# NOTE

## Res Judicata: The Requirement of Identity of Parties

### I

Res judicata may operate in at least three ways.[1] (*1*) Where the plaintiff has brought an action, and a final judgment for the payment of money is rendered in his favor, the plaintiff's cause of action is merged in the judgment, and the only cause of action left is on the judgment. (*2*) Where a final judgment is rendered in favor of the defendant, the plaintiff is barred from maintaining another action on the same cause of action. (*3*) Where a question of fact has been litigated and determined by a final judgment, the determination is conclusive between the parties in a subsequent action, and both will be collaterally estopped to deny the question as decided.

There are two interests which estoppel by res judicata protects:[2] the interest of society that the courts' time shall not be taken up with the vexatious and repeated relitigation of stale issues, and the interest of the individual that his rights be finally and definitively determined. Where there is an attempt by either party to an action to bring in issue again the identical issue already litigated and adjudged between the same parties in a former action the utility and desirability of the doctrine are certainly unimpeachable. Is the application of the doctrine likewise justifiable where one of the parties in the subsequent action did not appear in the former litigation?

It is a generally accepted rule that only parties to the former judgment or their privies may take advantage of or be bound by res judicata.[3] That a stranger should not be bound by a judgment against which he has never had an opportunity to defend himself is a cardinal principle of our law; every man should have his day in court.[4] Nor is this rule without its practical bases when the new party is the defendant against whom res judicata is being invoked. The former party, who stood in his shoes with respect to the issue now claimed res judicata, may have failed adequately to press a defense on the merits of the issue because of personal reasons and idiosyncracies or because of inadequate counsel; in either case it is hardly just that the new party should be bound. The cogency of this reasoning with respect to other situations involving a new party is less clear, and it will be seen below that sometimes res judicata can be successfully pleaded to bind a stranger to the former litigation.

### II

The first of the cases to be considered are those which, in fact, involve no stranger to the former action but in which one party or the other is

1. RESTATEMENT, JUDGMENTS (Tent. Draft No. 1, 1940) §§ 310, 311, 330; Scott, *Collateral Estoppel by Judgment* (1942) 56 HARV. L. REV. 1.

2. *See*, So. Pacific R. R. Co. v. U. S., 168 U. S. 1, 48 (1939); Miles v. Caldwell, 69 U. S. 35, 39 (1864); Univ. Oil Prod. Co. v. Winkler-Koch Engineering Co., 27 F. Supp. 161 (N. D. Ill. 1939); BOWER, RES JUDICATA (1924) 3; Moschzisker, *Res Judicata* (1929) 38 YALE L. J. 299.

3. Bigelow v. Old Dominion Copper Co., 225 U. S. 111 (1912); Keokuk & W. R. R. v. Missouri, 152 U. S. 301 (1894); 2 BLACK, JUDGMENTS (2d ed. 1902) § 534; see Moschzisker, *Res Judicata* (1929) 38 YALE L. J. 299, 302 ff.

4. Baldwin v. Iowa State Traveling Men's Assoc., 283 U. S. 522, 525 (1931); see note 3 *supra*.

protesting his lack of connection with the previous action. The court will look through legal fictions to find the real party in interest. Thus in the common law action of ejectment the real party will be barred notwithstanding the nominal parties;[5] likewise the use plaintiff will be barred from bringing another suit in his own name.[6] Nor can a defendant, who was sued in the wrong name and made no timely objection, escape being bound by an adverse judgment.[7]

A defendant who has not been made a party of record may be concluded by an adverse judgment if he had actual control of the former litigation,[8] and the court will examine the entire record of the former trial when the plea is raised.[9] Such a defendant must, however, have had some interest in the litigation, and his interest must be beyond an interest in the outcome of the litigation as a judicial precedent only.[10] The plaintiff need not allege or prove that he had any knowledge that the present defendant controlled the previous defense.[11] On the other hand, if the defendant who controlled the previous defense wishes to plead res judicata against the plaintiff, he must prove that the plaintiff knew that he was the real party in defense of the previous action.[12] This rule is apparently based on the principle that estoppel should be mutual.[13]

The defendant must have been more than a mere witness acting in the defense of the former action;[14] he must have had "the right to intermeddle in any way in the conduct of the case".[15] Paying the expenses, in the absence of further proof of control, is not sufficient to bind him in the subsequent action.[16] His power of control must have been no less than if he had been the defendant of record; it must appear that he had the right

5. 2 BLACK, JUDGMENTS (2d ed. 1902) § 537. Of course, this was always true, and repeated litigation was one of the principal objections to the common law action of ejectment.

