Maryland Law Review

Volume 21 | Issue 2 Article 5

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Comments and Casenotes

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By Joseph A. Matera

Stability and certainty are highly regarded values in any legal system, and it is to these ends that the doctrine of collateral estoppel[1] is directed. The doctrine is, simply, that parties to a cause of action which is partially if not wholly based upon facts which were litigated in a previous suit upon a different issue are bound by the determination of such facts made at the prior trial, if such facts were determinative of the issue in that trial. The purpose of the doctrine is to bar repetitious litigation or the bringing of piecemeal suits.[2]

The principle upon which it is based is certainly not a new one.[3] The *Dutchess of Kingston's Case*,[4] decided in 1776, is said to be a source of the doctrine.[5] There the court held that:

> ". . . the judgment of a court of concurrent jurisdiction, directly upon the point, is a plea, a bar, or is evidence, conclusive between the same parties upon the same matter, directly in question in another court."[6]

In an extensive discussion following the opinion in Smith's Leading Cases, it is clearly stated "that a declaration or admission will not give rise to an estoppel unless made with full knowledge of the right alleged to be precluded."[7]

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[1] Although the rule is commonly known as collateral estoppel, it has also been referred to by the courts as estoppel by record (Alexander v. Walter et al., 8 Gill. 239 (Md. 1849)) and estoppel by judgment; (Robertson v. Robertson, 61 So. 2d 499 (Fla. 1952); Gordon v. Gordon, 59 So. 2d 40 (Fla. 1952)).

[2] Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1 (1942); Note, *Collateral Estoppel by Judgment*, 52 Col. L. Rev. 647 (1952).

[3] The origins of the doctrine in Continental law are fully discussed in Millar, *The Premises of the Judgment as Res Judicata In Continental and Anglo-American Law*, 39 Mich. L. Rev. 1, 9 (1940).

[4] The opinion in this case, reported as Doe v. Oliver, 20 How. St. Tr. 355, 538 (1776), can be found in 2 SMITH, LEADING CASES (6th ed. 1866) 648.

[5] Millar, *supra*, n. 3, 5.

[6] SMITH, *op. cit. supra*, n. 4, 648.

[7] *Id.*, 753.

Before dealing more thoroughly with the doctrine, it is necessary to distinguish it from the similar doctrine of *res judicata*.[8] At the outset it must be recognized that there are two basic effects of a judgment: (1) that of deciding the rights and liabilities of the parties,[9] and (2) that of pronouncing a "sentence of law on the ultimate facts admitted by the pleadings or proved by the findings."[10] It is to the first effect that the doctrine of *res judicata* applies, barring a suit to relitigate a cause of action already decided by a court. It is to the second effect that the doctrine of collateral estoppel applies, rendering a "sentence of law" conclusive as to those issues of ultimate fact determined by the court; and no attempt may be made to relitigate such issues by the same parties or their privies in any subsequent action.[11] Thus, it is apparent that *res judicata* and collateral estoppel are both bars to relitigation, one in relation to the precise cause of action and the other to the ultimate facts determined by the court as adjudicated at the trial of that cause of action.

It is this similarity which causes the two rules to be roughly grouped together, but to attempt any similarity of application leads to grave error. Courts, therefore, are forced to differentiate the two rules before determining the proper scope of the collateral estoppel rule in a particular case.[12]

Both rules in effect contribute to certainty and stability, and both again suffer the weakness of perpetuating falsehoods. But the rule of *res judicata* renders a possible falsehood conclusive only with respect to a single claim or cause of action. However, collateral estoppel could perpetuate possible falsehoods conclusive as to all subsequent suits between the same parties involving those issues of ultimate fact determined by the court in the initial suit.[13]

In view of this effect of the doctrine, the necessity of applying it strictly becomes clear. Unless the parties can with reasonable certainty determine what issues of fact have been conclusively determined by the judgment, they

[8] The use by courts of the term *res judicata* when referring to collateral estoppel is a cause for confusion of the two rules. See, for example, Whitehurst v. Rogers, 38 Md. 503 (1873).

[9] 49 C.J.S. 26, Judgments, § 2.

