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Civil Procedure—Collateral Estoppel Under Section 59 (Now 388) of Vehicle and Traffic Law 73

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the Legislature, by its enactment of Section 21 suspended the running of the Statute for a period of eighteen months after the death of the person against whom a cause of action exists."[8]

It seems obvious from the previous discussion that the Legislature, by its enactment of Section 21, intended to prevent a plaintiff's cause of action from becoming legally ineffective or burdensome by reason of the wrongdoer's death, and such protection appears to be both reasonable and meritorious in a situation as was presented in the *Butler* case where there was no party in existence for the plaintiff to sue.

However, the need for similar protection does not appear as obvious in the present case or under similar situations which could arise under Section 118 of Decedant's Estate Law, for the wrongdoer's death, of and by itself, could not possibly affect the legal efficacy of a cause of action which does "exist" but which has not yet legally accrued. It is the additional fact that letters of administration were not issued to defendant's estate until June of 1958—approximately three years after the accrual of action—that raised the same dilemma in the present case that was presented by *Butler v. Price* and cases similar to it, and to which the Legislature, by its enactment of Section 21, addressed itself. To wit, an ineffective cause of action due to the absence of a liable legal representative to the wrongdoer's estate.

The question that faces us then is: will the courts be as willing to invoke Section 21 as it did here in other cases arising under Section 118 of Decedant's Estate Law where an administrator has already been appointed to the wrongdoer's estate when the action accrues? It would appear not since the reason for invoking Section 21 would no longer exist and any such use of it (Section 21) would obviously be a windfall to plaintiff or his estate. The question, however, appears to be left open by this case. It appears the holding is limited to cases involving Section 118 and is not an overruling of the rule set forth in the *Richman* case.[9]

COLLATERAL ESTOPPEL UNDER SECTION 59 (NOW 388) OF THE VEHICLE AND TRAFFIC LAW

Plaintiffs' administrators commenced the present wrongful death actions as a result of an automobile accident on a New York highway. The car in which the plaintiffs' intestates were killed was owned by the defendants, one of whom had loaned the car to other persons previous to the accident. Prior to the instant actions, the plaintiffs had brought suit in New Hampshire against the driver, one O'Rourke, seeking to impose liability on the insurer of the car. The insurance policy furnished coverage to the named insured and also to any person using the automobile with the insured's permission. In a declaratory judgment the New Hampshire court found that the limitation im-

8. Supra note 4 at 362, 65 N.Y.S.2d 690 (4th Dep't 1946).
9. Supra note 5.

posed by the owner upon the permissive use of the car was that it should not be used at all if O'Rourke was a passenger; therefore, the particular use to which the car was being put at the time of the accident was not with the owner's permission, and consequently, the insurer did not have to defend the action.[10]

Abandoning the New Hampshire action, the plaintiffs, claiming as a basis of liability Section 59 of the New York Vehicle and Traffic Law,[11] then commenced the present actions, *Hinchey v. Sellers*,[12] against the owners of the car. The issue before the Court of Appeals was whether, when under the same operative facts the ultimate issues differ, the doctrine of collateral estoppel precluded the New York court from relitigating the New Hampshire court's finding of fact of a complete denial of defendant's permission. The defendants maintained that the previous determination of the issue of permissive use was conclusive, and not, as the plaintiffs argued, simply a determination of the limits of permissive use in an insurance contract. The Supreme Court judgment for the defendant,[13] was reversed by the Appellate Division on two grounds. The issue of permissive use under a contract and under a New York statute differ totally, and the doctrine of collateral estoppel "is not applicable to evidentiary findings made in a prior action involving a different ultimate issue".[14] The Court of Appeals reversed the judgment of the Appellate Division and reinstated that of the Supreme Court.

In regard to the first issue, the Court of Appeals found that once the fact, that the defendant refused to permit O'Rourke to ride in the car, was established, recovery under Section 59 of the Vehicle and Traffic Law was impossible.[15] Judge Dye dissented in the present case on the ground that permission under a policy is one thing, and that permission under a statute is another; each issue must be decided separately. The majority would agree with the dissent's contention, in most instances, but under the present facts, where the owner expressly forbade O'Rourke to ride in the car, to find any permission under a policy or under a statute is impossible.

As for the second issue, the Court of Appeals agreed with the Appellate Divisions' finding that the ultimate issues in the two suits differed, but maintained that the doctrine of collateral estoppel did apply to the issue of permissive use. The fact that O'Rourke was forbidden to ride in the car was a finding essential to the first judgment, and the plaintiffs, therefore, are prevented from relitigating this previously determined issue. The Appellate

10. Hinchey v. National Surety Co., 99 N.H. 378, 11 A.2d 827 (1955).
11. N.Y. Vehicle & Traffic Law § 59 (now § 388):
Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence . . . by any person using or operating the same with the permission, express or implied, of such owner. . . .
12. 7 N.Y.2d 287, 197 N.Y.S.2d 129 (1959).
13. 1 Misc. 2d 711, 147 N.Y.S.2d 893 (County Ct. 1955).
14. 5 A.D.2d 440, 446, 147 N.Y.S.2d 47, 53 (4th Dep't 1958).
15. Arcara v. Moresse, 258 N.Y. 211, 179 N.E. 389 (1932).

