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Res Judicata--Collateral Estoppel--Application Between Former Codefendants

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follow the broader *Kieckhefer* rule, since it seems least arbitrary and establishes a clear standard.[30]

Such language seems to indicate that the court is not completely sure of its position and one could not confidently rely on the demand clause as set out in this case to avoid the restrictions of section 2503(c). Yet, the donor who has decided not to utilize section 2503(c) because of the attendent restrictions might nevertheless insert a demand clause as was employed in the *Crummey* case; he would have nothing to lose.

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Res Judicata—Collateral Estoppel—Application Between Former Codefendants

The plaintiff Schwartz sought to recover damages against the defendant administrator of Panoff's estate for injuries resulting from an automobile accident which occurred when a vehicle, operated by Schwartz, in which others were passengers, collided with a vehicle owned by Panoff. This action succeeded one brought jointly against Schwartz and Panoff by the passengers in Schwartz's car, wherein the passengers were awarded judgment against both on the grounds of the joint negligence of the two drivers. Defendant contended that the first judgment precluded any relief sought by Schwartz, since his negligence had been determined in the prior action and thus rendered him contributorily negligent and unable to recover in the second action. This contention was rejected and defendant appealed. *Held,* reversed. Schwartz is collaterally estopped from bringing suit as the issue of his negligence has been determined in the prior action. *Schwartz v. Public Administrator of County of Bronx,* 30 App. Div. 2d 193, 291 N.Y.S.2d 151 (1968).

In sustaining the defense of res judicata, the court pointed out that the factual situation required the application of that aspect of res judicata referred to as collateral estoppel. Thus, the decision raises a question as to the distinction between the two concepts.

Although both aspects of res judicata, merger and bar and collateral estoppel, have the same general objective—judicial finality—they are distinct in their operation.[1] That aspect of res judicata re-

[30] Crummey v. Commissioner, 397 F.2d 82, 88 (9th Cir. 1968).
[1] Southern Pac. R.R. v. United States, 168 U.S. 1, 48-49 (1897).

ferred to as merger and bar[2] applies to repetitious suits involving the *same* cause of action.[3] Thus, where a judgment is for the defendant on the merits of the case, the cause of action is extinguished, and the judgment acts as a *bar* to relitigating the same cause of action.[4] If the judgment is for the plaintiff, the cause of action is again extinguished but rights based on the judgment are added. There is a *merger* of the cause of action with the judgment and any further action must be on the judgment, not on the claim that is merged with the judgment.[5]

Collateral estoppel, the other aspect of res judicata,[6] applies when the second action is upon a *different* cause of action, and precludes relitigation in a subsequent proceeding of an issue which was actually decided in a prior cause of action.[7] While merger and bar may affect matters *which were not but could have been litigated* in a prior suit upon the *same* cause of action, collateral estoppel necessarily affects only those matters *actually litigated* and determined in a prior action upon a *different* cause of action.[8]

When a defense of collateral estoppel is asserted in a second action involving codefendants in a prior proceeding, the court must determine whether application of the doctrine would be proper. The majority of jurisdictions require three essential elements for application of collateral estoppel. First, there must be an identity of parties to the action.[9] Second, the operation of estoppels must be mutual; that is, the party invoking the judgment as an estoppel must also be bound by it.[10] Third, there must be an identity of the issue sought to be relitigated.[11] The *Schwartz* decision requires a reappraisal of the elements essential to the application of collateral estoppel.

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[2] RESTATEMENT OF JUDGMENTS § 45, comments *a* and *b* at 175 (1942).

[3] Comm'r v. Sunnen, 333 U.S. 591, 597 (1948).

[4] Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955).

[5] Caterpillar Tractor Co. v. International Harvester Co., 120 F.2d 82, n.4 (3rd Cir. 1941).

[6] "Collateral estoppel, despite its development quite apart from the other aspect of res judicata, seems now to be classified as only a facet of that broad generic concept." Polasky, *Collateral Estoppel—Effects of Prior Litigation,* 39 IOWA L. REV. 217 (1954).

[7] Babcock v. Babcock, 63 Cal. App. 2d 94, 146 P.2d 279 (1944).

[8] Polasky, *Collateral Estoppel—Effects of Prior Litigation,* 39 IOWA L. REV. 217, 218 (1954).

[9] Gratiot County State Bank v. Johnson, 249 U.S. 246 (1919).

[10] Brigham v. Fayerweather, 140 Mass. 411, 5 N.E. 265 (1886).

[11] Capps v. Whitson, 157 Va. 46, 160 S.E. 71 (1931).

In determining whether there is an identity of parties to an action, many courts utilize the adversarial test set forth in *Glaser v. Huette,*[12] a case heavily relied upon by the dissent in *Schwartz.* The court in *Glaser* laid down the proposition that there is no estoppel between parties who were not adverse in the prior litigation. As to co-parties, the general rule is that they are not adverse unless rights and liabilities between them were expressly put in issue in the first action.[13]

There is, however, another view as to what constitutes adversity between co-parties. Jurisdictions adhering to this view, while recognizing that a judgment cannot be res judicata between co-parties upon a different cause of action, hold that when an issue was determined in a prior suit against co-parties, then the requirement of identity of parties is satisfied.[14]

Some courts discard both the mutuality and identity of parties criteria and require only that the issues in the subsequent action be identical with those in the preceeding one.[15] The problem remains with respect to this approach, however, as to what constitutes identical issues.[16] In making this determination, one view specifically follows the reasoning that there are no issues that are identical between parties which were not litigated between those parties.[17] The other view, which the majority adopted in *Schwartz,* holds that the mere fact the parties in the prior action have not litigated an issue against each other does not preclude collateral estoppel from being invoked where the issues do not vary in the subsequent action from those decided in the prior action.[18]

