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# Notes and Comments

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### We Pause to Note

Some seventy years ago, Sir Frederick Pollock, writing on the subject of English case law and its availability for purpose of citation, indicated that the state thereof "might be not unfairly described as chaos tempered by Fisher's Digest."[1] The same thing might well have been said of American case law if, in Chicago ten years before, Frank Shepard had not begun providing lawyers with a case citation service which, while then limited in scope and cumbersome in form,[2] became the progenitor of the now widely known publications designated collectively as Shepard's Citations. In the eighty years which have elapsed since those humble beginnings, the compact Shepard volumes have come to provide citation service to every attorney in every jurisdiction throughout the United States. It is only fitting, therefore, to pause in the publication of articles of interest to the legal profession for the purpose of noting the eightieth anniversary of an idea and an organization without whose help the publication of this Review would have been well-nigh impossible.[3]

To have extracted from citing sources and to have compiled in readily usable form millions upon millions of citations and to add almost a million and a half new citations each year would alone represent an accomplishment worthy of praise. The Shepard publications, however, comprise much more than a mere listing of citing references. Within the scope of each publication there are letter-form abbreviations giving the available "history" of each cited case and the treatment accorded to it. Both legislative and judicial history is provided for every statutory provision. By means of superior figures, Shepard's indicates each particular point of law set forth in the syllabus of the cited case, thereby permitting the selection of citing references of interest without the necessity of reading all the references tabulated. Other features also exist.

It should hardly be necessary, however, to describe the many services performed by Shepard's, for its wealth of material in condensed form, providing a complete system of legal research permitting both the rapid location of cases and statutes and an analysis of the extent to which they still represent prevailing law, is known to the legal profession. The Chicago Kent Law Review, here openly acknowledging its debt to Shepard's, not only commends that organization for its eighty years of sterling achievement but wishes it untold years of further success so that it may live to serve law review staffs and lawyers yet unborn.

[1] Pollock, Essays on Jurisprudence and Ethics, p. 238.

[2] The page margins on the early Illinois Supreme Court reports, from Vols. 1 to 70, or thereabouts, will probably be pasted up with small clippings giving numerical parallel references. These clippings formed the original Shepard service.

[3] To mark its anniversary, Shepard's Citations has published a booklet entitled "Four Score Years of Service to The Legal Profession." A copy thereof is available to anyone interested. Address: Shepard's Citations, Colorado Springs, Colo.

## THE CONCLUSIVENESS OF ADJUDICATIONS

The well understood doctrine of res judicata, one which precludes parties, or their privies, from relitigating a cause of action once that cause has been finally determined by a court of competent jurisdiction,[1] recently has been made the subject of some further judicial examination in connection with two instances involving suits against employers and their employees wherein determinations regarding the liability of the one have been offered as the basis for decision in suits brought against the other. The first of these cases, that of *Weekley* v. *Pennsylvania Railroad Company*,[2] dealt with the problem from the standpoint of an injured third party who first sued the employee in a state court and lost but who thereafter sued the employer in a federal court, on the basis of diversity of citizenship, and was met by a motion for summary judgment on the ground that, as the only basis for the suit against the employer rested on imputed liability, the earlier determination in favor of the employee precluded a suit predicated on the same acts against the employer. The factual situation in the Illinois case of *Voss Truck Lines* v. *Pike*[3] was slightly more complicated[4] but the motion offered therein, based on the companion principle of estoppel by verdict, was ordered denied on the ground there was an absence of mutuality in estoppel, hence the earlier determination in the employee's suit did not operate to preclude a later action involving the employer.

Based on a sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing the same issue into controversy,[5] the doctrine of res judicata serves to protect a per-

[1] The doctrine extends not only to issues actually decided but also includes those issues which should have been presented and determined. In general, see Restatement, Judgments, § 68; Freeman, Judgments, 5th Ed., Vol. 2, § 627; Black, Judgments, 2d Ed., Vol. 2, § 504.

[2] 104 F. Supp. 899 (1952).

[3] 350 Ill. App. 528, 113 N. E. (2d) 202 (1953).

