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III

THE ANGLO-AMERICAN LAW

A. *Initial Considerations*

IN the Anglo-American law the question of the preclusive effect of the premises of the judgment is attended with vastly more difficulty than under any of the Continental systems. The difficulty is due not only to the number of independent jurisdictions dealing with the subject and the resultant occasion for very considerable divergency of view, but also, and in an important degree, to the existence of the common-law principle of estoppel by record as an institution historically distinct from the Roman-derived principle of res judicata, and the latter-day failure properly to appreciate the relationship between the two.

As we have sought to demonstrate elsewhere, estoppel by record, as recognized in the common-law courts, is a legacy from the Germanic period when the property of res judicata was wholly lacking to the judicial judgment. It was originally a true estoppel in the same sense as the later recognized estoppel by deed and estoppel *in pais*. In other words, its actuating motive was the inability of the party to recede from a condition which he had created or cooperated in creating. Under its operation the factor of preclusion was not the judgment but the allegation or admission of the party in the judgment-proceeding, which he was not allowed to contradict. Lord Ellenborough put the case well when he said in *Outram v. Morewood*:[144] "It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel." When the Roman principle came to be accepted, as it was in the infancy of the English law, the Germanic principle was not discarded, but was suffered to coexist with the other. The two instrumentalities, however, assumed different functions. In

* The first installment of this article, dealing with the Continental law, appeared in the November issue of the Review, 39 MICH. L. REV. 1 (1940).

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[144] 3 East. 346 at 355, 102 Eng. Rep. 630 (1803).

this way, the Roman principle operated to bar a new action upon the same demand, and probably, also, it was this principle that precluded an unsuccessful defendant from controverting by a new action the right thus adjudicated. But if it was sought to preclude the same plaintiff, because of what happened in the first suit, from maintaining a new action against the same defendant on a different claim, or the same defendant from maintaining a new action against the same plaintiff, except as just indicated, this could only be done within the compass, and subject to the technical rules, of estoppel by record. The estoppel thus extended to every material issue decided by the verdict, for the issues obviously were the product of party-acts, viz., the allegations. And provided that the verdict had been found against the admitting party, the estoppel extended also to every material admission, tacit or otherwise, occurring in the pleadings, to the extent of foreclosing, in the later suit, any allegation contrary to that admission. To be effective, however, it was necessary that the estoppel be authenticated by the rendition of judgment. Such were the rules obtaining in the common-law courts. Manifestly, therefore, so far as the premises of the judgment were concerned, the doctrine of res judicata had no application: all was governed by the self-contained principle of estoppel by record.[145]

Outside of the common-law courts, the technical principle of estoppel by record found no recognition. And as that principle depended upon the system of pleading it could not in strictness apply even in a common-law court, where the previous proceedings invoked by a party had been had in other than a common-law court, or, if had in a common-law court, were of such a nature that no pleadings had been employed in their conduct. For the wide field thus existing, beyond the province of the common-law principle, the preclusive effect of the former proceedings, in respect of the premises of the decision as well as of the decision itself, necessarily depended upon what the courts conceived to be the operation of the principle of res judicata.[146]

B. *The English Law at the Opening of the 1800's*

If, then, we look at the situation in England in the opening years of the nineteenth century, we find the common-law principle being administered in the common-law courts in all cases where its technical

[145] Millar, "The Historical Relation of Estoppel by Record to Res Judicata," 35 ILL. L. REV. 41 (1940).

[146] Ibid., 56-57.

factors are present. And in 1803 it underwent the clarification resulting from Lord Ellenborough's classic decision in *Outram v. Morewood.* The estoppel, he said, in the words previously quoted, was created by the allegation, not by the judgment.

> "The recovery of itself in an action of trespass," he continued, "is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them."[147]

Plainly evidencing the operation of the same principle in relation to admission is the case of judgment by default. Thus in *Rock v. Layton* (1700)[148] judgment by default against an administrator had been held to be conclusive of his possession of assets to the amount of the judgment, and in *Aslin v. Parker* (1758)[149] it had been decided that a default judgment in ejectment precluded the defendant from contesting the plaintiff's possession in a subsequent action for mesne profits.

In the field lying beyond the domain of technical estoppel, important contribution had been made by cases relating to the conclusiveness of judgments of the ecclesiastical courts, three of which require particular notice. *Blackham's Case* (1709),[150] decided at *nisi prius*, was an action of trover in respect of certain goods owned by Jane Blackham in her lifetime. As against the plaintiff's proof that the goods were taken from his possession, the defendant relied upon the grant to him of letters of administration upon the estate of Jane Blackham. Thereupon the plaintiff proved his marriage to the decedent a few days before her death. The defendant then contended that the sentence of the ecclesiastical court awarding the letters was conclusive against the marriage, "for they could not have granted administration to the defendant, but upon supposing there was no such marriage." But Holt, C. J., held for the plaintiff on the ground that while the sentence of the ecclesiastical court was conclusive as to "the point directly tried," it was not as to a collateral matter to be "collected or inferred from their sentence."

[147] Outram v. Morewood, 3 East. 346 at 355, 102 Eng. Rep. 630 (1803).

[148] 1 Ld. Raym. 589, 1 Salk. 31, Comb. 87, 91 Eng. Rep. 273, 1294, 92 Eng. Rep. 973 (1700).

[149] 2 Burr. 665, 97 Eng. Rep. 501 (1758).

[150] 1 Salk. 290, Holt 661, 91 Eng. Rep. 257, 90 Eng. Rep. 1265 (1709).

Bouchier v. Taylor (1776)[151] was an appeal from chancery, decided by the House of Lords. Here it appears that there had been a contest in the ecclesiastical court as to the right to administer the estate of Ann Millington, between William Bouchier, claiming as first cousin once removed of the decedent, and Alice Merchant, claiming as first cousin. Upon the death of the latter during the pendency of the proceedings, her executors had been substituted as parties. The ecclesiastical court, by its sentence, as stated in *Brown's Cases*, declared that the executors "had failed in the proof of Alice Merchant's having been the cousin-german or next of kin of Ann Millington; and was pleased . . . to pronounce and decree for the interest of the appellant William Bouchier, that he was the lawful cousin-german once removed, and as far as it appeared to the Court, the next of kin of Ann Millington,"[152] and accordingly granted administration to Bouchier. Later, one Taylor, a residuary legatee under the will of the decedent, with his wife (who died *pendente lite*) filed a bill in chancery against Bouchier and others for a distribution of the estate. In this suit, the defendants pleaded the ecclesiastical sentence as conclusive that Alice was not next of kin to the decedent, but a decree was rendered granting an issue to try this question, and it was from this decree that the appeal to the House of Lords was taken. The decree was reversed. Our only account of the grounds for reversal comes from *Hargrave's Law Tracts*, where it is said that the result was reached

> "without the least opposition from the lord chancellor or any other lord. And Lord Mansfield, who was the only speaker on the subject, in his reasons against the decree, was clear, that the sentence was conclusive, notwithstanding the difference, in points of objects between the two suits; and that the court of chancery, in exercising its concurrent jurisdiction as to distribution, was concluded by sentences of the spiritual court in granting administration, and not at liberty to re-examine the points decided in the exercise of that peculiar jurisdiction."[153]

Superficially the result here might seem in conflict with *Blackham's Case*, but there is this important difference between the two, that, whereas in the former case the point in question rested in inference only, there was here an express pronouncement upon it, namely, a

[151] (March 7, 1776) 4 Brown P. C. 708, 2 Eng. Rep. 481 (1776); HARGRAVE, COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 472 (1787).

[152] Id., 4 Brown P. C. 708 at 709.

[153] HARGRAVE, COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 473-475 (1787).

declaration in the sentence that the executors of Alice Merchant had failed in proving her next of kin.