It is interesting to note that both the majority and the dissent in *Schwartz* based their reasoning on Judge Halpern's concurring opinion in *Ordway v. White.*[19] The majority cited that part of the opinion which stated, in effect, that it would be proper to deny a former codefendant another opportunity to litigate issues adjudicated in the first action. The court reasoned that simply because one

[12] 232 App. Div. 119, 249 N.Y.S. 374, *aff'd mem.,* 256 N.Y. 686, 177 N.E. 193 (1931).
[13] Bunge v. Yager, 236 Minn. 245, 52 N.W.2d 446 (1952).
[14] *E.g.,* Pack v. McCoy, 251 N.C. 590, 112 S.E.2d 118 (1960).
[15] King, *Collateral Estoppel and Motor Vehicle Accident Litigation in New York,* 36 FORDHAM L. REV. 1 (1967). *See also* B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967) which calls the doctrine of mutuality a "dead letter."
[16] Polasky, *Collateral Estoppel—Effects of Prior Litigation,* 39 IOWA L. REV. 217, 223 (1954).
[17] Byrum v. Ames & Webb, Inc., 196 Va. 597, 85 S.E.2d 364 (1955).
[18] Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97 (1956).
[19] 14 App. Div. 2d 498, 217 N.Y.S.2d 334 (1961) (concurring opinion).

party did not exercise his right to cross-claim in the first action[20] or avail himself of the opportunity to explain away his negligence, was no reason to preclude the invocation of collateral estoppel. However, the only way to determine if the issues in a subsequent action are identical with those that have been determined is to review the record of the first action and make the determination on that basis.[21] This reasoning, also in the *Ordway* majority opinion, was picked up by the minority in *Schwartz,* along with the idea that it could be possible that a codefendant's negligence in the initial action would have no relation to the collision itself but he would nonetheless be liable to a plaintiff in a prior action.[22]

For example, a driver of an automobile negligently permitted a passenger to remain in the car while being pursued at a high rate of speed by a second automobile. There was an accident in which the passenger was killed. The passenger's administrator brought an action against the driver of both vehicles and was awarded judgment. Subsequently, the driver of the host car sued the pursuing driver for negligence. The defense of res judicata was asserted but the court said that it was not inconsistent to find that the plaintiff in the second action could be found *not* contributorily negligent as to the accident itself while being found to have breached a duty owed to a passenger. In other words, her negligence in permitting the passenger to remain in the car adjudicated in the first action did not in itself contribute to the accident.[23]

Similarly, a passenger in a bus recovered against the owner of the bus and the owner of an automobile involved in a collision. In a subsequent action between the codefendants it was held that the judgment entered in the first action was not a bar to the present suit. The bus owner owed the passenger the high degree of care which a common carrier, by virtue of its contractual relations, owes to its passengers, but did not owe a similar duty to the driver of the vehicle, and therefore could be liable to the passenger and yet recover from the motorist.[24]

Authority in West Virginia pertaining to the kind of problem presented in *Schwartz* is scarce. However, in one case it was held

[20] N.Y. C.P.L.R. § 3019(a) (McKinney 1963).
[21] Ordway v. White, 14 App. Div. 2d 498, 217 N.Y.S.2d 334, 341 (1961) (concurring opinion).
[22] Thornton, *Further Comment on Collateral Estoppel,* 28 BROOKLYN L. REV. 250 (1962).
[23] Terwilliger v. Terwilliger, 52 Misc. 2d 404, 276 N.Y.S.2d 8 (1966).
[24] Capps v. Whitson, 157 Va. 46, 160 S.E. 71 (1931).

that issues raised in the second action must be identical with those raised and decided in the first action before the doctrine of collateral estoppel may be invoked.[25] Likewise, in an earlier decision, the West Virginia court held that unless codefendants had properly pleaded the issue of liability on certain bonds in the first suit and had the issue decided as between them, they were not barred from again raising the question in a second suit against each other.[26] This indicates that West Virginia follows the adversarial test as to both issues and parties as espoused in the majority of jurisdictions.

In the latest West Virginia case on the subject of collateral estoppel, although the litigants were not co-parties in the prior action, the court explicitly stated that identity as to parties and issues plus mutuality of estoppel must be present to sustain a plea of collateral estoppel. The court stated:

> [W]here the causes of action are not the same, the parties being identical or in privity, the bar extends to only those matters that were actually litigated in the former proceeding, as distinguished from those matters that might or could have been litigated therein, and arise by way of estoppel rather than by way of strict *res adjudicata.*[27]

This West Virginia decision is in keeping with the West Virginia Rules of Civil Procedure. Under the Rules, a cross-claim between co-parties to an action *may* be filed, but it is not mandatory.[28] According to the reasoning in Schwartz, it appears that a claim arising out of the same event between co-parties must be asserted in the initial action or be barred in a subsequent action. While the New York Civil Procedure Act does not require mandatory cross-claims in actions arising out of the same event or transaction, a party who decides not to file a cross-claim runs the risk that in a subsequent action the court, relying on *Schwartz,* will rule that the issue upon which his cause of action is based has already been adjudicated and that he is estopped from bringing the action.

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[25] Soto v. Hope Natural Gas Co., 142 W. Va. 373, 95 S.E.2d 769 (1956).
[26] Central Banking and Security Co. v. United States Fidelity and Guaranty Co., 73 W. Va. 197, 80 S.E. 121 (1913). *But see* Hood v. Morgan, 47 W. Va. 817, 35 S.E. 911 (1900).
[27] Lane v. Williams, 150 W. Va. 96, 100, 144 S.E.2d 234, 236 (1965).
[28] W. VA. R. CIV. P. 13(g).
[29] N.Y. C.P.L.R. § 3019(a) (McKinney 1963).