[10] *Ibid.*

[11] A leading Supreme Court case on the distinction between *res judicata* and collateral estoppel is Cromwell v. County of Sac, 94 U.S. 351 (1876).

[12] Note, *Collateral Estoppel By Judgment*, 52 Col. L. Rev. 647, 648 (1952).

[13] Cases which make a point of citing the conclusiveness of rulings on ultimate facts are: Tait v. Western Md. Ry. Co., 289 U.S. 620 (1933), and Southern Pacific Railroad v. United States, 168 U.S. 1 (1897).

will be forced to litigate not only the single claim put forth in the pleadings, but all possible future claims which would involve some of the same facts. Without such caution an inadvertant admission could well lead to a future legal defeat in an entirely different cause of action. There is then a fine balance that must be preserved between achieving stability and effecting justice in a particular cause of action. It is the question of this balance that frequently becomes the cause of controversy in regard to the doctrine of collateral estoppel.

The courts have adopted two general views with relation to the scope and applicability of the doctrine. Most courts have taken a conservative outlook, only applying the doctrine where there has been actual litigation in regard to a clearly ultimate fact, offered for proof.[14] On the other hand, other courts have been more liberal, barring parties from litigating questions of fact which, for example, were only collaterally proved, or admitted, or inadvertantly indicated, by mere statements at a former trial.[15]

The Court of Appeals of Maryland, although not referring to the doctrine by name, has applied its principle in line with the conservative view.[16] In *Cecil v. Cecil*, the Court sets out the general view that:

> ". . . to conclude any matter in issue between the parties, it should appear by record or other proof, that the matter was in issue and decided at the former trial between the same parties."[17]

This ruling was further narrowed in *Cooper v. Utterbach*,[18] where the Court of Appeal refused to apply the doctrine to a finding by the jury on a question of fraud in the previous trial. There the Court held that the rule should apply only to facts *directly* in issue and "not to everything which

[14] The Evergreens v. Nunan, 141 F. 2d 927, 928 (2nd Cir. 1944); Serpell-Winner-Jordan v. Crete Mills, 51 F. 2d 1028 (8th Cir. 1931); Cooper v. Utterbach, 37 Md. 282 (1873); King v. Chase, 15 N.H. 9 (1844). RESTATEMENT, JUDGMENTS (1942) § 68, 293, supports this view, applying the rule only "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment . . . ."

[15] Clinton Engines Corp. v. Briggs and Stratton Corp., 175 F. Supp. 390 (E.D. Mich. S.D. 1959); Wright v. Griffey, 147 Ill. 496, 35 N.E. 732 (1893); Adams v. State, 133 Okla. 194, 271 P. 946 (1928); Stradley v. Bath Portland Cement Co., 228 Pa. 108, 77 A. 242 (1910).

[16] Whitehurst v. Rogers, 38 Md. 503 (1873) (collateral estoppel); Alexander v. Walter et al., 8 Gill 239 (Md. 1849) (estoppel by record).

[17] 19 Md. 72, 79 (1862).

[18] 37 Md. 282, 312 (1873).

was incidently brought into controversy during the trial." This case was cited with approval in the more recent case of *Barret v. Lohmuller Bldg. Co.*,[19] where the Court of Appeals again refused to apply the doctrine, the issue in question being a finding by the court of non-acceptance by the plaintiff of work done for him by the defendant, a collateral issue in the previous trial.

Thus, the conservative courts clearly require a showing that the particular fact was (1) directly in issue at a former trial between the same parties or their privies, and (2) that the fact was ultimate in nature in that case. This implies that the fact was the source of genuine argument between the adversaries before its adjudication.

The liberal courts, on the other hand, will treat facts, the ultimate character of which is more doubtful, as adjudicated facts and not subject to relitigation although they have in no sense been the subject of heated debate between the parties. Hence, facts merely consented to for reasons of convenience,[20] or admitted by counsel in the course of legal maneuvering during the trial,[21] have been held to be subject to collateral estoppel.