Some weeks after the decision in *Bouchier v. Taylor* came the celebrated *Duchess of Kingston's Case*.[154] The precise question involved, that of the conclusiveness, in a prosecution for bigamy, of a sentence of the ecclesiastical court against the validity of a marriage—a question which the House of Lords decided in the negative—does not affect the present subject of inquiry. But in the opinion of the judges, which was called for and received by the House, it was laid down, in limitation of the conclusiveness attaching to a judgment of a court either of concurrent or of exclusive jurisdiction upon the same matter later coming in question between the same parties in another court, that "neither the judgment of a concurrent or exclusive jurisdiction is evidence, of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment."[155] And *Blackham's Case* was referred to with approval as to its holding against the conclusiveness of matter to be inferred from the judgment. In spite of the exaggerated influence which the quoted expressions have had upon the later law, it is to be remembered that at best they were but dicta. Moreover, used, as it must be assumed they were, with full knowledge of the result reached so shortly before in *Bouchier v. Taylor*, they could not have been intended to conflict with that result and so to exclude from res judicata a matter coming in question and decided in the manner there appearing.

Accordingly, from these cases taken together, it must be considered that, as to the effect of the judgment-premises, the rule governing the matter of ecclesiastical sentences was that, although mere inference from the terms of the judgment was forbidden, whatever had necessarily come to direct decision and express pronouncement in arriving at the conclusion in chief had attained the property of res judicata.

Pertinent also in this same extra-estoppel area are certain cases which involved the conclusiveness of judgments of the Exchequer condemning goods for violation of statutory provisions. The holding here was that the judgment of condemnation precluded the cause of condemnation from again being litigated in a collateral proceeding, as in a proceeding by *scire facias* on a bond conditioned against a vessel

[154] (April 19, 1776) 20 How St. Tr. 355 (1814), 3 SMITH, LEADING CASES, 9th Am. ed., 1998 (1889).

[155] Id., 20 How. St. Tr. at 538.

being used for smuggling,[156] or on informations for statutory violations in respect of the goods after their condemnation.[157] The argument against such conclusiveness was well expressed by counsel in *Attorney General v. King* (1817),[158] decided on a ground not inconsistent with the holding in question, when he said that, "in practice, the record of condemnation does not state the cause of forfeiture, and the condemnation itself may have been the result of other conduct, than that with which the defendants are charged by this information."[159] These cases therefore, must be looked upon as attaching conclusiveness to the premises of the judgment, as appearing from the information, although there is no express pronouncement on the point in the judgment itself.[160]

Such are the principal markings of the basis upon which was to rest the later development in England and America. It will be seen that there are here exhibited three more or less variant rules—variant not because of anything materially intrinsic to the subject of decision but solely because of the different categories of cases in which the question of conclusiveness has arisen. These are (1) the rule that conclusiveness attaches or not to the premises as dictated by the principle of estoppel by record; (2) the rule, or at least the arguable doctrine, that, in view of the exclusion of collateral and incidental matters and matters to be inferred by argument from the judgment, as declared in the *Duchess of Kingston's Case*, no part of the premises can be regarded as res judicata unless it appear from the judgment itself to have been the subject of express decision; and (3)—for this is the necessary interpretation of the condemnation cases before mentioned—the rule that every part of the premises necessary to support the judgment is to be regarded as res judicata. To trace the ensuing English development in

[156] The King v. Matthews, 5 Price 202, 146 Eng. Rep. 582 (1797).

[157] Attorney General v. Wakefield, 5 Price 202, 146 Eng. Rep. 582 (1797); Attorney General v. Reynolds, 5 Price 203, 146 Eng. Rep. 582 (1804). Scott v. Shearman, 2 Wm. Black. 976 at 979, 96 Eng. Rep. 575 (1775), does not go to this extent, holding only that the condemnation was conclusive "that the goods were liable to be seized."

[158] 5 Price 195, 146 Eng. Rep. 579 (1817).

[159] Id., 5 Price at 208.

[160] Not without relevance is the similar rule applied in the case of sentences of foreign prize courts [Hughes v. Cornelius, 2 Show. 232, 89 Eng. Rep. 907 (1682); Geyer v. Aguilar, 7 T. R. 681 at 696; 101 Eng. Rep. 1196 (1798); Lothian v. Henderson, 3 B. & P. 499 at 545, 127 Eng. Rep. 271 (H. L. 1803)], from which the English courts have never materially departed. In Lothian v. Henderson, Lord Eldon expressed what Blackburn, J., in Castrique v. Imrie, L. R. 4 H. L. 414 at 434-435 (1870), describes as "a strong opinion that the practice of receiving the sentences of Prize Courts as conclusive of the collateral matter was originally a mistake, but had become inveterate, and could not now be disturbed."

any approach to detail, it need hardly be said, is here out of the question. All that is open to us is to note some of the more significant data.

C. *The Subsequent Course of Decision in England*

In the field of estoppel by record at common law is to be particularly noted *Howlett v. Tarte* (1861).[161] This, supplementing the dictum of Baron Parke in *Boileau v. Rutlin* (1848),[162] established the rule, scarcely to be collected from the older authorities,[163] that the estoppel extended only to preclude an allegation inconsistent with the record in the former suit, and that consequently, while in the later suit the defendant was estopped from controverting a traversable matter admitted by his failure to deny in the first suit (which had gone against him), he was not estopped from assailing it, in that second suit, by a plea in confession and avoidance.[164]

Inseparable as would seem the principle of estoppel by record from the system of common-law pleading, we find solution sought by its aid under different conditions of procedure. In *Humphries v. Humphries* (1910)[165] the Court of Appeal sought to apply the principle, as recognized in *Howlett v. Tarte*, in holding that a defendant against whom judgment had gone in a county court suit for rent, where there were no pleadings other than the plaint, was estopped in a second suit, also in the county court, for subsequently accruing rent, to assert the defense of the statute of frauds, on the ground that the existence of

[161] 10 C. B. (N. S.) 813, 142 Eng. Rep. 673 (1861).

[162] 2 Exch. 665 at 681, 154 Eng. Rep. 657 (1848): "The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, upon a different principle, and for the purpose of terminating litigation; and so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it."

[163] See Millar, "The Historical Relation of Estoppel by Record to Res Judicata," 35 ILL. L. REV. 41 at 53, note 55 (1940).

[164] In Carter v. James, 13 M. & W. 137, 153 Eng. Rep. 57 (1844), it had been held that there was no estoppel where the point (usury of an agreement) although admitted by failure of the plaintiff to deny the fact of usury alleged in the defendant's plea in a former suit, had not been in issue in that suit: the estoppel, it was said, related only to the issues and not to "any of the other facts which were taken in that case to be true merely for the purpose of deciding the question at issue." 13 M. & W. at 148. This decision, however, was plainly at variance with the English law before and since.

[165] [1910] 2 K. B. 531, dismissing appeal from judgment of Divisional Court, [1910] 1 K. B. 796.

the leasehold agreement had been in issue in the first suit. The ascertainment of what was in issue in the first suit was had only by reference to the finding of the deputy county court judge to the effect that the defendant had accepted the tenancy. Again, in *Cooke v. Rickman* (1911)[166] where the first suit, in which the plaintiff claimed rent under a certain agreement, was in the King's Bench Division, and the second suit for further rent was in the county court, it appeared that in the first suit the defendant, on the plaintiff's application for judgment under Order XIV, had filed an affidavit admitting that certain moneys were due for rent under the agreement in question and that the judgment included the sums so admitted to be due. In the second suit she sought to interpose the defense that the agreement was without consideration. The Court of Appeal, by reference to *Howlett v. Tarte* and *Humphries v. Humphries,* held that she was estopped to do so, since the admission of moneys due under the agreement was an admission that the agreement was valid. The fact that the statement of claim in the first case contained no averment of consideration was not permitted to stand in the way, because it was nevertheless incumbent upon the plaintiff to prove a consideration. It must, however, be apparent that, failing the technical factors of the common-law principle, these attempts to apply it involve much straining. Indeed, the practical inappositeness of the principle under the changed conditions of procedure is recognized by Bankes, J., in the second of these cases when he says:

> "The rule in *Howlett v. Tarte* was framed at a time when, owing to the great preciseness in pleading, it could be easily ascertained what was or was not a traversable allegation in the declaration, and under the present system of pleading there may in some cases be a difficulty in applying the rule." [167]

It would, however, have been much more logical for the court in both cases to have faced the reality induced by the change in procedure, and in view of the absence of the technical environment of the common-law principle to have rested the same result on the principle of res judicata in reliance upon those cases decided independently of the common-law principle.

Turning now to the area historically beyond the reach of the common-law principle, we encounter an effort to restrict the effect of the premises as res judicata by comparison of the objects of the first and the second suits. Here should be mentioned *Behrens v. Sieveking*

[166] [1911] 2 K. B. 1125.
[167] Cooke v. Rickman, [1911] 2 K. B. 1125 at 1130.