[4] The case grew out of a highway collision between certain automotive equipment. The parties may be described as A, driving unit No. 1 in the capacity of servant for B, owner of a trailer attached to a leased tractor, rented from C, the owner thereof, by B, comprising one of the units, on the one hand, and D, the servant-driver of unit No. 2, who died in the accident, working for E, the owner thereof, on the other hand. The first action, brought by B and C as co-plaintiffs, naming D's legal representative and E as defendants, sought recovery for the property damage done to unit No. 1. E offered a counterclaim therein, directed against B and C, for damage to his equipment and for such amounts as he might become liable to pay for workmen's compensation by reason of D's death. While that action remained pending, A filed a separate personal injury suit against E, resting on the employer's obligation to respond for D's negligence, to recover for the physical harm A had sustained in the same collision. This case was tried first and resulted in a judgment in A's favor. B and C then offered a motion for summary judgment in their action, relying on the record made in A's case, which motion was granted by the trial court but, on appeal, the order was reversed. Issues concerning the right to use third-party practice and the appropriateness of a motion for summary judgment in a tort action, entangled in the case, have been omitted for the purpose of this discussion.

[5] Bruszewski v. United States, 181 F. (2d) 419 (1950).

son from being twice vexed for the same cause.[6] It must, however, for validity in its operation, conform to the mandate of due process that no person shall be deprived of personal or property rights by a judgment taken without notice and without an opportunity to be heard.[7] In determining the validity of a plea of res judicata, therefore, three questions are pertinent, to-wit: (1) was the issue decided in the prior adjudication identical with the one presented in the action in question; (2) was there a final judgment on the merits; and (3) was the party against whom, or by whom, the plea is asserted one who was a party, or in privity with a party, to the prior adjudication.[8] Since the Weekley case involved neither of the first two points, the correctness of the decision therein depends on whether the defendant there concerned could be said to be one who was a party, or in privity with a party, to the earlier adjudication. Not having been named a party thereto, the defendant's right to assert the defense necessarily had to depend on the claim that the defendant was in privity with such a party.

In that connection, while parties have been defined as those who have a "right to control the action either personally, or if not fully competent, through persons appointed to protect their interests,"[9] privies are generally regarded as being those persons who, after rendition of the judgment, have acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase.[10] As to these persons, the mutuality of estoppel which lies at the base of the doctrine is to be found in the fact that the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.[11]

By contrast, the criteria used to determine the right of one to assert a plea of res judicata differs fundamentally from the criteria utilized in determining the person against whom the plea may be asserted. While the requirements of due process forbid the assertion of the plea against a party unless he was bound by the earlier litigation,[12] there is no compelling reason for requiring that the party asserting the plea should have been a party, or in privity with a party, to the earlier litigation.[13] As to such a person, and in the absence of a satisfactory rationalization for the re-

[6] Coca Cola Co. v. Pepsi Cola Co., 36 Del. (6 W. W. Harr.) 124, 172 A. 260 (1934). See also von Moschzisker, "Res Judicata," 38 Yale L. J. 299 (1929), and note in 29 Ill. L. Rev. 93.

[7] See note in 15 U. of Cinn. L. Rev. 349 to the case of Elder v. New York & Pennsylvania Motor Express, Inc., 284 N. Y. 350, 31 N. E. (2d) 188 (1940), and a note in 82 U. of Pa. L. Rev. 871.

[8] Bernhard v. Bank of America Nat. Trust & Sav. Ass'n, 19 Cal. (2d) 807, 122 P. (2d) 892 (1942); Tobin v. McClellan, 225 Ind. 335, 73 N. E. (2d) 679 (1947).

[9] Restatement, Judgments, § 79, comment b.

[10] Ibid., §§ 84-92.

[11] Myers v. Brown, 250 Ky. 64, 61 S. W. (2d) 1052 (1933).

[12] Coca Cola Co. v. Pepsi Cola Co., 36 Del. (6 W. W. Harr.) 124, 172 A. 260 (1934).