6. See 2 BLACK, JUDGMENTS (2d ed. 1902) §§ 537, 538, and authorities there cited.

7. *Id.* at § 534; 1 *id.* at § 213.

8. Souffrant v. Compagnie Des Sucreries, 217 U. S. 475 (1910); Lovejoy v. Murray, 70 U. S. 1 (1865); E. I. DuPont De Nemours & Co. v. Sylvania I. Corp., 122 F. (2d) 400 (C. C. A. 4th, 1941); Caterpillar Tractor Co. v. International Harvester Co., 120 F. (2d) 82 (C. C. A. 3d, 1941) and cases there cited; Cushman v. Warren-Scharf Asphalt Paving Co., 220 Fed. 857 (C. C. A. 7th, 1915); RESTATEMENT, JUDGMENTS (Tent. Draft No. 2, 1941) § 407. *See* (1939) 39 COL. L. REV. 1251, 1252.

9. Beyer Co. v. Fleischmann Co., 15 F. (2d) 465 (C. C. A. 6th, 1926).

10. White v. Croker, 13 F. (2d) 321 (C. C. A. 5th, 1926); *cf.* Williams v. Messick, 177 Md. 605, 11 A. (2d) 472 (1940).

11. Caterpillar Tractor Co. v. International Harvester Co., 120 F. (2d) 82 (C. C. A. 3d, 1941); Elliott Co. v. Roto Co., 242 Fed. 941 (C. C. A. 2d, 1917); Univ. Oil Prod. Co. v. Winkler-Koch Engineering Co., 27 F. Supp. 161 (N. D. Ill., 1939); 39 COL. L. REV. 1251.

12. Doherty Research Co. v. Univ. Oil Prod. Co., 107 F. (2d) 548 (C. C. A. 7th, 1939); Jefferson Elect. Light, Heat & Power Co. v. Westinghouse Elect. & Mfg. Co., 139 Fed. 385 (C. C. A. 3d, 1905); E. W. Bliss Co. v. Cold Metal Process Co., 1 F. R. D. 193, 196 (N. D. Ohio, 1940).

13. Elliott Co. v. Roto Co., 242 Fed. 941 (C. C. A. 2d, 1917). Also see section IV, part (1) *infra*. The burden is on the defendant to show that the plaintiff knew of his (. . . of the . . .) action. This is often a difficult burden to carry, so that the application of this rule will, in practice, give rise to non-mutual estoppels.

14. RESTATEMENT, JUDGMENTS (Tent. Draft No. 1, 1940) § 407, comment *e*.

15. Rumford Chem. Wks. v. Hygienic Chem. Co., 215 U. S. 156 (1909); Ostbyo Barton Co. v. Jungersen, 41 F. Supp. 552 (D. N. J., 1941); *cf.* Dohs v. Holbert, 103 Minn. 283, 143 N. W. 961 (1908) and cases cited note 16 *infra*.

