RES JUDICATA: PRIOR ADJUDICATION OF NEGLIGENCE BARS RELITIGATION OF THAT ISSUE BY DEFENDANT TO FORMER ACTION

Applying state substantive law, the Fourth Circuit held that a prior adjudication of negligence in an action brought against the present plaintiff was res judicata, even though defendant was not a party to the former action. The court discarded the mutuality rule and denied relitigation on the ground of effecting the policy of res judicata without impairing the litigant's constitutional right to a day in court, but failed to acknowledge the nature and extent of its investigation of plaintiff's former defense.

THE RULE of mutuality, a traditional limitation on the doctrine of res judicata,[1] has until relatively recent times[2] maintained a remarkably well-established position in the decisional law.[3] The rule requires that one who invokes the conclusive effect of a prior judgment must have been either a party or in privity with a party[4] to the

[1] Res judicata is a judicial policy which operates to preclude a matter which has once been adjudicated from being litigated a second time. For critical analyses of the doctrine and its policies, see generally Cleary, *Res Judicata Reexamined,* 57 YALE L.J. 339 (1948); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 STAN. L. REV. 281 (1957); Moore & Currier, *Mutuality and Conclusiveness of Judgments,* 35 TUL. L. REV. 301 (1961); Scott, *Collateral Estoppel by Judgment,* 56 HARV. L. REV. 1 (1942); Seavey, *Res Judicata with Reference to Persons Neither Parties Nor Privies—Two California Cases,* 57 HARV. L. REV. 98 (1943); von Moschzisker, *Res Judicata,* 38 YALE L.J. 299 (1929); *Developments in the Law—Res Judicata,* 65 HARV. L. REV. 818 (1952).

[2] For some of the earliest cases abandoning the mutuality requirement, see, *e.g.,* Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 Atl. 260 (1934); Liberty Mut. Ins. Co. v. George Colon & Co., 260 N.Y. 305, 183 N.E. 506 (1932); Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927).

[3] The mutuality rule is still applicable in numerous jurisdictions. *E.g.,* Interstate Elec. Co. v. Fidelity & Deposit Co., 228 Ala. 210, 153 So. 427 (1934); Faber v. Van Zyl, 198 Iowa 1028, 200 N.W. 702 (1924); Wallace v. Goldberg, 72 Mont. 234, 231 Pac. 56 (1925); Taylor v. Barker, 70 Utah 534, 262 Pac. 266 (1927); Collins v. Treat, 108 W. Va. 443, 152 S.E. 205 (1930).

[4] "The word 'privy' includes those who control an action although not parties to it (see § 84); those whose interests are represented by a party to the action (see §§ 85-88); successors in interest to those having derivative claims (see §§ 89-92)." RESTATEMENT, JUDGMENTS § 83, comment *a* (1942).

The notion of privity in this connection has not been without criticism: "The question of who is concluded by a judgment has been obscured by the use of the words 'privity' and 'privies,' which in their precise technical meaning in law, are scarcely determinative always of who is and who is not bound by a judgment. Courts have striven sometimes to give effect to the general doctrine that a judgment is only binding between parties and privies, by extending the significance of the word 'privies' to include relationships not originally embraced by it; whereas the true reason for holding the issue *res judicata,* does not necessarily depend on privity, but on the policy of

action in which that judgment was rendered.[5] Modern analyses, however, have increasingly criticized the requirements of the rule as lacking any "satisfactory rationalization."[6] In the recent case of *Graves v. Associated Transp., Inc.*,[7] the Fourth Circuit Court of Appeals enhanced this trend of attenuation by discarding the mutuality rule and holding that a judgment on an issue which was necessarily determined in a prior suit may be asserted by a defendant in a subsequent controversy, even though he was not a party to the prior suit or in privity with a party.[8]

Graves was one of two personal injury suits which arose out of a collision between an automobile driven by Graves and a truck driven by Associated's employee. In the prior decision, which had been rendered in a Virginia state court in an action brought by Associated's employee against Graves, it had been determined that Graves' negligence was the cause of the mishap.[9] In the instant federal court proceeding, brought by Graves against Associated,

law to end litigation . . . ." Taylor v. Sartorious, 130 Mo. App. 23, 40, 108 S.W. 1089, 1094 (1908), quoted in Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 133, 172 Atl. 260, 263-64 (1934).

