Michigan Law Review

Volume 48 | Issue 8

1950

JUDGMENTS-COLLATERAL ESTOPPEL BY A LOWER COURT JUDGMENT WHEN APPEAL THEREFROM IS DISMISSED BECAUSE THE CASE HAS BECOME MOOT

John C. Walker S.Ed.
University of Michigan Law School

JUDGMENTS—COLLATERAL ESTOPPEL BY A LOWER COURT JUDGMENT WHEN APPEAL THEREFROM IS DISMISSED BECAUSE THE CASE HAS BECOME MOOT—The United States sued defendant in two counts for violation of OPA price regulations. The first count asked for an injunction to restrain further violations[1] while the second sought treble damages for past violations.[2] By agreement of the parties the injunction issue was tried first. The trial court found that there had been no violation of price regulations and dismissed the bill. This phase of the case

[1] Emergency Price Control Act of 1942, 56 Stat. L. 33 (1943), 50 U.S.C.A. (1944) Appx., §925(a).

[2] 56 Stat. L. 34 (1943), 50 U.S.C.A. (1944) Appx., §925(e).

was appealed by the government as a final order. The appeal was dismissed on the ground that the injunction issue had become moot, the particular commodity having been decontrolled in the interim.[3] The government then sought to prosecute its claim for damages under the second count. *Held*, the trial court's determination in the injunction branch of the case that there had been no violation of price regulations was conclusive as against the government. It was a final determination by a court of competent jurisdiction of an essential issue actually litigated between the same parties. One judge dissented. *United States v. Munsingwear, Inc.*, (8th Cir. 1949) 178 F. (2d) 204.

For purposes of this discussion it will be assumed that the injunction count and the damage count were two separate suits on two different causes of action.[4] The instant case is important because it raises a question upon which there is practically no direct authority. It must be conceded that what little authority there is seems at first glance to support the position of the dissent. The *Restatement of Judgments* flatly declares: "Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action."[5] Professor Scott agrees with the *Restatement*,[6] but it should be remembered that he helped to write it. A glance at the hypothetical case used to illustrate the rule of the *Restatement*[7] will show that it was taken directly from the case of *Gelpi v. Tugwell*.[8] There the court in dismissing an appeal because the case had become moot said that its holding would not be res judicata in a subsequent suit between the same parties on a different cause of action. It is clear that this was mere dictum.[9] With one exception, the other cases cited in support of the dissent can be discarded as precedent since they did not decide the precise point in controversy in the principal case.[10] The exception is *Allegheny County v. Maryland Casualty Co.*,[11] which expressly follows the *Restatement*. Even in that case a serious question might be raised as to whether there was sufficient privity of parties to justify application of the doctrine of estoppel by judgment. It would seem, then, that

[3] Fleming v. Munsingwear, Inc., (8th Cir. 1947) 162 F. (2d) 125.

[4] This assumption was made by the court. The case actually involved the second count for damages plus a separate suit filed by the government for subsequent damages. The court made no distinction between the two claims.

[5] JUDGMENTS RESTATEMENT §69 (2).

[6] Scott, "Collateral Estoppel by Judgment," 56 HARV. L. REV. 1 at 16 (1942).

[7] JUDGMENTS RESTATEMENT §69, comment *d*, illustration 1.

[8] (C.C.A. 1st, 1941) 123 F. (2d) 377.

[9] There was a dissent in the case which, while agreeing with the dictum as to the effect of the dismissal, argued that the appeal was not moot since there was a high probability that there would be subsequent litigation between the parties involving the same issues.

[10] Rawlings v. Claggett, 174 Miss. 845, 165 S. 620 (1936) contains the same sort of dictum which is found in Gelpi v. Tugwell. In Knowlton v. Swampscott, 280 Mass. 69, 181 N.E. 849 (1932) the appeal was dismissed for mootness, but the decree of the lower court was modified so that it rested solely on the ground that the case was moot. Therefore there was no final decision on the merits. The same was true in Leader v. Apex Hosiery Co., (C.C.A. 3d, 1939) 108 F. (2d) 71, affirmed 310 U.S. 469, 60 S.Ct. 982 (1944). The prior litigation there was Leader v. Apex Hosiery Co., 302 U.S. 656, 58 S.Ct. 362 (1937).