(1837)[168] in chancery, where Lord Chancellor Cottenham, in passing upon a plea of proceedings in the Lord Mayor's Court, interposed to a bill of interpleader, seems to have taken the view that some identity of object was required for conclusiveness.

> "It was necessary," he said, "to shew that the proceedings in which the Plaintiffs were alleged to have failed were taken for the same purpose as the present suit; for the issue might have been the same, while the object was different; and the circumstance that the matter had been tried, as a matter of evidence, could not be conclusive."

And in *Barrs v. Jackson* (1842),[169] another chancery case, it was again the subject of debate whether a sentence of the ecclesiastical court granting letters of administration operated to foreclose litigation of the question who was next of kin to the decedent. Vice-Chancellor Bruce, with the citation of numerous passages from the Roman *Digest*, held that the sentence did not prevent the court of chancery from investigating this question. In the course of his decision, he took occasion to say that he thought it was

> "to be collected that the rule against re-agitating matter adjudicated is subject generally to this restriction, that, however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may as to immediate and direct object be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of decision be not attempted to be withdrawn from its operation so as to defeat its direct object."[170]

But on appeal, Lord Chancellor Lyndhurst disagreed with the vice-chancellor's conclusion. He held that the question was settled by the decision of the House of Lords in *Bouchier v. Taylor*. He laid no emphasis upon the wording of the ecclesiastical judgment, although this —as appears from the report of the proceedings before the vice-chancellor—had expressly found that the unsuccessful competitor for administration had "failed in proof" that she was next of kin. *Bouchier*

[168] 2 Myl. & Cr. 602, 40 Eng. Rep. 769 (1837).
[169] 1 Y. & C. C. C. 585, 62 Eng. Rep. 1028 (1842).
[170] Id., 1 Y. & C. C. C. at 597-598.

v. Taylor, he thought, was nowise in conflict with *Blackham's Case*, The decision in *Blackham's Case*, he said,

> "amounts to nothing more than this—that if the question had been put in issue and decided, the sentence would have been conclusive; but that, not having been put in issue, you are not to infer that fact from the sentence."[171]

And in the present case he obviously considered that the point had been put in issue and decided.[172]

One might have supposed that the effect would have been to set at rest any suggestion that the conclusiveness of the first judgment for the second suit depended upon any sameness of object or purpose in the two litigations. But this apparently has not been the case. For we find Lord Selborne, by way of dictum in *The Queen v. Hutchings* (1881)[173] in the Court of Appeal, quoting approvingly Vice-Chancellor Bruce's observations above noted, with the remark that the reversal of his decision was on "a ground not at all touching the statement of principles contained in it." Similar expressions of approval have appeared in later cases.[174] But how it can be said that the ground of Lord Lyndhurst's decision left Vice-Chancellor Bruce's statement of principles untouched is something very difficult to understand.[175] As opposed, however, to the notion that two proceedings must involve the same object may be cited *Priestman v. Thomas* (1884)[176] in the Court of Appeal, a case arising in the Probate Division. Here a will, having been propounded by Thomas and Gunnell in an action in the Probate Division, was admitted to probate as the result of a compromise of that action. Subsequently Priestman, discovering that the will was forged, brought an action in the Chancery Division against Thomas and Gunnell to revoke the compromise on this ground. In that action the forgery

[171] Barrs v. Jackson, 1 Phill. 582 at 589, 41 Eng. Rep. 754 (1845).

[172] Ibid.

[173] 6 Q. B. D. 300 at 304 (1881).

[174] Stephenson v. Garnett, [1898] 1 Q. B. 644 at 682 (C. A.); The Queen v. Ollis, [1900] 2 Q. B. 758 at 770; Re Allsop & Joy's Contract, 61 L. T. 213 at 215 (1889); Ord v. Ord, [1923] 2 K. B. 432 at 441.

[175] This idea seems to have been started by the editor of SMITH'S LEADING CASES. In almost the precise words later used by Lord Selborne, he says: "The principles laid down in the judgment of the Vice Chancellor Knight Bruce are, however, wholly untouched by the reversal. . . ." 2 SMITH, LEADING CASES, 7th Am. ed., 634 (*596) (1873). Even Spencer BOWER, in his work on RES JUDICATA 222 (1924), deprecating the frequent praise of the judgment in question, refers to it as involving "a rather gross misapplication of correctly stated principles."

[176] 9 Prob. Div. 210 (1884).

was found by a verdict of a jury, and judgment was rendered accordingly. Later Priestman brought an action in the Probate Division asking for a declaration that Thomas and Gunnell were estopped from denying that the will was forged and for a revocation of the probate. The President of the Probate Division decided in favor of Priestman and the present appeal was taken from his decision. It was held that the decision was right, although the actions were brought for different purposes, since the fact of forgery was one necessary to the decision of the chancery action. Said Cotton, L. J.:

> "But it is contended that the action in the Chancery Division was brought for a different object to that sought by the present action, and that the purpose for which the present action is brought is not within the jurisdiction of the Chancery Division. That is so, but the action was between the same parties, and when the very point has been decided in one action it would be wrong to allow the same parties to litigate it over again in another court when all parties interested in contending that the will was a forgery were present before the Court in the former action."[177]

And both Cotton and Lindley, L. JJ., were express to the effect that the matter had not been decided "incidentally" within the meaning of the *Duchess of Kingston's Case*.[178]

The rule which seems to have been the actuating one in the condemnation judgment cases before mentioned becomes decidedly articulate in *The Queen v. Inhabitants of Hartington Middle Quarter* (1855),[179] involving another manner of statutory proceeding. In this case two justices of the peace of Lancashire had made an order adjudging the settlement of Esther Gould, a lunatic pauper, to be in Hartington Middle Quarter, Derbyshire. On appeal to the Sessions by the overseers of Hartington Middle Quarter, the order was confirmed, subject to the opinion of the Queen's Bench as to the effect of an order made in 1849 by two justices of Lancaster. By this order it was adjudged that John and William Gould, unemancipated children of William and Esther Gould, were settled in Hartington Middle Quarter in right of their father's settlement therein. It was accordingly maintained before the Court of Queen's Bench that, as the last-mentioned justices were required to and did determine the settlement of William and his marriage to Esther, as a precondition of adjudicating

[177] Id., at 214.
[178] Id., at 214, 215.
[179] 4 E. & B. 780, 119 Eng. Rep. 288 (1855).

the settlement of the children, their order became res judicata on the question of Esther's settlement. The court held the point to be well taken.

> "The question then is," said Coleridge, J., delivering the judgment of the court, "whether the judgment concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue. And we think it does conclude to that extent. . . . In this case, the marriage of Esther with William, and his settlement, were necessary steps to the decision in 1849: and therefore we think the appellants concluded by it now, when the same facts come again in question as the basis of the present decision."[180]

To be sure, the order in question contains the equivalent of a specific finding as to the concluding facts; but as the court does not speak of this feature, it is fair to assume that the same result would have followed in its absence, so long as it was clear that the point in reference represented a necessary step in arriving at the conclusion.

Importance further attaches to *In re Bank of Hindustan: Alison's Case* (1873)[181] in the Court of Appeal, which involved the effect of a common-law judgment in a chancery proceeding. An action at law for unpaid calls on certain shares, brought against Alison by the Bank of Hindustan, had resulted in a judgment for the defendant. Later in a chancery proceeding to wind up the bank, Alison sought repayment of certain moneys paid to the bank in respect of the shares, on the ground that the consideration for the payment had failed. The common-law judgment was held conclusive in his favor. It appeared that, while this judgment in form merely determined that the bank was not entitled to recover, it was reached on the statement of a special case which, in the view of the present court, raised only the question whether Alison had ever been a shareholder—a question which the judgment had by necessary implication answered in the negative. Said Mellish, L. J.:

> "It is clear, I apprehend, that the judgment of the Courts of Common Law is not only conclusive with reference to the actual matter decided, but that it is also conclusive with reference to the grounds

[180] Id., 4 E. & B. at 794, 797. The court recognized that the order in question was a judgment in rem but held that "it is unnecessary now to rely on the judgment having been in rem; for it was a judgment between the same parties. . . ." Id., 792, 794.