[13] See cases cited in note 8, ante.

quirement of mutuality,[14] many courts have seen fit to abandon the requirement or have confined it for use only in determining the party against whom the plea may be asserted.[15] Other courts have, in effect, accomplished the same result by recognizing broad exceptions to the requirements of mutuality and privity, finding them unnecessary where the liability of the defendant claiming the benefit of the plea is dependent upon, or derived from, the liability of one who was exonerated in the earlier suit.[16]

The Weekley case illustrates but one phase of this rule, that is whether a suit against an employee, productive of a judgment in his favor, should operate to bar a suit against the employer, if the claimed liability of the latter is based on the doctrine of *respondeat superior* and arises from the same set of facts. As early as 1598, in the English case of *Ferrers* v. *Arden*,[17] the court said the principal, "although he be a stranger to the record, whereby the plaintiffs were barred, yet he is privy to the trespass; wherefore he well may plead it, and take advantage of it."[18] The views expressed therein were followed in another early case, that of *Biggs* v. *Benger*,[19] decided in 1723, where a verdict in favor of a landlord's agent in an action by a tenant for trespass was deemed sufficient ground for arresting judgment against the defaulting landlord. The first Illinois case treating with the situation, that of *Lake Shore & Michigan Southern Railway Company* v. *Goldberg*,[20] also a suit for trespass to land, produced a reversal of a judgment against the railroad-principal when it was shown that a prior suit for the same acts against the agent had absolved the agent from liability. The court there said: "But where the real actor, nonetheless liable personally because acting for another, is not guilty, it necessarily follows that the party for whom he acted cannot be. The principal could be no more guilty by reason of the act of his agent than if he had committed the act in person, and the party who was alone charged to have committed the act in person was conclusively adjudged not guilty."[21]

[14] In Bruszewski v. United States, 181 F. (2d) 419 at 421 (1950), the court answered one of the parties by saying: "In reality the argument of appellant is merely that the application of *res judicata* in this case makes the law asymetrical. But the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of *res judicata*."

[15] United States v. Wexler, 8 F. (2d) 880 (1911); Atkinson v. White, 60 Me. 396 (1872); Good Health Dairy Prod. Corp. v. Emery, 275 N. Y. 14, 9 N. E. (2d) 758, 112 A. L. R. 401 (1937); Liberty Mutual Insurance Co. v. George Colon & Co., 260 N. Y. 305, 183 N. E. 506 (1932); Eagle etc. Ins. Co. v. Heller, 149 Va. 82, 140 S. E. 314, 57 A. L. R. 490 (1927). Accord: Restatement, Judgments, § 96a.

[16] The cases are listed in a comment appearing in 35 Yale L. J. 607. See also note in 18 N. Y. U. L. Q. 565.

[17] 2 Cro. Eliz. 668, 78 Eng. Rep. 906 (1598).

[18] Ibid., 78 Eng. Rep. 906 at 907.

[19] 2 Ld. Raymond 1372, 92 Eng. Rep. 394 (1723).

[20] 2 Ill. App. 228 (1878).

[21] 2 Ill. App. 228 at 234-5. To the same effect are the leading cases of Portland Gold Mining Co. v. Stratton's Independence, Ltd., 158 F. 63 (1907) and Emma Silver Mining Co. v. Emma Silver Mining Co. of New York, 7 F. 401 (1880).

While this result has not reappeared in any subsequent Illinois decision where agent and principal, or employee and employer, were sued separately, the rationale has been followed in a series of decisions where, according to a common practice, the agent and principal, or employee and employer, have been sued together.[22] The leading case in this category, that of *Doremus* v. *Root*,[23] vividly illustrates the effect of the application of this rule. A brakeman there brought a personal injury suit against both the railroad and the conductor whose negligence formed the basis of the action. A verdict against the railroad, but silent as to the conductor, was construed to be the equivalent of a verdict in the conductor's favor and, as so construed, then required a judgment in favor of the railroad for the action against it rested solely on the doctrine of *respondeat superior*. While that case was not decided in Illinois, the holding therein has been uniformly followed in this state in those cases where the liability of the principal is derivative only.[24]

