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RES JUDICATA—THE PRECLUSIVE EFFECT OF COLLATERAL ESTOPPEL

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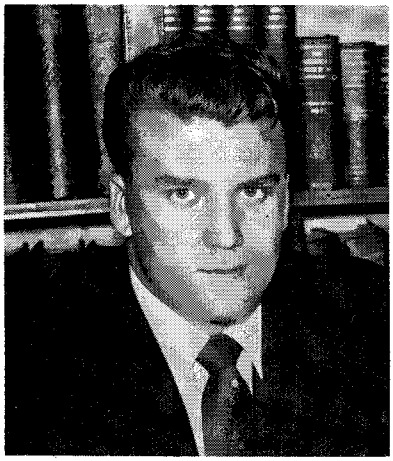

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Most lawyers are familiar with the doctrine of res judicata.[1] However, many of them are not very well acquainted with the doctrine of collateral estoppel, a flexible segment of res judicata.[2] The two doctrines are closely related parts of the law of judgments.[3] They are similar but distinct.[4] Although one is considered to be a part of the other, they apply to different situations and have different effects.[5] One narrows the scope of inquiry, the other operates as a complete bar. One is somewhat flexible, the other is rigid. It is helpful, therefore, to understand the fundamental differences between them.

DEFINITION OF TERMS

At the outset, definitions of the two doctrines will help to frame the necessary distinctions. Res judicata is the doctrine that an existing final judgment rendered on the merits by a court of competent jurisdiction is conclusive of the rights of the parties in a subsequent suit based on the same claim.[6] On the other hand, collateral estoppel is the doctrine that the final decision of a court of competent jurisdiction on an issue actually litigated and determined is conclusive of that issue in a subsequent suit between the same parties based on a different cause of action.[7]

In identifying collateral estoppel the courts use varied terminology, such as: "estoppel by record," "estoppel by findings," "estoppel by ver-

[1] The "merger" and "bar" aspects of res judicata are discussed in Bigelow, Estoppel 41 (6th ed. 1913).
[2] See Polasky, Collateral Estoppel—Effects of Prior Litigation, 39 Iowa L. Rev. 217 (1954).
[3] Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1 (1942).
[4] Id. at 3.
[5] Grand Valley Irrigation Co. v. Fruita Improvement Co., 37 Colo. 483, 501, 86 Pac. 324, 329 (1906).
[6] Massachusetts Bonding Co. v. Ginsberg, 131 Colo. 1, 278 P.2d 1018 (1955).
[7] Cromwell v. County of Sac, 94 U.S. 351 (1876) (leading Supreme Court case on the distinction between res judicata and collateral estoppel).

dict," and "estoppel by judgment."[8] Since the use of different terms to describe the same legal doctrine can be a source of confusion, it is necessary to mention that these terms actually do stand for the same proposition. Another point that should be kept in mind with respect to the use of terms is that the courts often use the term res judicata to include collateral estoppel.[9]

As has been observed already, there are several features of res judicata and collateral estoppel which distinguish one from the other. For one thing, the area of applicability is different. That is to say, collateral estoppel applies to a cause of action different from that involved in the original controversy but res judicata applies to a suit based on the same cause of action as that involved in the original controversy.[10] In this respect collateral estoppel is broader than the "merger" and "bar" aspects of res judicata.[11] However, it does not apply to matters which could have been litigated but were not. [12] In this respect it is narrower than the "merger" and "bar" aspects of res judicata. [13]

With these preliminary distinctions in mind, attention is directed toward the doctrine of collateral estoppel as applied by the courts. It is submitted that, while the basic requirements of the doctrine are clear, the language and analyses in the cases are far from satisfactory. The wide scope of the subject matter does not permit a complete treatment here, but it is hoped that the sources referred to will provide an adequate supplement. No attempt will be made to discuss res judicata in its "merger" and "bar" aspects. That is beyond the limited scope of this note. However, cases dealing with collateral estoppel will be viewed in relation to general principles of applicability. In addition, some Colorado cases in which the doctrine has been applied will be discussed. It is hoped that in this setting some worthwhile conclusions can be drawn.

AREA OF APPLICABILITY

A. Matters Actually Litigated and Determined

It is well settled that in order to invoke the doctrine of collateral estoppel it is necessary that the issues sought to be relitigated have been actually litigated and determined in a prior action between the same parties.[14] Consequently, while those matters which were litigated and determined of necessity in the prior action cannot be relitigated, the parties are not precluded from relying upon matters which were not litigated and which give rise to a different claim for relief.[15] This is true even though the new matter could have been determined in the original action. [16]

The scope of applicability with respect to matters actually litigated and determined has been passed upon many times. A few illustrations will show that the courts are reluctant to preclude a party from litigating an issue when he has not had his day in court as to that issue.