16. Rumford Chemical Works v. Hygienic Chem. Co., 215 U. S. 156 (1909); Litchfield v. Goodrow's Adm'r, 123 U. S. 549 (1887); American Water Works & Elect. Co., Inc. v. Allegheny Trust Co., 43 F. Supp. 99 (W. D. Pa. 1940); Williams v. Lumbermen's Ins. Co., 332 Pa. 1, 1 A. (2d) 658 (1938).

to or did, in fact, introduce evidence, control the proceedings, and appeal from the judgment.[17]

If, on the other hand, a defendant invokes res judicata against a purportedly new party-plaintiff, the situation is quite different. The defendant is not required to show the degree of control over the former proceedings that the plaintiff must show to bind the purportedly new party-defendant. Often it is sufficient that the defendant bring out no more than that the plaintiff instigated and procured the former litigation and that he was interested directly in the outcome of it.[18] Nor does this seem unduly oppressive on the plaintiff, when it is remembered that he had his opportunity of a day in court; the plaintiff may well be deemed to have foregone this right procuring another to try his cause and acquiescing in another's control over the consequent proceedings. Indeed, in some situations he will be bound upon a showing that his only connection with the previous action was to receive notice that the right of action in which he was interested was about to be litigated.[19]

## III

The rule as stated above is that only parties to the former judgment or their privies may take advantage of or be bound by res judicata. A privy, generally speaking, is one who claims an interest in the subject-matter affected by the judgment through or under one of the parties.[20] The cases disclose, however, that privity as thus defined is not the only relation that will give rise to a situation wherein a stranger to the previous record can successfully plead or be bound by res judicata. For privity to operate for the purpose of res judicata the relationship must have been brought about *after* the judgment in question was rendered.[21] In the situations which do not include privity, it will be seen that the relationship must have been created *before* the rendition of the judgment now pleaded as res judicata.

The concept of privity implies a transfer of property. For example: *A* claims an easement over *B's* property. *A* sued for damages and had judgment in his favor. Subsequently, *B* conveys to *C*. *C* would be bound by that judgment if he sues *A* for trespass. Conversely, if *A* had failed to recover, he could not now sue *C* for damages. Mutuality will always exist in this situation, since *C* is deemed visited with notice of the previous action. Nor is the wisdom of applying res judicata in this situation to be questioned; to hold otherwise would promote interminable litigation. Likewise a mortgagee will be bound by a judgment against his mortgagor,[22] nor can he escape if he gets his interest before judgment is rendered but after the action was brought, for a purchaser pendente lite will be bound by the subsequently rendered judgment.[23]

Situations in which a stranger can be bound by or take advantage of previous litigation will be found to include cases involving derivative lia-

17. Bigelow v. Old Dominion Copper Co., 225 U. S. 111 (1912); and see 2 BLACK, JUDGMENTS (2d ed. 1902) § 540.

18. 2 BLACK, JUDGMENTS (2d ed. 1902) § 539; *cf.* Williams v. Messick, 177 Md. 605, 11 A. (2d) 472 (1940); 2 BLACK, JUDGMENTS (2d ed. 1902) § 541.

19. See Wheaton, *Representative Suits Involving Numerous Litigants* (1934) 19 CORN. L. J. 399, 427 ff.

20. Womack v. City of St. Joseph, 201 Mo. 467, 100 S. W. 433 (1907); 2 BLACK, JUDGMENTS (2d ed. 1902) § 549; Note (1926) 35 YALE L. J. 607, 608.

21. See note 20 *supra*.

22. Cook v. Parham, 63 Ala. 456 (1879); Wilson v. Tompkins, 24 Misc. 598, 54 N. Y. Supp. 6 (Sup. Ct. 1898); Schnepf's Appeal, 47 Pa. 37 (1864).

23. Daniels v. Henderson, 49 Cal. 242 (1874); Hoppin v. Avery, 87 Mich. 551, 49 N. W. 887 (1891); 2 BLACK, JUDGMENTS (2d ed. 1902) § 550, and cases cited in n. 276 thereto.