[181] L. R. 9 Ch. App. 24 (1873).

of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discovered."[182]

A similar question arose in *In re South American and Mexican Co.* (1894).[183] The Bank of England, claiming by virtue of an agreement on the part of the South American and Mexican Company to pay the sum of £514,300, with interest in four installments, had brought suit to recover the second installment (the first having been paid) and in this action judgment had been entered by consent for the sum claimed, £100,000. Subsequently in a winding-up proceeding in the Chancery Division, the bank, after the last installment had become due, presented its claim for the unpaid balance. The official liquidator rejected proof of the claim on certain grounds which had been alleged as a defense in the previous action and expressly stated that the consent judgment did not bind the company. On a summons to reverse this decision, Vaughan Williams, J., held that the company was concluded by the judgment, in respect not only of the installment in suit, but also of the balance of the claim. The consent judgment, he considered, stood on the same footing with respect to conclusiveness as a judgment rendered on default or on controversy. Then, having reference to the statement of claim and particulars on which the judgment proceeded,

"it seems to me," he said, "abundantly clear that the existence of this particular agreement was of the essence of the Plaintiff's claim in the action, and that it was impossible for the Plaintiffs to recover the instalment of £100,000 in the action unless the agreement alleged in the statement of claim existed. . . . I hold that the judgment on the claim is a judgment for the £100,000 under the agreement alleged in the pleadings, and that the judgment, therefore, affirms the existence of the agreement. . . ."[184]

With the observation on the part of Lord Chancellor Herschell that he thought "it would be very mischievous if one . . . were to allow questions that were really involved in the action to be fought over again in a subsequent action," the decision was affirmed by the Court of Appeal.[185]

In the same regard should be noted *Woodland v. Woodland* (1928)[186] in the Probate Division. On a petition by a husband for nullity of marriage on the ground that it was bigamous on the part

[182] Id., at 25.
[183] [1895] 1 Ch. 37.
[184] Id., at 47, 48.
[185] Id., at 50.
[186] [1928] Prob. Div. 169.

of the wife, it appeared that the allegation of bigamy was grounded upon the alleged inoperativeness of a French decree of divorce obtained by the wife in 1914 against her former husband. But it also appeared that in 1921 the wife had petitioned in the Probate Division for a restitution of conjugal rights against the present petitioner. In this proceeding the latter had entered an appearance but had put in no answer, and a decree was rendered in favor of the wife containing, as it is said, "in the usual form an express finding that the parties were husband and wife."[187] It was held that this decree concluded the husband in the present case, since, as said by the court:

> "The marriage was directly in issue in the proceedings for restitution. It was actually decided by the Court, and the Court could not have made a decree without finding that it was a valid marriage. It appears from the judgment itself to be the ground upon which it was based; there was a finding that they were lawful husband and wife."[188]

There can be no doubt, under these decisions, that, other things being equal, a fact may become conclusively adjudicated for the purpose under examination as the result of admission, whether what is sought to be applied is the common-law rule of the estoppel cases or the general principle of res judicata. This is especially apparent from *In re South American and Mexican Co.* and *Woodland v. Woodland.*

What, then, is to be concluded as to the present state of the English law on the general question, as compared with what it was at the opening of the nineteenth century? It now seems clear that a matter is not to be regarded as incidental or collateral within the ban of the *Duchess of Kingston's Case* if it definitely constituted part of the grounds of decision. Nor is it excluded because of being a matter of inference from the judgment, within that ban, if, although not coming to express decision, it was a logical and necessary step on the way to the judgment-conclusion. The common-law principle of estoppel by record, although paid formal homage in *Humphries v. Humphries* and *Cooke v. Rickman,* has in reality, through supervening changes in procedure which have deprived it of its common-law mechanism, become a method of approach—and an extremely awkward one—to the application of the principle of res judicata, and may be regarded as substantially merged with that principle. The failure to discriminate in terminology, especially evident since the Judicature Acts, which has led

[187] Id., at 170.
[188] Id., at 173.

to the incorrect use of "estoppel" as a synonym for the preclusion worked by the judgment-proceedings, whether resulting historically from the principle of common-law estoppel or from that of res judicata,[189] is but symptomatic of this substantial merger. If, therefore, anything in the nature of uniform rule is to be deduced from the modern decisions, it would seem to be this, namely, that if the ground of decision becomes apparent either from the terms of the judgment itself, or by absolutely necessary illation from those terms, or becomes apparent from the judgment itself, taken in connection with the pleadings and other constituents of the record or, at least in cases where there are no pleadings, in connection with evidence *aliunde*,[190] it is to be considered as having been conclusively adjudicated, so as to bind the parties in a suit on a different cause of action. To such extent the property of res judicata attaches to the premises of the judgment. This result, however, is clouded, on the one hand, by the expressions[191] which have occurred from time to time in approval of Vice-Chancellor Bruce's view in *Barrs v. Jackson* that diversity in purpose between the first and second suits may operate against the res judicata of the premises of the first judgment, and, on the other, by Lord Selborne's doubt[192] of the correctness of the rule declared by Coleridge, J., in *The Queen v. Inhabitants of Hartington Middle Quarter*, as well as by intimations that that rule may not be applicable to other than exceptional cases.[193]

[189] See Millar, "The Historical Relation of Estoppel by Record to Res Judicata," 35 ILL. L. REV. 41 at 57 (1940).

[190] The older law, with reference to common-law estoppel by record, did not permit the use of evidence *aliunde*. Sintzenick v. Lucas, 1 Esp. 43, 170 Eng. Rep. 274 (1793). In America such evidence has long been freely admitted to establish identity of adjudicated facts in every sort of proceeding. Although in England the practice has not gone to the same extent, there is no doubt that the principle is, at least, well on its way to general acceptance. The rule of inquiry by means of extrinsic evidence has been definitely settled in various cases where the judgment-proceeding has not involved the use of pleadings, as in certain statutory matters. The King v. Wheelock (Inhabitants), 5 B. & C. 511, 108 Eng. Rep. 190 (1826); The Queen v. St. Peters, Droitwich (Inhabitants), 9 Q. B. 886, 115 Eng. Rep. 1514 (1847); The Queen v. Leeds (Inhabitants), 9 Q. B. 910, 115 Eng. Rep. 1524 (1847); Heath v. Weaverham (Township) Overseers, [1894] 2 Q. B. 108. It is the necessary result of certain cases in relation to county court judgments. Flitters v. Allfrey, L. R. 10 C. P. 29 (1874); Ord v. Ord, [1923] 2 K. B. 432. And expressions are to be found indicating that, if occasion demanded, the rule would be given a wider application. Heath v. Weaverham Overseers, supra; Ord v. Ord, supra. Whittaker v. Jackson, 2 H. & C. 926, 159 Eng. Rep. 383 (1864), is explainable on the ground that the evidence in question would have contradicted the record.

[191] Supra, p. 247.

[192] The Queen v. Hutchings, 6 Q. B. D. 300 at 303 (1881), supra, note 173.

[193] De Mora v. Concha, 29 Ch. D. 268 at 301-303 (C. A. 1885); Wakefield Corporation v. Cooke, [1903] 1 K. B. 417 at 424.

D. *The American Law*

In America the several streams of English doctrine disclosed at the opening of the nineteenth century have variously mingled their waters, giving rise at the same time to minor effluents whose channels have been dug by the exigencies of the multiform situations, procedural and otherwise, in which the question of conclusiveness has arisen. The American scene, however, has been substantially untroubled by any serious appearance of the idea that there should exist identity of purpose or object between the first and second suits as a condition of conclusiveness in the present regard.[194] To be noted also is the fact that failure to discriminate between the common-law principle of estoppel by record and the principle of res judicata with the concomitant confusion in terminology, has in later years been even more pronounced than in England. As a consequence, while the common-law principle has been much more influential upon the result than in the English cases, there has come about more definitely than in England, although for the most part unconsciously, what in practical effect is a merger of the two principles under the general rubric of res judicata—so much so that there is no occasion for any separate consideration of the two. The larger influence of the common-law principle is perhaps apparent in the exclusion, above noted, of the idea that there must be any identity of purpose between the two proceedings, but it is very clearly apparent in the notion that as a mode of approach to the solution of the question it is not so much the grounds of decision, as such, upon which emphasis is to be placed, as upon the inquiry whether the point in reference had been the subject of issue in the previous suit. It is this notion which characterizes the dominant doctrine, whose establishment has had its most powerful factor in the case of *Cromwell v. County of Sac*,[195] decided by the United States Supreme Court in 1876. Here, after stating the unquestioned rule that, where the second suit is upon the same cause of action as the first, the judgment is conclusive as to every ground of claim or defense that was or might have been advanced, the court, per Mr. Justice Field, goes on to say:

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action

[194] "The only matter essential to making a former judgment on the merits conclusive between the same parties is, that the question to be determined in the second action is the same question judicially settled in the first." 2 FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS, 5th ed., § 672, p. 1418 (1925). ". . . the principle runs through nearly all the American cases, that a judgment is conclusive, if upon the direct point, though the objects of the two suits are different." Ibid., § 673, p. 1420.