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[8] See note 2 supra.
[9] Caterpillar Tractor Co. v. International Harvester Co., 120 F.2d 82 (3d Cir. 1941); Youngquest v. Youngquest, 102 Colo. 105, 110, 76 P.2d 1117, 1119 (1938).
[10] See note 7 supra.
[11] See note 1 supra.
[12] Peckham v. Family Loan Co., 196 F.2d 838 (5th Cir. 1952).
[13] See note 1 supra.
[14] Cromwell v. County of Sac, 94 U.S. 351 (1876); Hinsdale County v. Mineral County, 38 Colo. 433, 88 Pac. 436 (1907).
[15] Youngquest v. Youngquest, 102 Colo. 105, 76 P.2d 1117 (1938).
[16] Ibid.

In *Cromwell v. County of Sac*,[17] a leading United States Supreme Court case, the plaintiff brought an action to recover on coupons accrued on bonds. In its answer the defendant averred that the bonds had been issued fraudulently because a county official had been bribed. A judgment for the defendant was affirmed on the ground that the bonds had been issued fraudulently and that the plaintiff had not proved payment of value. After the bonds had matured the plaintiff brought a second action to recover the principal and the interest accrued after the first action. The defendant county pleaded the former judgment, asserting that the question of payment of value had been determined. The defendant received a favorable judgment on that ground but the plaintiff appealed to the Supreme Court and it reversed. The Court held that the question of payment of value actually had not been litigated and that the prior judgment worked an estoppel only as to matters actually decided.

In a 1906 case[18] the Colorado Supreme Court followed the *Cromwell* decision. A stockholder brought an action to enjoin the execution of a contract by a company of which he was a member. He alleged that the company had made a contract in violation of its charter and by-laws and that it was unlawfully attempting to assess him. A decree for the plaintiff was entered, enjoining the company from executing the contract or levying any assessment for that purpose. Thereafter, the original assessment was reduced and the plaintiff was notified of the new assessment. Upon his failure to pay, the plaintiff's stock was sold pursuant to the by-laws. The plaintiff then brought another action for damages on the ground that such sale was illegal because the assessment was void, in accordance with the former decree. The defendant sought to show that the reduced assessment was proper. The court held that the judgment in the first suit was not necessarily conclusive against the validity of the reduced assessment and that the burden was upon the plaintiff to show that the validity of the original assessment had been litigated and determined in the first action.[19]

In *Jacobson v. Miller*,[20] an early Michigan case, the plaintiff sued the defendant to recover some rentals due under a lease. There was a judgment for the plaintiff. Thereafter, the plaintiff brought another action under the same lease to recover rentals subsequently due. This

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[17] 94 U.S. 351 (1876).
[18] Grand Valley Irrigation Co. v. Fruita Improvement Co., 37 Colo. 483, 86 Pac. 324 (1906).
[19] Id. at 503, 86 Pac. 329.
[20] 41 Mich. 90 (1879).

time the defendant denied that the lease had been executed. The lower court held that the earlier judgment precluded the defendant from making such a denial. On appeal the Michigan Supreme Court reversed the lower court because the question of execution had not been litigated in the first action. However, the court indicated that if the question of execution had been raised and litigated in the first action, it would have been a final determination of that issue even though the second suit was based on a different cause of action.

The three cases just discussed clearly show the difference between the effect of a judgment as a bar against the bringing of a second action based on the same claim or demand, and its effect as an estoppel in another action between the same parties and based on a different claim or demand. If the second suit is based on the same claim, the first judgment constitutes an absolute bar to the second action. It concludes the parties as to every matter which was offered and received to sustain or defeat the claim and as to every other substantial matter which might have been offered for that purpose. But if the second action is based on a claim or demand different from that involved in the first action, the judgment operates as an estoppel only as to those matters which were actually litigated and determined in the first.[21]

B. Matters Immaterial or unessential to the First Judgment

In addition to the requirement that the issue must have been actually litigated and determined in the first action, there is another rule which narrows the area of applicability even further and which presents more subtle problems when it is applied to a given case. A statement of this rule is that even where a matter is put in issue and decided, it is not concluded by the judgment for purposes of collateral estoppel, if it was immaterial or unessential to the determination of the real and decisive issue.[22]

The rule was applied by the Wisconsin Supreme Court in *Schofield v. Rideout.*[23] In that case a daughter had brought an action against her father, alleging that she had conveyed certain land to him, that he had agreed to sell it and pay the proceeds to her and that he had broken the

[21] Grand Valley Irrigation Co. v. Fruita Improvement Co., 37 Colo. at 500, 501, 86 Pac. at 328 (1906).

[22] Landon v. Clark, 221 Fed. 841 (2d Cir. 1915); House v. Lockwood, 137 N.Y. 259, 33 N.E. 595 (1893); Word v. Colley, 173 S.W. 629 (Tex. Civ. App. 1914); Willis v. Willis, 48 Wyo. 403, 49 P.2d 670 (1935).

