible in evidence for the purpose of proving where evidence of his having done so is given.

(2) In any proceedings in which by virtue of this section a person other than the accused is proved to have been convicted of an offence by or before any court in the United Kingdom or by a Service court outside the United Kingdom, he shall be taken to have committed that offence unless the contrary is proved.

(3) In any proceedings where evidence is admissible of the fact that the accused has committed an offence if the accused is proved to have been convicted of the offence—

(a) by or before any court in the United Kingdom; or

(b) by a Service court outside the United Kingdom,

he shall be taken to have committed that offence unless the contrary is proved.

(4) Nothing in this section shall prejudice—

(a) the admissibility in evidence of any conviction which would be admissible apart from this section; or

(b) the operation of any enactment whereby a conviction or a finding of fact in any proceedings is for the purpose of any other proceedings made conclusive evidence of any fact.

75.—

(1) Where evidence that a person has been convicted of an offence is admissible by virtue of section 74 above, then without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based—

> **(a)** the contents of any document which is admissible as evidence of the conviction; and
>
> **(b)** the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted,
>
> shall be admissible in evidence for that purpose."

The general effect of these provisions is to make subsisting[646] convictions[647] by English courts and courts martial (but *not* by foreign courts) admissible to prove relevant facts. It is moreover confined to criminal convictions. Accordingly, it does not make admissible acquittals in previous criminal proceedings.[648] Nor are findings in earlier civil proceedings admissible in later criminal cases, even if they consist of or necessarily involve findings of guilt or innocence of criminal charges.[649] Foreign convictions, where admissible, may be proved under s.7 of the Evidence Act 1851 together with evidence as to the identity of the person convicted.[650]

43-93 Section 74(1) makes admissible the convictions of persons other than the accused as proof that they committed the offences that they were convicted of. Before the section can be relied on the fact that the person committed the offence must be relevant to an "issue" in the accused's trial. The proof of such a conviction has the effect of casting on the party disputing its correctness the burden of disproving it. It is thought that as in other situations where the accused may bear the burden of proof, it will be necessary for them to disprove the correctness of the conviction only on the balance of probabilities, while the prosecution must do so beyond reasonable doubt. As with s.11 of the Civil Evidence Act 1968, however, there is an issue as to whether the introduction of evidence of a conviction under the section merely reverses the burden of proof on the question whether the offence was committed by the person convicted or whether the conviction is itself weighty evidence of commission.[651] In discussing the 1968 Act the position was taken that the conviction should be treated as a weighty piece of evidence, and it is submitted that the arguments in favour of this conclusion are even stronger in the criminal context. If s.74(2) was interpreted as merely reversing the burden of proof this would leave the prosecution having to prove commission of the previous offence beyond reasonable doubt as soon as the defence introduced any evidence tending to suggest that the person convicted did not in fact commit it. The criminal courts have recognised, however, that sometimes a person may plead guilty for reasons other than an admission of guilt. The Court of Appeal has held that if an accused in a subsequent case can point to any reasons suggesting that a person previously convicted might have pleaded guilty for reasons other than his guilt there may be a case for excluding evidence of the conviction under s.78 of PACE.[652]

The effect of s.75(1) is to assist in identifying the facts on which the conviction is based. This subsection provides a list of materials to which resort may be had to find out what the certificate of conviction reveals. This is expressly without prejudice to any other admissible means of achieving this result.

The nature of the "issue" to which the person's commission of the offence must be relevant was widely defined in *R. v Robertson and Golder*.[653] It is not necessary that the other's guilt should bear on the ultimate issue, or on an essential ingredient of the offence with which the accused is charged. In *Golder's* case the convictions of three other persons were admitted because the details of the offences that they had presumptively committed matched details in Golder's confession and thus tended to suggest that it was genuine. Similarly, in *R. v Castle*[654] the width of the definition of "issue" meant that the reliability of a witness's identification of the accused could be fortified by the fact that a co-accused identified by the same witness pleaded guilty.[655] Although the court interpreted the provision as having a broad meaning, it also held that it ought to be invoked sparingly. There are three serious risks associated with the admission of evidence of convictions under s.74(1). First, there is the problem that if the other's conviction directly and inevitably implicates the accused, a direction that it is for the accused to prove that the other's conviction was incorrect, in effect, leaves the defence with the burden of proof on the ultimate issue in the case. This type of case occurs, for example, where a person has been found guilty of conspiring with the accused alone to commit an offence. This was the situation which arose in *R. v Curry*[656] and *R. v O'Connor*,[657] where the convictions were excluded pursuant to the court's general discretion under s.78.[658] Evidence that someone has pleaded guilty to a conspiracy may be relevant and admissible to prove that a conspiracy existed so long as the conviction does not necessarily implicate the accused, and