[195] 94 U. S. 351 (1876).

> operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."[196]

Although the Court may have thought otherwise, this is not the common-law principle of estoppel, for—to say nothing of the verbal imprecision in referring to the "estoppel of a *judgment*"—that principle recognized as conclusive not only the decided issues, but also, except as against attack by way of confession and avoidance, material admissions. And, notwithstanding the Court's citation of *Howlett v. Tarte*, its intention not to allow the rule to embrace the conclusiveness of admissions[197] would seem to be evident from its statement later in the opinion that "a judgment by default only admits for the purposes of the action the legality of the demand or claim in suit: it does not make the allegations of the declaration or complaint evidence in an action upon a different claim."[198]

But some eighteen years later in *Last Chance Mining Co. v. Tyler Mining Co.* (1895)[199] the Court changed its view as to the effect of a judgment by default, saying that such a judgment:

> "is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest. . . . A failure to answer is taken as an admission of the truth of the facts stated in the complaint, and the court may properly base its determination on such admission."[200]

This being so, the doctrine, as expressed in *Cromwell v. County of Sac*, must be regarded as enlarged to let in the conclusive effect of an admis-

[196] Id., at 353.

[197] It need hardly be said that any rule negativing the conclusive effect of admissions in the present connection refers to admissions effected in the course of the pleadings otherwise than by demurrer or its statutory equivalent. For when res judicata attaches to a judgment rendered on demurrer, no one can doubt that it does so because the facts on which the issue of law have arisen have stood admitted by the demurrer. When, therefore, in the present discussion, we speak of the conclusiveness or non-conclusiveness of admissions, it will be understood that we are leaving out of view the case of decision on demurrer.

[198] Cromwell v. County of Sac, 94 U. S. 351 at 356 (1876).

[199] 157 U. S. 683, 15 S. Ct. 733 (1895).

[200] Id., 157 U. S. at 691.

sion, material to the adjudication, occurring in the course of the pleadings.

Difference of view, however, from that of this corrected doctrine has found place among the American courts, and in particular the rule articulated in *The Queen v. Inhabitants of Hartington Middle Quarter* has come to expression in sundry jurisdictions. The bewildering mass of decisions with which we are confronted puts any attempt to follow the doctrinal development quite beyond the reach of the present paper. We can only note with respect to the results reached the leading divisions of the doctrinal field. Accordingly, by a rough classification, there are discernible three main rules, which we may distinguish as (1) the rule of relative conclusiveness of the premises; (2) the rule of qualified conclusiveness of the premises; and (3) the rule of absolute conclusiveness of the premises.

(1) *The Rule of Relative Conclusiveness of the Premises.* This is the rule of *Cromwell v. County of Sac,* as amended by *Last Chance Mining Co. v. Tyler Mining Co.* It insists that before any part of the premises shall be deemed conclusively adjudicated so as to bind in respect of the point in reference, that point shall have been in issue in the previous suit or, if of fact, shall have been the subject of admission, express or implied in the pleadings therein. It represents, beyond question, the doctrine of a majority of the American jurisdictions.[201]

(*a*) On the question of admission, however, opinion is not unanimous. By the necessary effect of some decisions the admission is conclusive against any form of attack in the later suit. This usually results from a misapplication of the rule everywhere appropriate to the case of suit upon the same demand already adjudicated, to the effect that what might have been advanced is now foreclosed.[202]

(*b*) Other decisions, more faithful to the idea resident in the common-law principle of estoppel by record, hold that the admission is conclusive against a denial in the second suit but not against attack by way of affirmative allegation.[203]

[201] See 2 FREEMAN, JUDGMENTS, 5th ed., §§ 688, 660 (1925); 2 BLACK, A TREATISE ON THE LAW OF JUDGMENTS, 2d ed., §§ 609, 622 (1902).

[202] Newton v. Hook, 48 N. Y. 676 (1872); C. Graham & Sons Co. v. Van Horn, 49 N. Y. S. 401 (S. Ct. 1898); Phipps v. Oprandy, 69 App. Div. 497, 74 N. Y. S. 985 (1902); Harper v. Harper, (C. C. A. 3d, 1892) 53 F. 35; Collister v. Inter-State Fidelity Bldg. & Loan Assn., 44 Ariz. 427, 38 P. (2d) 626 (1934).

[203] Hanham v. Sherman, 114 Mass. 19 (1873); Adams v. Adams, 25 Minn. 72 (1878); Oregon Ry. v. Oregon Ry. & Nav. Co., (C. C. Ore. 1886) 28 F. 505; Meyerhoffer v. Baker, 121 App. Div. 797, 106 N. Y. S. 718 (1907); Phillips v. Phillips, 118 N. J. Eq. 189, 178 A. 265 (1935). *Semble*: Orr v. Mercer County Mut.

(2) *The Rule of Qualified Conclusiveness of the Premises.* By this rule conclusiveness in the present regard is confined to matters which were in issue in the former suit. It represents what would be the rule of *Cromwell v. County of Sac*, taken literally and unmodified by the Supreme Court's later decision as to the effect of a judgment by default. Accordingly, no conclusiveness attaches to an admission made in the course of the pleadings. The rule finds its rationale solely in the fact of a previous adjudication consequent upon a concrete contest, at least in the pleadings, of the point in reference.[204]

Each of the two main rules above mentioned is attended with the necessity of determining whether the point was in issue within their meaning. Here we may note the following:

(*a*) There has found place the conservative view that a matter is in issue for this purpose only when it has been controverted in allegation. This does not mean necessarily that the matter should have been specifically in issue, for general pleading must be here taken into consideration, but apparently requires that the point must be one of ultimate fact which if not raised specifically by the pleadings, is such as would have been the subject of specific controversy in the pleadings had these been special.[205]

(*b*) The great majority of the cases, however, do not insist upon so strict a definition of matters in issue, extending the conclusiveness to matters in the nature of subordinate propositions or logical steps

Fire Ins. Co., 114 Pa. St. 387, 6 A. 696 (1886); Des Moines Nat. Bank v. Harding, 86 Iowa 153, 53 N. W. 99 (1892).

In BIGELOW, A TREATISE ON THE LAW OF ESTOPPEL, 6th ed., 206-207 (1913), it is observed that "there is the best authority for saying that judgment by default does not conclude defences in confession and avoidance in a different action."

[204] Jacobson v. Miller, 41 Mich. 90, 1 N. W. 1013 (1879); Bond v. Markstrum, 102 Mich. 11, 60 N. W. 282 (1894); State ex rel. v. Cooley, 58 Minn. 514, 60 N. W. 338 (1894); Lublin v. Stewart, Howe & May Co., (C. C. N. J. 1896) 75 F. 294; Hodge v. United States Steel Corp., 64 N. J. Eq. 90, 53 A. 601 (1902); Tudor v. Kennett, 87 Vt. 99, 88 A. 520 (1913); Gibbs v. Security Trust & Savings Bank, 65 Colo. 413, 176 P. 827 (1918); Mason's Exrs. v. Alston, 9 N. Y. 28 (1853); Craft v. Perkins, 83 Ga. 760, 10 S. E. 357 (1889).

This view is strongly supported by 1 VAN FLEET, RES JUDICATA, §§ 217-227 (1895). "It is my opinion," he says, "that if an issue is not contested it ought not to be concluded." § 217.

