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Civil Procedure—Mutuality of Estoppel

Richard Robinson

The word "identical" is defined as "exactly the same for all practical purposes."[39] Thus an identical interest can be said to be an interest exactly the same as another interest for all practical purposes. It must be admitted that identical interest alone will not bind the non-appealing defendant to the previous judgment merely because he participated in the defense.[40] This is true even if he had an identical interest with an interest previously litigated since his interest may not have been set forth or defended so as to come within his constitutional guarantee of due process of law.[41] But the writer believes that the non-appealing defendants' right to their day in court can be waived by certain conduct on their part. There is authority to the effect that if one prosecutes a suit to protect his own right or assists in prosecution of an action in aid of some interest of his own and controls that action, although the suit is brought in name of another, he is bound by the judgment.[42] It appears that a question of fact arose whether the non-appealing defendants participated to the extent that they might be bound by the judgment on stipulation for judgment absolute. It is submitted that in view of the question of fact, the majority, while applying the statute literally, failed to construe the statute liberally, and was in error in holding, as a matter of law, that no question of fact existed.

Mutuality of Estoppel

Where the liability of a defendant is based in part upon the act of a third party, it does not strike unfairly that a plaintiff, who has failed in a prior action against that third party, should be prevented by res judicata from raising again the identical issues decided in the prior suit.[43] This indeed would seem to be most in accordance with the underlying policy of res judicata, *i.e., interest republicae ut sit finis litium.*[44] Yet such a result must be reached with some difficulty by the courts because of a verbal stumbling block. As has been said, "The repetition of a catchword can hold analysis in fetters for fifty years or more."[45] The catchword here is "mutuality."

Under the doctrine of "mutuality of estoppel" a party is precluded from asserting a judgment in estoppel unless he would also be estopped had the same judgment gone the other way; or, in other terms, the judgment must be equally conclusive on both parties.[46] Most reasons advanced for the rule, such as fairness,[47]

39. BLACK'S LAW DICTIONARY (4th ed. 1951); *Cain v. Moore,* 74 Fla. 77, 76 So. 337 (1917).
40. See note 37 *supra.*
41. U. S. CONST. amend. XIV, §1; N. Y. CONST. art I, §6.
42. *Flynn v. Colonial Discount Co.,* 149 Misc. 607, 269 N. Y. S. 2d 893 (City Ct. 1933); *cf. Henderson v. Henderson,* 247 N. Y. 428, 160 N. E. 775 (1928).
43. *Cf.* RESTATEMENT, JUDGMENTS §99 (1942).
44. *Good Health Products v. Emery,* 275 N. Y. 14, 9 N. E. 2d 758 (1937).
45. Cardozo, *Mr. Justice Holmes,* 44 HARV. L. REV. 682 (1931).
46. *Nelson v. Brown,* 144 N. Y. 384, 39 N. E. 355 (1895).
47. 1 FREEMAN, JUDGMENTS §429 (5th ed. 1925).

or judicial recognition that many suitors gauge their efforts to the importance of their opponents,[48] have been found wanting.[49] It is plausible that the mutuality concept is a carry-over from the time when parties could not be witnesses and there was fear that a third party might later take advantage of a judgment obtained upon his own testimony.[50] But whatever the origin or rationale, the doctrine that estoppels must be mutual has been assumed by New York courts without examination.[51]

Certain exceptions have arisen, however, where the relationship between the party asserting the estoppel and the party whose rights were affirmed in the prior suit is that of master and servant, principal and agent, or indemnitor and indemnitee. The leading New York case which circumvented the mutuality rule is *Good Health Products v. Emery*,[52] in which the owner of a vehicle involved in a collision was allowed to use defensively a judgment in favor of the driver of the vehicle in an earlier suit against the present plaintiff. However, the effect of this decision was seemingly limited by *Elder v. New York & Penn. Motor Express, Inc.*,[53] in which Judge Finch (who also wrote the opinion in the *Good Health* case) said, "If . . . we eliminate in the rule followed in the *Good Health* case, the necessity of the liability being dependent on the negligence of a servant . . . then it would seem that we would eliminate entirely the requirements of mutuality of estoppel and privity."[54]

