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RES JUDICATA
ROBERT VON MOSCHZISKER

The rule of res judicata is said not to have been definitely formulated until 1776, but, in essence, it is of much earlier origin and application. Primarily, the rule is one of public policy, and, secondarily, of private benefit to individual litigants. The primary principle early found expression in the maxim "Interest reipublicae ut sit finis litium," and the secondary or subordinate one in the form "Nemo debet bis vexari pro una et eadem causa." The whole doctrine bears a close resemblance to the exceptio rei jucdicae of the Roman law.

Although the doctrine of res judicata is frequently invoked, yet difficulties continue to be encountered in its application, particularly where either court or counsel fails to realize that, of the two principles which it comprehends, the protection from the annoyance of repeated litigation, which the individual suitor is afforded, is, after all, only an incident of the first principle, that the best interests of society demand that litigation be concluded. The inclusive idea is set forth in an early Pennsylvania case thus:

"The maxim, nemo debet bis vexari, si constet curiae quod sit pro una et eadem causa, being ... established for the protection and benefit of the party, ... he may ... waive it, and unquestionably, so far as he is individually concerned, there can be no rational objection to his doing so. But then it [must] be recollected, that the community has also an equal interest and concern in the matter, on account of its peace and quiet, which ought not to be disturbed at the will and pleasure of every individual, in order to gratify vindictive and litigious feelings. Hence, it would seem to follow that wherever, on the trial of a cause, from the state of the pleadings in it, the record of a judgment rendered by a competent tribunal upon the merits in a former action for the same cause, between the same parties or those claiming under them, is properly given in evidence to the jury, it ought to be considered conclusively binding on both court and jury, and to preclude all further inquiry in the cause; otherwise the rule or maxim, expedit reipublicae ut sit finis litium, which is as old as the law itself, and a part of it, will be exploded and entirely disregarded."

1 Duchess of Kingston's Case, 3 Smith, Leading Cases (9th ed. 1776) 1998.

2 Broom, Legal Maxims, 327 et seq.

Economy of the time of the courts is one of the obviously beneficial results of the doctrine, and this feature becomes increasingly important as work crowds more and more on our overburdened tribunals; but the broader and even more important aspect of the public policy of res judicata is its promotion of peace and quiet in the community through the creation of certainty in the relations of men.

There is a certain resemblance between the doctrines of res judicata and stare decisis; both are rules of public policy intended to maintain stability in human relations by giving repose to litigation, and both operate to prevent the constant reconsideration of settled questions, but they operate in somewhat different fields and with different degrees of authority. Stare decisis deals exclusively with matters of law and principle, and may be applied to such matters only when the proved facts of a pending case coincide with, or approximate, those of a prior one; whereas res judicata, though fixing the law of the actual controversy, has to do particularly with the protection from attack of judicially established facts. Also, stare decisis, while of high authority, is not absolutely binding in subsequent cases, that is to say, the court may reconsider the question previously passed upon and modify or reverse its former pronouncements of law; but res judicata is not so yielding—it binds alike both courts and litigants. As a plea, a former adjudication is a bar to subsequent suits for the same cause; as evidence, it is conclusive of the facts therein established.

Speaking broadly, the rule of res judicata means that when a court of competent jurisdiction has determined, on its merits, a litigated cause, the judgment entered, until reversed, is, forever and under all circumstances, final and conclusive as between the parties to the suit and their privies, in respect to every fact which might properly be considered in reaching a judicial determination of the controversy, and in respect to all points of law there adjudged, as those points relate directly to the cause of action in litigation and affect the fund or other subject-matter then before the court. And under some circumstances, a judg-

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7 34 C. J. 743.
8 A comment on Tasin v. Bastress, 284 Pa. 47, 130 Atl. 417 (1925), in (1926) 35 Yale L. J. 607, 608, states: “A privy within this rule must be one who claims an interest in the subject-matter affected by the judgment through or under one of the parties, i.e., either by inheritance, succession or purchase; and this interest must have been acquired after the rendition of the judgment.” See authorities there cited.
ment will, in certain respects, so establish the legal status of an object or person directly involved in a suit as to bind all parties who may subsequently deal with it or him, even though those thus dealing may have had no connection with the litigation in which the judgment was entered. Issues of fact actually determined in a prior suit, and also those which were relevant subjects for determination therein, cannot be re-examined in a subsequent legal proceeding, between the same parties or their privies, involving the identical cause of action formerly tried. Even where the cause of action in a pending suit is not identical with that previously litigated between the parties, all relevant issues of fact that were actually raised in the prior litigation are res judicata between the parties and their privies,—though, under such circumstances (that is, where the second suit turns on a different cause of action) issues which might have been, but were not, raised and determined in the prior suit, are not accounted in law as res judicata. Finally, the rule of res judicata holds good not only in the court which rendered the judgment in question, but in other tribunals where the same facts or points of law may later be directly at issue.

Certain Pennsylvania decisions well illustrate the effect of res judicata in the field of law, as distinguished from that of fact, its binding force so far as concerns the law governing a particular cause of action or object of judicial consideration, and its lack of applicability to the law in subsequent suits on other causes of action or relating to other objects of judicial consideration, even when such later cases are between the same parties as those who figured in the suit or proceeding which gave rise to the original judgment or decree.

To instance one illustrative decision on the operation of res judicata in the field of law: in 1872, the Pennsylvania legislature passed an act which, among other things, reduced the amount of tax previously imposed by the charter of the Ridge Avenue Railway Company of Philadelphia. An adjudication of the corporation's liability was made under this act, and taxes were paid accordingly during a considerable period. Subsequently, in an independent suit, the supreme court of the state held the act unconstitutional. The City of Philadelphia immediately commenced action against the company to recover the difference between the reduced taxes paid under this invalid statute, and the amount that would have been due according to the original charter, for the period from 1880 to 1883 inclusive, and was allowed to recover. On appeal, it was held that the prior litigation determining the taxes for the years in question, though brought under the unconstitutional Act of 1872, was conclusive of the cause of action there involved, that the judgment rendered in that suit was res judicata, and the subsequent
decision holding the act unconstitutional could not alter the effect of such prior judgment; in short, the first suit had determined the whole liability as to the taxes which were then claimed,—the law and facts in regard to that subject-matter had been settled once and for all, however erroneous the view taken of the law might have been. This case well shows the binding force in the field of law of the doctrine under discussion when a particular cause of action, already reduced to judgment, again comes before the courts in another suit between the same parties.

In litigation between the same parties, but involving causes of action, or objects of judicial consideration different from those previously reduced to judgment, the doctrine of res judicata is not applied to questions of law. This is made plain by many Pennsylvania decisions concerning successive distributions of different funds in the same estate, which hold that where issues of fact in regard to the persons entitled are raised and determined on the first distribution, those facts are binding in any subsequent distribution, but that at a later distribution, there is no obligation on the court to follow the law as determined in the former proceeding, if it was erroneous. Thus, on a partial distribution of an estate, the fund was awarded to certain individuals under an application of the rule in Shelley's Case; no exceptions were taken to this award. Later, additional assets of the same estate were to be distributed; the auditing judge then held that the rule in Shelley's Case was not applicable and awarded the fund to others than those who had been favored by the first award. Though it was objected that the former adjudication was conclusive, the distribution last made was sustained on appeal, the supreme court saying:

“The law applied in the first distribution, if inapplicable, is not the law of the case; the duty of the auditing judge in distributing a second [fund] is to distribute according to law . . .; and in discharging this duty he must be free to disregard a decision of his own, or that of another, upon the same bench, which as he is better informed he would reject.”

Identity of parties is one of the classic requisites to the operation of a judgment as res judicata. The effect of the authorities is that, as a general rule, res judicata can be invoked only where the subsequent litigation is between the parties to the

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11 Kellerman's Estate, Havir's Estate, both supra note 10; Guenther's Appeal, 4 Wkly. Notes Cas. 41 (Pa. 1877).
12 Stewart J., in Kellerman's Estate, supra note 10 at 12, 88 Atl. at 869.
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former judgment or their privies, and that others can neither take advantage of nor be bound by the result of the first action.\(^2\) That, under ordinary circumstances, a former judgment should not be conclusive of any matter against one who had no part in the proceedings which led to it, excepting, of course, those in privity\(^3\) to the litigants, is an obviously just and proper rule; but the result of strict adherence to the requirement of identity of parties on both sides is to permit, in some instances, repeated litigation of adjudged points. Thus, speaking generally, a litigant, having lost a battle on questions of fact, is permitted to reopen all the old issues in a second action, provided he has a new adversary not in a position to set up the former judgment as determining those matters. It may be argued that better administration of law would result if the rule simply demanded that the one against whom a former judgment is used shall have been a party to that judgment, or shall have been in privity with one who was a party, without demanding that the one seeking to use the judgment shall likewise be so situated. Such a rule, however, would always require a litigant to establish or defend his position to the utmost; whereas the law takes cognizance of the frailties of human nature and realizes that, even in litigation, one, because of consideration for his opponent or for other reasons personal to himself, may not desire either to establish or defend his position to the utmost, and that, for purposes of the particular case, he may admit facts or fail to meet evidence, which he would combat as against another opponent. This, rather than the desire to maintain the mutuality so often required in equity, is probably the reason why res judicata has been held to apply only as between parties to the original suit, or their privies, with certain exceptions relating to personal status, and also to some actions in rem where the legal position of the res is established as against, or in favor of, all persons thereafter dealing with it.\(^4\) Examples of these

\(^{13}\) Commonwealth v. Quaker City Cab Co., 236 Pa. 224, 133 Atl. 223 (1926); Bigelow v. Old Dom. Copper Co., 225 U. S. 111, 32 Sup. Ct. 641 (1912); Keokuk & W. R. R. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592 (1894); Tasin v. Bastress, supra note 8; 1 Greenleaf, Evidence (16th ed. 1899) § 524. It is also necessary that the parties shall have been adverse in the prior proceeding; this, however, does not mean that they must have been plaintiff and defendant respectively; it is sufficient if they were asserting adverse interests even though they were both denominated defendants or plaintiffs. Pittsburgh & L. E. R. R. v. McKees Rocks, 237 Pa. 311, 135 Atl. 227 (1926); Hertzel v. Weber, 283 Fed. 921 (G. C. A. 8th, 1922); Renfro v. Hanon, 297 Ill. 353, 130 N. E. 790 (1921); 34 C. J. § 1472.

