South Carolina Law Review

Volume 28 | Issue 4 Article 4

Winter 2-1-1977

Res Judicats and Collateral Estoppel in South Carolina

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RES JUDICATA AND COLLATERAL ESTOPPEL IN SOUTH CAROLINA

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The concepts of res judicata and collateral estoppel enforce a corollary of the common law's requirement that every individual be given his or her day in court before being either barred from asserting a claim or found liable to another: every individual is entitled to only one such day in court because of the interest of society (as well as that of the adversary party) in an end to litigation.[1] These two concepts are traditionally distinguished by reference to the cause of action attempted to be brought in the second suit. If such cause of action is the same as that involved in the first suit and if the first suit was resolved by a valid and personal final judgment on the merits of the cause of action, that judgment

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1. Hart v. Bates, 17 S.C. 35, 40 (1882). *See also* Watson v. Goldsmith, 205 S.C. 215, 221-22, 31 S.E.2d 317, 319-20 (1944), in which the court apparently distinguishes res judicata, which it agrees rests upon such common law principles, from estoppel, which is the result of equitable considerations. However, a reading of the holding in that case, as well as an understanding of South Carolina's use of the term res judicata, indicates that the estoppel of which the court speaks is not that referred to herein as collateral estoppel. *See* notes 86-89 and accompanying text *infra*.

At least one case, Farmer v. Miller, 39 S.C.L. (5 Rich.) 480 (1852), indicated a second concern underlying res judicata: were the second suit not barred, it might result in a decision contrary to the first judgment. However, since a second suit would not be an appellate proceeding, the first judgment would continue to stand in conflict with the second. "Such results can not be allowed: and hence, therefore, the plaintiff ought to be concluded [by the first judgment]." *Id.* at 484. *See also* Greenwood Drug Co. v. Bromonia Co., 81 S.C. 516, 520, 62 S.E. 840, 842 (1908).

To some extent, the same policies also underlie the distinct South Carolina doctrine of election of remedies. The courts of the state have consistently distinguished the two theories, holding that if the same facts would have supported two causes of action, suit on the second after a judgment on the first is barred because the plaintiff has elected his remedy, not because of any operation of res judicata. If, however, the facts failed to support the first cause of action but would support the second, the plaintiff is barred neither by res judicata (*see* note 71 and accompanying text *infra*) nor by election of remedies. Lancaster v. Smithco, Inc., 241 S.C. 451, 128 S.E.2d 915 (1962); Lafitte v. Tucker, 216 S.C. 201, 57 S.E.2d 255 (1950). Cases usually make a distinction between res judicata and the law of the case, which is a refusal to permit parties to argue the same point twice in the same case. This is a clearer distinction since the concept of res judicata, however defined, begins with the assumption of two consecutive suits. *But see* Montgomery v. Robinson, 93 S.C. 247, 76 S.E. 188 (1912). This article will not deal with election of remedies or the law of the case but will concern itself with res judicata and collateral estoppel.

constitutes an absolute bar to the subsequent action. It concludes the parties and their privies not only as to matters litigated in the first suit but also as to matters which might have been litigated therein. The judgment is said to be res judicata. On the other hand, if the second cause of action is different from the first, the first judgment is binding only as to those matters actually and necessarily litigated and determined in the first suit. It collaterally estops parties or their privies[2] from again disputing the same fact.[3] Unless otherwise indicated in the text, this article will utilize these traditional definitions.[4]

The most frequently cited formulation of the doctrines in South Carolina is stated in the nineteenth century case of *Hart v. Bates*:[5] "[A]t least three things are necessary: the parties must be the same, or their privies; the subject-matter must be the same, and the precise point must have been ruled."[6] By 1922 the court had come to realize the inadequacy of this third requirement and amplified it in *Johnston-Crews Co. v. Folk*:[7]

> 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

2. The extent to which persons other than parties or their privies may utilize the doctrine of collateral estoppel is discussed at notes 119-33 and accompanying text *infra*.