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provided that the jury are clearly directed on the use to which the evidence may be put. [659] The second risk is that the jury might overlook the precise issue that the convictions were introduced to prove and convict the accused using some notion of "guilt by association". This risk was clearly raised by the case of *R. v Warner and Jones* [660] where at the trial of the appellants for supplying heroin evidence was given by police witnesses that they had observed up to 40 people per day visiting the appellants' house, and s.74(1) was relied on to establish that eight of the visitors had convictions for possession or supply of heroin. The Court of Appeal approved the admission of this evidence as relevant to ground an inference as to the type of business which was going on at the house, but this seems a case where there would have been a strong risk of the jury relying on "guilt be association". [661] The third problem with evidence under s.74(1) is that where the other's commission of the offence is proved using only a certificate of conviction under s.73 the accused has little opportunity to challenge the basis of the conviction. The person convicted is unlikely, for instance, to be available for cross-examination.

43-94 The courts have clearly recognised the risks that s.74(1) can pose to a fair trial. Indeed the view has been expressed that "Parliament cannot have appreciated how wild an animal it was prepared to let loose upon the field of evidence when it enacted s.74". [662] The provision has been brought under control, if not finally tamed, by reliance on a combination of s.78 and clear directions about how such evidence can be used. Thus, in *R. v Mahmood and Manzur* [663] the Court of Appeal stated that a trial judge should exclude evidence of the convictions of others under s.78 unless convinced that the probative value of the evidence outweighs the prejudice that might be caused by it, and that if the evidence is admitted the judge should clearly direct the jury both on the purposes for which it should not be used and the issue to which it was relevant. [664]

43-95 Section 74(3) makes evidence that the accused has previously been convicted of an offence admissible to prove that the accused in fact committed the offence where that is relevant to any issue in the proceedings other than to show disposition. The conviction is again made presumptive evidence of commission. [665]

The width of the subsection has caused some controversy. First, there is the problem that s.74(3) refers to evidence "relevant to any matter in issue" whilst s.74(1) refers to evidence "relevant to any issue". It has been suggested that this difference makes s.74(3) narrower than s.74(1) and that, in particular, s.74(3) cannot be relied on when the accused's conviction is merely relevant to his credibility. Secondly, there is the problem of the exclusion from the scope of s.74(3) of evidence that is only relevant because it has "a tendency to show in the accused a disposition to commit the kind of offence with which he is charged". One view is that this means that s.74(3) cannot be relied on to prove that the accused committed an offence which it is permissible to show that he committed under the "similar facts" rule.
[666]

The alternative view is that the exclusion of evidence only relevant to disposition from s.74(3) was an attempt to exclude only that evidence which was forbidden under the "similar facts" rule before the rule was reformulated in terms of probative value and prejudicial effect. If evidence relevant and admissible as "similar facts" is excluded then s.74(3) is left extremely narrow. One circumstance where the section will be of use is where statute has created an offence and so defined it that it can be committed only by a person who has previously committed some other offence.

In *R. v Hayter* [667] the House of Lords held that when in a joint trial the case against a defendant depended upon the prosecution proving the guilt of a co-defendant, and the evidence against the co-defendant consisted solely of his own out-of-court confession, then that confession would be admissible as against the defendant only in so far as it went to proving the co-defendant's guilt. The admissibility of the confession as against the defendant was subject to two conditions (on truthfulness and incrimination).

Footnotes

644 Note the amendments brought about by the Criminal Justice Act 2003.

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645 i.e. criminal proceedings: see s.82(1).