\(^{14}\) “An apparent exception to this rule, as to the identity of the parties, is allowed in . . . proceedings in rem, which include not only judgments of condemnation of property, as forfeited or as prize, . . . but also the
exceptions may be found in decrees or judgments as to marriage, divorce, legitimacy, feme sole traders, bankruptcy, condemned property, the probate and validity of wills, and in cases which involve title to property where all parties in interest are brought on the record. Such judgments and decrees, when entered on the merits, are binding on all persons subsequently litigating as to the status or thing involved in the original suit, whether or not the persons in question were parties to that proceeding.

Other exceptions to the requirement of identity of parties are sometimes made in favor of persons who sustain a relationship of secondary or derivative liability to a defendant,—such as principal and agent in tort cases, and indemnitor and indemnitee, who have long been accorded the benefits of the principles of res judicata in respect to judgments for one or the other; though in many situations a judgment against one of such parties is held not conclusive upon the other. Thus, in a suit based on the negligence of one's servant, a judgment in favor of defendant concludes the plaintiff on the issue of the servant's alleged negligence, in a subsequent action brought by such plaintiff against the servant himself; but a judgment for plaintiff in the first case would not be conclusive in the subsequent action against the servant.

decisions, . . . directly upon the personal status or relations of the party, such as marriage, divorce, bastardy, settlement, and the like. These decisions are binding and conclusive, not only upon the parties actually litigating in the cause, but upon all others.” 1 Greenleaf, op. cit. supra note 13, § 525. Examples of the effect of such judgments may be seen in Hood v. Hood, 110 Mass. 463 (1872) (divorce); Gelston v. Hoyt, 3 Wheat. 246 (U. S. 1818) (forfeiture; good discussion by Story, J.); Ennis v. Smith, 14 How. 400 (U. S. 1852) (pedigree); New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 656 (1875) (status of bankruptcy). Matters of probate, judgments as to validity of wills, settlement of accounts of executors, and discharge of bankrupts are other types of judgments in rem, effective against the world. See 1 Herman, Estoppel and Res Judicata (1886) § 290 et seq.; Burlen v. Shannon, 3 Gray 387 (Mass. 1855); Huntsville v. Goodenrath, 13 Ala. App. 579, 68 So. 670 (1915); 34 C. J. § 1483.


18 Rookard v. Atlanta & C. Ry., 84 S. C. 190, 65 S. E. 1047 (1909); 34 C. J. 976. An excellent example of a common-sense, liberal attitude toward the problem of identity of parties is seen in Commonwealth v. Kelly, supra note 3, where in a contest between two factions of a voluntary association as to the right to hold office, a former case, decided in Maryland, was held to make the matter res judicata, although the Maryland case was in equity in the names of the national and state lodges of the association, and the Pennsylvania proceeding was on quo warranto
Negligence cases for defective streets and sidewalks also show allowable exceptions to the requirement of identity of parties. In these cases a municipality, having paid a judgment against it for injuries sustained by reason of a defective street or sidewalk, seeks reimbursement from the abutting property owner or from a public service company fixed with a duty to maintain the way in safe condition. Although the defendant in this second suit may not be in privity with either party to the former suit, it is apparently well settled that, if he had notice of the action against the municipality and an opportunity to intervene and defend, he is concluded by the judgment there entered so far as it determined the existence of the defect in the street or sidewalk, the cause of the injury, the amount of damage sustained and the liability of the former defendant; but that judgment would not affect or conclude the question of the second defendant's own negligence, if that point was not at issue in the first case. If the defendant in the second suit did not have sufficient notice and opportunity to defend the first suit, no force of res judicata is given to the judgment there entered.

Where a suit is instituted by an injured plaintiff against one of several parties who might be held responsible for defects in a street, either against a municipality, a traction company (occupying the roadway), or an abutting owner, and the action results in a judgment on the merits for defendant, there seems at the relation of certain individuals, against other individuals. The court, differentiating the case from those in which title to tangible property is in dispute, looked behind the mere form and refused to deny the application of res judicata for lack of identity of parties, saying that in both cases the same interests were represented, and the same questions and subject matter were involved, and that it is just such repeated litigation that the doctrine of res judicata is designed to prevent.


The rule in the federal courts is that any knowledge of the pendency of the action against the municipality is sufficient notice. Robbins v. Chicago, 4 Wall. 637 (U. S. 1866); Wolfe v. Barataria Land Co., 255 Fed. 503 (C. C. A. 8th, 1919); Caldwell v. Bledgett, 256 Fed. 744 (C. C. A. 8th, 1919). Other courts, however, require that there shall have been formal notice and a request to intervene given by the municipality, in order to conclude the owner on any point. Seattle v. Northwestern Pac. Ry., 47 Wash. 552, 92 Pac. 411 (1907); Lebanon v. Mead, 61 N. H. 8, 4 Atl. 392 (1885).

to be less agreement as to the force of such a judgment in a subsequent suit by the same plaintiff against one of the other parties charged with the duty of keeping the roadway or sidewalk in repair. In dealing with these cases, much depends upon the theory of liability of the respective defendants entertained by the particular jurisdiction. For example, in Pennsylvania an abutting owner is regarded as having the primary obligation to maintain the sidewalk in front of his property; and although the municipality may be sued directly by one who is injured because of a defect in that part of the street, yet its liability is regarded as secondary, not a responsibility for failing to repair, but only for omitting to make the abutting owner do so. Under this view, if, in a first suit against the abutting owner, it were adjudged that he was not at fault, the judgment in favor of the abutting owner would be a bar to a subsequent action against the municipality. The theory of primary and secondary obligations does not prevail in all jurisdictions, however, and it is not the rule even in Pennsylvania as to defects in the highway which a street railway or other public service company is bound to maintain. In this latter class of cases, the municipality is regarded as having a primary and independent liability, not simply a derivative one, and, so far as res judicata is concerned, difficulties appear, the question arising, what is the effect upon the independent liability of the municipality of a prior judgment in favor of the street railway company?

In an Oklahoma case, the city and the street railway company were regarded as joint tortfeasors, a view rejected, however, by a number of jurisdictions and the court refused to allow the force of res judicata to a prior judgment for one of these parties, on the ground that a finding in favor of one joint tortfeasor cannot be set up as a defense by the other. This result naturally follows from holding the parties joint tortfeasors, for the respective defendants would not be in privity, and it would be unnecessary to view the cause of action as the same, since each suit would be based upon the acts, or failure to act, of the particular defendant involved. It is commonly said that

27 Bigelow v. Old Dominion Copper Co., supra note 13.
the liability of joint wrongdoers is joint and several; to speak
more accurately, it is joint or several, since the injured plain-
tiff must elect between a joint action against all or separate
suits against one or more of the tortfeasors. If he elects to
sue separately, and recovers a judgment against one of the joint
tortfeasors, the almost universal rule is that such a judgment,
so long as it remains unsatisfied, does not bar an action against
another of them for the same tort; and Freeman, in his work
on Judgments, after stating this rule says, "Neither is a judg-
ment in favor of one joint tortfeasor evidence in favor of or
a bar to an action against another, except where the liability
of the latter is purely derivative, or he is entitled to indemnity
from the other." At other places in his work, Freeman
says, of the above exceptions, that they are not really excep-
tions, but are determined by other principles, such as the doc-
trine of election, etc. Moreover, even in such cases, the first
judgment is no bar when it is based on grounds not applicable

\[\text{References:}\]

28 Sessions v. Johnson, 95 U. S. 347 (1877); Cameron v. Kanrich, 201
Mass. 451, 87 N. E. 605 (1909); Moore v. Chattanooga Elec. Ry., 119
Tenn. 710, 109 S. W. 497 (1907). In some jurisdictions, however, no
such election is required, and plaintiff may institute both joint and
several actions. Gilbreath v. Jones, 66 Ala. 129 (1880); Davis v. Cas-
well, 50 Me. 294 (1862).