[5] For an extensive discussion of the rule of mutuality see text accompanyiug notes 20-25 *infra*.

[6] Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 812, 122 P.2d 892, 895 (1942).

The mutuality rule has not been without its opponents historically. See BENTHAM, *Rationale of Judicial Evidence*, in 7 WORKS OF JEREMY BENTHAM 171 (Bowring ed. 1843), a relevant excerpt of which is quoted in Currie, *supra* note 1, at 284 n.6.

See also, Cox, *Res Adjudicata: Who Entitled to Plead*, 9 VA. L. REG. (u.s.) 241 (1923); Currie, *supra* note 1; Note, 41 VA. L. REV. 404 (1955); 35 YALE L.J. 607 (1926).

[7] 344 F.2d 894 (4th Cir. 1965).

[8] The case was filed in a Virginia state court and removed to the federal court by Associated, predicating jurisdiction upon diversity of citizenship. Under the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the court was bound to decide in accordance with the substantive law of Virginia. The parties having stipulated that there was no Virginia authority squarely on point, however, disposal of the case was to accord with what the court believed "would be decided by the highest court of Virginuia, taking into account not merely the generalizations and the dicta in cases from years past but also trends in modern legal thought which we think would be accepted by the Supreme Court of Appeals of Virginia today." 344 F.2d at 896.

The court noted that the Supreme Court of Virginia had subscribed to the mutuality rule in the most recent cases explicitly dealing with it. *Id.* at 897, citing Ferebee v. Hungate, 192 Va. 32, 63 S.E.2d 761 (1951); Pittston Co. v. O'Hara, 191 Va. 886, 63 S.E.2d 34 (1951), *appeal dismissed sub nom.* Wiuu v. Pittston Co., 342 U.S. 803 (1951). The court listed subsequeut cases involving res judicata which have been adjudicated in Virginia and declared that these "have turned upon their individual factual circumstances, with little or no discussion of the mutuality rule." 344 F.2d at 897 n.3.

[9] 344 F.2d at 896. Flowers, Associated's employee was awarded a jury verdict of $2000 on a finding that Graves' negligence was the cause of tbe accideut.

the latter pleaded res judicata and relied upon the previous determination of fault.[10] Although a res judicata assertion of the prior judgment might have been predicated on the "employer-employee" exception to the mutuality rule,[11] the Court of Appeals chose to diverge from this traditional ground. Rather, the previous determination of the negligence issue was deemed controlling as a result of the court's decision to reject the mutuality rule entirely.

In order to assess the viability of the rule of mutuality, its status as a branch of the res judicata concept must be examined. The essence of the doctrine of res judicata is the judicially formulated proposition that a matter which has been adjudicated in a prior action cannot be litigated a second time.[12] The policies which res judicata is designed to serve include the public interest in decreasing litigation, protection of the individual from the harassment of having to litigate the same cause of action[13] or issue against the same adversary or his privy more than once, and facilitation of reliance on judgments.[14] The collateral estoppel aspect of res judicata[15] provides that *issues* which

[10] The federal action had been commenced prior to the state court proceeding, but final judgment in the latter action preceded the federal determination.

[11] 344 F.2d at 898.

One of the recognized exceptions to the mutuality rule is that it will not be applied in an action against an employer if the party bringing the action has previously been unsuccessful in litigating the same issue against the employee. For a more inclusive discussion of the exceptions to the rule see note 24 *infra*.

[12] The doctrine is, of course, tempered by the requirement that justice be done in the individual case. Thus it has been held not to apply where there are overriding competing policies. Spilker v. Hankin, 188 F.2d 35 (D.D.C. 1951) (preservation of attorney-client relationship); White v. Adler, 289 N.Y. 34, 43 N.E.2d 798 (1942) (individual's protection from official misfeasance).

[13] For a treatment of what constitutes a "cause of action," and the dissatisfaction with definitions of the phrase, see Cleary, *supra* note 1, at 339-42. Cleary takes note of two divergent definitions of the term as formulated by the leading exponents of rival schools of thought: "That group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded." McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614, 638 (1925), quoted in Cleary, *supra* note 1, at 340. "Such an aggregate of operative facts as will give rise to at least one right of action, but it is not limited to a single right (if it is ever possible to isolate one such right from others). The extent of the cause is to be determined pragmatically by the court . . . but the controlling factor will be the matter of trial convenience . . . ." CLARK, CODE PLEADING 137 (2d ed. 1947), quoted in Cleary, *supra* note 1, at 340.

