Marquette Law Review

Volume 33
Issue 1 *May 1949*

Article 11

1949

Federal Taxation: Collateral Estoppel Where Decisional Law Changed or Clarified Between Trails Involving Different Tax Years

James Kirschling

has never been overruled in Wisconsin, and a later case decided in 1908, substantially affirmed it in that point of law.[16]

The minority ruling as presented by the Wisconsin courts is upheld in Pennsylvania,[17] Ohio,[18] Montana,[19] Iowa,[20] and Massachusetts.[21] The Montana Court states its view of the question by saying that a prior marriage, being shown undissolved, casts upon the relationship of the parties to the second marriage the shadow of illegitimacy; they further rule that upon this showing the "law's favorite presumption of innocence" disappears, and the presumption of wrongdoing takes its place. The burden of proof requires those asserting legitimacy to show the validity of the subsequent marriage.[22]

The intention of the Wisconsin courts and of those other jurisdictions following the minority view has been to preserve the integrity of the marital status, a status which can only be properly dissolved by death or by the legal fiction of divorce. The courts sustaining the majority view feel that their position, on the other hand, causes a lesser hardship upon modern society, the innocent parties to the second marriage, and the children of the second marriage. Nevertheless, although the ruling case in Wisconsin was recently cited, erroneously it would seem, as authority in a case following the majority view,[23] the minority opinion has been so long sustained in this state that it seems apparent that Wisconsin will continue to uphold the rule first laid down in this state in 1885.

MARGADETTE MOFFATT

Federal Taxation — Collateral Estoppel Where Decisional Law is Changed or Clarified Between Trials Involving Different Tax Years — The taxpayer was principal stockholder of a corporation, which he licensed, under various royalty contracts, to manufacture and sell various devices, on which he had applied for patents. The taxpayer assigned his rights, title and interests in the contracts to his wife, at various times, without consideration, and the royalty payments were made to the wife. In 1935, the Board of Tax Appeals held the taxpayer was not liable for income tax on payments made the wife during

[16] Hilliard v. Wisconsin Life Insurance Co., 137 Wis. 208, 117 N.W. 999 (1908).
[17] Madison v. Lewis, 151 Pa. Super. 138, 30 A.(2d) 357 (1943). In this typical fact situation the husband entered into a subsequent marriage while his prior undivorced spouse was still living. Held: presumption of the continuing validity will be sustained.
[18] Industrial Commission of Ohio v. Dell, 104 Ohio St. 389, 135 N.E. 669 (1922).
[19] Welch v. All Persons, etc., 85 Mont. 114, 278 Pac. 110 (1929).
[20] Barnes v. Barnes, 90 Iowa 282, 75 N.W. 851 (1894).
[21] Turner v. Williams, 202 Mass. 500, 89 N.E. 110 (1909).
[22] *Supra,* note 19.
[23] *Supra,* note 13.

the years 1929-1931 pursuant to the 1928 license contract.[1] In 1946, the taxpayer's liability for royalty payments during the years 1937 to 1941, to his wife, under the 1928, and later license contracts, was before the Tax Court,[2] and that Court held the taxpayer liable, except for 1937 payments made under the 1928 contract. The Eighth Circuit Court of Appeals reversed that part of the Tax Court's decision favorable to the government, holding that the payments were not income to the taxpayer, and affirmed that part of the Tax Court's holding, that res judicata applied to the 1937 royalties paid under the 1928 agreement.[3] The Supreme Court granted certiori. The taxpayer claimed the doctrine of res judicata applied to relieve him from liability. *Held:* the contracts not before the Board in 1935, are different contracts from the 1928 contract, however similar or identical they are to it, therefore the nature of these contracts was never litigated, and neither the doctrine of res judicata, nor that of collateral estoppel apply to them, though the court may apply the rule of stare decisis. As to the 1928 contract, while the law of transferor's income tax liability was not changed since 1935, it has so developed through the *Clifford-Horst* line of cases,[4] that the legal climate is sufficiently changed that the doctrine of collateral estoppel can no longer apply to the assignment of the 1928 contract, and a reconsideration of the 1935 decision is justified in the light of the doctrine of the *Clifford-Horst* cases. *Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 673 (1948).*

