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Judgements--Res Adjudicata--Effect of Judgement of Justice Court on Pending Tort Action in Circuit Court

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a single corporation may conceal a changed personnel. Suppose *X* Bank is appointed executor; if *Y* Bank now purchases the controlling stock so as to make the former a part of its chain of banks, the *X* Bank, although continuing its legal existence, is no longer the same. Any personal confidence which the testator may have originally imposed is now fundamentally a negligible consideration.

The writer has been unable to find any West Virginia case bearing on the question, but the revised codes of both Virginia and West Virginia expressly adopt the view that the consolidated bank may qualify as executor.[8] These new provisions may be said to follow the better view, since in neither jurisdiction does the court have the authority to inquire as to the suitability of the executor, whether a natural or corporate person.[9]

—BERNARD SCLOVE.

JUDGMENTS — RES ADJUDICATA — EFFECT OF JUDGMENT OF JUSTICE COURT ON PENDING TORT ACTION IN CIRCUIT COURT. — In a litigation arising out of an automobile accident between cars owned by plaintiff and defendant the plaintiff started a suit in the circuit court and the defendant shortly afterwards started a suit in the justice of the peace court. The circuit court plaintiff appeared in the justice court and pleaded to the merits. He did not advise the justice court of the circuit suit, pending on the same cause of action. Judgment was given in the sum of $14.77 for the circuit court plaintiff, who thereafter prosecuted his circuit court suit to judgment. On appeal the judgment was reversed for error in disallowing evidence in support of defendant's pleas of res adjudicata. *Johnson v. Rogers.*[1]

This case is unusual because of the unique fact situation and the problems arising as a result of the decision. Under the rule of this case the plaintiff, starting a suit in the circuit court, must appear in the justice court and plead a suit pending in the circuit court, though the latter was prior in time to the justice action. If he fails to advise the tribunal of this fact and pleads to the merits,

[8] W. VA. REV. CODE (1931) c. 31, art. 4, § 7, outlines the rights, privileges, powers and immunities of trust companies and confers the same upon national banks provisionally, and c. 31, art. 8, § 29, passes the office of trustee or executor to a consolidated bank whether or not already vested "to same effect as if the consolidated institution had been named in such deed, will, *etc.*" VA. REV. CODE (1930) c. 164a, § 4149(10).

[9] See statutes, *supra* n. 5.

[1] 157 S. E. 409 (W. Va. 1931).

the determination of the justice is final. An appeal is not possible here because the sum sued for was less than $15, the appealable amount.

It is well settled that when a matter is once adjudicated in a court of competent jurisdiction it is conclusively determined.[2] This rule applies to justice proceedings. *Davis v. Trump.*[3] Here, it is true, the action in the circuit court was commenced before the justice proceeding. But since judgment was first rendered in the justice court and no plea of suit pending was tendered the judgment stands.[4] Although the court in which suit is first begun thereby obtains exclusive jurisdiction in the normal case,[5] a judgment obtained in another court on the same subject matter while the first suit is pending and without the jurisdictional question being pleaded will be conclusive.

The plaintiff could have protected himself by asking for a stay of proceedings until his other suit was decided. This right is given by statute.[6] It is applicable to intermediate and inferior courts of record as indicated by the revisers note in the Revised Code. In *Dunfee v. Childs*[7] the granting of a stay was held to be a matter of discretion; but the court in the later case of *Keenan v. Scott*[8] indicated that if the stay is essential to justice it should not be denied. This course was open to the circuit court plaintiff in this case.

The court declared that if the suit in the justice court was for the purpose of avoiding the circuit court action it would have been a reprehensible and sharp practice and the result in this case would have been quite different, adding equivocally, however, that if this was his object the plaintiff would nevertheless have to preserve his rights by a special appearance. The question is not discussed further because the court fails to see such a scheme

[2] Ensign Co. v. Carroll, 30 W. Va. 532, 4 S. E. 782 (1887); Lawson v. Conaway, 37 W. Va. 159, 16 S. E. 564 (1892); LaMotte v. Harper, 88 Ga. 226, 13 S. E. 804 (1891); see collection of cases in 34 C. J. §§ 1285-6.

[3] 43 W. Va. 191, 27 S. E. 397 (1897).

[4] Chicago v. Schendel, Adm'r., 270 U. S. 611, 70 L. Ed. 757 (1926); Casebeer v. Mowry, 55 Pa. 419 (1868); Garden City v. Bank, 65 Kan. 345, 69 Pac. 325 (1902).

[5] State v. Fredlock, 52 W. Va. 232, 43 S. E. 153 (1902); Lawson v. Conaway, *supra* n. 2; McGrew v. Maxwell, 80 W. Va. 722, 94 S. E. 395 (1917); Whan v. Hope Natural Gas Co., 86 W. Va. 342, 94 S. E. 365 (1917); Toro v. Shilling, 108 W. Va. 614, 152 S. E. 6 (1930).

[6] W. VA. REV. CODE (1931) c. 56, art. 6, § 10.

[7] 59 W. Va. 225, 53 S. E. 209 (1906).

[8] 78 W. Va. 729, 90 S. E. 331 (1916); citing: Katzenstein v. Prager, 67 W. Va. 343, 67 S. E. 792 (1910); Scott and Cobb v. Keenan, 69 W. Va. 412, 71 S. E. 570 (1911).

disclosed on the face of the record. This is the colorable point in the case.

Another question is suggested by this case. Suppose the justice of the peace suit is started first for an amount less than $15. The probable result would be that a $3,000 tort action would be settled irrevocably in the justice court. It would be impossible to appeal because of the amount involved. Thus might persons who are quite certain of their liability find their escape. A race for jurisdiction might ensue with the party at fault heading for a justice of the peace court. Such a result is not desirable. Yet unless we refuse to recognize the justice's judgment as binding and conclusive it must inevitably follow.

—JEROME KATZ.

PRINCIPAL AND AGENT—ACCOUNTING FOR PERSONAL PROFITS MADE BY AGENT WITHHOLDING INFORMATION FROM PRINCIPAL.—In a recent case,[1] it was found by the lower court that Crichton was the agent of Laing when he had a conference with officials of the Chesapeake & Ohio Railway Company relative to the purchase of Laing's stock in the Greenbrier and Eastern Railroad Company and that the agent's negotiations for and decision to purchase Laing's 2655 shares for his brothers and other business associates at $75.00 a share resulted from information received at this conference which he did not disclose to his principal. Crichton, who then owned some shares of this stock and later secured a number of shares for corporations in which he was the majority stockholder, gained control of more than 8000 shares, including the Laing stock, and sold the entire amount to the C. & O. Ry. Co. for $140.91 a share. The lower court awarded judgment for the profit made on the Laing stock, which with interest amounted to $243,733.10. The appeal to the Supreme Court was limited to the consideration of the measure and amount of recovery.

On the ground that a fiduciary is strictly prohibited from making a personal profit out of his fiduciary relation aside from the compensation allowed by law or contract with his principal, and where he does so, courts of equity will invariably compel him to account therefor as trustee,[2] the upper court ordered Crichton to account to Laing for all the profits made by him on stock

[1] Laing *et al.* v. Crichton, 156 S. E. 746 (W. Va. 1931).

[2] The court cites: 15 AM. & ENG. ENCY. LAW, 1199, 1200. POM. EQ. JURIS. (4th Ed. 1919) Par. 959; MECHEM ON AGENCY, (2d Ed. 1914) Pars. 1224, 1225; Robertson v. Chapman, 152 U. S. 673, 681, 14 S. Ct. 741 (1894).