[14] Moore & Currier, *supra* note 1, at 308.

Some writers have stressed and criticized subsidiary policies which are also effected by res judicata. They include prevention of double recovery, inconsistent verdicts and unstable decisions. *E.g.*, discussions of these policies in Cleary, *supra* note 1; *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 826-28 (1952).

[15] Many state courts refer to collateral estoppel as "estoppel by judgment," but this is technically improper. "The doctrine of estoppel is not strictly applicable to a

have previously been litigated[16] and determined[17] by a valid and final judgment[18] shall not be unnecessarily relitigated in any subsequent action between the parties or their privies.[19]

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judgment. A judgment is not the act of a party; an estoppel is." 2 FREEMAN, JUDGMENTS § 626 (5th ed. 1925).

See Scott, *supra* note 1, at 3 nn.4 & 5, for a discussion of how the term "collateral estoppel" is used by the RESTATEMENT, JUDGMENTS §§ 45 (c), 47 (e), 68 (a) (1942).

[16] Actual litigation is a prerequisite to the application of collateral estoppel. This requirement reflects the notion that the determination of an issue is not sufficiently reliable to be used in a subsequent litigation unless that determination results from the issue's having been submitted to the rigors of an adversary system. For example, a default judgment generally should not be conclusive against a defendant in a subsequent suit based on a different cause of action. See RESTATEMENT, JUDGMENTS § 68 (f) (1942).

[17] It is imperative in the second proceeding for the court to know that the issue in question was by necessity determined in order to render the judgment in the prior action. Thus, where findings are made but the judgment is not dependent on those findings, they are not conclusive between the parties in the subsequent suit. RESTATEMENT, JUDGMENTS § 68 (o) (1942). Further, where several issues are considered in the prior action, if it does not appear from an investigation of that action that judgment was based on a determination of the issue in question, the judgment is not conclusive in the second action. RESTATEMENT, JUDGMENTS § 68 (l) (1942).

[18] A judgment is final if no further action by the rendering court is necessary to determine the matter litigated. RESTATEMENT, JUDGMENTS § 41 (1942). For example, interlocutory orders by themselves are not ordinarily considered final for res judicata purposes. *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 835 (1952).

Authorities diverge on the question of whether a judgment pending appeal is final in a subsequent suit. See, *e.g.*, 2 FREEMAN, JUDGMENTS § 722 (5th ed. 1925). For the relevance of this point to *Graves*, see note 43 *infra*.

[19] As used by the RESTATEMENT, JUDGMENTS, Introductory Note, ch. 3 (1942), res judicata is a term representing the conclusion that one of the following four rules applies: merger, bar, direct estoppel or collateral estoppel. The use of merger and bar in the RESTATEMENT is illustrated by one of the Reporters in Scott, *supra* note 1, at 2: "A judgment has the effect of putting an end to the cause of action which was the basis of the proceeding in which the judgment is given. If the judgment is for the defendant and is on the merits, the cause of action is extinguished; that is, the judgment operates as a *bar*. If the judgment is for the plaintiff, the cause of action is extinguished but something new is added, namely, rights based on the judgment; there is a *merger* of the cause of action in the judgment."

Direct estoppel operates only when an issue is actually litigated and determined. In such a case the determination is conclusive in any subsequent action between the parties based upon the *same* cause of action provided that the plaintiff is not precluded from maintaining the subsequent action by extinguishment of his cause of action under the rules as to merger and bar. RESTATEMENT, JUDGMENTS § 45, comment *d* (1942).

Collateral estoppel applies when the subsequent action is predicated on a different cause of action. In such a situation the prior "judgment is conclusive between the parties . . . as to questions actually litigated and determined by the judgment. It is not conclusive as to questions which might have been but were not litigated [and determined] in the original action." RESTATEMENT, JUDGMENTS § 68, comment *a* (1942).