[205] King v. Chase, 15 N. H. 9 (1844); Vaughan v. Morrison, 55 N. H. 580 (1875); Metcalf v. Gilmore, 63 N. H. 174 (1884); Winnipiseogee Lake Cotton & Woolen Mfg. Co. v. Laconia, 74 N. H. 82, 65 A. 378 (1906); Chesley v. Dunklee, 77 N. H. 263, 90 A. 965 (1914); Caperton v. Schmidt, 26 Cal. 479 (1864); Garwood v. Garwood, 29 Cal. 514 (1866); Coville & Garber v. Gilman, 13 W. Va. 314 (1878); Smith v. Town of Ontario, (C. C. N. Y. 1880) 18 Blatch. 454, 4 F. 386; Oglesby v. Attrill, (C. C. N. Y. 1884) 20 F. 570.

whose decision is necessary to determine the ultimate fact in issue.[206] More usually such matters are identified as "matters necessarily involved" in the issue as framed, or by the use of some kindred expression.[207] Limit, however, is frequently set to the extension by withholding conclusiveness from controverted matters which are purely evidentiary.[208] Sometimes merging with the latter is the limit set by invoking the rule of the *Duchess of Kingston's Case* against the conclusiveness of incidental or collateral matter.[209] By the weight of opinion, however, a matter is deemed incidental or collateral in this sense only when its determination has not been necessary to the support of the judgment rendered.[210]

[206] ". . . subordinate rights or questions which are branches of a larger right or question put in issue . . . are determined by a judgment on the merits. . . ." Pray v. Hegeman, 98 N. Y. 351 at 359-360 (1885). "This doctrine . . . is equally applicable whether the point was, itself, the ultimate vital point, or only incidental, but still necessary to the decision of that point." Attorney General v. Chicago & Evanston R. R., 112 Ill. 520 at 539 (1884), quoted in Wright v. Griffey, 147 Ill. 496 at 499, 35 N. E. 732 (1893). "A judgment concludes not only the technical fact in issue, but also every component fact necessarily involved in its determination." Rauwolf v. Glass, 184 Pa. St. 237 at 240, 39 A. 79 (1898). BIGELOW, ESTOPPEL, 6th ed., 170 (1913), speaks of "necessary facts in a chain as well as the primary facts in issue."

[207] Chamberlain v. Gaillard, 26 Ala. 504 (1855); Babcock & Co. v. Camp, 12 Ohio St. 11 (1861); Casler v. Shipman, 35 N. Y. 533 (1866); Huntley v. Holt, 59 Conn. 102, 22 A. 34 (1890); Sargent & Co. v. New Haven Steamboat Co., 65 Conn. 116, 31 A. 543 (1894); Coltrane v. Laughlin, 157 N. C. 282, 72 S. E. 961 (1911).

[208] "Facts offered in evidence to establish the issue . . . are not themselves in issue, and the judgment is no evidence in regard to them." Belden v. State, 103 N. Y. 1 at 8, 8 N. E. 363 (1886). To the same effect: Badger v. Titcomb, 15 Pick. (32 Mass.) 409 (1834); Haight v. City of Keokuk, 4 Iowa 199 (1856); Ford v. Ford's Admr., 68 Ala. 141 (1880); Cavanaugh v. Buehler, 120 Pa. St. 441, 14 A. 391 (1888).

"It is sometimes difficult to determine when the particular issue settled in a judicial proceeding is of sufficient dignity to be covered by the rule of estoppel. Whenever the question of fact is of such a character that it requires evidence to sustain it, and upon that evidence a determination has been reached and declared, the fact adjudicated is one which the parties and their privies will not be permitted to reopen in a second controversy among themselves." Tompkins v. Hooker, (Tex. Civ. App. 1917) 200 S. W. 193 at 195.

[209] Eastman v. Cooper, 15 Pick. (32 Mass.) 276 (1834); Lewis & Nelson's Appeal, 67 Pa. St. 153 (1870); Marvin v. Dutcher, 26 Minn. 391 (1880); Williams v. Williams, 63 Wis. 58, 23 N. W. 110 (1885); Mullaney v. Mullaney, 65 N. J. Eq. 384, 54 A. 1086 (1903); Wells v. Boston & Maine R. R., 82 Vt. 108, 71 A. 1103 (1909); In re Wagner's Estate, 178 Okla. 384, 62 P. (2d) 1186 (1936).

[210] Singery v. Attorney-General, 2 Har. & J. (6 Md.) 487 (1809); Kennedy v. Scovil, 14 Conn. 61 (1840); Watts v. Rice & Wilson, 75 Ala. 289 (1883); Stannard v. Hubbell, 123 N. Y. 520, 25 N. E. 1084 (1890); Smith v. Rountree, 185 Ill. 219, 56 N. E. 1130 (1900); Moser v. Philadelphia, H. & P. R. R., 233 Pa. St.

(*c*) In any event where the point in reference does not appear on the face of the pleadings the ascertainment of whether the point was in issue may involve resort to evidence *aliunde*, the use of which is much more common than in England. Such evidence may also be required, however special the allegations, if the verdict or finding is a general one. And, *a fortiori*, occasion for like resort may arise where there have been no pleadings.[211]

(*d*) This recognized use of evidence *aliunde* has incident to it the necessity of regulating the burden of proof in its adduction. An important question in this connection is presented when in the first suit there is a plurality of issues and, as in the case of a general verdict or finding, the record does not disclose upon which of the issues the judgment was based. Manifestly, if for the plaintiff, the judgment is a conclusive adjudication of every defense going simply in negation of the plaintiff's cause of action, provided that but a single cause of action is alleged and no affirmative defenses are present, and this however general the verdict or finding may be. But outside of this situation uncertainty may exist. Thus, where the complaint or declaration contains a plurality of counts or where the defendant has pleaded a plurality of defenses, one or more of them affirmative, a general verdict or finding, under present-day practice, will often, in the one case, and always in the other, leave unidentified the particular basis on which judgment was rendered. Here it has been held, on the one hand, that there is a pre-

259, 82 A. 362 (1912); Kicinko v. Petruska, 259 Pa. St. 1, 102 A. 286 (1917); Venetsanos v. Pappas, 20 Del. Ch. 453, 171 A. 925 (1936).

[211] "The ancient system of pleading, which was conducive to the end of ascertaining the material issue between the parties, and the preservation in a permanent form of the evidence of the adjudication, has been condemned as requiring unnecessary precision, and subjecting parties to over-technical rules, prolixity, and expense. A system of general pleading has been extensively adopted in this country, which rendered the application of the principle contended for by the plaintiffs [that the estoppel must appear on the face of the record] impracticable, unless we were prepared to restrict within narrow bounds the authority of the *res judicata*. It was consequently decided that it was not necessary as between parties and privies that the record should show that the question upon which the right of the plaintiff to recover, or the validity of the defence, depended for it to operate conclusively; but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury." Per Campbell, J., in Washington, Alexandria & Georgetown Steam-Packet Co. v. Sickles, 24 How. (65 U. S.) 333 at 343-344 (1860).

How large this matter of extrinsic evidence bulks in the American scheme may be judged from the fact that in the work of Freeman no less than thirty-three pages are devoted to its treatment. 2 FREEMAN, JUDGMENTS, 5th ed., §§ 764-773 (1925).

sumption that the judgment was based on all the issues, which presumption can only be rebutted by a showing that the particular issue was not the subject of adjudication.[212] Sometimes, however, this presumption seems to be conditioned upon it being made to appear that evidence was introduced on all the issues.[213] On the other hand, a large preponderance of opinion supports the view that no presumption of the kind exists, that the whole question of conclusiveness is at large and that the burden is upon the party asserting the res judicata to establish that the particular issue was actually adjudicated.[214] On the whole, this may be the better rule, as frequently said; but one result of it is this, namely, that if, for example, to a money demand, the defendant puts forward the two defenses of payment and the statute of limitations and a general verdict is returned in his favor, the ensuing judgment, in the absence of identifying evidence, is not conclusive as to either defense in a subsequent suit upon a different cause of action—a result quite at variance with common-law principle, under which a general verdict was committed to record in terms of the particular pleading issues which it resolved,[215] and so was a conclusive finding on each of these issues.

(*e*) Finally, it is to be noted that the term "issue" as used in the statement of these two main rules is not necessarily confined to issues of fact.[216] When occasion requires, the term covers, besides questions of fact or of mixed law and fact, questions of law, not, of course, in *abstracto*, but in their concrete application to facts proved or admitted.[217] The decision applying the law to the facts becomes conclusive "for the

[212] Day v. Vallette, 25 Ind. 42 (1865); Hall v. Zeller, 17 Ore. 381, 21 P. 192 (1889).