[23] 233 Wis. 550, 290 N.W. 155 (1940).

agreement. The court found that such an agreement had been made but that the father had not violated it because he had tried to sell the land and had been unable to find a buyer. Accordingly, a judgment was entered dismissing the complaint. Thereafter, an assignee of the daughter's interest brought an action against the father. The plaintiff alleged that the father had subsequently conveyed the land to his wife. The plaintiff offered proof of the agreement but did not prove the conveyance had been made. The trial court gave judgment for the plaintiff on the ground that the agreement was conclusively established by the former judgment. The supreme court reversed and remanded for trial on the question of the existence of the agreement. The court based its decision on the ground that the finding in the first action that the agreement existed was not necessary to the decision.

Although the view followed in the *Schofield* case seems to be well established,[24] *Clark v. Knox*,[25] a 1904 Colorado case, may be cited for the opposite view. In that case the grantee of an insolvent debtor brought an action against an attaching creditor to remove a cloud from the title to certain real estate. The pleadings raised two issues. One was that the conveyance by the debtor was in fraud of creditors, the other that the deed was delivered after the levy of attachment. The trial court found both issues in favor of the attaching creditor. On appeal the appellate court reversed the trial court on the question of fraud, holding that the conveyance was not fraudulent, but it affirmed the judgment on the second issue. In a subsequent action between the same parties but involving other real property conveyed by the same deed and levied on by writ of execution after the delivery of the deed, the court held that the prior judgment on the question of fraud was res judicata. The court said:

> "The fact that it was not essential that the court of appeals should pass on the question of fraud, because the judgment was predicated entirely upon the finding on the other issue in the case . . . is not material. Such a finding, it is true, was conclusive of the rights of the parties, yet this did not preclude the court from passing upon the other issue of fraud which was presented by the pleadings and argued by counsel."[26]

The decision in *Clark v. Knox* is not too far out of line when one realizes that the question of fraud had been argued before the Colorado Court of Appeals and had been decided on the merits. Indeed if the court had reached the opposite result, the defendant would have had to defend a second time against the allegation that the conveyance was fraudulent. It is submitted that the language of the Colorado Supreme Court to the effect that the applicability of collateral estoppel or res judicata must always be considered in connection with the facts of the particular case must not be taken lightly.[27]

C. Prior Determination of Negligence

The determination of the question of negligence is an area which requires close examination and one which is particularly interesting in the application of collateral estoppel. The two cases set out below indicate the complexity of problems raised by applying the doctrine

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[24] See note 22 supra.
[25] 32 Colo. 342, 76 Pac. 372 (1904).
[26] Id. at 352, 353, 76 Pac. at 375.
[27] Youngquest v. Youngquest, 102 Colo. 105, 108, 76 P.2d 1117, 1118 (1938).

in this area. Under a different heading the really controversial question as to whether strangers to the initial action should be allowed to rely on collateral estoppel in certain types of negligence cases will receive some brief comment.

In *Cambria v. Jeffrey*,[28] the Massachusetts court refused to apply the doctrine on the ground that a finding as to the issue of negligence, which was crucial in the second case, had not been essential to the decision in the first action. The case was an action for damages arising out of an automobile collision. The trial court found that the collision was the result of the concurrent negligence of the parties and gave judgment for the defendant. The defendant in the first action turned around and sued the former plaintiff for damages from the collision. A jury verdict in his favor was set aside on the ground that the earlier judgment, since it determined that both parties were guilty of negligence, precluded recovery. The Massachusetts Supreme Court reversed and judgment was entered on the verdict.

An interesting contrast to the *Cambria* decision is *Lamberton Coach Co. v. Stone*,[29] a North Carolina case involving the question of conclusiveness of a consent judgment in a negligence case. A bus passenger died as the result of a collision between a tractor and the bus. His personal representative brought an action for wrongful death and joined the tractor company and the bus company as defendants. Each defendant denied liability and alleged that the other was negligent. However, a consent judgment was entered granting the plaintiff recovery from the co-defendants. In a later action the bus company sued the tractor company and the latter set up the consent judgment as a bar to recovery. The court held the defense good since the negligence of the plaintiff had been determined judicially in the prior action.

D. Applicability of the Doctrine to Non-Parties

In order to take advantage of collateral estoppel the person asserting its applicability must have been a party to the prior proceeding or in privity with a party.[30] This principle has been strictly applied so that nominal parties and parties not having a real interest in the controversy will not be collaterally estopped from raising issues determined in a prior suit based on a different cause of action.[31]

An interesting case in which the court might well have applied collateral estoppel had it not been for the doctrine of identity of parties is *Gilman v. Gilman*.[32] There the plaintiff's wife had been injured while riding as a passenger in the defendant's car. The wife sued for damages and recovered. Subsequently, the husband sued the same defendant for loss of his wife's services and for medical expenses. The defendant's liability in the action brought by the husband depended on the same facts that had established the defendant's negligence in the action previously brought by the wife. Despite the identity of the issues, the court held that the defendant could again deny the negligent character of his driving.