The converse of that situation came before the Illinois Appellate Court for the Third District in the fairly recent case of *Spitz* v. *BeMac Transport Company*[25] wherein the Appellate Court affirmed a judgment granted on motion in favor of an absent employee, in whose behalf proceedings had been stayed under the Soldiers' and Sailors' Civil Relief Act,[26] when it appeared that, following a trial, a final judgment had been given in favor of the employer, which judgment was said to operate as res judicata so far as the employee was concerned. Cited and followed therein were the leading cases of *Anderson* v. *West Chicago Street Railroad Company*[27] and *Emery* v. *Fowler*.[28] In the former, a lessor-lessee relationship between the defendants in the two suits was equated to the principal-agent relationship, with the result that the lessee, occupying the position of agent, was necessarily determined to be free from actionable wrong when the lessor, occupying the position of principal, was found not guilty. In the other case, the successive defendants were father and son, the latter acting under the father's direction. Deciding that a judgment in favor of the father was a bar to a suit against the son on the same acts, the court said: "To permit a person to commence an action against the principal, and prove the acts alleged to be trespasses to have been committed by his servants acting by his order, and to fail upon the merits to

22 Snow, "Effect of Verdict for Employee in Joint Action against Employer and Employee," 3 Mercer L. Rev. 298 (1952).

23 23 Wash. 710, 63 P. 572, 54 L. R. A. 649 (1901).

24 See the wrongful death cases of Hayes v. Chicago Telephone Co., 218 Ill. 414, 75 N. E. 1003 (1905); Rogina v. Midwest Flying Service, 325 Ill. App. 588, 60 N. E. (2d) 633 (1945); and Larson v. Hines, 220 Ill. App. 594 (1921). See also Billstrom v. Triple Tread Tire Co., 220 Ill. App. 550 (1921), an action for rescission of a contract based on fraud and deceit, and Antrim v. Legg, 203 Ill. App. 482 (1916), an action for personal injuries based on an agent's negligence.

25 334 Ill. App. 508, 79 N. E. (2d) 859 (1948).

26 50 U. S. C. § 510 et seq.

27 200 Ill. 329, 65 N. E. 717 (1902).

28 39 Me. 326, 63 Am. Dec. 627 (1855).

recover, and subsequently to commence an action against that servant and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases the technical rule, that a judgment can be admitted between the parties to the record or their privies, expands so as to admit it when the same question has been decided and judgment rendered between parties responsible for the acts of others."[29]

Although the ordinary examples of derivative liability are those of master and servant[30] and principal and agent,[31] there are a number of other relationships to which the doctrine in question has been held applicable as, for example, that of indemnitor and indemnitee;[32] father and son, the latter acting under direction;[33] warrantor and warrantee;[34] sheriff and deputy;[35] depositor and bank;[36] one joint maker of a joint and several note and another maker of the same note;[37] members of a partnership sued separately;[38] and a beneficiary under a will and the same person suing as administrator with the will annexed.[39] In each of these cases there was clear evidence of a relationship between the successive defendants, but courts may, at times, seize upon the slightest of evidence to sustain a plea of res judicata on this ground.[40]

Persons who seek to rely on the doctrine should be careful to note that there are situations, deceptively similar, where the raising of the same issues in a subsequent suit brought by the same plaintiff will not be barred. One such exception exists where the principal or employer is not neces-

29 39 Me. 326 at 329, 63 Am. Dec. 627 at 629.

30 Wolf v. Kenyon, 242 App. Div. 116, 273 N. Y. S. 170 (1934).

31 Rookard v. Atl. & C. Air Line R. Co., 84 S. C. 190, 65 S. E. 1047, 27 L. R. A. (N.S.) 435, 137 Am. St. Rep. 839 (1909).

32 Hawley v. Davenport, R. I. & N. W. Ry. Co., 242 Iowa 17, 45 N. W. (2d) 513 (1951).

33 Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627 (1855). But see Myers v. Brown, 250 Ky. 64, 61 S. W. (2d) 1052 (1933).

34 In Atkinson v. White, 60 Me. 396 (1872), a judgment in a suit in trover in favor of a warrantee of title, establishing the validity of the sale to him, was held to preclude the same person from maintaining another trover suit based on the same sale against the warrantor of title.

35 Overstreet v. Thomas, — Ky. —, 239 S. W. (2d) 939 (1951); King v. Chase, 15 N. H. 2, 41 Am. Dec. 675 (1844).

36 In Tobin v. McClellan, 225 Ind. 335, 73 N. E. (2d) 679 (1947), a judgment in favor of a wife, in an action litigated with her husband over the right to money withdrawn by her from a bank account, was held available to the bank when the husband sought to recover the same money from it.