29 Betcher v. McChesney, 255 Pa. 334, 100 Atl. 124 (1917); Johnson
Co. v. Philadelphia, 236 Pa. 510, 84 Atl. 1014 (1912); Fox v. Northern
Liberties, 3 W. & S. 103 (Pa. 1841); Cole v. Reebiging Const. Co., 156
Cal. 443, 105 Pac. 255 (1909); Tandrup v. Sampsell, 234 Ill. 526, 85 N.
E. 231 (1908); Nugent v. Boston Cons. Gas Co., 238 Mass. 221, 130 N. E.
488 (1921); Old Dominion Copper Min. Co. v. Bigelow, 203 Mass. 159,
89 N. E. 193 (1909), aff'd, 225 U. S. 111, 32 Sup. Ct. 641 (1912); Squire
in England and Canada. Brown v. Wootten, Cro. Jac. 73 (1650); Brins-
mead v. Harrison, L. R. 7 C. P. 547 (1872); Longmore v. McArthur,
19 Man. 641 (1910). It has also been followed in Rhode Island. Roberts
v. Rhode Island Co., 41 R. I. 235, 103 Atl. 714 (1918); Hunt v. Bates,
7 R. I. 217 (1862). Virginia at one time followed the English rule. Staun-
this rule has been changed by Va. Code (1919) § 6264. Fitzgerald v.
Campbell, 131 Va. 486, 109 S. E. 308 (1921). Of course, where the prior
judgment has been satisfied, the second action cannot be maintained.

28 2 FREEMAN, JUDGMENTS (5th ed. 1925) § 573.

30 Old Dominion Copper Co. v. Bigelow, supra note 29; Nelson v. Illinois
Cent. R. R., 98 Miss. 295, 53 So. 619 (1910); Three States Lumber Co.
v. Blanks, 118 Tenn. 627, 102 S. W. 79 (1907).

31 See Bigelow v. Old Dominion Copper Co., supra note 13, and Portland
Gold Mining Co. v. Stratton's Independence, Ltd., 158 Fed. 63 (C. C. A.
8th, 1907), where these exceptions are discussed, and the cases are
collected.

32 1 FREEMAN, op. cit. supra note 30, §§ 451, 470; 2 ibid. § 573.
to both defendants, or where the facts determining liability are not the same.

In a Missouri case, the court likewise refused to allow the force of res judicata to a prior finding for one of two defendants in a case such as we are now considering. It so ruled, however, not on the ground that they were joint tortfeasors, but on the ground that defendants thus situated had, as toward the public, separate and independent duties to maintain the street, and the fact that one of them had been acquitted of a violation of its duty in that regard did not determine the charge against the other. Either of these theories may well lead to complications, and defeat the public policy represented in the doctrine of res judicata. For example, suppose a suit, by one injured because of the defective condition of the roadway, is first brought against a traction company, bound to maintain the portion of the street in which the defect existed and a judgment is entered in favor of the company. The plaintiff in this prior suit later recovers a judgment against the municipality, and it, in turn, seeks by another suit to recoup itself from the street railway company. On the theory of independent obligations, the last-mentioned suit would, of course, not be for the same cause of action as that first instituted against the company, and on that ground the judgment in such prior case would not be a bar. The result is that the company, having once successfully defended itself against a claim arising from a particular alleged defect in the street, would be forced to defend itself again, this time against the municipality's claim; both suits involving the same state of facts, so far as the existence of the defect and the resulting injuries are concerned. Thus the public policy of res judicata would be defeated. Realizing the situation, a number of jurisdictions have held that the first judgment, in favor of the railway company, barred the municipality's subsequent action against that defendant. While reaching this decision, the courts have labored somewhat in seeking established principles upon which to rest their position. They have used grounds of subrogation, of principal and agent, of principal and surety, of primary and secondary obligations; but none of them with entire satisfaction. As said in a Rhode Island case, 

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"The courts [when dealing with the class of controversies which we are now considering] allow themselves a good deal of latitude in applying the rule [so far as identity of parties is concerned], observing the spirit . . . rather than the letter [of the rule]."

In a recent Pennsylvania case,\(^{25}\) where an injured person brought suit against a trolley company, whose tracks were laid on the highway under an obligation assumed by the company to maintain the road in good repair, it was found that the corporation had not failed in that regard, and judgment was entered on a verdict for defendant. Later the same plaintiff instituted suit in another court, on the same state of facts, against the municipality; it was held that, notwithstanding a difference in parties, res judicata applied, and judgment was entered accordingly. On appeal, in affirming the court below, the supreme court of the state said:

"If a recovery were now had, then the borough defendant could compel, by suit, the street railway to pay for the injury, where in a regular judicial proceeding it has been declared not to be responsible. The plaintiff elected to sue the one ultimately liable, and failed to recover, and he cannot now be permitted to secure judgment against the borough for this identical negligence. If so, then the latter can seek a recovery from the former, though its non-liability has been adjudicated, and compel it to defend a proceeding based on a cause of action previously determined in its favor. . . . Ordinarily, an estoppel by judgment is only applied where parties are the same, or in privity; . . . but an apparent exception to the rule of mutuality has been held to exist where the liability of defendant is altogether dependent upon the culpability of one exonerated in a prior suit upon the same facts, when sued by the same plaintiff; in such cases the unilateral character of the estoppel is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct action. 34 C. J. 988. If the liability rests on the proof of wrongdoing by one, and the necessary facts to establish it have been found adversely in a prior proceeding, a suit against another, based on the same cause of action, cannot be maintained."

A rule often repeated in elaboration of the requirement of identity of parties, states that one is not bound by a judgment entered in a case where he sued or defended in his individual capacity, when such judgment is pleaded as res judicata in a subsequent suit where he appears only in a representative character;\(^{40}\) and the doctrine as thus stated may be accepted as


satisfactorily expressing the law applicable to a vast number of situations where the change of capacity represents an actual change in the real parties in interest. Thereby rights of beneficiaries, such as legatees, devisees, minors and others, are protected from being concluded by former judgments to which the fiduciary representing them in a subsequent action was a party in an individual capacity. Not infrequently, however, the change of capacity is but formal, the record parties and those really in interest, being in fact the same although named differently. It is essential, therefore, in examining the question of identity of parties in any particular situation, that the court look beneath the surface and ascertain what are the interests actually represented; since, if this is not done, a mere change in designation of parties on the record may bring about the very evils against which the doctrine of res judicata is intended to protect. For example, an administrator who is sole heir should not be permitted, by styling himself administrator in one proceeding and heir in another, to litigate the same question twice. In a case recently before the United States Supreme Court, claims for compensation for a single injury had been made in two separate proceedings, one under a state compensation act, and the other under the federal statute. The plaintiff, though the same party in each case, sued individually in one, and in a representative capacity in the other. The fact that the accident happened in intra-state commerce was determined in the first proceeding, and it was held that this fact was res judicata in the second. Certain earlier cases in the federal courts had decided that, under such circumstances, an adjudication in one of the two proceedings could not be res judicata in the other. The later decision, mentioned above, apparently overrules these earlier cases, and, at least in the federal courts, settles the law to this effect: that, when the parties and interests represented, though named differently, are in fact the same, res judicata applies.


As indicated earlier in this article, there is a difference, so far as the doctrine of res judicata is concerned, between (1) a suit employed to re-litigate a cause of action previously tried, and (2) one which, though presenting a cause of action not previously before the courts, yet involves those who were parties to prior litigation which to some extent comprehended issues of fact again sought to be raised. In the first instance, since the doctrine operates to bar entirely the reopening between the same parties of a cause of action once terminated, it prevents later judicial consideration not only of the questions of fact which were actually raised in the former suit, but also of every relevant issue which might properly have been raised there to sustain or defeat the claim in controversy. In the second instance, where the subsequent or pending suit is upon a different claim, or cause of action, though between the same parties and involving some of the same issues of fact, res judicata is applicable only to such issues as were actually raised and determined in the former suit.45

To illustrate the governing principle, where the causes of action in the original and pending proceedings differ: in a suit to collect coupons of certain corporate bonds, the plaintiff was not allowed to prove he was a holder in due course, because, in a former suit by him on other coupons attached to the same bonds, recovery had been denied on the ground that he had not shown he occupied that position. The Supreme Court of the United States reversed the judgment, deciding that the causes of action were different, and failure of the plaintiff to show that he was a holder in


An example of how these two situations are confused and essential limitations omitted in the language of the case, is seen in the following passage from Stokes v. Foote, 172 N. Y. 327, 344, 65 N. E. 176, 182 (1902): "There is no doubt as to the general rule that a judgment of a court of competent jurisdiction is final and conclusive upon the parties, not only as to the issues actually determined, but as to every other question which the parties might or ought to have litigated. In other words, all the issues that were necessarily involved."
due course on the trial of the first case did not preclude such proof in the second. Justice Field, who wrote the opinion, dwelt at length upon the distinctions to be recognized, summarizing as follows: 47

"In considering the operation of this judgment, it should be borne in mind . . . that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action; it is a finality to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose . . . . If such defenses were not presented in [a prior] action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the [particular] demand or claim in controversy . . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined."

The rule under consideration, as such, is simple enough; the difficulties come in its application, chiefly in determining whether the second proceeding is upon the same claim or cause of action as the former one. Where, in the second suit, the parties bear the same relation to each other as they did in the first, and the claim is stated in the same terms, even though the forms of action may differ, the rule is not hard to apply; the identity of the causes is obvious and the former judgment may be invoked as a bar to the whole proceeding without serious difficulty. The term "same cause of action" cannot, however, be confined to such situations. For instance, in a case before the Missouri Court of Appeals there had been a former proceeding in equity

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47 See Cromwell v. County of Sac, 94 U. S. 351, 352-353 (1876).
between the same parties, to enjoin the enforcement against plaintiff's land of tax liens which he claimed were invalid, where-
in the validity of the liens was upheld. The second proceeding
was at law, by the former defendants against the former plain-
tiff, to enforce the same liens. The court held that the cause
of action was the same, and refused to allow defendant to attack
the validity of the liens on grounds which he could have raised
in the former equity suit but did not, saying: 43

"In the determination of the question of whether in a given
case the two actions involve the same claim or demand . . . the
test questions to be answered are these: Will both actions em-
brace the same issue, require the same evidence, and, though
different in form, call for substantially the same result? If
these questions may be answered in the affirmative, the claims
are the same, though one action may be in equity and the other
at law, and the plaintiff in one may be the defendant in the other."