[213] White v. Simonds, Conant & Co., 33 Vt. 178 (1860); Rhoads v. City of Metropolis, 144 Ill. 580, 33 N. E. 1092 (1889).

[214] Russell v. Place, 94 U. S. 606 (1876); Littlefield v. Huntress, 106 Mass. 121 (1870); Hoffman v. Silverthorne, 137 Mich. 60, 100 N. W. 183 (1904); Hoffman v. Hoffman, 330 Ill. 413, 161 N. E. 723 (1928); True-Hixon Lumber Co. v. Thorne, 171 Miss. 783, 158 So. 909 (1934); Kelliher v. Stone & Webster, (C. C. A. 5th, 1935) 75 F. (2d) 331.

[215] See Millar, "The Old Régime and the New in Civil Procedure," 14 N. Y. UNIV. L. Q. REV. 1, 197 at 213 (1937).

[216] "Matters in issue or points controverted" is the expression used in Cromwell v. County of Sac, supra at note 196. "A right, question or fact distinctly put in issue" is the re-phrasing in Southern Pacific R. R. v. United States, 168 U. S. 1 at 48, 18 S. Ct. 18 (1897).

[217] Southern Minn. Ry. Extension Co. v. St. Paul & S. C. R. R., (C. C. A. 8th, 1893) 55 F. 690; State ex rel. Kennedy v. Broatch, 68 Neb. 687, 94 N. W. 1016 (1903); Bissell v. Spring Valley Township, 124 U. S. 225, 8 S. Ct. 495 (1887).

purpose of the conclusiveness of those facts, but no further."[218] To this extent, however, it is fully vested with the property of res judicata.[219]

(3) *The Rule of Absolute Conclusiveness of the Premises.* The third main rule reflects the English doctrine coming to definite expression in *The Queen v. Inhabitants of Hartington Middle Quarter.* This rule goes on the ground that since the conclusion attained by the judgment is res judicata, every part of the premises essential to support this conclusion is also res judicata. It is thus permitted to "reason back" from the conclusion to the premises.[220] While, obviously, reference to the pleadings cannot be dispensed with, in determining what the premises were, the question of what was in issue is not here of major importance. Indeed, there is distinct expression to the effect that the rule applies

[218] BIGELOW, ESTOPPEL, 6th ed., 112 (1913).

[219] Under the two main rules of which we speak (the second as well as the first, since they differ only in their attitude toward admissions of fact) specific contest of the question of law in the first suit would logically be necessary to render it res judicata in a second suit based upon a different claim. Recognition of this is by no means complete. See BIGELOW, ESTOPPEL, 6th ed., 112-113 (1913); 2 FREEMAN, JUDGMENTS, 5th ed., § 709 et seq. (1925). It does, however, afford the basis of decision in Stoll v. Gottlieb, 305 U. S. 165, 59 S. Ct. 134 (1938). Where the question is that of the constitutionality of a statute there is especially strong reason for the requirement. Boyd v. Alabama, 94 U. S. 645 (1876), actuated thus by the disinclination of courts to raise such a question of their own motion, would appear to accord with the conclusion indicated. But the recent case of Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, 60 S. Ct. 317 (1940), can be made to harmonize with that conclusion only by taking a somewhat elastic view of what constitutes sameness of causes of action.

[220] "The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis on which it stands, 'upon the obvious principle that, where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion.' " Burlen v. Shannon, 99 Mass. 200 at 203 (1868).

". . . the judgment in favor of Mrs. Bleakley could not have been rested upon any other ground than that her claim to be the child's mother was found by the court to be true. Within the rule approved in Redden v. Metzger [46 Kan. 285, 26 P. 689 (1891)] it is apparent that by reasoning back from the judgment to the basis on which it stands we find the judgment could only be based upon the premise of motherhood, and this premise is as much a thing adjudicated as the conclusion itself." Bleakley v. Barclay, 75 Kan. 462 at 473, 89 P. 906 (1907).

"The point falls squarely within the rule that every proposition assumed or decided by the court leading up to the final conclusion and upon which such conclusion is based, is as effectively passed upon as the ultimate question which is finally solved." State ex rel. Atkinson v. McDonald, 108 Wis. 8 at 16, 84 N. W. 171 (1900).

". . . the judgment is a conclusion, and, if necessarily drawn from certain premises, such premises are conclusive as the judgment itself." Shelby v. Creighton, 65 Neb. 485 at 492, 91 N. W. 369 (1902).

whether the premisory matter has been in issue or not.[221] And it goes without saying that the premises may be either matter of fact or matter of law in its application to the facts adjudicated.

These are but the more conspicuous indicia of the American law in the present regard.[222] Their statement leaves unnoticed a myriad of questions concerning collateral and subordinate phases of the situation on which conflict of opinion has not failed to arise. At best, moreover, difficulty is constantly encountered in the application even of the stated principles. In particular, if the issue test is applied, "the difficulty is to determine what points were in issue and determined by the judgment, or, rather what issues were necessarily involved in the judgment, although not directly and expressly made and litigated."[223] The observation is an accurate one that "the line of demarcation between what is res judicata and what is not does not always run true in case-made law."[224] And especially is it accurate when said of the American picture. The categorical variation of doctrine bequeathed to us by the early

Accord: Farmers' & Fruit-Growers' Bank v. Davis, 93 Ore. 655, 184 P. 275 (1919); Johnson v. Gillett, 66 Okla. 308, 168 P. 1031 (1917); Town of Pittsford v. Town of Chittenden, 58 Vt. 49 (1886); Redden v. Metzger, 46 Kan. 285, 26 P. 689 (1891); Uncle Sam Oil Co. v. Richards, 73 Okla. 248, 175 P. 749 (1918); Lee v. Kingsbury, 13 Tex. 68 (1855).

In a number of the foregoing cases, the judgment in question was one in rem, but the rule is quite independent of the nature of the previous proceeding as in rem or in personam. See the relevant observation of Coleridge, J., in The Queen v. Inhabitants of Hartington Middle Quarter, supra at note 180.

[221] Bleakley v. Barclay, 75 Kan. 462 at 470-472, 89 P. 906 (1907); Johnson v. Gillett, 66 Okla. 308 at 310, 168 P. 1031 (1917); Farmers' & Fruit-Growers' Bank v. Davis, 93 Ore. 655 at 666, 184 P. 275 (1919); Lee v. Kingsbury, 13 Tex. 68 at 71 (1855).

[222] It will be recalled that in the Continental law, the defense of compensation, in relation to the present inquiry, is often the subject of distinct provision. Its corresponding institution in the Anglo-American law, that is to say, set-off, *stricto sensu*, does not require the same special regulation, for the reason that our substantive law has never recognized any species of set-off equivalent to compensation *ipso jure*. Accordingly, the claim of set-off is always regarded as in the nature of an affirmative counter-demand. Except, therefore, as the case may be affected by statutes or rules of court, which exist to a limited extent, requiring the assertion of certain counter-demands in a suit on the principal demand [see 2 FREEMAN, JUDGMENTS, 5th ed., § 788 (1925); Rules of Civil Procedure for the District Courts of the United States, Rule 13(a)] the defendant is free to assert or not the claim of set-off as he chooses. If, however, there is a failure to assert the claim in the face of a provision of the kind, the claim is lost. Whether in such case it can accurately be said that the preclusion from asserting the claim in a later suit arises from the res judicata of the judgment on the principal demand is perhaps an arguable question.

[223] Mitchell, J., in Jordahl v. Berry, 72 Minn. 119 at 122, 75 N. W. 10 (1898).

[224] Lamm, J., in Womach v. City of St. Joseph, 201 Mo. 467 at 475, 100 S. W. 443 (1907).

English decisions, the inherited differences between the procedure of the common law and that of equity, to say nothing of proceedings not governed by the pleading rules of either, the necessity of adjustment to the changes effected by latter-day pleading reform and the confusion induced by an imperfect understanding of the historical separateness of estoppel by record and res judicata, have all conspired, on a much larger scale and in a deeper measure than in England, to thwart the formation of a uniform and easily applied body of principle. Indeed, we think it might be fairly said that there is no other field of American judicature which redounds so little to the credit of its administrators in point of the development of a clear-cut and serviceable system. And the situation in England is better only in so far as it is that of a single jurisdiction dealing with a comparatively small volume of cases.