In the recent case of *Israel v. Wood Dolson Co., Inc.*,[55] the plaintiff brought an action against the defendant Wood Dolson for breach of contract, combining with it an action against one Gross for inducing the breach. The actions were severed and the contract action tried first, resulting in a dismissal of the complaint. No appeal was taken. Thereupon Gross amended his answer to plead that judgment as an estoppel and moved for a summary judgment.[56] The motion was denied by Special Term, which held that the judgment bound only the parties in-

48. Moszisker, *Res Judicata*, 38 YALE L. J. 299, 303 (1928).
49. *Bernhard v. Bank of America*, 19 Cal. 2d 807, 122 P. 2d 892 (1942).
50. *Atkinson v. White*, 60 Me. 396 (1872).
51. *The Atlantic Dock Co. v. Mayor*, 53 N. Y. 64, 68 (1873); *Haverhill v. International Ry. Co.*, 217 App. Div. 521, 217 N. Y. Supp. 522 (4th Dep't 1926), *aff'd*, 244 N. Y. 582, 155 N. E. 905 (1926).
52. 275 N. Y. 14, 9 N. E. 2d 758 (1937).
53. 284 N. Y. 350, 31 N. E. 2d 188 (1954).
54. See note 53 *supra*, at 353, 31 N. E. 2d 188, 191 (1940).
55. 1 N. Y. 2d 116, 134 N. E. 2d 97 (1956).
56. "The effect of an adjudication as res judicata is not confined to subsequent independent actions or proceedings, but is equally applicable to all ancillary or collateral proceedings, in the same suit . . . ." 2 FREEMAN, JUDGMENTS §927(a) (5th ed. 1925). The doctrine of the "law of the case" is limited to subsequent proceedings of the same case, *Scott v. Scotts Bluff County*, 106 Neb. 355, 183 N. W. 573 (1921), involving orders which are interlocutory, *Walker v. Gerli*, 257 App. Div. 249, 12 N. Y. S. 2d 942 (1st Dep't 1939), and the same parties or their privies, *Hartford Life Ins. Co. v. Blincoe*, 255 U. S. 129 (1920).

volved on the trial or their privies, and further that mutuality of estoppel was lacking. The Appellate Division reversed[57] and was upheld by the Court.

Here there is neither privity nor derivative liability. Yet, relying principally on the *Good Health* case the Court held that the underlying principles of the exceptions to the mutuality rule—that a complaining party who has had a full opportunity to litigate certain issues should not be permitted to relitigate the *identical issues*[58] in a new action, and further that the policy behind res judicata is that it is in the interests of the state that there be an end to litigation—estopped the plaintiff.

While the Court emphasized that it was not adding a new class of exceptions to the general rule (the Court did not refer anywhere to the *Elder* case), it would seem that, in the face of an anomolous result, it has indeed done so. This decision indicates that though the courts may continue to pay their respects to the mutuality concept, the letter of the rule will not defeat the spirit of the doctrine of res judicata.

Appeal—Certified Questions

Meenan v. Meenan[59] involved an appeal upon certification of a question, by the Appellate Division who had reversed[60] the granting by Special Term of a motion for temporary alimony and other interlocutory relief. The question asked the Court of Appeals was whether "upon the facts presented", Special Term properly exercised its power and authority in granting the plaintiff's motion. *Hilton Watch Co. v. Benrus Watch Co.* [61] was a like appeal upon certification by the Appellate Division, who had upheld[62] the denial by the Special Term of a motion for leave to serve a supplemental complaint. This question asked whether the Special Term was correct in its denial. The Court of Appeals dismissed the appeals upon the ground that the appellant in each case had failed to comply with

57. 285 App. Div. 718, 140 N. Y. S. 2d 663 (1st Dep't 1955).

58. The Court laid great stress on this factor; query whether a plaintiff, in a negligence suit in New York against a joint tort-feasor, where the plaintiff had lost in a former action against defendant's joint tort-feasor because of a failure to prove freedom from contributory negligence, could be barred by "res judicata" because of such "identical issue"?

59. 1 N. Y. 2d 269, 135 N. E. 2d 30 (1956).

60. 286 App. Div. 775, 147 N. Y. S. 2d 122 (1st Dep't 1955).

61. 1 N, Y. 2d 271, 135 N. E. 2d 31 (1956).

62. 282 App. Div. 939, 126 N. Y. S. 2d 193 (1st Dep't 1953).