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RES JUDICATA: APPLICATION TO SUBSEQUENT
TORT ACTION BASED ON ACTION EX CONTRACTU*Kent et al. v. Stuker, 40 So.2d 145 (Fla. 1949)*

Plaintiff delivered jewelry to the defendants for examination and inspection only. He received a receipt that stated the value to be \$5,050. Upon the refusal of the defendants to return the jewelry, the plaintiff, believing that he still held title, brought an action in assumpsit. Before plaintiff fully presented his testimony, the trial court held that plaintiff's proof was inconsistent with his manner of pleading and that under such circumstances his remedy lay in a tort action. On its own motion the court directed the jury to find a verdict for the defendants. Plaintiff subsequently brought another action in assumpsit and added a count for conversion. The parties joined issue on the conversion count, and the defendants filed a special plea of res judicata. The trial court in effect then directed a verdict for the plaintiff by instructing the jury to disregard what had taken place in the prior adjudication, particularly as it applied to the count in conversion. On appeal, HELD, the institution of a suit sounding in contract does not preclude the bringing of a tort action if the former is not prosecuted to a final judgment on the merits. Judgment affirmed, Chief Justice Adams and Justice Chapman dissenting.

In this appeal the Court did not decide the correctness of the trial court's interpretation of the law pertaining to the mode of pleading adopted by the plaintiff in the first action.¹

The doctrine of res judicata restricts relitigation when there has been a prior adjudication on the merits by a court of competent jurisdiction.² Interwoven with this theory is the doctrine of election of remedies.³ Through the use of these theories the courts have effective tools with which to limit litigation between the same parties on the same claims.⁴ When a party having an election of inconsistent remedies chooses one and prose-

¹In this comment attention has been confined solely to a discussion of the applicability of the doctrine of res judicata. An additional problem is raised regarding the Court's decision that a directed verdict is not a final adjudication on the merits.

²*Fayerweather v. Rich*, 195 U. S. 216 (1904); *McEwen v. Growers Loan and Guaranty Co.*, 116 Fla. 540, 156 So. 527 (1934).

³*First Nat. Bank of Osakis v. Flynn*, 190 Minn. 102, 250 N. W. 806 (1933); *Deinard and Deinard, Election of Remedies*, 6 MINN. L. REV. 341 (1922); Note, 36 HARV. L. REV. 593 (1923).

⁴See note 2 *supra*.