Merger, bar and direct estoppel are all concerned with successive suits between the *same* parties on the *same* cause of action. "The term 'collateral' estoppel is intended to emphasize the fact that the causes of action involved in the two proceedings are different, even though the issues or some of them are the same." Scott, *supra* note 1, at 3.

The rule of mutuality[20] has traditionally been applied in deciding which *persons* are bound by the adjudication of an issue once it is known that the issue was litigated and determined in a prior action. Mutuality has been principally justified on the ground that it is dictated by the requirements of due process.[21] A fundamental principle of due process is the assurance that a person who has not had a fair opportunity to be heard on a question which affects his interests should not be bound by an adjudication of that question.[22] Within the context of due process, therefore, collateral estoppel should not be applied in such a way that the determination of an issue will bind a party to a subsequent litigation who was not a party to the action in which that determination was made.[23] The rule of mutuality effectuates the "fairness" dictates of due process by requiring that unless *both* parties to the subsequent litigation were also parties to the former action, or in privity with such a party, the finality of the prior adjudication may not be asserted in the subsequent action.[24] Thus mutuality has been deemed

[20] The term "mutuality" derives from the expression that the estoppel of a judgment must be mutual to be effective; that is, a party will not be bound by a prior judgment unless he would have been bound by it had it gone the other way. See Pittston Co. v. O'Hara, 191 Va. 886, 901, 63 S.E.2d 34, 42, *appeal dismissed sub nom.* Winn v. Pittston Co., 342 U.S. 803 (1951).

[21] For a case discussion of due process requirements in res judicata, see Hedlund v. Miner, 395 Ill. 217, 230, 69 N.E.2d 862, 868 (1946). 89 U. PA. L. REV. 525 (1941); 27 VA. L. REV. 396 (1941).

[22] "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." Hansberry v. Lee, 311 U.S. 32, 40 (1940).

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) .

[23] "This does not mean, however, that everyone must in fact have a day in court, but only that the machinery must be provided so that a reasonable opportunity to be heard will be afforded under normal circumstances." Seavey, *supra* note 1, at 99.

[24] In order to keep the mutuality rule viable, the courts developed certain exceptions in cases where its application would create an anomalous situation. Such a situation may occur when a party to one action is in a position of indemnity to a party in a subsequent action. Master-servant, principal-agent, employer-employee, and derivative liability relationships are subsumed under this category. For example, suppose that an indemnitor has recovered a judgment from a third party and that the third party then brings an action against the indemnitee. If the indemnitee is held liable to the third party, the court can either deny him his cause of action against the indemnitor or allow him to recover from the indemnitor who has already recovered a judgment in his favor. The first alternative is unjust; the second raises the anomaly that the indemnitor will be held liable on an issue on which he has already been adjudged free from fault. In order to avoid a choice between these un-

requisite on the theory that since it is unfair to allow the prior determination of an issue to be asserted *against* one not a party to the prior proceeding, it is reciprocally unfair to allow the determination to be asserted *by* one not a party to the prior proceeding.[25]

In so operating, however, the rule unduly exceeds the requisites of due process since it fails to distinguish between the severable questions of who may assert a prior judgment and against whom it may be asserted.[26] It was precisely this analytic shortcoming that the Supreme Court of California seized upon in its noted judicial assault on the mutuality rule in *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n.*[27] The *Bernhard* court posed the inquiry in terms of whether the party who would be affected by a plea of res judicata has already had a full and fair day in court on the

desirable alternatives, the courts have traditionally allowed the indemnitee to take advantage of the indemnitor's prior victory by a plea of res judicata. It is important to note, however, that the existence of the anomaly—the possibility of holding the indemnitor liable to the indemnitee on an issue which has already been decided in his favor—was the only reason for permitting the exceptions. Thus the indemnitee presumably should not be allowed to use offensively a prior judgment and the indemnitor should never be allowed to use a judgment obtained by the indemnitee, since in neither situation can the anomaly arise. See, *e.g.*, Good Health Dairy Products Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937) (derivative liability exception); City of Richmond v. Davis, 135 Va. 319, 116 S.E. 492 (1923) (indemnitor-indemnitee exception).

The *Graves* case itself, as the court noted, presents a situation where application of the employer-employee exception would be proper. It has been suggested, however, that to include the employer-employee relationship among the exceptions is slightly unrealistic since actions for indemnity by the employer against the employee are unlikely. "Perhaps a solution for this branch of the problem would be facilitated if the courts were to take candid account of the insurance factor." Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 306 n.58 (1957).