bility or liability over. In these cases there is strong authority indicating that if the judgment in the former action was in favor of the party who was derivatively liable, the one whose liability was direct may take advantage of the judgment;[24] thus the failure to get a judgment against a master would be res judicata in a subsequent action against the servant.[25] The same rule would seem often to favor the party whose liability is derivative where the plaintiff in the former action has failed to recover from the one directly liable; thus the principal could take advantage of a judgment in favor of his agent.[26] This will be seen to conflict with the well-established and often reiterated rule that estoppel should be mutual, for if the plaintiff in the former action had got a judgment in his favor, he could not take advantage of it against the party whose liability is derivative unless he had been made a party to the former action.[27] Indeed, one jurisdiction has gone so far as to say that the one of derivative liability will not be bound even though he conducted the defense of the former action as the agent of the party of direct liability.[28] On the other hand, the plaintiff will be permitted to take advantage of a judgment against a party of derivative liability, if the party of direct liability had notice of the prior action and an opportunity to defend it;[29] he is the one ultimately liable, and it is his duty to defend the one for whom he is responsible. He has had his chance to a day in court. Thus an agent will be conclusively bound by a judgment against his principal where he had notice and an opportunity to defend,[30] and he will be collaterally estopped to deny his liability whether in an action by the third party or by his principal.[31] So, too, will a warrantor be bound by a judgment against his warrantee, for he is ultimately liable and should have defended the former action.[32]

There is still another class of cases in which the question of the application of res judicata has arisen to puzzle and plague the courts. These are cases of joint tortfeasors and involve neither privity nor liability over. Under the principles adduced above there seems no room for argument that when one of the joint wrong-doers has suffered an adverse judgment, this judgment cannot be pleaded as res judicata by the third party against a second joint wrong-doer, for the second wrong-doer has had no opportunity or right to defend himself in the first suit. Nor can there be found any case where such a plea was even attempted. However, where the plaintiff has failed to recover in the first suit a different situation is presented. If the failure to recover in the first suit is held a bar, this is a direct contravention of the rule that estoppel must be mutual. On the other hand, if it is not a bar, is not the plaintiff given the opportunity to try the same cause twice?

This same dilemma has confronted the courts in those cases in which the plaintiff, having failed to get judgment against the agent, then brought an action against the principal; in this situation it has been usually held

24. Cox, *Res Adjudicata: Who Entitled to Plead* (1923) 9 VA. L. REG. 241, 246; Note (1926) 35 YALE L. J. 607, 610.

25. Bailey v. Sundberg, 49 Fed. 583 (C. C. A. 2d, 1892); Lasher v. McAdam, 125 Misc. 685, 211 N. Y. Supp. 395 (Sup. Ct. 1925).

26. Hill v. Bain, 15 R. I. 75, 23 Atl. 44 (1885); Sawyer v. Norfolk, 28 Va. App. 640 (1923); Cox, *loc. cit. supra* note 24, at 245; *see* Bigelow v. Old Dominion Copper Co., 225 U. S. 111, 128 (1912).

27. Rookard v. Atlanta & Co. Air Line Ry., 84 S. C. 190, 65 S. E. 1047 (1909); Cox, *loc. cit. supra* note 24, at 247.

28. *But see* 2 BLACK, JUDGMENTS (2d ed. 1902) §§ 578, 579.

29. *See* Cox, *loc. cit. supra* note 24, at 248.

30. Robbins v. Chicago, 71 U. S. 657 (1866); Cox, *loc. cit. supra* note 24, at 248.

31. Cox, *loc. cit. supra* note 30.

32. 2 BLACK, JUDGMENTS (2d ed. 1902) § 567.

that the principal can successfully plead res judicata.[33] The courts are, however, by no means as friendly toward the second wrongdoer. A leading case has attempted to distinguish these seemingly opposite holdings as follows:

> "The unilateral character of the estoppel of an adjudication in such cases [cases involving principal and agent] is justified by the injustice which would result in allowing a recovery against a defendant for the conduct of another, when that other has been exonerated by a direct suit."

