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Gerald Baskey

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Res Judicata—Non Litigated Issues Resolved

*Ripley v. Storer*²¹ is the culmination of a struggle for control of the business left by Robert Ripley, originator of the "Believe It or Not" series. Douglas Ripley, the cartoonist's brother and the majority stockholder, in a prior action had attacked the validity of an agreement in which he had promised to vote his stock for Storer and Colwell who had working control of the business by virtue of their position as two of the three directors. The agreement was held to be binding.²² Ripley then commenced this action for a declaratory judgment²³ that he was entitled to have the directors call a meeting of stockholders for the purpose of increasing the number of directors.²⁴ This would enable Ripley to gain a majority on the Board. The Special Term²⁵ and Appellate Division²⁶ held that the prior judgment did not preclude this conduct.

The decisions below were reversed on the ground that the court in the prior action had not only found that the agreement to maintain the two directors in office was valid but also had found that an integral part of the agreement was to keep the number of directors at three. The Court held that even though the question of increasing the number of directors was not involved in the first action and res judicata does not apply to facts immaterial to the issue decided even though such facts be pleaded and litigated, still, to strike out here any part of the agreement as found in the first action would invalidate the whole agreement as it was entire and thus destroy rights established by the first action.²⁷

A possible argument for a contrary holding might have been made on the following line of reasoning. First, the casual statements from which the court finds that it was testified to and adjudicated in the first action that there was such a limitation are not strong enough to support that interference in the face of findings by the lower courts, who were directly confronted with the issue, that there was no such term agreed upon. The truth seems to be that no one had realized that such a device was available. Second, granted that such a finding was made in the prior action, it was mere dictum, as no justiciable controversy as to the existence or validity of such a term had yet ripened to the point where it was

21. 309 N.Y. 506, 132 N.E. 2d 87 (1956).

22. *Storer v. Ripley*, 1 Misc. 2d 235, 125 N.Y.S. 2d 831 (Sup. Ct. 1953).

23. N. Y. CIV. PRAC. ACT §473.

24. See N. Y. STOCK CORPORATION LAW §35.

25. 1 Misc. 2d 281, 139 N.Y.S. 2d 786 (Sup. Ct. 1955).

26. 286 App. Div. 844, 142 N.Y.S. 2d 269 (1st Dep't 1955).

27. "A judgment in one action is conclusive in a later one, not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair the rights or interests established by the first." *Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250 N.Y. 304, 165 N.E. 456, (1929).

a fit subject for a declaratory judgment. Such actions are not the place for gratuitous legal advice as to moot questions. The Rules of Civil Practice²⁸ require that the prayer in such an action, "specify the *precise* rights and other legal relations of which a declaration is requested." Third, the striking out of the finding that there was a term of the agreement relating to a limitation on the power to increase the number of directors would have no effect at all on the rights created by the prior action. The elimination here is not the striking out as invalid one term of an entire contract thereby invalidating the whole. It is merely a finding that the agreement made contained a provision concerning the voting of stock but did not contain a provision concerning a limitation on the number of directors. It is evident, however, that the equities in Storer's favor weighed heavily with the court to prevent Ripley from doing indirectly what he had agreed not to do directly.

Privity and Res Judicata—Closed Corporations

*In re Shea's Will*²⁹ involved an extended controversy which arose when the plaintiff general manager of the Shea theatre corporation requested an arbitration of a dispute over bonus computation. The original employment, negotiated by plaintiff and the decedent Shea provided for such arbitration,³⁰ and the terms were substantially the same in renewals of the contract, made in 1942 and 1946. The heirs of Shea who were the sole stockholders of the theatre corporation immediately discharged the plaintiff and commenced an action to declare fraudulent, and void the extensions of plaintiff's contract. The Surrogate upheld the contract renewals and dismissed.³¹ The plaintiff then proceeded with his action to compel arbitration and was met by the corporation's attempt to re-litigate the validity of the contracts.

The Court held that the attack on the contracts was barred by res judicata since the heirs as sole stockholders and the theatre corporation were in privity, having mutual relationships to the same rights of property.

The New York position concerning the binding effect of res judicata on

28. N. Y. R. CIV. PRAC. §211.

29. 309 N.Y. 605, 132 N.E. 2d 684 (1956).

30. The 1936 contract provided: ". . . if any dispute of any kind or character arises between the parties as to any matter contained in this agreement, then such dispute shall be referred to arbitration."

31. *In re Shea's Estate*, — Misc. —, 115 N.Y.S. 2d 868 (Surr. Ct. 1952); *aff'd per curiam*, 282 App. Div. 1013, 126 N.Y.S. 2d 253 (1st Dep't 1953).

32. *Fulton County Gas & Elec. Co. v. Hudson River Tel. Co.*, 200 N.Y. 287, 296, 93 N.E. 1052, 1055 (1911); *New York State Labor Relations Board v. Holland Laundry*, 294 N.Y. 480, 63 N.E. 2d 68 (1945).