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REVIEW SECTION

RES JUDICATA IN SOUTH CAROLINA

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This title is not intended to suggest that *res judicata* has pursued a novel course in this State, but simply to indicate that this rather cursory review of some of the high lights of this legal doctrine is based primarily upon our own decisions.

Res judicata, literally meaning matter adjudicated, is somewhat unique because it is an essential principle in any effective legal system, and consequently it is said to form a part of the legal systems of all civilized nations.

The following quotation from 30 Am. Jur. 910-911 clearly states the basis of this doctrine:

> The doctrine of res judicata may be said to inhere in the legal systems of all civilized nations as an obvious rule of expediency, justice, and public tranquility. Public policy and the interest of litigants alike require that there be an end to litigation which, without the doctrine of res judicata, would be endless. The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent.

It is frequently suggested that this doctrine is merely a branch of the law of estoppel, which is essentially an equitable principle, but clearly estoppel is rather a collateral principle, although sometimes applicable; and the distinction between these two legal concepts is accurately shown by the case

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of *Watson v. Goldsmith,* 205 S. C. 215, 31 S. E. 2d 317 (1944). We quote the following from the opinion in that case, which was delivered by Mr. Justice Stukes:

> Estoppel rests generally on equitable principles, which *res judicata* does not, but upon the two maxims which were its foundation in the Roman law, *memo debet bis vexari pro eadem causa* (no one ought to be twice sued for the same cause of action) and *interest reipublicae ut sit finis litium* (it is the interest of the state that there should be an end of litigation.) Contemporary laymen devised a possibly uncomplimentary comment, *res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum* (a decision makes white black; black, white; the crooked, straight; the straight crooked).

The quoted excerpt is quite interesting and informative, and shows what might have been expected, namely, that the valuable principle of *res judicata* necessarily conflicts occasionally with the ethical maxim that nothing is decided until it is decided right. Consequently, it was necessarily held in the case of *Greenwood County v. Watkins,* 196 S. C. 51, 12 S. E. 2d 545 (1940), that it is well settled in this State that the rulings in a case, even though admittedly they be wrong, become the law of the case, and are *res judicata* between the parties.

The American doctrine of *res judicata,* in general, has its source in the English case cited as the *Duchess of Kingston's* case; and in one of the early cases, to wit, *Hart v. Bates,* 17 S. C. 35 (1881), it is held that according to the *Duchess of Kingston's* case (2 Sm. Lead. Cas. 424) "three things are necessary to sustain the plea of *res judicata*: 1, the parties must be the same, or their privies; 2, the subject-matter must be the same; 3, the precise point must have been ruled."

This is indeed a valuable statement of the essential elements, but like most formulas, especially when expressed so concisely, it was subject to variation and modification in the course of legal history.

Considering these elements in the inverse order; the third was early seen to be stated too narrowly, and it was sometimes said that a judgment was conclusive of every question which might have been made in the case. But in the *Hart V. Bates* case it was held that a judgment is conclusive only

of matters that had of necessity to be determined before the judgment could have been given. But this is another statement which is not altogether adequate. Indeed, the following quotation from one of our later cases, to wit, *Johnston-Crews Co. v. Folk,* 118 S. C. 470, 111 S. E. 15 (1921), in which the opinion was delivered by Mr. Justice Cothran, is much more accurate and comprehensive:

> As to the third element as stated above: In the case of *Hart v. Bates,* 17 S. C., 35, the element is stated in rather tabloid form thus: "The precise point must have been ruled." This requires some amplification. If the identity of the parties and the identity of the causes of action have been established, the former adjudication is conclusive, not only of the precise issues raised and determined, but such as might have been raised affecting the main issue. If the identity of the parties has been established, but the identity of the causes of action has not, any issue appearing upon the record or by extrinsic evidence to have been adjudicated in the former suit is conclusive upon the parties in a subsequent action. If the identity of the parties has been established but the identity of the causes of action has not, the former judgment is conclusive only as to those issues actually determined; that is, the rule of conclusiveness as to matters which might have been litigated has no application.

The views expressed by Judge Cothran indicate that there is some overlapping between the three essential elements of the principle under discussion, and they cannot be considered as entirely separate and independent.

The rather novel and interesting case of *Kirven v. Virginia-Carolina Chemical Co.,* 77 S. C. 493, 58 S. E. 424, was decided in 1907, and at that time the Supreme Court consisted of the Chief Justice and three Associate Justices, and when the Court was equally divided the result was the affirmance of the Circulit Court.