Whereas, the court continues:

> "It is too evident to need argument that the remedy of this plaintiff does not depend upon the culpable conduct of Lewisohn [the defendant in the former action] but upon Bigelow's [the present defendant] own wrong, whether alone or in cooperation with Lewisohn." [34]

This distinction, though confidently stated, is a tenuous one. To be sure, in the principal-agent situation the principal is being sued for another's wrong, and to be held liable when no wrong has been held to exist seems a grotesque result. However, the same logical difficulty exists in the joint wrong-doer cases, for the second defendant, who is being sued for a wrong identical to that of the first defendant, will be found guilty of a wrong already declared non-existent. Technically, of course, *his* wrong has not been tried before, but the identical facts that will establish his guilt have been; so in either case, whether principal or second defendant for a joint wrong-doing, liability would be founded upon facts that have already been determined to give rise to no liability. The courts have not met this problem with uniformity. Often the plea of res judicata is rejected altogether.[35] Others have accepted the plea where it clearly appears from the record of the first trial that there can be no cause of action.[36] Various other holdings, mostly by indirection, indicate that the plea will be good.[37]

## IV

There are three situations, then, where, with varying degrees of success, lack of mutuality is invoked as a reason for denying a plea of res judicata:

(*1*) Where in the former suit the plaintiff did not know that the present defendant, was in fact, in control of the litigation; the plaintiff here maintains that to invoke res judicata against him would violate the rule of mutuality, because, had the judgment been in his favor, he could not have used it against the present defendant. There are various possible refinements of this; for example: where the defendant in reality had the control of the former suit, but he contends that the plaintiff, now suing him in his own name, did not know it; defendant maintains that to invoke res judicata against him would violate mutuality, because if judgment had been in his favor, the case would not have been res judicata against the plaintiff. Indeed, one diligent attorney attempted to carry the principle to the point that the defendant's ignorance of the plaintiff's knowledge that he was defending the case was sufficient ground to deny the plea, because

33. *See* note 26 *supra.*
34. Bigelow v. Old Dominion Copper Co., 225 U. S. 111, 128 (1912).
35. *Ibid.*
36. 23 Cyc. 1213.
37. See discussion in Cox, *loc. cit. supra* note 24, at 249.

had the defendant prevailed in the former action, it would have been unable to allege and prove the necessary knowledge to bar a subsequent suit by the plaintiff. Not without an eye for the picturesque a court has thus described the situation:

> "In court counsel for the real party in interest, with somewhat the same skill as an ostrich seeking to conceal itself, assumes a stranger-like attitude toward the client that hired and paid him . . . His adversary takes exactly the opposite position. He knows the true status of opposing counsel, knows that his adversary's ostrich-like efforts to conceal his true relations are quite as ineffectual as they are grotesque." [38]

(*2*) Where the plaintiff has failed to recover from the one directly liable, and the derivatively liable defendant seeks to invoke res judicata against him; plaintiff contends that the doctrine should not apply since, if he had recovered from the one directly liable, he could not have applied res judicata against the present defendant.

(*3*) Plaintiff makes a like contention when a second of two joint tort feasors seeks to invoke the doctrine against him.

Mutuality has for many years been a decadent doctrine.[39] It is not to be doubted that if mutuality were the only reason for the courts' sometimes denying the application of res judicata in the above situations, the law would long ago have yielded to the popular pressure against mutuality.

There is in all of these situations a square conflict of policies. The plaintiff against whom res judicata is being invoked in the above situations has had control of the former proceedings, and, admittedly, questions identical to those already settled are again to be put in issue. The plaintiff has had his day in court. But in situation (*1*) above, the plaintiff was not aware of the true defendant in the former action. In (*2*) and (*3*) the plaintiff has never brought his cause of action against the second defendant. Should the courts recognize the frailty of human nature and deny both the defendant and the tax-payers the benefits of the doctrine of res judicata, because the plaintiff did not choose to attack his first opponent as efficiently as he would some other opponent? [40] Should the courts countenance a doctrine that promotes such idle litigation?

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38. Doherty Research Co. v. Universal Oil Prod. Co., 107 F. (2d) 548, 549 (C. C. A. 7th, 1939).

39. See Ames, *Mutuality in Specific Performance* (1903) 3 COL. L. REV. 1; Note (1926) 35 YALE L. J. 607, 611 n. 11, 21.

40. Moschzisker, *Res Judicata* (1929) 38 YALE L. J. 299, 303.