It is this liberal approach that frequently raises the question as to whether the aforementioned balance between stability and justice has been upset. The recent case of *Clinton Engines Corp. v. Briggs and Stratton Corp.*[22] is an example of this problem. That case involved an alleged violation of anti-trust laws, pressed by Clinton against Briggs and Stratton. In a prior suit between the same parties but on an issue of patent infringement, Clinton as defendant charged that Briggs and Stratton had deliberately and fraudulently withheld from the patent office its knowledge of previous public use of certain inventions. Clinton's attorney, at the time of presenting a motion to reopen proofs and for a new trial, was questioned by the court as to the reason for his failure to put into testimony evidence concerning the former public use of the patents involved. Apparently surprised by this charge of lack of diligence, the attorney made this state-

[19] 151 Md. 133, 134 A. 37 (1926).

[20] Judgments by consent and default judgments (see *infra*, ns. 31-33) are areas in which certain facts may be consented to or left uncontested because the smallness of the amount of money involved outweighs the inconvenience of a trial on the issues. See Blair v. Bartlett, 75 N.Y. 150 (1878); Lumberton Coach Co. v. Stone, 235 N.C. 619, 70 S.E. 2d 673 (1952).

[21] Clinton Engines Corp. v. Briggs and Stratton Corp., 175 F. Supp. 390 (E.D. Mich. S.D. 1959).

[22] *Ibid.*

ment concerning the charge made against Briggs and Stratton:

> "If that charge is made I don't stand upon it . . . and I am sure we would agree to withdraw it. I have known Mr. Jones and right here I want to say that is not correct or encouraged."[23]

In the second suit the court would not allow Clinton, as part of their attempt to show Briggs' scheme to create a monopoly, to revive the charge made against Briggs and Stratton in the previous suit. The court held that the statement made by the attorney brought about the equivalent of an adjudication on that particular issue, and therefore Clinton was collaterally estopped from relying on any charge of misconduct by Briggs and Stratton in the use of the patents in question. The court concluded that the concession by Clinton amounted to a determination against the factual existence of such claimed misconduct. Thus, what may have seemed like an unimportant statement to the attorney at the time became a litigated issue under the court's liberal application of this doctrine of collateral estoppel, and not subject to a "re-duel" in a future suit.[24]

The problem as to when this doctrine will be applied to bar statements made by attorneys in a prior suit between the same parties is one which would no doubt arise in only the more liberally inclined courts. Two problems are apparent in such an application of the doctrine: (1) When does a statement made by an attorney become an issue of ultimate fact? (2) May such a statement which has not constituted a contested issue of fact between the parties be treated by the court as an adjudication upon the fact it contains?

As mentioned above, collateral estoppel applies not to every issue which is raised in a trial, but only to those issues involving ultimate facts as distinguished from evidentiary facts. In the leading case of *The Evergreens v. Nunan*,[25] Judge Learned Hand defined an ultimate fact as "one of those facts upon whose combined occurrence the law raises the duty, or the right, in question." An evidentiary fact was described in the same case as one from which the existence of an ultimate fact could be

[23] *Id.*, 403.
[24] *Id.*, 404.
[25] 141 F. 2d 927, 928 (2nd Cir. 1944). For discussion of "ultimate facts" in relation to findings required of administrative agencies, see 2 DAVIS, ADMINISTRATIVE LAW TREATISE (1958) § 16.06.

rationally inferred.[26] In another leading case in this area, *King v. Chase*,[27] an ultimate fact was described as one vital to the determination of the case, so much so that the cause of action would not have been decided in the same way on other grounds, and as a fact which receives as careful a consideration as if it had been the main and only question in the controversy.[28]

It does not seem fair to say that the statement made by the attorney for Clinton was a statement of an ultimate fact. It was not even made on the attorney's own initiative but came in response to a question of the court implying lack of diligence by him in the discovery of evidence. To avoid this dilemma he chose to deny a charge made in his pleadings at the original hearing.[29] It was in no sense a contested issue, but the court interpreted this concession as vital enough to constitute an ultimate fact which has been decided for all time as to any future suit between these same two parties.