The *Gilman* case represents the prevailing view. There is some indication, however, that strict adherence to the requirement of identity

[28] 307 Mass. 49, 29 N.E.2d 555 (1949).
[29] 235 N.C. 619, 70 S.E.2d 673 (1952).
[30] Gumieny v. Hess, 285 Mich. 411, 280 N.W. 809 (1938).
[31] Rosenfield v. Rosenfield, 212 Ind. 120, 6 N.E.2d 938 (1937).
[32] 115 Vt. 49, 51 A.2d 46 (1947).

of parties may be breaking down.[33] It would appear that where the issues are identical, *e.g.,* in a series of actions by passengers injured through the fault of a common carrier in the same accident—the courts should not adhere blindly to the requirement of identity of parties.

WHAT CONSTITUTES THE SAME CLAIM

The question as to what constitutes the same claim is of great importance because res judicata applies where the second action is based on the same claim and collateral estoppel applies where the second action is based on a different claim. The rule that parties may be precluded from relitigating an issue even though the second suit is based on a different cause of action is well established.[34] However, it must be kept in mind that while res judicata concludes the rights of the parties in the second suit, collateral estoppel only precludes relitigation of matters determined of necessity in the prior action.[35] The importance of this distinction has been brought out in Colorado cases.

In *Albertson v. Clark,* [36] the plaintiff brought an action to recover for services rendered as an attorney under a contract. He received a favorable judgment and, while the suit was pending on appeal, he brought another action to recover for additional services rendered pursuant to the contract. Before the second suit was disposed of the first action had been finally determined in the attorney's favor. The defendant sought to relitigate the issue as to whether the contract pleaded in the first action was a forgery. The court held that the defendant could not relitigate the issue. It said that the cause of action need not be the same if the issue determined between the parties in the earlier action is the same.[37]

While the fact that the cause of action was not the same did not prevent the court from holding that the issue of forgery could not be relitigated in *Albertson v. Clark,* it had a different effect in *Youngquest v. Youngquest.*[38] In the latter case the administratrix of the decedent's estate had obtained an order restraining the American National Bank from paying out or disposing of any funds in a certain checking account which allegedly was the joint account of the decedent and the claimant. The claimant filed a petition praying that the restraining order be dissolved. The petition was denied. The claimant then commenced an action in which she alleged absolute individual ownership of a portion of the account. She offered proof that she had put $1,800 of her own money into the account. The Colorado Supreme Court, in holding that she was not precluded from maintaining the action said: "The principle contended for (res judicata) is controlling where the second action is based on the *same claim* as was asserted in the first, but where the second proceeding is based upon a *different claim,* only matters actually litigated in the first action are concluded."[39]

In support of its position the court emphasized that the cause of action in the first suit had been based on the alleged existence of a joint bank account in which the claimant had asserted the right of survivor-

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[33] Polasky, Collateral Estoppel—Effects of Prior Litigation, 39 Iowa L. Rev. 243-48 (1954).
[34] Southern Pacific R. R. Co. v. United States, 168 U.S. 1 (1897).
[35] Northern Pacific R. R. Co. v. Slaght, 205 U.S. 122 (1907).
[36] 70 Colo. 129, 197 Pac. 757 (1921).
[37] Id. at 130, 197 Pac. 758.
[38] 102 Colo. 105, 76 P.2d 1117 (1938).
[39] Id. at 110, 76 P.2d at 1119.

ship, whereas the suit presently before the court was based on the claimant's alleged absolute ownership of a part of the account.[40]

The *Youngquest* case indicates the difference between the preclusive effect of res judicata and the preclusive effect of collateral estoppel. The fact that the cause of action in the second suit was different was the decisive factor. It was not disputed that in the initial suit the claimant asserted her right to the entire account. Thus, in a very real sense, the subject matter involved in the second suit was also involved in the first. In addition, the parties were identical. It was the difference in the claim that made collateral estoppel the only possible test. Since the same issue had not been actually litigated before, the claimant was not barred from maintaining her action.

CONCLUSION

Collateral estoppel is a desirable doctrine which aids in the expedient termination of costly litigation. However, if it is not properly applied it can result in serious injustice. Individual cases should be weighed in the light of sound reasoning, and basic principles should furnish a guide to equitable results. The basic distinctions between res judicata in its "merger" and "bar" aspects and collateral estoppel are important. Without them the way is cluttered. As the complexity of litigation increases, the need for well-reasoned principles shows itself more fully. The principles are clear, the application is difficult.

[40] Id. at 111, 76 P.2d at 1120.