The facts out of which this case arose were that Kirven had given his note to the Chemical Company in a certain sum for fertilizers which he had bought from the Company, which upon maturity of the note brought action against him on the obligation, which was instituted in the United States Circuit Court. Kirven's answer at first contained the defense

that the fertilizers furnished were deleterious and destructive to crops, but later he was permitted to withdraw this defense. This action resulted in a judgment in favor of the Chemical Company. Thereafter Kirven instituted in the Court of Common Pleas the action against the Chemical Company which came to our Supreme Court, based upon his complaint that the defendant Company was liable to him for damages by reason of the deleterious and destructive character of the fertilizers sold to him, and the case came on to be tried before Judge Klugh and a jury, resulting in a verdict for the plaintiff, Kirven; and from the judgment entered thereon the defendant appealed to the Supreme Court.

It was duly contended in the trial of the case that the judgment rendered in the United States Circuit Court in favor of the Chemical Company on the note given by Kirven for the fertilizers in question was a bar to his action in the State Court, because *res judicata*. But upon the appeal the leading opinion was delivered by Mr. Justice Gary, which held that while the actions were between the same parties, they were upon different claims, one being upon a promissory note and the other for unliquidated damages, and besides, the question raised in the State Court was not actually litigated and determined in the Federal Court. Mr. Justice Woods filed a concurring opinion in which he stated, among other things:

> Having such a cause of action against the Virginia-Carolina Chemical Company, Kirven had a right to choose his own time and his own tribunal for asserting it, and could not be forced to assert it at the time and before the tribunal chosen by the Company. This conclusion is, I think, in accord with the principles laid down in *Hart v. Bates*, 17 S. C., 40.

However, Chief Justice Pope filed a dissenting opinion to the effect that the Federal Court having adjudged that the fertilizers were of such value that Kirven was required to pay the note given for the same, the resulting judgment was a bar to his action in the State Court "as a matter of public policy"; and Mr. Justice Jones concurred in the view that there should be a reversal upon this ground. The result was that the judgment of the Circuit Court was affirmed by an equally divided Court.

The foregoing recital sufficiently shows that the *Kirven* case not only relates to the third essential element of *res judicata,* but also to the second element, which is that the subject-matter must be the same. The phrase "subject-matter" is more comprehensive than "cause of action"; and one of the corollaries of the principle of *res judicata* is that a cause of action must not be split. *Lawton v. New York Life Insurance Co.,* 181 S. C. 230, 186 S. E. 909 (1936).

Since the cause of action may not be split, the same rule logically applies to a claim set up by way of defense, and the leading case of *Mitchell v. Federal Intermediate Credit Bank of Columbia,* 165 S. C. 457, 164 S. E. 136, 83 A. L. R. 629 (1932), is quite apposite, for it was therein held:

> One who sets up as a defense to an action on promissory notes liability of the holders to him in a sum in excess of the amount of the notes, without seeking affirmative relief, cannot, even though successful in establishing such defense, thereafter maintain a separate action against such holders for the balance.

The opinion in this case, delivered by Mr. Justice Stabler, is of special value because of its comprehensive consideration of the relevant authorities, including of course the *Kirven* case, which was properly distinguished in certain respects. But the Court rather clearly intimates that the *Kirven* case, decided by an evenly divided Court, in the light of later decisions, is at least of limited authority, although the same was not overruled.

But in the application of the elements of *res judicata* to cases involving varying and unusual facts and conditions, the most difficult one of the elements is the first, namely, "the parties must be the same, or their privies." Of course where the parties are actually the same there is no difficulty. But what is privity in this sense? The word "privity" is defined in Baldwin's Century Edition of Bouvier's Law Dictionary as: "The mutual or successive relationship to the same rights of property." But this is too concise, and we quote the following more explanatory statement from 72 C. J. S. 954-955:

> Although it has been said that there is no definition of the word "privity" which can be applied in all cases, as most generally defined, and in its broadest sense, "priv-

ity" is the mutual or successive relationship to the same right of property, or such an identification in interest of one person with another as to represent the same legal right.

An unusually interesting case to students of this general subject, especially because of the extraordinary facts which prevented the application of *res judicata,* is that of *Battle v. DeVane,* et al., reported in 140 S. C. 305, 138 S. E. 821, and decided July 6, 1927.