Assuming that a fact is ultimate in nature, the question then arises as to whether the mere concession of such a fact can be treated as an adjudication thereof. There is a split of authority upon this question. The liberal argument is that, although the second suit is on a different cause of action, each party has had his day in court as to the issues which he constructively admitted by not contesting them, or which he chose to concede as part of the trial tactics in his first encounter. There the fault is considered to be his own and the inference is that the lawyer was either negligent in conceding such fact or had insufficient evidence to rebut it, if it was asserted by his opponent.[30]

Courts following this line of reasoning have had no difficulty applying collateral estoppel to a judgment by consent,[31]

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[26] The Evergreens v. Nunan, 141 F. 2d 927 (2nd Cir. 1944). IN RESTATEMENT, JUDGMENTS (1948 Supp.) 337, the writers of the RESTATEMENT adopt this analysis by Judge Hand as a "clear and workable definition of the two classes of facts." They refer to ultimate facts, however, as "facts in issue."

[27] 15 N.H. 9 (1844).

[28] *Ibid.*

[29] *Supra*, n. 21.

[30] Last Chance Min. Co. v. Tyler Min. Co., 157 U.S. 683 (1895); Bissell v. Spring Valley Township, 124 U.S. 225 (1888).

[31] Stradley v. Bath Portland Cement Co., 228 Pa. 108, 77 A. 242, 243 (1910). There the court said:

> "It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the court has exercised a judicial discretion in the matter."

Whether it has always been the law or not, the much earlier case of Cromwell v. County of Sac, 94 U.S. 351, 356 (1876), recognized the harsh-

or a judgment by default,[32] situations in which the danger of a liberal application of the doctrine are most apparent. The *Clinton* case, however, expands the doctrine to its extreme limits, for here the issue of fact in question was not one that was constructively admitted by Clinton's attorney by failing to contest the fact. Nor can it be said, without some reservation, that an ultimate fact as such was conceded by the attorney to the court. The language used was not so strong as to absolve Briggs and Stratton of any wrongdoing. In what seemed more like a hedging maneuver, the attorney answered the court's query regarding Clinton's charge in their original pleadings by saying such charge was "not correct or encouraged."[33] This is not the unequivocal language which would seem to be called for in characterizing a fact as one so vital to the judgment that when conceded it would amount to an adjudication upon that fact. Nor do the circumstances indicate that the "careful consideration" standard, alluded to in *King v. Chase*,[34] was influential in the court's decision on this issue of fact.

The point of the matter is that statements which do not go to the very heart of an issue in controversy, which do not become a basis of contest between the opposing

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ness in so applying collateral estoppel. Considerations of the party allowing such a judgment to be rendered against him, such as smallness of amount of value, involved expense of litigation, inconvenience, etc., should not render him estopped in future claims arising out of the same transaction.

In Blair v. Bartlett, 75 N.Y. 150 (1878), cited in Note, *Collateral Estoppel by Judgment*, 52 Col. L. Rev. 647, 654 (1952), the harshness of such an application of collateral estoppel was most apparent. In this case, a prior default judgment in favor of a doctor for a small sum owing for services rendered to a patient operated to bar a malpractice suit by this same patient for a significantly larger sum. The reasoning the court used in applying collateral estoppel was that the default judgment conclusively determined that the physician's services were of value since the patient had allowed such a judgment to be rendered. It follows from this determination that the services could not have been harmful. In RESTATEMENT, JUDGMENTS (1942) § 68 d, 300-301, it was felt to be most unjust to a defendant "to hold that his failure to defend should have the same result as though he had interposed a defense and it was found that the matters alleged in the defense were untrue."

[33] Kelleher v. Lozzi, 7 N.J. 17, 80 A. 2d 196 (1951); Lumberton Coach Co. v. Stone, 235 N.C. 619, 70 S.E. 2d 673 (1952). Judge Hand in The Evergreens v. Nunan, 141 F. 2d 927 (2nd Cir. 1944), points to some of the same weak points in so applying the doctrine as we saw in the case of default judgments. The same considerations which influenced a party to allow a default judgment are also applicable to a consent judgment. Thus it does not logically follow that a party defendant to a consent judgment conclusively admits liability. Despite this, such consent could become the basis for an estoppel in a future suit between the same parties on a different claim. The obvious result is to discourage voluntary settlements in the original suit.