37 Cowley v. Patch, 120 Mass. 137 (1876).

38 Taylor v. Sartorious, 130 Mo. App. 23, 108 S. W. 1089 (1908).

39 Bernhard v. Bank of America Nat. Trust & Sav. Ass'n, 19 Cal. (2d) 807, 122 P. (2d) 892 (1942). An administrator with the will annexed was there held barred, in a suit against the executor, by a former adjudication in favor of the executor obtained in a case brought by the beneficiaries under the will, of whom the administrator was one.

40 Riordan v. Ferguson, 80 F. Supp. 973 (1948); Liberty Mutual Insurance Co. v. George Colon & Co., 260 N. Y. 305, 183 N. E. 506 (1932).

sarily liable under the doctrine of *respondeat superior*. Illustration thereof may be found in the case of *McGurren* v. *McVeigh*,[41] an action against an agent for deceit. The agent there contended that a prior judgment in favor of his principal in a suit by the same plaintiff should operate to bar the action against him, but the defense was rejected on the ground that the principal could have been absolved from liability for his alleged agent's deceit because he had not authorized, knowingly permitted, nor participated therein.[42] Another apparent exception is illustrated by the case of *McAlevey* v. *Litch*,[43] where the plaintiff first sued a corporation for the alleged negligence of its agent and the general verdict therein ran in favor of the corporation without deciding whether the agent had acted within the scope of his employment. In the second suit, brought against the agent for the same acts and injuries, the court rejected the defense of res judicata because the issue of whether the agent was acting within the scope of employment had not specifically been decided and it was possible that the agent could have been acting outside the scope thereof, hence could be personally liable anyway. The holding in the Voss Truck Lines cases turns on a distinction of this nature, for it was there said that a decision that the employee was free from contributory negligence could not be said to be conclusive on the point as to whether or not the employer-plaintiff had also exercised care for the safety of the employer's property.

The nature of the action may also have the effect of engrafting an exception to the doctrine of derivative liability. In *Central New York Coach Lines* v. *Syracuse Herald Company*,[44] one Grady, servant of the Herald Company, had collided with a bus owned by the Coach Lines and had been killed. The first action, brought against the Coach Lines by Grady's administrator, suing under limited letters for the sole benefit of the statutory beneficiaries and not for the general estate, included a counterclaim, which was decided adversely to the counter-claimant. The second action, brought by Coach Lines against the Herald Company, was attacked on the ground the finding on the counterclaim operated by way of res judicata, but it was held to be no bar because the use of a counterclaim in a wrongful death action was deemed to be improper, hence the judgment in the first action should have been taken only on the question as to whether or not the plaintiff-administrator had established his case.[45] Except for the limited character of the original action, a different result might well have been obtained.[46]

[41] 117 F. (2d) 672 (1941).

[42] But see Billstrom v. Triple Tread Tire Co., 220 Ill. App. 550 (1921).

[43] 234 Mass. 440, 125 N. E. 606 (1920).

[44] 277 N. Y. 110, 13 N. E. (2d) 598 (1938).

[45] But see the abstract opinion in Perfection Pulverizing Mills v. Keiser, 203 Ill. App. 383 (1917), where recovery on a set-off filed by an agent, when sued for a debt of the undisclosed principal, was held to be res judicata as to both him and his principal.

[46] For the general effect to be given to a judgment for a plaintiff on a counterclaim or set-off, as barring the same cause of action in a subsequent suit, see Restatement, Judgments, §§ 59-60.

Within the limits noted, there is good reason why, after a judgment in favor of an employee in a suit brought by or against him, the employer should be allowed to have the benefit of the earlier judgment as a bar to any later suit brought against the employer based on the same act. Conversely, and within the same limits, there is evident reason why the employer, acting affirmatively and not simply by way of defense, should gain nothing from the employee's victory but should be compelled to prove his case anew. Once the door to liability has, in that fashion, been properly closed, it should not again be reopened; where not closed, it should be allowed to swing wide to permit the doing of justice.

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