The doctrine of collateral estoppel is especially important in the field of taxation, because of the constant recurrence of similar issues in successive tax years. The doctrine differs from the doctrine of res judicata in nature, and in force. The doctrine of res judicata applies only to attempted relitigation of the same cause of action, and the doctrine bars the relitigation by merging the cause of action in the judgment.[5] The doctrine of collateral estoppel, on the other hand, applies to suits on different claims, but where some or all of the issues are the same or similar. The doctrine holds that where the issue is actually litigated in a prior trial, it may not be relitigated in a subsequent trial of a different claim.[6] There has been some confusion in the cases

[1] 32 B.T.A. 1337 (1935) Memo Op.
[2] 6 T.C. 431 (1946).
[3] 161 F.(2d) 171 (C.C.A. 8th, 1947).
[4] Helvering v. Clifford, 309 U.S. 331, 60 S. Ct. 554, 84 L.Ed. 788 (1940); Helvering v. Horst, 311 U.S. 112, 61 S. Ct. 144, 85 L.Ed. 75, 131 A.L.R. 655 (1940); Helvering v. Eubank, 311 U.S. 122, 61 S. Ct. 149, 85 L.Ed. 81 (1940); Harrison v. Schaffner, 312 U.S. 579, 61 S. Ct. 759, 85 L.Ed. 1055 (1941); Commissioner v. Tower, 327, U.S. 280, 66 S. Ct. 532, 90 L.Ed. 670 (1946); and Lusthaus v. Commissioner, 327 U.S. 293, 66 S. Ct. 539, 90 L.Ed. 679 (1946), all of which cases related to income transferor's liability for income tax thereon.
[5] Cromwell v. County of Sac, 94 U.S. 351, 24 L.Ed. 195 (1877); Tait v. Western Maryland Railway Co., 289 U.S. 620, 53 S. Ct. 706, 77 L.Ed. 1405 (1933).
[6] *Ibid.*, 94 U.S. 351.

between these two doctrines,[7] but this is probably because the limits on the doctrine of collateral estoppel have not been too well defined.[8] This case should go far to settle some of this confusion.

In *Cromwell v. County of Sac*,[9] the Supreme Court, in 1877, laid down the rule that where there is a second suit on a different claim or demand between the same parties, the estoppel doctrine applies only to the matters in issue, or the points controverted, which were determinative of the judgment. In 1897, the Court held that each year's tax liability constitutes a separate cause of action, and res judicata does not apply to a second suit.[10] And in 1927, the Court would seem to have clinched the question by their decision that a prior judgment was not conclusive as to matters of law in later suits between the same parties.[11] However, in 1933, in *Tait, Collector of Internal Revenue v. Western Maryland Railway Co.*,[12] the Court said that where the same question, but for a different tax year, has been decided, that is res judicata as to the liability for a different tax year. This case seems to have caused some of the difficulty in the lower courts.[13] The law in that case had remained the same in the period between the two suits, and that was noted by the Court, but the Court's use of the words "res judicata" may have caused some of the confusion. The rule applied in the *Western Maryland* case is still good, when the law remains the same between the two cases. The *Blair* case[14] followed this in 1936, and said that where a decision of a state court intervenes between the prior and later suits, the rule of collateral estoppel does not apply. This rule still did not clear up the confusion, though, regarding changes in federal decisional law, as state law was held to be a matter of fact, and not of law, as far as the federal courts were concerned.[15] Now, however, the *Sunnen* case makes it clear that changes in federal decisional law

---

[7] See Tillman v. National City Bank of New York, 118 F.(2d) 631 (C.C.A. 2d, 1941), holding that findings based on stipulation are as binding as findings actually litigated in the prior suit, and citing the Western Maryland case (fn. 5), and see also Commissioner v. Western Union Telegraph Co., 141 F.(2d) 774 (C.C.A. 2d, 1944), holding a prior decision res judicate, though federal decisional law had changed between suits; and compare these with Henricksen v. Seward, 135 F.(2d) 986, 150 A.L.R. 1 (C.C.A. 9th, 1943); Corrigan v. Commissioner, 155 F.(2d) 164 (C.C.A. 6th, 1946), and Traveler's Insurance Co. v. Commissioner, 161 F.(2d) 93 (C.C.A. 2d, 1947), holding changes in the law prevented the application of the collateral estoppel or res judicate doctrines.