646 Defined by s.75(4).

647 Defined by s.75(3). See also *R. v Robertson and Golder [1987] Q.B. 920*.

648 On the admissibility of previous acquittals, see paras 43-80 et seq.

649 For a related point see, *R. v D, R. v J [1996] Q.B. 283 CA*.

650 *R. v Mauricia [2002] EWCA Crim 676; [2002] 2 Cr. App. R. 27 CA*; *W-A (Children: Foreign Conviction), Re [2022] EWCA Civ 1118; [2022] 3 W.L.R. 1235*.

651 *Stupple v Royal Insurance Co Ltd [1971] 1 Q.B. 50 CA*.

652 *R. v Lee [1996] Crim. L.R. 825 CA*.

653 *R. v Robertson and Golder [1987] Q.B. 920*.

654 *R. v Castle [1989] Crim. L.R. 567*.

655 See also, *R. v Gummerson and Steadman [1999] Crim. L.R. 680 CA*, where a witness claimed to have identified the voices of four attackers and the guilty plea of one was admitted to rebut the defence claim that in the circumstances no accurate identification of anyone's voice was possible.

656 *R. v Curry [1988] Crim. L.R. 527 CA*.

657 *R. v O'Connor [1987] 85 Cr. App. R. 298 CA*.

658 A point made clear in *R. v Robertson and Golder [1987] Q.B. 920*.

659 *R. v Lunnon (1988) 88 Cr. App. R. 71 CA*. It is to be hoped that the decision in *R. v Bennett [1988] Crim. L.R. 686 CA*, can be treated as overtaken by the development of principle.

660 *R. v Warner and Jones (1992) 96 Cr. App. R. 324 CA*.

661 See generally, *R. Munday, "Proof of Guilt by Association under Section 74 of P.A.C.E. 1984" [1990] Crim. L.R. 236.*

662 *R. v Hillier and Farrar (1992) 97 Cr. App. R. 349* at 355, per Watkins LJ.

663 *R. v Mahmood and Manzur [1997] 1 Cr. App. R. 414 CA*; considered in *R v Greaves [2007] EWCA Crim 1348*. In *R. v Downer [2009] EWCA Crim 1361* the Court concluded that evidence of the earlier guilty pleas should have been excluded under s.78.

664 *R. v Mahmood & Manzur [1997] 1 Cr. App. R. 414*, approving *R. v Boyson [1991] Crim. L.R. 274 CA*. See also *R. v Shirt [2018] EWCA Crim 2486; [2019] 1 Cr. App. R. 15*, where evidence of co-defendants' guilty pleas was admitted as evidence of the existence of a conspiracy to defraud. A conviction of a co-defendant that proves too much (e.g. not only the existence of a conspiracy to defraud, but that the defendant must have been a party to the conspiracy), may have such an adverse effect on the fairness of proceedings that it ought to be excluded, but not in every case: *R. v Merchant and Mathew [2017] EWCA Crim 60; [2018] 1 Cr. App. R. 11* at [62]–[64] (conspiracy to defraud in respect of fixing the LIBOR rate for the US dollar).

665 The same observation as to quantum of proof applies as was made in relation to s.74(2). See *C v R. [2010] EWCA Crim 2971* where the Lord Chief Justice stated: "… the evidential presumption is that the conviction truthfully reflects the fact that the defendant committed the offence. Equally, however, it is clear that the defendant cannot be prevented from seeking to demonstrate that he did not in fact commit the offence and therefore, that the jury in the current trial should disregard the conviction…" (para.9).

666 This view is expressed in Sir J.C. Smith, Criminal Evidence (1995), p.126. See also, Cross and Tapper on Evidence, 13th edn (London: Butterworths, 2018) at p.119: "… s.74(3) which deals with previous convictions of the accused, is concerned exclusively with the means of proof, and does not furnish an independent route to admissibility" (citing *R. v Harris unreported 19 April 2000 CA* at [21]).

667 *R. v Hayter [2005] UKHL 6; [2005] 1 W.L.R. 605*. See also *R. v Y [2008] EWCA Crim 10*.