[33] *Supra*, ns. 21-23.

[34] *Supra*, n. 27.

attorneys, and which are in effect part of the legal maneuvering of the attorney charged with them, would not appear to qualify as valid subjects for application of the collateral estoppel rule. The inherent weakness and dangers of the rule would certainly be most likely realized in this area of application. Objective standards in asserting the rule would give way to wide discretion on the part of courts as to when a statement made by an attorney has taken on the dignity of an ultimate fact, conceded to the extent of denying the possibility that it could ever be a source of litigation between the same parties again.

Another effect of such a liberal approach to collateral estoppel would be the burdening of parties with a stand upon certain issues which they had not discussed thoroughly with their attorney because of the seeming irrelevance or unimportance of such facts at that time. They would thus be committed to a position they had no hand in creating. It is highly conceivable, for example, that Clinton had no intention of making the concession that its attorney found expedient to make at the time. This situation has no doubt occurred in numerous suits though it would not appear on the record.

While it seems clear that the majority of courts at least give lip service to the ultimate fact test in applying collateral estoppel, it may be necessary to re-examine the concept of what constitutes an ultimate fact, a practice that would prevent too liberal an extention of the doctrine.[35] More exact word measurements than are frequently applied by the courts would be a step in this direction.[36]

Another means of guarding against the dangers inherent in the very nature of the doctrine would be to apply it only

[35] Judge Learned Hand in The Evergreens v. Nunan, 141 F. 2d 927, 929 (2nd Cir. 1944), points out that even when the doctrine is correctly applied to ultimate facts, the result often is unfair. Thus, his proposal, in event that the law were to be recast, would be to limit the conclusiveness of a judgment, even as to ultimate facts, to future controversies that "could be thought reasonably in prospect when the first suit was tried."

However, it would seem that the difficulty of determining what was reasonably in prospect may be fraught with even greater problems than of determining what is ultimate fact, which would seem to be the basic problem.

[36] Among the inexact phrases courts have used in referring to ultimate fact are: "[f]acts cardinal to the decision," Venetsanos v. Pappas, 21 Del. Ch. 177, 184 A. 489, 490 (1936); facts "technically in issue," Winnipiseogee Lake C. & W. Mfg. Co. v. City of Laconia, 74 N.H. 83, 65 A. 378, 379 (1906); no "estoppel as to unessential facts, even though put in issue by the pleadings," Willis v. Willis, 48 Wyo. 403, 49 P. 2d 670, 675 (1935); no estoppel unless fact is material, Hunter v. Troup, 315 Ill. 293, 146 N.E. 321, 324 (1924), MacKenzie v. Union Guardian Trust Co., 262 Mich. 563, 247 N.W. 914, 921 (1937); estoppel applied to facts "essential to the finding of the former verdict." Whitehurst v. Rogers, 38 Md. 503, 517 (1873).

to matters which have been clearly contested by the parties. Such an approach will better assure the litigants that the issue has been conclusively determined by the court and that it has been decided correctly. To this end, the less liberal courts will apply the doctrine only to those issues of fact which in the prior proceeding were vigorously litigated by the parties and determined by the court, and which clearly involved ultimate facts found in favor of the victor. The end result of such an approach is to create less hesitancy on the part of attorneys otherwise fearful that chance statements be characterized as ultimate facts, thereafter binding in suits between the same litigants. Moreover, any issue of fact which is made the subject of argument by the attorneys will then more likely be one of an ultimate character.

Following the more conservative approach, it would seem improbable that mere statements, not clearly contested and not vital to the determination of rights and liabilities of parties in a particular suit, would become subject to estoppel in all future suits between the same parties as to facts contained therein. Viewing the general scope of cases this approach appears to be that of a majority of the courts. The degree of stability sacrificed by this line of thought regarding collateral estoppel seems minimal. The effect of insuring more justice to the parties concerned and greater freedom to the attorney in the argument of his case far outweighs this sacrifice.