E. *Conclusion*

What thus appears in the Anglo-American law is the case of a basically simple matter which by an undiscriminating adherence to traditional dogma, coupled with lack of attention to historical evolution, has become complicated in the extreme. There is no good reason why a state of affairs so at variance with every consideration of directness and certainty should continue to be maintained. If we are willing to take a lesson from the Continent, the remedy is plain and for the most part easy of attainment.

First. Let us forget, save as a historical memory, the common-law principle of estoppel by record. It has served faithfully in the past, but has lost its vital means of subsistence with the disappearance of the system of pleading on which it depended. Moreover, by a process of assimilation, largely unconscious, to be sure, it has become substantially merged into the Roman-derived principle of res judicata. Let the latter, therefore, control throughout in name as well as in effect.

Second. In applying the principle of res judicata, let us, as is done under the system originating in France and elaborated by the German and other Continental codes, definitely restrict its operation to the actual decision of the particular claim in suit, forbidding thus the relitigation of the same claim in any form, but, subject to what shall next be said, not extending the res judicata to any part of the premises.

Third. Let either party, in the course of the cause, by means of an appropriate pleading, be at liberty to present, in respect of any material question whose decision is a precondition of the adjudication, a prayer that the determination of such question be made the subject of judicial

declaration as part of the judgment to be rendered. As regards a point thus coming to be explicitly decided, as evidenced by the declaration, the judgment would be res judicata, but otherwise, as before indicated, would have no binding effect in a subsequent suit upon a different claim.

The particular mode and time of advancing the prayer would be regulated by the circumstances and the will of the parties. To illustrate: *A* sues *B* upon a written lease of certain premises, running for a term of years from May 1, 1937, at a rental of $2400 per annum, payable quarterly, to recover $600 as rent for the first quarter. The complaint alleges that the lease was executed on behalf of *B* by one *C*, whom *B* had duly authorized so to act. *B* has never entered into possession, so that recovery must be had, if at all, upon the written lease. *B* has two possible defenses: (1) that he never authorized *C* to execute the lease on his behalf; (2) that, by an instrument under seal, *A*, after the making of the lease, released *B* from any liability thereunder. With a view to avoiding liability for future installments of rent, it would be distinctly in the interest of *B*, if confident that these defenses were well-founded, to ask that their determination be made the subject of judicial declaration. Accordingly, if he so desired, he could add to his answer a prayer for such a declaration,[225] namely, one negativing the authority of *C* and affirming the fact of release. But if, on the other hand, *A* were confident of his ability to defeat the defenses by proving the authority of *C* and the inexistence of the release, it would be equally in his interest to have a declaration to the opposite effect, namely, one affirming the authority of *C* and negativing the release. And obviously, as dictated by circumstances, the contemplated declaration, in either case, might be confined to one of the defenses. In any event, if *B*'s answer had not sought the declaration, *A*, by supplementary[226] complaint could present the requisite prayer appropriate to his side of the case. Indeed, there would be nothing to prevent *A*, if he knew or suspected that *C's* authority would be denied, from including in his original complaint a prayer for a declaration that *C* had been duly authorized by *B* to sign the lease. Nor, in those jurisdictions which see no

[225] In strictness the defendant's prayer would constitute a counterclaim (see what appears in the first part of this article with respect to the Austrian system, 39 MICH. L. REV. 1 at 22-24) and it might be well to call it so, but we are sufficiently familiar with the idea of an answer asking for affirmative relief to dispense, if we choose, with the specific label.

[226] We employ the term "supplementary" rather than "supplemental" with a view to avoiding the connotation ordinarily attaching to the latter, as conveying the idea that the pleading which it designates is one setting up a right accrued since the commencement of suit.

objection to anticipatory allegation in the complaint, would anything stand in the way of the original complaint praying even for a declaration negativing the release. We need not carry the illustration further, but it is apparent that cases may arise in which the declaration may be sought at a later stage because of the contents of a reply, as when, in the case instanced, the defense of release would be met by an allegation of fraud in its procurement. So, also, we can suppose the prayer for the declaration coming at a later stage because of being omitted at an earlier time when it might have been advanced. In the latter case, the matter of presentation of the prayer would be subject to control by the judicial discretion in substantially the same manner as is now the matter of ordinary amendment of the pleadings.

When the cause is one triable by jury and the declaration involves a question of fact, that question would properly form the subject of a special issue to be determined by the jury, although if this were the only controversy of fact in the cause, a general verdict for one party or the other would obviously afford a sufficient basis for the declaration.

Under such a practice, the record would always show a distinct prayer that the premisory question be expressly pronounced upon, followed by that express pronouncement in the judgment-order. Given a proper prayer for the declaration, and, where required, its proper support by the verdict, then, apart from the case of ambiguity in the phrasing of the judgment-declaration, no doubt could conceivably arise as to the existence of res judicata with respect to the decision of the premisory question. Gone would be the groping and uncertainty as to the range of the adjudication. Gone also would be the resort to evidence *aliunde*, with the various doubts and difficulties arising in that connection, for now the record and the record alone would answer the question whether the former judgment has foreclosed the relitigation of a particular point in the later suit. Besides thus facilitating administration of the principle of res judicata, the proposed practice would be in the direct interest of substantial justice. Under the present system, it is exceptional that a premisory question is controverted with a direct view to its effect upon future litigation. Often, indeed, counsel may not acutely have in mind the possibility of this future effect, and because of the minor importance of the claim in suit or for other reason, fail to put forward his utmost endeavor in contesting the point, only to find in a later suit, when he is prepared to employ all the vigor and resources at his command in dealing with this same point, that by reason of the former judgment it is now too late to do so. Under the proposed practice, on the other hand, a prayer for declaration on the part of his adversary

would definitely put him upon notice that the point is to be controverted once and for all and warn him to train all his forces upon its litigation.

It is, of course, clear that the prayer in respect of the premisory question involves an invocation of the declaratory power of the court. And where, as in England and a large majority of the American states, the principle of the declaratory judgment has been accepted, the courts would have direct authority to entertain and act upon such a prayer. But, even in those jurisdictions which have not yet given place to the declaratory judgment, there should be no obstacle to the adoption of the proposed practice. For whenever, under the present system, any part of the premises acquires binding force for a future action upon a different claim, it is in virtue of a judicial declaration, express or implied. If, for instance, in an equity decree foreclosing a mortgage, there is an express finding that the defendant executed the mortgage, which finding is deemed res judicata in a later suit, can there be any doubt that the res judicata rests upon what is in reality an exercise of the declaratory power of the court? The order of sale in the decree is an exercise of its dispositive power, but the statement of the premises of this order is in virtue of its declaratory power. If, again, in the absence of an express finding on the point, the decree is treated as res judicata in respect of the existence of the mortgage, is it not so because of the implied judicial declaration of that existence? The declaratory fixation of the premises is thus very plain in the case of the equity decree. In the case of common-law judgments, had the principle of estoppel by record been kept distinct from the principle of res judicata, it would have been difficult, and perhaps impossible, to say the same thing. But in view of the substantial absorption of the former principle by the latter, we are justified in concluding that in the law of today the common-law judgment in the present respect does not stand on any different basis from the equity decree and that its premises, too, must be regarded as established by judicial declaration, which may be express, as in the case of findings where the trial is by the court, or implied, as is always true where the trial is by jury. We do not call this fixation of the premises by decree or judgment an exercise of the declaratory power, nor are we accustomed to think of it as such, but that this is its juristic nature cannot well be gainsaid. The dispositive power resides merely in the award or withholding of what is demanded: what leads up to this award or withholding, so far as it is bindingly adjudicated per se, is adjudicated by virtue of declaration. Hence, when under the proposed practice the court is asked to make a declaration in respect of a premisory question, it is being asked to do no more than what under a different

form and under a different terminology it is actually doing every day.

Thus the plan suggested implies no revolution. It represents but a methodizing and reduction to scientific reality in a new application of principles constantly recognized. And that, if adopted, it would go far toward meeting the urgent need for simplification and clarification in the present field, on both sides of the Atlantic, does not admit of serious question.