[8] See Pelham Hall Co. v. Bassett, 147 F.(2d) 63 (C.C.A. 1st, 1945).

[9] *Supra*, fn. 5.

[10] New Orleans v. Citizen's Bank, 167 U.S. 371, 17 S. Ct. 905, 42 L.Ed. 202 (1897).

[11] U.S. v. Stone & Downer Co., 274 U.S. 225, 47 S. Ct. 616, 71 L.Ed. 1013 (1927).

[12] 289 U.S. 620, 53 S. Ct. 706, 77 L.Ed. 1405 (1933).

[13] See fn. 7, fn. 8, and Commissioner v. Arundel-Brooks Concrete Corp., 152 F.(2d) 225, 162 A.L.R. 1200 (C.C.A. 4th, 1945).

[14] Blair v. Commissioner, 300 U.S. 5, 57 S. Ct. 330, 81 L.Ed. 465 (1937).

[15] Commissioner v. Western Union Telegraph Co., 141 F.(2d) 774 (C.C.A. 2d, 1944).

are sufficient to rule out collateral estoppel, and the case goes even further than past cases, and says that an intervening clarification of the law may be sufficient ground on which to base a reconsideration of matters found in a prior case.

Another matter that has caused some trouble has been the finding based on mixed fact and law. It has been held that while res judicata (presumably meaning collateral estoppel) does not apply to a strict question of law, where a fact, question or right is found by an erroneous application of the law, that finding is binding is a subsequent suit between the same parties.[16] However, this would seem to be cleared up by the *Sunnen* case, as all income transferor tax liability cases would seem to involve mixed findings of fact and law. The injustice that would be done by holding the parties to a finding based upon an erroneous application of the law, or upon law which is later changed or clarified by decision, is not hard to imagine, especially in income tax cases.

While authority is abundant that changes in the law, statutory and decisional, would throw out the plea of res judicata or collateral estoppel in a later suit,[17] the liberal rule of the *Sunnen* case, that mere clarification of the law is sufficient to create a change in the "legal atmosphere", does not seem to have the same support in the cases, but it is a rule that should prevent much injustice. The American Law Institute would apparently go as far, however.[18] The res judicata and collateral estoppel doctrines are based on a public policy, only, which attempts to settle matters once litigated. A public policy as this will not be allowed to prevent justice, by causing the perpetuation of an error in later suits involving different claims.[19]

JAMES KIRSCHLING

Sales — Consummation of Sales in Self-Service Stores — Plaintiffs entered the self-service store of the Great Atlantic & Pacific Tea Company. The husband selected two bottles of ginger ale and proceeded to place them in his merchandise cart when one bottle exploded. A piece of glass therefrom struck his wife in the leg causing her serious injury. Defendants were engaged in the business of manufacturing and bottling the ginger ale. This product was sold and delivered to the Great Atlantic & Pacific Tea Company for resale in its stores. Plaintiffs based their action on assumpsit for breach of implied warranty of fit-

[16] U.S. v. Moser, 266 U.S. 236, 45 S. Ct. 66, 69 L.Ed. 263 (1924). See also, Griswold, "Res Judicate in Federal Tax Cases," 56 Yale L.J. 1320, at pp. 1333, 1334, 1355, 1356, but see p. 1335 for cases contra (1937).

[17] State Farm Mutual Auto Insurance Co. v. Duel, 324 U.S. 154, 65 S. Ct. 573, 89 L.Ed. 812 (1945), and see fns. 5, 10, 11 and 14, *supra.*

[18] American Law Institute, Restatement of the Law of Judgments, sec. 70 (1942).

[19] See fn. 18, *supra,* and also Henricksen v. Seward, 135 F.(2d) 986, 150 A.L.R. 1 (C.C.A. 9th, 1943).