

criticism,¹⁶ and possibly the court in the instant case, by deciding that the contractor had no property interest in the funds, has found a loophole to avoid the harsh application of this doctrine.

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Judgments—Collateral Estoppel Used Defensively by One Not a Party, or in Privity with Party, to Former Action.—*Emil Eisel v. Columbia Packing Co.*¹—A products liability action was brought in the Federal District Court in Massachusetts by a Connecticut consumer of ham against the packer, a Massachusetts corporation. In a previous action brought by the consumer in the state courts of Connecticut both the retailer and packer had been named as parties defendant. On motion by the packer, he had been dropped as a party defendant, the action thereafter being prosecuted only against the retailer. Judgment was had by the retailer on a finding that the consumer's injuries did not result from any defective condition of the ham. The packer, relying on the prior adjudication, moved for judgment in the present action, contending that the consumer was collaterally estopped from maintaining the suit. HELD: the plaintiff having had full opportunity to litigate his claim against the retailer, and having been unsuccessful for reasons unrelated to any personal defense of the retailer, is precluded from relitigating the same issue against the packer. While every man is entitled to his day in court there is no persuasive public policy allowing the relitigation of a claim when the issue has been fully tried in substantially the same context in a prior suit. Where the successful prosecution of a suit against a retailer would permit of the defendant's indemnification by the manufacturer, unilateral estoppel precludes the unsuccessful plaintiff from subsequently suing the manufacturer on substantially the same issue, the policy of the doctrine of res judicata being that there should be an end to litigation.

The plea of res judicata is available when the parties and issues in a prior case are identical to those presently before the court.² In such case each of the parties is estopped from setting up his claim or defense against the other, there being, consequently, a mutuality of estoppel. However, where a party has several claims against two or more persons, he may pursue his remedy against each separately (absent procedural rules requiring joinder) and he is not precluded by a failure of successful prosecution against one, from thereafter pursuing his claim against the other. But a judgment for a defendant will not be conclusive against the plaintiff in a subsequent action brought by him against a new defendant, unless a favorable judgment for the plaintiff in the first case would have either permitted

¹⁶ MacLachlan, *Improving the Laws of Federal Liens and Priority*, 1 B. C. Ind. & Com. L. Rev. 73 (1959). Kennedy, *The Pernicious Career of the Inchoate and General Liens*, 63 Yale L.J. 905 (1954).

¹ 181 F. Supp. 298 (D. Mass. 1960).

² *Old Dominion Copper Mining and Smelting Co. v. Bigelow*, 203 Mass. 159, 89 N.E. 193 (1909), aff'd, 225 U.S. 111 (1911).

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him to have based his action on such judgment in the second case against the new defendant, or have permitted him to have based his defense on such judgment if suit had been brought against him in the second case. Conversely, no party to present litigation can claim the benefit of a prior judgment secured by a third party against his present opponent, unless a prior judgment secured by his present opponent against such third party could have been used against him.³

Conflicting with this view is the principle that once a party has litigated an issue, he should be precluded from relitigating it, even against a stranger.⁴ Thus, exceptions to the doctrine of no *res judicata* where no privity of parties to the litigation, or no mutuality of estoppel, appear in cases involving successive suits against servant and master, agent and principal, and possibly in other situations involving comparable relationships.⁵ Justification for these exceptions is based on the undesirability of exposing to a judicial determination of liability a person whose legal accountability arises as a result of the actions or inactions of another, after the actor has been judicially exonerated of liability as a result of a suit brought by the present plaintiff.

A growing minority of jurisdictions has extended the exception beyond these relationships on the ground that a plaintiff, having chosen his adversary and forum, should not be allowed as a matter of public policy to relitigate the same substantive claim unsuccessfully prosecuted by him initially.⁶

The same result is had where the first suit is brought against the actor's principal and unsuccessfully prosecuted because of failure to establish the actor's legal liability, and subsequently the same plaintiff seeks to establish, a second time, the legal liability of the actor, in a suit brought against the latter.