[25] "If the rule is a curious one, the reason given for it is even more so:—'Nobody can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary': a maxim which one would suppose to have found its way from the gambling table to the bench. If a party be benefited by one throw of the dice he will, if the rules of fair play are observed, be prejudiced by another; but that the consequence should hold when applied to justice is not equally clear." Bentham, *supra* note 6, quoted in 35 YALE L.J. 607, 609 n.11 (1926).

[26] See Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942). See also cases cited in note 2 *supra*.

[27] 19 Cal. 2d 807, 122 P.2d 892 (1942). In *Bernhard*, testatrix's administratrix sued the bank for money paid to a former executor. The bank was allowed to rely conclusively on a prior judgment rendered by the probate court in which it had been determined that the bank had properly paid the money to the executor in a suit brought against the executor by the beneficiaries, one of whom was the administratrix. The bank had not been a party to the prior litigation.

"No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend." *Id.* at 812, 122 P.2d at 895.

issue. If such a hearing has been afforded, there is no reason to allow the affected party to interpose against a different opponent an issue which has already been adversely determined.[28] Hence under the *Bernhard* criterion a plea of res judicata will be allowed if the person *against whom* the plea is asserted was either a party or in privity with a party to the prior adjudication.[29] Thus it is unnecessary to determine whether the person asserting the plea was a party to the former action, since that determination does not affect the question of fairness.

The *Bernhard* decision, although receiving scant comment at the time it was rendered, has not remained unapplauded.[30] Some concern, however, was manifested over the effect which mechanical application of *Bernhard* might have on the fairness requirement in certain situations. One such situation arises when offensive use of a prior judgment is allowed against a party who was a *defendant* in the prior action.[31] It has been suggested that in the realities of litigation, the defendant in the prior action does not control the time or place of the suit. Thus, he may not have had the opportunity to make an effective defense and, hence, may in fact have been denied his full and fair day in court.[32]

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[28] 19 Cal. 2d at 814, 122 P.2d at 896.

As well as transcending the requirements of due process, the mutuality rule contains a logical fallacy in its statement that since a person would not have been bound by the judgment had it gone the other way, he cannot take advantage of it as it is.

[29] The *Bernhard* court asserted that the answers to three inquiries would be determinative in any case where the plea of res judicata was invoked by way of collateral estoppel: "Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" 19 Cal. 2d at 813, 122 P.2d at 895 (1942).

[30] *E.g.*, Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

[31] Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (1958); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 316 (1957). Professor Currie subsequently retracted this reservation in Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 28-29 (1965).

[32] Another of Professor Currie's objections stemmed from his concern over the problem of a mass disaster, where a defendant would be faced with multiple claimants. Following the prescripts of *Bernhard* a judgment for any plaintiff would be conclusive against the defendant in all subsequent actions, whereas no judgment for the defendant would be conclusive against any plaintiff in a subsequent suit. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 289-94 (1957). This precise situation arose in United States v. United Air Lines, Inc., 216 F. Supp. 709 (D. Nev. 1962), where, following the *Bernhard* rule, the District Court of Nevada held that a prior California adjudication estopped the airline from relitigating the issue of negligence. For a thorough discussion, see 1964 DUKE L.J. 402. In this situation also Professor Currie withdrew his reservations. Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 32 (1965).

In the absence of the mutuality rule, a judgment will be binding on a party in all future actions involving the same issues. A second objection to the *Bernhard* rationale was based on the observation that for practical purposes, a defendant is forced to fight every issue in order to avoid an adverse judgment.[33] This, it has been argued, is unduly harsh.[34] It is to be noted that the mutuality rule, perhaps fortuitously, precluded both of these alleged iniquities from arising. In those cases in which the mutuality rule has been rejected, however, the courts have in each case inquired into the question of fairness by assessing the party's opportunity to litigate the issues in the former action.[35] Thus in each of the qualifying situations mentioned the courts have taken an *ad hoc* approach in examining the realities of a former defense to determine whether the defendant's full and fair day in court was affected.