It appears that Mr. Battle, together with his brother and sister, conveyed on September 14, 1917, the timber upon certain lands, including the small tract involved in this litigation, situate in Horry County, to a certain Lumber Company for a period of five years. The timber deed was in the usual form, except that it did not contain a general warranty and only warranted the title against the grantors and their heirs; and sometime after this timber deed was executed Mr. Battle acquired the interest of his brother and sister.

The Lumber Company having commenced to cut and remove the timber, an action in trespass was brought in the Court of Common Pleas for Horry County by one Soles, who claimed title to the land in dispute, and an injunction *pendente lite* against the Lumber Company was issued by the Court. This case was tried in due course, and resulted in a verdict in favor of the plaintiff, Soles, who was thereupon adjudged to be the owner in fee simple of the land in question, and a permanent injunction was issued against the defendant Lumber Company, there being no other parties to this action; and there was no appeal from this judgment.

After the judgment in favor of Soles he conveyed the timber on the land in question to Mr. DeVane, who commenced to cut and remove the same, whereupon Mr. Battle brought an action in trespass in the Court of Common Pleas for Horry County against DeVane, Soles and an agent of DeVane; and an injunction *pendente lite* against the defendants was duly issued by the Court. This case came on for trial, and at the first trial thereof resulted in a verdict in favor of the defendants. But upon appeal to the Supreme Court the judgment of the Circuit Court was reversed and the case remanded for a new trial, as will appear by reference to the opinion above mentioned, which shows that the reversal was mainly due to errors in the charge of the Presiding Judge.

It further appears that in the course of this trial the defendants offered in evidence the judgment in the case brought by Soles against the Lumber Company as *res judicata,* but the trial Judge held that it was not effective as such, although he admitted it in evidence "for what it is worth in order to establish a chain of title." The Supreme Court made the following statement with regard to this matter:

> The record was admissible to support the claim of *res adjudicata,* or not at all. We shall not consider its admissibility for that purpose, for the reason that the Circuit Judge refused to admit it for that purpose. It should have been admitted to sustain the claim or excluded entirely.

Upon the new trial ordered by the Supreme Court the Presiding Judge excluded the judgment, holding that it could not operate as *res judicata,* and the result of that trial was in favor of the plaintiff, Battle, who was adjudged to be the owner of the premises in fee simple, and the defendants were permanently enjoined from entering upon the tract of land; and there was no appeal.

The result was that Battle found himself as the indefeasible owner of the land in question with the timber thereon practically intact. Such a result may seem anomalous, but when all of the facts are known and considered there is no doubt but that the result was in full accordance with the established law. It is quite true that there may have appeared to be privity between Battle and the Lumber Company because the latter was his grantee, but there was no privity as related to *res judicata* for the simple reason that Battle was under no obligation to the Lumber Company to defend the title, and the well recognized rule laid down in the case of *Newell Construction Co. v. Blankenship,* 130 S. C. 131, 125 S. E. 420 (1924), was directly applicable; and we quote the following from the opinion delivered by Mr. Justice Cothran:

> So that, in order to invoke the principle of *res adjudicata* against one not a party to the action in which the judgment was obtained, it must appear, in the action in which that principle is invoked: (1) That such person was legally bound to, at least partially, indemnify the defendant in the first action against the recovery suffered by him therein.

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It should also be mentioned that while Mr. Battle testified in behalf of the defendant in the trial of the case of Soles against the Lumber Company, there was no evidence that he otherwise concerned himself with that litigation, and hence could not be deemed in anywise a party to the same. See 30 Am. Jur. 960-961, and *Whaley v. Houser*, 18 S. C. 602 (1882).

Finally, we mention another important case involving the question of privity, decided by the Supreme Court by a vote of three to two, namely, the case of *First National Bank of Greenville v. United States Fidelity & Guaranty Co.*, 207 S. C. 15, 35 S. E. 2d 47, 162 A. L. R. 1003 (1945). The holding in this case will be clearly seen by reference to the annotated syllabus, which is as follows:

> Guardian and ward are in privity with each other so as to satisfy the condition of *res judicata* in that regard, where the surety on the official bond of a probate judge, in an action by a guardian, in its individual capacity, to recoup the loss sustained by the guardian when compelled to reimburse the ward for the latter's funds which it had improperly delivered to the probate judge, asserts as a bar a judgment in a previous action to which the ward (represented by a guardian ad litem), but not the guardian, was a party, absolving the surety from liability in respect of the ward's funds on the ground that the probate judge had no legal authority to receive them.