It appears from these decisions that three requirements must be met before the exception will be invoked; (1), the substantive issue in the prior litigation must be identical to that in the second case, (2), the prior judgment must have been on the merits, and (3), the party the plaintiff against whom the prior judgment is sought to be asserted as a defense must have been a party to the prior litigation.⁷ Thus it is apparent that the development in the law is away from formalism where such prevents the achievement of a fair and desirable result.

³ Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 Iowa L. Rev. 217, 241 (1954).

⁴ *Jenkins v. Atlantic Coast Line*, 89 S.C. 408, 412, 7 S.E. 1010, 1012 (1888).

⁵ *Portland Gold Mining Co. v. Stratton's Independence*, 158 F.2d 63 (8th Cir. 1901); *Giedrewicz v. Donovan*, 277 Mass. 563, 179 N.E. 246 (1931); *Emery v. Fowler*, 39 Me. 326 (1855).

⁶ *Coca Cola v. Pepsi Cola*, 36 Del. 124, 172 Atl. 260 (Sup. Ct. 1934); *Bruzewski v. United States*, 181 F.2d 419 (3d Cir. 1950); *Bernhard v. Bank of America*, 19 Cal. App. 2d 807, 122 P.2d 892 (1942); *Good Health Products Corp. v. Emery*, 215 N.Y. 14, 9 N.E.2d 758 (1937).

⁷ *Bernhard v. Bank of America*, *supra* note 6.

It is suggested that by casting aside the requirement of mutuality of estoppel a party should be allowed to plead affirmatively a judgment against one not in privity with a party to the first action.⁸ However, in practice the courts have generally not gone this far, only one case having been found which permitted the prior judgment to be used affirmatively.⁹ The courts are understandably reluctant to extend the doctrine beyond the defensive use of the prior judgment against a plaintiff, because of the possibility of undue hardship or injustice if a second plaintiff should be permitted to rely on the first plaintiff's prior judgment against a defendant, as a basis for judgment in the second proceeding.

The same cannot be said for cases like the present,¹⁰ where the major issue in the successive trials was identical, a close legal relationship existed between the three parties involved—a consumer, the retailer from whom he purchased and the packer from whom the retailer received the merchandise. If the consumer could not prove as against the retailer that the purchased item was defective there is no great injustice in saying that he should not be given a second chance to prove it against the packer.

Thus it is felt that the court in the instant case has followed the modern trend that has reached the limit to which the judiciary will extend the rule that mutuality of estoppel is necessary for the application of the doctrine of *res judicata*.

ARTHUR J. CARON, JR.

Labor Law—Picketing for Union Shop when No Dispute Exists Between Employer and Employees.—*Messner v. Journeymen Barbers*.¹—Defendant union submitted a contract to the plaintiff that would have required both plaintiff and his employees (barbers) to join defendant's organization. The union did not represent any of the plaintiff's employees, and the em-

⁸ Polasky, *supra* note 3, at 247; Comment, 35 Yale L.J. 607 (1926); Note, 57 Harv. L. Rev. 98, 104 (1943). Cf. Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281 (1957). Such a case would arise where a railroad accident is caused by the alleged negligence of the carrier. After passenger A is successful in maintaining his action against the carrier can passenger B introduce A's judgment to conclusively establish the carrier's liability for the accident leaving B to his proof only of the connection between the accident and his injury and the extent and monetary value of his damages? A second situation could arise where an automobile accident involves driver A, driver B and passenger C in B's car. A's suit against B results in judgment for B based on a finding of A's contributory negligence. Can passenger C in a suit against A rely on B's judgment to establish A's negligence?

⁹ Voss Truck Lines, Inc. v. Pike, 350 Ill. App. 528, 113 N.E.2d 202 (1953).

¹⁰ Seavey, Development in the Law of *Res Judicata*, 65 Harv. L. Rev. 818 (1952). While, as the court points out, Professor Seavey is apparently not sympathetic to the application of the doctrine of *res judicata* in situations where there is an absence of mutuality of estoppel, he does state: "Perhaps a fair limit would allow strangers to use prior judgments defensively, at least against the plaintiff in the prior action, not affirmatively." *Ibid.* 863.

¹ 4 Cal. Rptr. 179, 351 P.2d 347 (1960).