It is impossible to lay down an all-inclusive and satisfying
formula to determine whether or not causes of action are
identical. Facts and issues of infinite variety are brought into
litigation in numberless ways; these the courts seek to decide,
and, by passing judgment on them, to relegate to oblivion, but
shortly another crop of litigation springs up, with facts and
issues bearing marked resemblance to those recently put to
rest. When this occurs, it must be determined whether these
facts and issues present only the old questions, endowed by the
ingenuity of counsel with a semblance of life, or are, in truth,
new issues, and therefore legitimate work for the courts. The
cases do perhaps warrant a definition to this extent: for purposes
of res judicata, there is identity of causes of action when in
both the old and new proceedings the subject-matter 49 and the

43 Barber Paving Co. v. Field, supra note 45, at 639, 97 S. W. at 181.
49 The statement is occasionally made, in cases concerning title to prop-
erty, that it is not essential that the same subject matter be involved
to make two causes of action the same, but that it is sufficient if they
involve the same title. This is the view taken by Justice Clifford in
Aurora City v. West, 7 Wall. 82 (U. S. 1868), and again in his disZenting
opinion in Cromwell v. County of Sac, supra note 47, citing in both cases
Outram v. Morewood, 3 East 346 (1803). But how can it be said that a
claim for property not claimed before is the same cause of action as a
former one? Necessarily, if in the prior action there was litigation and
adjudication of a title upon which a party must rely in the sub2cquent
action, that issue is res judicata, and in all probability it will control
the result of the second action; but this is not because the claims are the
same, but because an issue essential to the case has actually been adjudi-
cated. This was exactly the situation in Outram v. Morewood. An inter-
esting split of authority on a point of this kind is found in regard to the
question whether a judgment concerning liability to a certain tax in one
year is res judicata in efforts to collect the same tax for a subsequent
ultimate issues are the same; but, beyond this, determination of the question must rest in the sound discretion of the courts as applied to the circumstances of each case, having proper regard both to the public policy of res judicata and to the rights of the parties to have every bona fide issue passed upon.

Illustrations of suits not to be classed as new litigation, since in essence they are no more than attempts to retry previously determined causes, on grounds that might have been presented in former proceedings, may be found in instances where defeated parties seek to recover damages from former opponents, alleging the latter procured judgment in their favor by illegitimate means.\(^50\) It has been generally held that cases of this character are not maintainable, for the very gist of the new action is an allegation that the former judgment was improper. To permit such a case to be proceeded with would be in effect to reopen the judgment entered in the prior suit and retry the merits in a collateral proceeding. Despite first appearances to the contrary, the causes of action are the same, in the sense that the facts alleged are such as could have been litigated in the first suit. But there are many other instances where the identity of causes of action is not so easy of solution.

The decision as to identity of causes of action occasionally depends on rules of substantive law in the particular jurisdiction. This occurs, for example, in regard to the question as to whether an injured plaintiff may institute more than one action against a particular defendant to recover damages arising out of the same tortious act; that is, whether there can be separate suits for injury to the person and injury to property, occasioned by the same tort. In dealing with this problem, the great majority of courts, regarding the wrongful act as the basis of the cause of action, hold that all damages which are to be obtained must be recovered in a single suit,\(^51\) and when that is determined the cause of action is res judicata. But a few decisions treat

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\(^50\) McMichael v. Horay, 90 N. J. L. 142, 100 Atl. 205 (1916); Dunlap v. Glidden, 31 Me. 435 (1850); White v. Merritt, 7 N. Y. 352 (1852); Smith v. Lewis, 3 Johns. 167 (N. Y. 1808); Cunningham v. Brown, 18 Vt. 123 (1896).

the injury as the basis of the cause of action, and accordingly permit separate suits for each injury, though it does not appear, from the reports of these cases, whether or not they embody any exception to the general doctrine of res judicata as applied to distinct causes of action. If the courts, in the class of cases under consideration, follow the usual principles of res judicata, then, on the trial in the second suit, practically all questions except those relating to the damages sustained would be excluded as previously determined; but if they throw open the whole case, including the issues of negligence and contributory negligence, they certainly violate cardinal principles of res judicata.

The terms res judicata and estoppel are so closely linked in legal parlance that at times the two seem to be used almost interchangeably; yet it is essential to keep in mind the difference between the estoppel elements of res judicata and estoppel in pais. This distinction was noted in an early Pennsylvania case thus:

"The effect of a judgment, of a court having jurisdiction over the subject-matter of controversy between the parties, even as an estoppel, is very different from an estoppel arising from the act of a party himself,... which [latter estoppel] may or may not be enforced at the election of the other party, because whatever the parties have done by compact they may undo by the same means. But a judgment of a proper court, being the sentence or conclusion of the law, upon the facts contained within the record, puts an end to all further litigation on account of the same matter,... even by the consent of the parties, and is not only binding upon them, but upon the courts and juries ever afterwards, as long as it shall remain in force and unreversed."

Both forms of estoppel operate to deprive one of the right to assert a legal claim or defense which otherwise would be available to him, but they are different in principle and origin. Res judicata is a rule of public policy laid upon suitors to

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53 As in defective sidewalk cases cited supra note 18.
55 See Kilheffer v. Herr, 17 S. & R. 319 (Pa. 1828). The facts of res judicata must be on the record in some form to warrant their consideration by an appellate court; they must have been introduced in evidence or presented in some other judicial manner. Pasquinelli v. Southern Macaroni Mfg. Co., 272 Pa. 468, 116 Atl. 372 (1922); John Deere Plow Co. v. Herabey, 287 Pa. 92, 134 Atl. 490 (1926). The absence of these facts from the record explains many of the cases which refuse to consider res judicata on the appeal. There are, however, other cases which reject consideration of the question if it was not made an issue below, regardless
maintain general peace, promote certainty, and conserve the time of the courts; while estoppel in pais is of concern to the parties alone, and arises out of the voluntary acts of one of the parties to a controversy. This latter sort of estoppel originated in equity, and, as enforced by the courts, operates to prevent one who has induced others to rely on his acts from pursuing a remedy which denies them. Since estoppel in pais is entirely for the protection of those entitled to call for its enforcement, it is a personal right which may be lost either by failing to set it up properly, or by voluntary waiver; and, in contrast to res judicata, no principle of public policy is involved.

Some courts, however, overlook the distinction, stating broadly that a party may waive the defense of res judicata, or may, by his acts, be estopped to set it up. A Maryland case goes so far as to say: \(^{56}\)

"It cannot be doubted that a party in whose favor a decree or judgment has been rendered can waive the defense he would be authorized to make against another suit for the same cause of action."

In a Kentucky case,\(^ {57}\) a former judgment had been given for the defendant. Sometime thereafter he acknowledged that plaintiff's claim against him was just and promised to pay it; but no new consideration passed. Subsequently, plaintiff began a second action on the same demand, and, owing to defendant's new promise and the moral obligation supposed to be involved, the court refused to view the former judgment as a bar. Of a similar nature, in respect to the question of res judicata, are decisions to the effect that, in the second proceeding, a pleading to the merits, a submission on agreed facts, a consent to go to trial, or an admission of record inconsistent with the prior judgment, is a waiver of the right to raise the issue of res judicata.\(^ {58}\) In the same category, also, are cases which hold of the state of the record; but these cases also may be explained without doing violence to the public policy basis of res judicata. By the time a case, in which issues previously determined have been re-tried, reaches the appellate court, much of the harm has been done which an application of res judicata would have prevented. The time of the court has been consumed, and it may well be argued that public policy would not be served by permitting such a tardy raising of the question.


\(^ {57}\) Cook v. Vimont, 6 T. B. Mon. 284 (Ky. 1827); cf. also Fledderman v. Fledderman, supra note 56; McCarthy v. Sleight, 114 Mich. 182, 72 N. W. 165 (1897).

\(^ {58}\) Hill v. City of Huron, 39 S. D. 530, 165 N. W. 534 (1917); McArthur v. Oliver, 53 Mich. 299, 19 N. W. 5 (1884); House v. Lockwood,
that, if a defendant fails to object to the splitting of a cause of action, and answers to the merits, he is estopped from subsequently pleading or proving, as a bar to an action for the remainder,\textsuperscript{69} the previous judgment.

The decisions mentioned in the preceding paragraph must be classed as departures from the proper theory that res judicata is a rule of public policy. There is, however, another type of case which, while also holding that there may be waiver or estoppel to prevent the setting up of a former judgment, is not inconsistent with the public-policy theory of res judicata. In this latter line of cases, the question of res judicata arises, not in a second, but in a third or subsequent suit, involving the same issues as were previously adjudged between the parties.\textsuperscript{53}

In such a situation, where the party entitled to rest on res judicata had an opportunity to avail himself of that defense in the second proceeding, but failed to take advantage of it, he will not thereafter be permitted to plead the original judgment, if such judgment is contrary to that entered in the second suit, and thus disturb the new determination of the question which he has, by his own inaction, allowed to be made.