In *Graves,* the Fourth Circuit rejected the mutuality rule on the basis of the trend of the substantive law of Virginia[36] and adopted the reasoning of the *Bernhard* case.[37] In addition, the court alluded

[33] Moore & Currier, *supra* note 1, at 309.

[34] *Ibid.*

Without the limiting force of the mutuality rule, a litigant who would otherwise be willing to suffer a default judgment because of the "comparative insignificance of the claim and the costliness of full and thorough litigation" cannot reasonably do so since the judgment will be binding on him as to the issues litigated in all future suits no matter how unforeseeable. *Id.* at 309. "Danger arises when the possibility of subsequent litigation involving identical issues is so remote at the time of the first suit that the party may not have litigated all issues fully; especially is this true when the stake in the first suit was not great, and the stake in the second suit is disproportionately larger." *Id.* at 309 n.22.

In response to this objection it has been suggested that to prevent the plea of res judicata in situations where the defendant merely chooses not to press a particular defense depending on the stakes in the action or for "strategic reasons relating to other cases which may be brought against him" merely "allows the defendant to trifle with law administration." Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 STAN. L. REV. 281, 303 (1957).

[35] Zdanok v. Glidden Co., 327 F.2d 944, 953 (2d Cir. 1964); Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 607, 375 P.2d 439, 441, 25 Cal. Rptr. 559, 561 (1962) ("he had every motive to make as vigorous and effective a defense as possible"). Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 STAN. L. REV. 281, 308-22 (1957).

[36] See note 8 *supra.*

[37] 344 F.2d at 900.

It is interesting to note that both the *Bernhard* and *Graves* decisions laid emphasis on an earlier Virginia decision rendered in Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927). This case allowed the use of an earlier criminal conviction in a subsequent suit. Since a criminal conviction represents a conclusion beyond a reasonable doubt, a stricter standard than is required in a civil case, it is generally considered that criminal convictions should have res judicata effect in a subsequent suit, but that criminal acquittals for the same reason should not. See *Developments in the Law—Res Judicata,* 65 HARV. L. REV. 820, 874-80 (1952).

to the necessity of making an inquiry into the circumstances of the fairness of the previous action on a case-by-case basis.

The plaintiff in *Graves* alleged that to allow a plea of res judicata in the instant case would transgress the requirements of fairness due to special circumstances involved. It was contended, first, that Associated's plea in bar should be denied because Graves was not represented in the federal court by the same counsel as in the state court proceeding. This, however, was not deemed so prejudicial as to compel the court to allow relitigation. The court dismissed the contention as specious in view of Graves' failure to allege that his counsel in the former action lacked either competence or diligence.[38] The opinion further noted that a mere change in counsel did not indicate that "the plaintiff had anything other than a full and fair chance to present all the relevant evidence and be heard on all points of law" in the prior action.[39] This summary disposition of the plaintiff's argument is somewhat troublesome in light of the fact that by rejecting the mutuality rule the court has explicitly imposed upon itself the duty to make a *factual* investigation into the adequacy of Graves' former defense. The court was silent on the question of whether the *motive* of Graves to make a good defense was in this connection relevant to a rejection of the argument that a prior defense was inadequate. Graves, in the state court action, had been represented by his insurance carrier's counsel. In cases involving small claims it is quite conceivable that the insurance company might not put forth its best efforts. Here, although the prior judgment against Graves had been only $2000, Associated's employee had claimed $50,000. This would seem to be a sufficiently substantial claim to warrant the insurance company's putting forth its best defense. Unfortunately, there is no indication in the court's language that such an examination of these indicia was made. It would seem that in cases which formerly brought mutuality into play attention should be given to the factual realities influencing a party's motive to defend, especially in the situation where the claim is small and the insured is required by contract to be represented by his insurer's counsel.[40]

For a concise case discussion see Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962) (criminal conviction given res judicata effect in subsequent suit to recover on insurance contract).

[38] 344 F.2d at 901.

