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Civil Practice—Res .ludicata and Election of Remedies

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states.[27] Now, by this more lenient policy, damages for personal injuries beyond the value of the goods purchased may be had in a breach of warranty action, where negligence may not be involved, without confining the plaintiff to the three year limitation.

Res Judicata and Election of Remedies

"*Res judicata* is a common law doctrine designated to bar litigation of an adjudicated claim."[28] The test of whether the same cause of action has been previously adjudicated has been variously expressed. Judge Lehman defined the test as, "the violation of but one right by a single legal wrong . . . the subject matter and the ultimate issues are the same."[29] Judge Cardozo determined that, "a judgment in one action is conclusive in a later one . . . when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first."[30]

In a recent case,[31] these tests were applied by the court. The plaintiff originally sued for money due him under an oral contract of employment. The complaint was dismissed on the grounds that the contract did not comply with the Statute of Frauds. Leave to amend the complaint was granted, and the amended complaint set forth a cause of action for an accounting based on the oral agreement. After trial, the judgment was directed for the defendant, the court holding that the action was still barred by the Statute of Frauds. Plaintiff then commenced an action in *quantum meruit*. The defendant moved under Rule 107 to dismiss the complaint on the ground of *res judicata*. The Court of Appeals held that the previous contract action was not a bar to a *quantum meruit* suit. "The two actions involve different 'rights' and 'wrongs' . . . The rights and interests established by the previous adjudication will not be impaired by a recovery . . . in *quantum meruit*."[32]

The court reinforced its determination with cases where an action on an express contract did not preclude recovery in *quantum meruit*, in the same action.[33] Other cases cited pointed up the

27. *Challis v. Hartloff*, 136 Kan. 823, 18 P. 2d 199 (1933); *Gotten v. Owl Drug Co.*, 6 Cal. 2d 683, 59 P. 2d 142 (1936); *Schuler v. Union News*, 295 Mass. 350, 4 N. E. 2d 465 (1936).

28. PRASHKER, NEW YORK PRACTICE 194 (2d ed., 1951).

29. *De Coss v. Turner & Blanchard, Inc.*, 267 N. Y. 207, 211, 196 N. E. 28, 30 (1935).

30. *Schuylkill Fuel Corp. v. B. & C. Realty Corp.*, 250 N. Y. 304, 306-7, 165 N. E. 456, 457 (1929).

31. *Smith v. Kirkpatrick*, 305 N. Y. 66, 111 N. E. 2d 209 (1953).

32. *Id.* at 72, 111 N. E. 2d 212.

33. *Young v. Farwell*, 165 N. Y. 341, 59 N. E. 143 (1901); *Marsh v. Masterton*, 101 N. Y. 401, 5 N. E. 59 (1886).

general feeling of the court toward allowing the claim in the instant case.[34]

In allowing recovery in *quantum meruit* after disallowing recovery on the contract, they pointed out that the doctrine of election of remedies did not act as a bar. A party is said to elect a remedy when he chooses between irreconcilable and inconsistent claims. This harsh doctrine has been criticised by the court in previous cases,[35] and the Legislature has enacted sections which have delimited the area of the doctrine's use.[36] "The concept of election of remedies . . . is out of line with modern procedural concepts of unlimited joinder of causes of action regardless of consistency, and the liberal allowance of amendment of pleadings."[37] Perhaps it will not be long before the doctrine will become completely obsolete.

IV. Conflict of Laws

The conflict of laws cases decided in the past term were predominantly occupied with choice of law questions. Of the four cases discussed in the section, all had this issue as their focal point, although the first also included a jurisdictional problem. While choice of law involves the evaluation of many factors,[1] it is interesting to note the role played by that of policy. Local policy considerations were given great weight in the first two cases, a fundamental public policy guided the third, and the last decision was involved mainly with the question of whether or not the application of foreign law was violative of local policy. It is also notable that the desire, although subconscious, of a forum to prefer the *lex fori* was laudably suppressed in two of the four cases.

Garnishment

Assuming a testamentary trust of personalty to have been validly created, a problem arises as to what law should be applied to questions concerning the administration of the trust. It is usually presumed to be the law of the testator's last domicile,[2] but this can be rebutted by a clear or implied indication that the testa-

34. *McKeon v. Van Slyke*, 223 N. Y. 392, 119 N. E. 851 (1918); *Harmon v. Alfred Peats Co.*, 243 N. Y. 473, 154 N. E. 314 (1926).

35. *Metropolitan Life Ins. Co. v. Childs Co.*, 230 N. Y. 285, 130 N. E. 295 (1921); *Schenck v. State Line Tel. Co.*, 238 N. Y. 308, 144 N. E. 592 (1924); *Clark v. Kirby*, 243 N. Y. 295, 153 N. E. 79 (1926).

36. C. P. A. § 112(a-h), (enacted since 1939).

37. Prashker, *op. cit. supra* note 28, 207-208.

1. See Cheatham and Reese, *Choice of the Applicable Law*, 52 Col. L. Rev. 959 (1952).

2. Restatement, Conflict of Laws § 298, comment *a* (1934).