Since the doctrine of res judicata affects principally issues of fact, a natural inquiry arises as to whether there is any necessity that the former judgment be based on actual contest of such issues; there is no requirement of this kind. If, for instance, facts alleged are formally admitted in the course of a judicial proceeding, they are thereby established against the party who made the admission, with the same effect as if found by a jury after a contest.\textsuperscript{63} Cases of formal admissions present few difficulties, but when we come to constructive admissions, and to the various judgments which may be rendered without full litigation of facts, such as judgments on demurrer, nonsuits, judgments on cases stated, and default judgments in general,


\textsuperscript{53}"Splitting of the cause of action amounts to nothing if the party affected thereby consents to it." See Edmonston v. Jones, 96 Mo. App. 83, 91, 69 S. W. 741, 743 (1902); cf. Louisville Bridge Co. v. Louisville & N. R. R., 116 Ky. 258, 75 S. W. 285 (1903); Burritt v. Belfy, 47 Conn. 323 (1879).

\textsuperscript{60}Board of Directors of Chicago Theolog. Sem. v. People, 189 Ill. 429, 59 N. E. 977 (1901); Semple v. Ware, 42 Cal. 619 (1872); Borden v. McNamara, 20 N. D. 225, 127 N. W. 164 (1910).

\textsuperscript{61}Blair v. Bartlett, 75 N. Y. 150 (1878); McClellan v. Lewis, 35 Cal. App. 64, 169 Pac. 436 (1917); Moseley v. Johnson, 144 N. C. 277, 56 S. E. 329 (1907).
much diversity of opinion is found; though the authorities seem to agree that a suit dismissed, on demurrer or otherwise, for some formal or technical defect, such as misjoinder or non-joinder of parties, a mistaken form of action, or premature beginning of action, is no bar to a subsequent suit on the same cause of action. Judgments of the kinds indicated should be considered as concluding only the technical points decided, unless they in fact go to the merits of the case.

A type of judgment which, though entered without the verdict of a jury, is frequently claimed to be on the merits, is the judgment on a demurrer to pleaded facts, particularly where the ground of demurrer was either that the facts alleged were insufficient to constitute a cause of action or a defense, or that the pleadings demurred to revealed affirmatively a conclusive fact or state of affairs which foreclosed the pleader's case, as, for instance, contributory negligence, or the bar of the statute of limitations, and thus questions of res judicata often arise.

It is hardly necessary to say that, where a demurrer is sustained on substantial (untechnical) grounds, such as those last suggested, and where no leave to amend is given, the defeated party is out of court, as he has averred an inadequate cause or defense, and, under such circumstances, the judgment entered against him is final, and as conclusive as though on the merits.

If, on the other hand, a demurrer is overruled, without permission to plead over, the demurrant stands as one who has not pleaded at all, and final judgment may be entered against

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62 St. Romes v. Levee Steam Cotton Press Co., 127 U. S. 614, 8 Sup. Ct. 1335 (1888); Wills v. Pauly, 116 Cal. 575, 48 Pac. 700 (1897); Richardson v. Richards, 36 Minn. 111, 30 N. W. 457 (1886); 2 Freeman, op. cit. supra note 30, § 738.


64 Maxwell v. Clarke, 139 Mass. 112, 29 N. E. 224 (1885); Scheeline v. Mosher, 172 Cal. 565, 158 Pac. 222 (1916); 2 Freeman, op. cit. supra note 30, § 739.

65 Terry v. Hammonds, 47 Cal. 32 (1873); Gould v. Evansville & C. R. R., 91 U. S. 526 (1875); Lamb v. McConkey, 76 Iowa 47, 40 N. W. 77 (1888); 2 Black, Judgments § 709. Story, J., in Gilman v. Rives, 10 Pet. 298, 302 (U. S. 1836), makes a statement which is apparently contrary to the principle involved in the above cases, but an examination of the report of the decision shows that the former judgment there involved had been on a demurrer for non-joinder of parties, a technical defect only.

him accordingly; unless such a judgment be reversed, the cause of action is thereby concluded. This is the true foundation of the judgment against demurrant; though it is common to assert that a defeated demurrant is concluded because he has admitted all the properly pleaded facts and has lost on issues of law.\(^6\)

If, for the sake of conforming with time-honored judicial expression, the theory of admissions be employed to support the conclusiveness of the judgment against demurrant, then the principle should be fully understood that a demurrant admits properly alleged facts for purposes of the argument, and to that end alone; but, since there is in no true sense an admission of facts by demurrer, it would be better not to speak of facts admitted at all. The real effect of the demurrant's action is to say, "Even if I should admit the facts alleged, still there is no cause of action set forth," rather than, "I admit the facts." This must be true, for if a demurrant is permitted to plead over, he may deny the allegations of the pleading to which he demurred; whereas, if his demurrer were a complete admission, this could not be done.

Another instance of a conclusive judgment on demurrer is one against a defendant whose demurrer to plaintiff's averments of fact has been overruled with leave to answer, and who has not availed himself of that privilege. Such a demurrant is left with no ground to stand upon, and, having had his opportunity, he ought not to be given additional chance at the expense of time belonging to litigants in other cases. This last mentioned class of cases stands somewhat by itself; judgments entered under such circumstances should not only be accounted as decisions on the merits, but should bar future litigation of the same cause both as to the issues raised in the first case and also as to all issues of fact that might there have been pleaded by defendant, for since he failed to take advantage of an express opportunity to state his case, the law will assume he had none to plead.

Decisions may be found which permit one against whom final judgment has been entered on demurrer, because of the insufficiency of facts averred, to renew his action on a declaration containing a more complete statement of facts; and this

\(^{67}\) Bissell v. Spring Valley Twp., 124 U. S. 225, 8 Sup. Ct. 495 (1883); Aurora City v. West, 7 Wall. 82 (U. S. 1868), and cases there cited; Kleinschmidt v. Benzel, \textit{supra} note 63.

is so even where the new matter set up was pertinent to and
available in the first action. Such decisions attempt to explain
themselves on the untenable ground that the second declaration
avers a cause of action which had never been passed upon, not-
withstanding the fact that the pleading in question really deals
with the same facts as set forth in the first declaration, though
more fully stated. These cases say in effect that there was no
judgment on the merits in the first suit, because there was no
cause before the court concerning which its judgment could be-
come res judicata,69 or they say that a judgment on demurrer
is not, after all, a judgment on the merits, but simply a decision
that the particular pleading attacked did not entitle the pleader
to proceed. When, however, a final judgment is entered on such
grounds against a pleader who has had full opportunity to state
his case, he should no more be allowed to consume the time of
the courts in further experiments to enforce the same cause
of action or defense than is the person against whom judgment
has been rendered on a verdict.

Immediately heretofore we have been dealing with the effect
of demurrer judgments in subsequent proceedings brought on
the same cause of action, and in this class of cases, aside from
the problem as to whether the prior judgment can properly be
accounted as on the merits, usually no great difficulty is en-
countered in applying the principles of res judicata. Where
the cause of action is the same in two suits, a judgment in the
first of them, which may properly be accounted a judgment on
the merits, is conclusive in the second, whether such judgment
was entered on a demurrer or otherwise; but this is otherwise
in a subsequent suit, in spite of its being between the same
parties, if such suit turns on a different cause of action, even
though some of the issues be identical in both cases. As pre-
viously explained, when in the second suit the cause of action
differs from that in the prior one, a judgment entered in such
prior suit can have the force of res judicata in the second one
only as to facts actually admitted, and such points as were
raised and adjudged as issues in the prior proceeding; and since
no facts are actually admitted by, or issues of fact determined
on, demurrer, where the cause of action is not the same in both
suits a demurrer judgment lacks the force of res judicata so
far as such facts or issues are concerned. While such a judg-
ment may have concluded the original cause of action, it was
not on the theory of distinct facts actually admitted or of specific
issues raised and adjudged;70 judgments on demurrer are en-

69 None of this discussion is applicable to judgments on demurrers to
declarations which affirmatively disclose a fatal defect in the case, such
as contributory negligence or statute of limitations.

70 "A judgment by default only admits for the purpose of the action
tered either because the pleading under attack fails to set forth a case or defense, or because it does so defectively, and thereby no issues of fact are determined so as to make them res judicata in a subsequent suit on a different cause of action. The distinctions here noted should not be lost sight of, though they apparently have been by some courts, which proceed on the theory that so-called admissions made by demurrer in a former suit are conclusive of like issues of fact involved in a subsequent suit, even though the cause of action be not the same. Failure of the courts when dealing with demurrer judgments to recognize the distinctions here indicated, and a careless use of language as to admissions, have led to much unnecessary judicial discussion, and, in some cases, to improper conclusions.

All that has been said up to this point of judgments on demurrer, concerns demurrers to pleadings. Judgments on properly directed verdicts, and those on demurrers to evidence, are always final, constituting res judicata in subsequent actions as fully as judgments entered on jury verdicts. Likewise, judgments entered on default, for want of an appearance, for want of an affidavit of defense, or for want of a sufficient affidavit of defense, usually make a case res judicata as fully as do judgments after complete litigation. A number of decisions, however, except from the operation of this latter rule matters which, although available as a defense, might also have been made the basis of an independent cross suit; according to these rulings, the default judgment does not bar a subsequent suit based on such matters.

the legality of the demand or claim in suit: it does not make the allegations of the declaration or complaint evidence in an action upon a different claim.” Field, J., in Cromwell v. County of Sac, supra note 47, at 355 (1876).