[11] (C.C.A. 3d, 1944) 146 F. (2d) 633.

case authority in favor of the dissent is very slight and of doubtful validity. The holding of the majority, on the other hand, is based upon general rules of estoppel by judgment, and there is no doubt that the facts of the case fit perfectly into the formula approved by both text writers and judges.[12] There was a final adjudication of an essential issue by a court of competent jurisdiction, the parties were the same, and the issue adjudicated was essential to the second suit. Moreover, it is settled law that mere lack of a right to appeal will not prevent the operation of the doctrine of res judicata.[13] The question narrows down to this: Should an exception to the general rules of estoppel by judgment be made where the losing party in the first suit has been deprived of his right to an appellate determination of the merits solely because the case became moot during the pendency of the appeal? The question is important because it is one of first impression in practically all jurisdictions. It must be admitted that appealing arguments can be made both for and against making such an exception. On the one hand, the strong policy arguments underlying the entire doctrine of res judicata ought to protect a successful party from repeated litigation of the same issues; on the other, the losing party, through no fault of his own, has been deprived of an appellate determination to which he would otherwise have a right. It is submitted that in the absence of "special equities" the better solution is to hold that the first judgment is an estoppel. It seems to this writer that to hold otherwise is to presume a high percentage of error in lower court decisions, whereas the whole doctrine of res judicata is based on the opposite presumption. After all, a "right" to appeal is in a very real sense nothing more than a privilege granted by a statute or constitution. What facts would constitute "special equities" justifying an exception to the general rule is a difficult question to answer in the abstract. One example might be where the losing party on the first appeal argued, but was unable to convince the court, that the case was not moot for the very reason that the judgment would operate as an estoppel in any subsequent litigation. In this connection, attention should be called to the principal case, where the court said that perhaps appellate courts should "re-examine their standards for determining under what circumstances a case may be dismissed as moot."[14] If the lower court's determination on the merits will affect pending or likely litigation because of the doctrine of estoppel, it would seem that the issues should not be considered moot.[15] Having gone to the trouble and expense of taking an appeal, the parties ought to be entitled to a final appellate determination of the controversy if it can be shown that making such a determination will not be a completely futile act on the part of the court. If this suggestion is followed, it would eliminate the problem of the principal case before it arises. Another way

[12] See Southern Pacific R. Co. v. United States, 168 U.S. 1 at 48 et seq., 18 S.Ct. 18 (1897); Johnson Co. v. Wharton, 152 U.S. 252, 14 S.Ct. 608 (1894); 2 FREEMAN, JUDGMENTS 1321, §§627 and 1412, §670 (1925); Scott, "Collateral Estoppel by Judgment," 56 HARV. L. REV. 1 (1942); and Von Moschzisker, "Res Judicata," 38 YALE L.J. 299 (1929).

[13] Johnson Co. v. Wharton, supra, note 12; Scott, "Collateral Estoppel by Judgment," 56 HARV. L. REV. 1 (1942); 2 FREEMAN, JUDGMENTS 1339, §635 (1925).

[14] Principal case at 209.

[15] This was the position of the dissent in Gelpi v. Tugwell, (C.C.A. 1st, 1941) 123 F. (2d) 377. See note 9, supra.

in which the problem could be eliminated would be for the appellate court in the first case to order the lower court to enter judgment of dismissal on the ground of mootness alone. There would then be no final judgment on the merits, and consequently no estoppel. This solution, however, results in a logical inconsistency. While refusing to take jurisdiction of the case because it has become moot, the appellate court does take jurisdiction to the exent that it modifies the grounds upon which the judgment below was given. Perhaps in this area logical difficulties should give way to practical considerations, and at least two courts have ordered modification of the lower court decree in dismissing appeals for mootness.[16]

John C. Walker, S.Ed.

[16] Swampscott v. Knowlton, 272 Mass. 475, 172 N.E. (2d) 601 (1930) and Leader v. Apex Hosiery Co., 302 U.S. 656, 58 S.Ct. 362 (1937). The second phase of these two cases is discussed in note 10, supra.