[39] *Ibid.*

[40] In this connection it might also be relevant to inquire into the right of appeal

Graves also contended that res judicata worked injustice in his case because the federal court action in which he was plaintiff had been commenced prior to the state court action. In considering this argument, the court stated that there was nothing unfair in the policy of determining the binding date of an adjudication as the date judgment is rendered rather than the time an action is commenced.[41] The *Graves* court rationalized this conclusion by a general reaffirmation of res judicata rather than inquiring into the particulars of immediate justice. Noting that there is "an element of the arbitrary and fortuitous . . . in the basic idea of res judicata," the court deemed the policy well-justified per se in that it prevented numerous untimely and ill-considered actions from being commenced.[42] Again, the Fourth Circuit appears remiss in failing to relate this policy to the facts of *Graves* by explicit analysis designed to show that Graves was subjected to no unfairness by the res judicata effect given the prior judgment.[43]

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of the party in the former action. If there is no appeal of right, this may be an additional factor motivating the party to litigate fully. In *Graves,* there was no appeal of right under VA. CODE ANN. § 8-462 (1957). "A writ of error and supersedeas in this case was refused by the Supreme Court of Appeals on January 18, 1965." 344 F.2d at 896 n.1. On the other hand, the lack of an appeal of right would seem especially deserving of court attention in Graves since it tends to magnify the possible prejudice inherent in an alleged inadequacy of counsel.

[41] 344 F.2d at 901.

[42] *Ibid.*

[43] It would seem that if Graves feared a prejudicial effect from the state court action, he might have petitioned for a stay of proceedings in the state court, VA. CODE ANN. § 8-462 (1957), until the federal court had rendered judgment.

The opinion does not state whether Flowers, Associated's employee, was a resident of Virginia. If he was not, Graves might have removed the state court proceeding to the federal court on diversity grounds. Graves could then invoke FED. R. CIV. P. 42(a) and consolidate both actions in the federal court. Either of these courses of action would have resolved any prejudicial effect of prior adjudication in the state court action that Graves may have wished to avoid. See RESTATEMENT, JUDGMENTS § 68(t) (1942).

It is also significant to note that the state court judgment was pending appeal when the lower federal court rendered its decision. 344 F.2d at 895, 896 n.1. Whether this fact might affect the applicability of a plea of res judicata was not discussed in the *Graves* opinion since the Supreme Court of Appeals of Virginia had refused a writ of error before the Fourth Circuit rendered its decision. A majority of jurisdictions which have considered the point have held that the pendency of an appeal does not invalidate the res judicata effect of a judgment. See Annot., 9 A.L.R.2d 984 (1950). The cases distinguish between the subject matter of appeals, generally holding that in the situation where an appeal is limited to a review of the record of the lower court, the prior judgment will be considered final for res judicata purposes. E.I. DuPont De Nemours & Co. v. Richmond Guano Co., 297 Fed. 580, 583 (4th Cir. 1924).

The objection to the rule under which the pendency of an appeal prevents a judgment from operating as res judicata is that it enables one against whom a judgment is entered to avoid its force for a considerable period of time merely by taking

It may seem that in the absence of the mutuality rule the alternative "fairness" approach is not totally satisfying in view of the difficult inquiries which this approach necessitates.[44] In the last analysis, however, approval or disapproval of the result adopted in *Graves* must rest in one's confidence in the ability and willingness of the courts to make this kind of investigation. Although the Fourth Circuit did not satisfactorily specify its investigatory processes in *Graves,* the ultimate result would indicate that it has met the task.

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an appeal. The objection to the opposing rule is that even though the judgment, if erroneous, will be reversed, it is the causal factor of another judgment from which obtaining relief may be impossible. Federal courts will reopen second judgments in such situations. FED. R. CIV. P. 60 (b) (6). By weighing these arguments solely with regard to fairness it would seem that the judgment pending appeal should not have res judicata effect, especially in light of the facts that the time for appeal is limited and that there is great potential danger in holding the pending decision as res judicata. The best solution, it has been suggested, is a stay in the proceedings of the second suit until the appellate decision is rendered. See 2 FREEMAN, JUDGMENTS § 722 (5th ed. 1925).

[44] *E.g.,* detecting compromise jury verdicts and appraising the quality of counsel for the defense. See United States v. United Air Lines, 216 F. Supp. 709, 730-31 (D. Nev. 1962). For a case where a compromise verdict was suspected by the court see Leipert v. Honold, 39 Cal. 2d 462, 468, 247 P.2d 324, 328 (1952). In that case, the plaintiff sought a new trial limited to the issue of damages. The Supreme Court of California denied the request, as the issue of liability had been a close one and the court feared the prejudicial effect which any new trial would have on the defendant.