71 Aurora City v. West, supra note 67, at 99 et seq.


When we come to the field of nonsuits, and consider their relation to res judicata, the decisions are by no means uniform, nor the judicial opinions in their support satisfactory; but it seems commonly conceded that a compulsory nonsuit, without more, cannot be pleaded or treated as res judicata of either the general cause of action or of the facts or issues involved. Even where the record shows a motion to remove a compulsory nonsuit, and an appealable judgment of refusal entered thereon, though some courts seem to think this state of affairs sufficient to constitute res judicata, we find no decisive utterance on the point until a recent opinion by the Supreme Court of Pennsylvania, where it was squarely ruled that a judgment refusing...

76 Cleary v. Quaker City Cab Co., 285 Pa. 241, 132 Atl. 185 (1926), and cases there cited; Manhattan Life Ins. Co. v. Broughton, 100 U. S. 121, 3 Sup. Ct. 99 (1883); United States v. Parker, 120 U. S. 59, 7 Sup. Ct. 454 (1887); Audubon v. Excelsior Ins. Co., 27 N. Y. 216 (1863). The result is that the nonsuited plaintiff, who has had greater opportunity to present his whole case than one whose declaration has been held bad on demurrer may renew the action without change, while the overruled demurrant may not. There are a few statements made to the effect that a compulsory nonsuit does not adjudge anything on the merits. Gummor v. Trustees of Village of Omro, 50 Wis. 247, 253 (1880); Bliss v. Philadelphia R. T. Co., supra note 73, at 177; 2 BLACK, op. cit. supra note 65, § 699. The more common explanation given in these cases, however, is that, since no judgment can be given for the plaintiff if defendant's motion for nonsuit is overruled, it would not be fair to permit final judgment against the plaintiff if the motion is sustained; that if the defendant wants a final judgment, he must demur to the evidence or go to the jury, and thus risk having judgment given against himself. Protests against the prevailing rule on the effect of nonsuits are to be found. Fitzpatrick v. Riley, 163 Pa. 65, 29 Atl. 783 (1894). Decisions contrary to it are rare. Cartin v. South Bound R. R., 43 S. C. 221, 20 S. E. 979 (1894); Ordway v. Boston & M. R. R., 69 N. H. 429, 45 Atl. 243 (1898). The opinion in the last-mentioned case analyzes the nature of compulsory nonsuits, and holds that they have the same effect as res judicata as judgments on demurrers to evidence, and says that the contrary or majority view is based on an erroneous analogy drawn between compulsory nonsuits and the common-law voluntary nonsuit; but this is contrary to the generally accepted view.

77 See Cleary v. Quaker City Cab Co., supra note 76, and cases there cited. But in Mason v. Kansas City Belt Ry. Co., 226 Mo. 212, 125 S. W. 1128 (1910), a judgment refusing to remove a nonsuit was held not to constitute res judicata under the Missouri statutes. In Morgan v. Bliss, 2 Mass. 111 (1806), and Fleming v. Insurance Co., 12 Pa. 391 (1849), involuntary nonsuits which the court had refused to take off were held not to constitute res judicata, but there is no discussion in these cases of the effect of the refusal to remove. On the other hand, in Ordway v. Boston & Maine R. R., supra note 76, where the former nonsuit was held to constitute res judicata, the fact that the plaintiff's "exception" to the nonsuit had been considered and "overruled" is not discussed in determining the effect as res judicata.

to remove a nonsuit, unless reversed on appeal, is conclusive of the plaintiff's case, effectively barring the maintenance of another suit on the same cause; and that, the plaintiff having chosen to follow this procedure instead of beginning a new suit, as he was at liberty to do, thereby submitted his case for final decision.

Voluntary nonsuits present no problems of res judicata; they are suffered at the instance of the plaintiff, and before a verdict has been rendered or any judgment or order of the court entered which would dispose of the case. Nothing, therefore, has been adjudicated, and the principles of res judicata cannot apply.79

Judgments entered on an agreed statement of facts are within the doctrine of res judicata. The force of a case stated is essentially the same as that of a special verdict; one is established by the deliberations of a jury, the other by agreement of the parties. In the case stated there is a real and formal admission of facts, as distinguished from the so-called admissions that follow in the wake of a demurrer. When, therefore, a judgment is pronounced on such a foundation, the cause should become res judicata as completely as though a verdict had been rendered by a jury. The facts have been admitted and adjudicated; public policy forbids the parties later to reopen the matter and contradict their former admissions. This is the foundation of the better considered cases.80

True, judicial utterances may be found contrary to the views just expressed concerning the conclusiveness of judgments on agreed facts; most of such pronouncements, however, are simply dicta,81 since they appear in opinions where the second action involved different parties from those in the prior suit. As to the suggestion in these cases that "circumstances may be conceded as existing to raise a question of law, without intending to admit them as true, and even without believing them,"82 that

81 See Hart's Appeal, 3 Pa. 32, 37 (1848); Gibson v. Rowland, 35 Pa. Super. 158, 165 (1903). That the statements in these cases are dicta is pointed out in State v. Consolidated Water Co., supra note 5, at 39, 110 Atl. at 284.
82 Hart's Appeal, Gibson v. Rowland, both supra note 81. A similar expression is used in Mc'Lughan v. Bovard, supra note 80, but it was made in connection with a case stated that had been withdrawn before any judgment was entered upon it.
is the situation where a demurrer is interposed, for there the acts of the parties are hostile, but the proposition has no place where the parties are in agreement; otherwise the courts would render merely advisory opinions.

It may be well to note at this point, that the so-called declaratory judgments which, through recent legislation, have come into vogue in American jurisdictions, are more than advisory. As stated by the Supreme Court of Pennsylvania, in a late opinion reviewing the law upon the subject of such judgments:

"Since the numerous jurisdictions enjoying this practice all hold that a real controversy must exist, that moot cases will not be considered, and that declaratory judgments are res judicata of the points involved, such judgments cannot properly be held merely advisory, ... ; declaratory judgments [have] the effect of making the issues at stake res judicata, and, in this important sense, such judgments are forever enforceable."

While the effect of declaratory judgments as res judicata, is, in a sense, new to American law, and no doubt time will require the courts to pass on aspects of the matter which have not yet presented themselves, nevertheless, it can be said in a general way that declaratory judgments seem to be well within the doctrine of res judicata.

At common law, perhaps the most outstanding exception to the doctrine of res judicata was to be found in the rule which prevailed in an action of ejectment; it was settled that a judgment in such an action was no bar to later proceedings between the same parties, for the same land, and based on the same claim of title. The explanation is historical and procedural. Common-law ejectment was but a possessory action; although it was generally necessary for the plaintiff (always claiming as a lessee ousted of his term) to prove his lessor's title, in order to validate his own claim as a lessee. Yet the authorities considered that title was drawn into question only collaterally, "the direct question being the plaintiff's right to immediate possession," and that whatever might be incidentally determined as to title was not res judicata in a second ejectment. Such second action was essential to actual recovery of the land, and therein a new demise was supposed. Moreover, in this form of action nominal parties were used, and they were different in the second suit. The retention of these fictions, with others, was an additional reason for not applying res judicata. When, particularly in America, ejectment ceased to be a purely

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83 See Kariher's Petition, 284 Pa. 455, 464, 469, 131 Atl. 265, 268, 270 (1925).
84 Stevens v. Hughes, 31 Pa. 381 (1858).
possessory action, title became a real fact at issue. Some courts welcomed an opportunity to hold that the old right of successive suits was lost, but others hesitated about taking this step and left it for the legislatures to make the break with the past. Now, judgments in actions to try title, by whatever name they may be called, are generally final, and constitute res judicata.

So far, we have been dealing in the main with civil cases, but the principles of res judicata apply in successive criminal proceedings against the same defendant, involving the same facts, practically as in civil suits. This is a different thing from the force of the doctrines of former jeopardy, and of autrefois acquit or autrefois convict; those doctrines operate to prevent renewed prosecutions for the same offense; res judicata is of wider effect; it prevents retrial of facts, even though the offenses in which they figure are differently denominated. Thus, an acquittal on an indictment for the specific offense of furnishing liquor on Sundays was held to bar proof on a subsequent trial of another indictment, which charged the same defendant with selling liquor to intoxicated persons on those particular Sundays. Facts litigated in civil actions are not res judicata in subsequent criminal proceedings, and vice versa. The reason is obvious;

85 A thorough discussion of the subject is contained in the opinion of Sawyer, J., in Caperton v. Schmidt, 26 Cal. 479 (1864). Cf. also Campbell v. Rankin, 99 U. S. 261 (1878); Note (1864) 85 Am. Dec. 208.

86 For example, in Pennsylvania an act of 1807 [Pa. Laws (Dunlop, 1847) 201] provided that two verdicts and judgments thereon in ejectment, in favor of one party, should be conclusive, and it was not until 1901 [Pa. Stat. (1922) §§ 9407, 9408] that one verdict and judgment was made final. It had there long been the rule, however, that one judgment in ejectment based on an equitable title was conclusive. Wimpenny v. Wimpenny, 92 Pa. 440 (1880). Cf. Sanford v. Herron, 161 Mo. 176, 61 S. W. 839 (1901); Crockett v. Lashbrook, 5 T. E. Mon. 501 (Ky. 1877).