Division in its opinion relied heavily on the decision of *Fox v. Employers' Liability Assur. Corp.*,[16] one of three related cases on the same subject. The facts in that case were similar to those in the present case, except that the first of the suits involved the issue of permission under Section 59 and the second under an insurance policy; in the present case the order of these issues is reversed. In the *Fox* case, which was never reviewed by the Court of Appeals, the defense of res judicata was not upheld by the court on the ground that the causes of action differed. It was held that only consent under Section 59, and not consent under a policy, was determined in the first judgment. The Court of Appeals in the present case overruled the *Fox* case as authority for denying the effect of collateral estoppel where the ultimate legal issues in the two suits differ.

The doctrine of res judicata has two distinct phases—barring a second suit designed to relitigate a prior cause of action, and rendering the prior determination of certain issues of law and fact conclusive in any subsequent suit between the same parties or their privies. Where the causes of action are identical in both suits, direct estoppel, the first phase, would apply; however, where the causes of action differ, only collateral estoppel may apply.[17] In the present case, the Court used the term "ultimate issue" to signify cause of action, for if the "ultimate issues" were the same, the suits would have been identical, except for the change of defendants which would only have amounted to a substitution of privies. Direct estoppel would have applied, and not collateral estoppel; it is only because of the "ultimate issues" were different that collateral estoppel applied.[18]

The doctrine of collateral estoppel states that a fact essential to recovery, which is put in issue and determined by a court of competent jurisdiction, cannot be relitigated in a subsequent suit between the same parties or their privies.[19] However, collateral estoppel does not apply to all facts decided in an action, but only to ultimate facts placed in issue because such facts will have been thoroughly contested by the parties and then employed by the court in rendering its decision.[20]

If the effect of collateral estoppel is thus limited to ultimate facts, it becomes necessary to distinguish between such a fact and an evidentiary fact. "A proposition of evidentiary fact is a proposition to which no legal consequences immediately attach, but which is used to establish another proposi-

16. 239 App. Div. 671, 268 N.Y. Supp. 536 (4th Dep't 1934).

17. Cromwell v. County of Sac, 94 U.S. 351 (1876); Schuylkill Fuel Corp. v. Nieberg Realty Co., 250 N.Y. 304, 165 N.E. 456 (1929).

18. Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1 (1942); Collateral Estoppel by Judgment, 52 Colum. L. Rev. 647 (1952).

19. Tait, Collector of Internal Revenue v. Western Maryland R. Co., 289 U.S. 620 (1933); Southern Pacific R. Co. v. United States, 168 U.S. 1 (1897); The Evergreens v. Nunan, 41 F.2d 927 (2d Cir. 1944); House v. Lockwood, 137 N.Y. 259, 33 N.E. 595 (1893); 50 C.J.S., Judgments, § 712.

20. Cambria v. Jefferey, 307 Mass. 49, 29 N.E.2d 555 (1940); Karameros v. Luther, 279 N.Y. 87, 17 N.E.2d 779 (1938).

tion of fact (the ultimate fact) to which legal consequences attach."[21] Statements concerning to whom the defendant gave the keys to the car are evidentiary leading up to the ultimate fact, that the defendant forbade O'Rourke's presence in the car, to which legal consequences attach. In order to avoid inconsistent and incongrous results, findings of ultimate fact must be conclusive in a subsequent action.

It is possible that the *Hinchey* case represents an example of judicial evasion of a difficult problem in the doctrine of collateral estoppel—namely, what constitutes an ultimate or evidentiary fact. Definitions may be expounded, but their application to a specific fact situation is not automatic. In the present case, the Appellate Division found the lack of permission by the owner in regard to O'Rourke's presence in the car to be an "underlying evidentiary question"; the Court of Appeals found the same fact to be "a finding essential to judgment." Neither court, however, states any substantial reasons in arriving at a conclusion nor attempts to clarify the difference between an evidentiary and ultimate fact.

WHO IS AN AGGRIEVED PARTY UNDER CIVIL PRACTICE ACT SECTION 557.

A patient's action for malpractice against a doctor and a private hospital, in *Baidach v. Togut*,[22] occasioned a consideration of the relationship between Sections 557 and 211-a of the New York Civil Practice Act. The former concerns the meaning of "aggrieved party" for appeal purposes while Section 211-a grants the right to contribution among joint tort-feasors.

The plaintiff obtained a jury verdict and judgment against the doctor and hospital owner, but the Appellate Division dismissed the claim against the doctor and reduced the amount of the judgment.[23] The hospital owner paid the reduced judgment and attempted to appeal the dismissal of the doctor claiming that since he lost the right of contribution against the doctor he was an aggrieved party under Section 557(2) and thus qualified to appeal.[24]

The Court of Appeals held that the hospital owner was not a party aggrieved by the Appellate Division ruling because he has no right of contribution against the doctor at the time he paid the judgment, and thus he had no right to appeal.

There was no right of contribution at common law. An injured person could sue any one of several joint tort-feasors and recover full damages, the paying defendant having no recourse against the other tort-feasors. In deroga-

21. Morris, Law and Fact, 55 Harv. L. Rev. 1303, 1326 (1942). See also, The Evergreens v. Nunan, 141 F.2d 927 (2d Cir. 1944).

22. 7 N.Y.2d 128, 196 N.Y.S.2d 67 (1959).

23. 8 A.D.2d 838, 190 N.Y.S.2d 120 (2d Dep't 1959) as amended 9 A.D.2d 628, 191 N.Y.S.2d 365 (2d Dep't 1959).

24. N.Y. Civ. Prac. Act § 557(2):
A person aggrieved who . . . has acquired since the making of the order or the rendering of the judgment appealed from an interest which would have entitled him to be so substituted if it had been previously acquired, may also appeal; . . .