87 Altenburg v. Commonwealth, 126 Pa. 602, 17 Atl. 799 (1889); Commonwealth v. Greery, 75 Pa. Super. 110 (1920); Commonwealth v. Ellis, 160 Mass. 165, 35 N. E. 773 (1893); In re Food Conservation Act, 254 Fed. 885 (N. D. N. Y. 1918). An exception to this is made where offenses charged in the original and later indictments involve different standards of proof. Thus the former conviction of a crime, which defendant under oath had denied committing, was held not to be res judicata in a subsequent prosecution for perjury, where the original crime could be proved by one witness but two were required to convict of perjury. State v. Sargood, 80 Vt. 415, 68 Atl. 49 (1905), and cases there cited.

88 Altenburg v. Commonwealth, supra note 87.

usually the parties are not the same, and speaking generally res judicata applies only as between the same parties and their privies; in addition, as between criminal and civil cases, in most instances different standards of evidence and proof are involved.

The records of criminal trials are at times accepted as evidence in civil actions, and conversely, on issues which involve facts that were previously involved in the rendition of the judgments shown by the records in question, but in such instances they are received simply as containing evidence, not as conclusive in themselves; and, in order to be admissible at all, they must generally be presented as in some way constituting proof of admissions. For example, records may be offered as containing pleas of guilty. Then, there are instances where records of judgments were offered in evidence by the persons against whom they were held to operate as res judicata.

In an interesting case, decided in 1921, by the Supreme Court of Pennsylvania, the defendant had first been charged with murder, "of which crime he was tried and acquitted; subsequently he was indicted for involuntary manslaughter in killing the same person, of which offense he was convicted." Sentence was imposed by the trial court; the defendant appealed to the superior court, which reversed; the Commonwealth appealed to

be admissible in evidence to prove the facts upon which it is based. The disfavor with which the court views the established rule is obvious in this case. Cf. Dorrell v. State, 83 Ind. 257 (1882), where, in a criminal prosecution for trespass, conclusive force as to the location of a boundary line is given to a former judgment in an action of ejectment between the prosecuting witness and the defendant in the criminal case. United States v. Baltimore & O. R. R., 229 U. S. 244, 33 Sup. Ct. 850 (1912), is also cited as opposed to the prevailing rule, but it can scarcely be so classified, for the decision is not that the former bill in equity had established facts conclusively, but that it had determined defendant's rights under the law. The case is, therefore, one involving stare decisis rather than res judicata.

The mere fact that one action is civil and one criminal in form is not always sufficient to determine the admissibility of the record of the prior one. Thus, an action to enforce penalties or forfeitures consequent upon a crime charged in a former proceeding although civil in form, is regarded as part of the criminal prosecution, and the conviction or acquittal constitutes res judicata. Coffey v. U. S., 116 U. S. 436; In re Food Conservation Act, supra note 87.


91 Stewart v. Stewart, 93 N. J. Eq. 1, 114 Atl. 851 (1921); Markett v. Gemke, Anders v. Clover, both supra note 90.


the supreme court, which set aside the reversal and affirmed the sentence. There was no question in the case as to defendant's having killed the deceased; but in answer to the indictment for manslaughter the accused contended that his lack of legal guilt was res judicata by force of the prior judgment on the murder indictment. In disposing of defendant's contention of res judicata, the supreme court said:

"Res judicata conclusively determines not only the ultimate facts established by a . . . judgment, but every other fact necessarily found in reaching the conclusion as to that ultimate fact; but that does not mean . . . that every defence [interposed in the first case, i.e. the murder trial, was] established. . . . Nor does it follow that because the evidence is the same in the two cases,—even if we assume there was not the slightest difference,—that the defeating of one action concludes also the other. In each case there was an inference to be drawn by the jury from the evidence. To convict in the first it would have had to infer an intent to wound or kill, which it refused to do; to convict in the second it had to infer there was no intent to wound or kill, which it did . . . The inference in each case, however, was for the jury, not for the court; and the fact that the evidence was the same in each, does not alter this, but, on the contrary, strengthens the conclusion of the accuracy of the last finding, since two juries, on the same evidence, seem to have reached a like conclusion, viz., that there was a reckless or careless killing and not an intentional one."

Under the law of Pennsylvania, where an indictment for murder does not include the charge of involuntary manslaughter, a finding of reckless or careless, not intentional, killing would acquit of murder, but such a finding would constitute the basis for a conviction of involuntary manslaughter; so that, though other facts, such as the killing having taken place, identity of persons, etc., might have been conclusively determined in the first trial, yet the vital one as to the defendant's intent was not,—hence the judgment on the verdict there rendered was unavailable, under a plea of res judicata, to force an acquittal at the second trial.

Attempts to apply the doctrine of res judicata in habeas corpus proceedings have brought it into conflict with some time-honored principles peculiarly attached to this writ. Habeas corpus is designed to afford the individual the fullest opportunity to be free from illegal restraint of his person, and application of the principles of res judicata, necessarily including the rule that what might have been litigated before is barred in a later proceeding on the same cause of action, would be a harsh restriction on the principles of this great writ. A person illegally detained might very easily, on his first writ, fail to make out a case, and to deprive him of all right to apply again, on other
grounds, for his freedom, would not comport with the spirit of habeas corpus. Then, at common law, habeas corpus was not an action; it was a summary proceeding from which no appeal lay, and it early became settled that the refusal to discharge on habeas corpus did not bar subsequent applications, whether on the same or on additional facts. A leading English case went so far as to say, "The defendant has the right to the opinion of every court as to the propriety of his imprisonment."

At the present time, in many jurisdictions, as the result of statutes or of judicial decisions, appeals are permitted in habeas corpus proceedings; and the courts of some of these jurisdictions—arguing that the privilege to appeal adequately protects the rights of those restrained of their liberty,—have held that repeated applications for discharge will no longer be allowed. Others adhere to the old doctrine, saying, however, that the granting of the second writ is within the discretion of the court, which is not bound by, but may give weight to, the former denial of discharge.

Varying conclusions have been reached by the courts concerning the effect, as res judicata, of a discharge on habeas corpus. Speaking generally, where the question is the liability to a second arrest for the same cause, it may be said that the first proceeding is res judicata as to all matters there determined; but this does not necessarily mean that it is a bar to a second arrest. If the discharge is in a preliminary proceeding, such as extradition, or holding for trial by a committing magistrate, where

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94 Cox v. Hakes, 15 App. Cas. 506 (1890); Russell v. Commonwealth, 1 Penn. & W. 82 (Pa. 1829); Clark v. Commonwealth, 29 Pa. 129 (1858); Bradley v. Beetle, 163 Mass. 154, 26 N. E. 429 (1891); In re Waller, 234 S. W. 866 (Mo. App. 1921).

95 Ex parte Partington, 13 M. & W. 679 (1845); Cox v. Hakes, supra note 94; In re Snell, 31 Minn. 110, 16 N. W. 692 (1883); People v. Brady, 56 N. Y. 182; In re Waller, supra note 94; Matter of Perkins, 2 Cal. 424 (1852); Matter of Ring, 28 Cal. 247 (1865).

96 Ex parte Partington, supra note 95, at 684.

97 5 Stat. 539 (1842); 28 U. S. C. § 462 (1926); Cuddy Petitioner, 131 U. S. 280, 9 Sup. Ct. 703 (1889); In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658 (1889); Ex parte Hamilton, 65 Miss. 98, 3 So. 68 (1887); State v. Witcher, 117 Wis. 668, 94 N. W. 787 (1903); Doyle v. Commonwealth, 107 Pa. 20 (1884); Commonwealth v. Butler, 19 Pa. Super. 626 (1902); Commonwealth v. Cairns, 46 Pa. Super. 96 (1911).


99 Salinger v. Loisel, 265 U. S. 224, 44 Sup. Ct. 519 (1923); Wong Doo v. United States, 265 U. S. 239, 44 Sup. Ct. 524 (1923); Ex parte Lawrence, 5 Binn. 304 (Pa. 1812); Commonwealth v. Biddle, 4 Clark 35 (Pa. 1846); cf. Ex parte Justus, 26 Okla. 101, 110 Pac. 907 (1910); People v. Lamb, 118 N. Y. Supp 389 (Sup. Ct. 1909).
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there is no consideration of the merits, this is no bar to a
later arrest for the same cause of complaint, under a different
process; on the other hand, in most jurisdictions, a prisoner
discharged on habeas corpus after a hearing where the merits
of the case are fully passed upon, is entitled to plead res judicata
in bar of subsequent arrest.

Again, in suits for false imprisonment, brought by one who has
been discharged on habeas corpus against the person who
caused his wrongful detention, if the defendant in such suit had
previously been given opportunity to contest the habeas corpus
proceeding, the discharge becomes res judicata in respect to the
wrongfulness of the detention, for purposes of recovering dam-
ages for the false imprisonment.

Another point for consideration is: to what general character
of judgments, orders, and decrees does the rule of res judicata
apply? It may be said, in a broad way, to cover judgments and
decrees of courts of record, in equity as well as at law, and also
judgments of justices of the peace or magistrates, and the or-
ders of referees in bankruptcy, when these several tribunals
act within the scope of their respective jurisdictions; but we find
at the present day a rapidly increasing number of governmental
administrative boards to which various duties of a quasi-judicial
nature are frequently assigned. These bodies hear and weigh
testimony, make findings of fact, apply the law thereto, and en-
ter orders and awards. Ought such orders and awards to have
the same force of res judicata as is accorded to judgments of
actual courts? If a board or commission, acting within its juris-
diction, makes a determination which is judicial in its nature,
and final in substance and form, there is no substantial reason
for giving it less effect as res judicata in the field of fact than
would be accorded the judgment of a court; for, the matter hav-
ing been litigated before the body appointed by law to pass upon
it, unless the legislature, in creating that body indicated a differ-

100 Ex parte Milburn, 9 Pet. 704 (U. S. 1835); Ecken v. Palmer, 31
App. D. C. 561 (1908); Commonwealth v. Hall, 75 Mass. 252 (1877);
State v. Fley, 2 Brev. 333 (S. C. 1809); Kurtz v. State, 22 Fla. 36 (1889).
101 United States v. Chung Shee, 71 Fed. 277 (S. D. Cal. 1895); Mc-
Conologue's Case, 107 Mass. 154 (1871); Ex parte Jilz, 64 Mo. 205 (1876).
102 Oxford v. Berry, 204 Mich. 197, 170 N. W. 83 (1918); Turgeon v.
Bean, 109 Me. 189, 83 Atl. 557 (1912); State v. Huegin, 110 Wis. 189, 85
N. W. 1046 (1901); Zebley v. Storey, 117 Pa. 478, 12 Atl. 369 (1888).
Dep't 1905).
103 Larkins v. Lindsay, 205 Pa. 534, 55 Atl. 134 (1903).
104 Marsteller v. Marsteller, 132 Pa. 517, 19 Atl. 344 (1890); Gibby v.
Duryea Borough, 223 Pa. 252, 77 Atl. 461 (1910); Blair v. Bartlett, supra
note 61; 34 C. J. 878.
105 McCulloch v. Davenport Savings Bank, 226 Fed. 309 (S. D. Iowa
1915).
ent purpose, we may reasonably assume that the law-makers intended final decisions on all matters of pure fact, within the jurisdiction of the designated tribunal, to be conclusive, and, at least to this extent, its orders should be res judicata. The cases support this view.\(^{106}\) However, where a determination of fact covers a point of law, such as a utility rate alleged to be confiscatory, constitutional requirements may demand that the facts involved shall be passed on by a court,\(^{107}\) and hence, pending an appeal, a decision by a commission on such a point ought not in any sense be given force as res judicata. Moreover, when dealing with determinations of administrative bodies, it must always be remembered that these tribunals are purely statutory and their powers and functions limited in each instance to the legislative grant; in this connection, it will be found that, where the orders of such bodies have been refused the force of res judicata, it has generally been because of some statutory obstacle.\(^{108}\) Frequently the particular actions of the boards or commissions in question have been held not to be of a judicial nature, and, for that reason not within the doctrine;\(^{109}\) then, in some statutes there are special provisions which are construed to prevent the application of the doctrine of res judicata to the order or award there dealt with. Of this latter nature is the direction contained in the Act of Congress that, in suits to enforce reparation orders made by the Interstate Commerce Commission, such orders shall be only prima facie evidence of the facts which they contain;\(^{110}\) upon this basis they are held not to constitute res judicata.\(^{111}\)

While the doctrine under consideration is accorded its great-

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\(^{110}\) 34 STAT. 690 (1906), 36 STAT. 554 (1910), 49 U. S. C. § 16 (1926).

est force in the field of fact, yet, as before noted, under it, legal questions necessarily involved in a cause of action determined by a court, are concluded between the parties and their privies so far as that particular cause of action is concerned; but we find a number of decisions which, though recognizing the force of res judicata to conclude issues of fact involved in the determination of administrative boards or commissions, hold that their orders are entirely inconclusive on questions of law. These decisions are supported by sound reason. With the creation of administrative boards and commissions, the legislature usually provides a statutory mode of review; sometimes this is by the courts, but not infrequently the appeal is to a higher board or officer, and its or his decision is declared to be final. Where this latter situation exists, the rulings have been held inconclusive as to legal issues; and, obviously, correctly so, for administrative boards and commissions cannot properly be accounted courts of law. On the other hand, where an appeal to the courts is provided, their judgments are conclusive in all respects. Moreover, if a party does not avail himself of the right of appeal, the original order or award should be accounted res judicata, just as though the appeal had been taken and the order or award of the board or commission affirmed.

It is a settled rule that where statutory modes of review are established, the prescribed method must be followed, if relief from the order of a special tribunal is sought; although not the same, this rule and res judicata are often discussed together. Both bring about similar results in many instances, but res judicata is the more far-reaching. For example, while the rule as to following statutory methods of appeal prevents the further consideration of the particular case except in the ordained way, the rule of res judicata applies not only in that case but in all subsequent litigation between the same parties and those claiming under them.

122 Wisconsin Cent. R. R. v. Forsythe, 159 U. S. 46, 15 Sup. Ct. 1020 (1894); Buffalo Land Co. v. Strong, 91 Minn. 84, 97 N. W. 575 (1903), aff'd, 203 U. S. 582, 27 Sup. Ct. 780 (1906); Ard v. Pratt, supra note 106; see also Note, L. R. A. 1918D 597.


125 Fine v. Soifer, supra note 78, and cases there cited.


Before ending this article, it may not be amiss to consider the practical methods of establishing res judicata; a matter which presents few serious difficulties.

The existence of a prior judgment, which has adjudicated part or all of a pending controversy, is primarily in the nature of a fact; and this fact must be established as other facts. It cannot be brought before the court by demurrer, unless the pleading demurred to discloses on its face the existence of the judgment or matter depended upon as res judicata; 118 but it can be raised by any pleading whose office it is to put facts at issue, and questions thus raised will be dealt with and determined in the same manner as other issues in the case. Just when the issue of res judicata is to be brought forth must, of course, depend somewhat on the nature of the case, and the practice of the court in which the particular litigation is pending; some jurisdictions require res judicata to be specially pleaded, while others do not. It is essential, however, that the former judgment or matter claimed as res judicata be properly brought on the record, whether the issue is to be determined on the pleadings or otherwise; for it cannot be known to the court as a fact until established judicially. In doing this, it is necessary that the record, as made, shall show the issues in the former and the pending actions to be the same and that the requisites of res judicata are present; or, if the cause of action is not precisely the same, then the particular facts at issue in the pending action and those claimed to have been adjudicated in the prior one must be shown to be the same. If the record in the prior proceeding fails to disclose the required information, some cases 119 hold that extrinsic evidence may be introduced for the purpose of showing the facts and issues there determined. Not only the existence of the prior judgment must be proved but the record connected therewith has to be brought in, because mere reference to the judgment itself will establish only such matters as are absolutely essential to its existence. 120 In some jurisdictions, the fact that the former proceeding was in the same court, and perhaps before the same judge, will not excuse formal proofs, for, even under these circumstances, judicial notice will not be taken of issues adjudicated by a prior judgment. 121 The proper course, then, where the judgment or matter depended upon is not admitted or established

120 John Deere Plow Co. v. Hershey, supra note 55; 21 R. C. L. 477.
121 Steel v. Levy, supra note 118; Sauber v. Nouskajan, 286 Pa. 449, 133 Atl. 642 (1925); John Deere Plow Co. v. Hershey, supra note 55; Donner v. Board of Comm'rs, 278 Ill. 189, 115 N. E. 831 (1917); Matthews v. Matthews, 112 Md. 582, 77 Atl. 249 (1910); 23 C. J. 113.
by the pleadings alone, is to make sure that all facts essential to res judicata are set up as early in the action as possible, and proved by competent evidence.

As already stated, some courts do not require a former judgment to be specially pleaded as res judicata, but permit it to be produced in evidence under a plea of the general issue. While there is no unanimity of opinion as to this, yet those jurisdictions which refuse to give conclusive force to a prior judgment not specially pleaded, thereby permit mere want of pleading to prolong litigation and cause the waste of public time,—the very things which the doctrine under consideration is designed to prevent. To illustrate how far most courts will go to end litigation and save time: ordinarily, appellate tribunals refuse to consider, for purposes of bringing about reversals, points not presented to the court below, even when such a course may terminate litigation; but exceptions to this rule are often made where public policy is involved, and a number of appellate courts have very properly so treated questions of res judicata, thus enabling such tribunals, when the record contains the requisite data, to determine the case on a point not previously pressed.

122 Southern Pac. R. R. v. United States, 168 U. S. 1, 18 Sup. Ct. 18 (1897), and cases there cited; Marsh v. Pier, supra note 3; Bruner v. Finley, 211 Pa. 74, 60 Atl. 483 (1905); State Hospital v. Consolidated Water Co., supra note 3. For Greenleaf, op. cit. supra note 13, § 531.

Contr_a: Williams v. Williams, 265 Ill. 64, 106 N. E. 476 (1914); Krehler v. Ritter, 62 N. Y. 372 (1875); Smith v. Elliott, 9 Pa. 345 (1843); cf. Stafford v. Clark, 2 Bing. 377 (1824). It is held in one case that where the second proceeding is in the same court that entered the prior judgment, the court was bound to take judicial notice of it, even though it was not set up by the parties. Aetna Ins. Co. v. Dancer, 215 S. W. 962 (Tex. 1919).


It may be noted, however, that, even in those jurisdictions which view res judicata strictly as a matter of public policy, and administer the doctrine accordingly, situations may arise where the general welfare is best served by a re-litigation of issues formerly decided. In such a case, if the parties entitled choose not to plead res judicata, and a court sees fit to rehear the issues, its action in so doing may be approved on appeal; but this does not necessarily mean that the trial court would have been reversed on appeal had it followed the usual rule and refused to re-try issues previously determined.