3. Cromwell v. County of Sac, 94 U.S. 351 (1876).

4. Other definitions of res judicata are clearly possible. The term is sometimes used, as in South Carolina and the RESTATEMENT (SECOND) OF JUDGMENTS (Tent. Draft Nos. 1, 1973, and 2, 1975) [hereinafter cited as RESTATEMENT (1) and RESTATEMENT (2)] to refer to both res judicata and collateral estoppel. The *Restatement* also, however, separates the concept into three parts: merger and bar, direct estoppel, and collateral estoppel. Certain texts refer to claim preclusion and issue preclusion. As long as each concept is understood and differentiated from the other, it seems to make little difference which term is used, provided the usage is consistent.

5. 17 S.C. 35 (1882). *See also* Smith v. Smith, 55 S.C. 507, 510, 33 S.E. 583, 584 (1899).

6. Hart v. Bates, 17 S.C. 35, 40 (1882).

7. 118 S.C. 470, 111 S.E. 15 (1921).

> conclusiveness as to matters which might have been litigated has no application.[8]

Thus, by introducing in the *Johnston-Crews* case the concept of a cause of action and its possibly broader preclusionary impact as only one example of the prohibition against relitigating the same issue, South Carolina has developed the doctrine of res judicata as a corollary to the doctrine of collateral estoppel and has termed both the basic rule and its subsidiary res judicata. To determine the precise effect of a former judgment in a subsequent suit, it is necessary to determine first in each case which doctrine is being used. The analysis which follows, therefore, is divided into two major parts according to the traditional definitions and is concentrated in each instance on the primary difficulties of the doctrine.

I. RES JUDICATA[9]

A. *The Scope of a Cause of Action*

1. The Plaintiff's Viewpoint

Essential to a decision that one suit in its entirety is barred by a judgment in a former suit is a determination that both suits rest upon the same cause of action. The formulation of South Carolina's doctrine unfortunately adds the issue of whether the cause of action expressed by a complaint is the same thing as the

8. *Id.* at 482, 111 S.E. at 18; *accord*, Mitchell v. Board of Trustees, 380 F. Supp. 197, 199 (D.S.C. 1973).

9. In addition to the requirements for applying res judicata discussed below, it is also necessary that the judgment have been rendered by a competent court. The distinction between courts of law and equity, prior to their merger, was irrelevant in those cases where their subject matter jurisdiction was coextensive, *see, e.g.*, Henderson v. Mitchell, 8 S.C. Eq. (Bail. Eq.) 113 (1830), but the distinction between civil and criminal proceedings, in the context of res judicata, is not. A criminal judgment will not support a plea of res judicata in a civil action. Frierson v. Jenkins, 72 S.C. 341, 51 S.E. 862 (1905). If that judgment is admissible in the civil suit because it is based upon an admission (plea) of guilt by defendant, it is of evidentiary value only and is not conclusive. Globe & Rutgers Fire Ins. Co. v. Foil, 189 S.C. 91, 200 S.E. 97 (1938). Whether or not bodies not designated as courts may render judgments binding on the parties in a subsequent suit depends upon the nature of the body and the cause of action involved. *Compare* Derrick v. Gaston School Dist., 172 S.C. 472, 174 S.E. 431 (1934) (suit by plaintiff before the Board of Education determining his right to teach in the district conclusive in his subsequent suit for back pay) *with* County of Richland v. Miller, 16 S.C. 244 (1879) (decision by the Board of Commissioners expressed in audit not conclusive of plaintiff's suit to recover funds distributed to defendant pursuant to audit). *See also* McKee v. Town-Council of Anderson, 24 S.C.L. (Rice) 24, 26 (1838).

subject matter of a suit to the inevitable difficulty of defining a cause of action. Courts which have addressed the question directly agree that the phrases refer to separate concepts: a single cause of action can involve only a single subject matter, but numerous causes of action may spring from that one subject matter.[10] Nonetheless, a decision that res judicata bars a second suit frequently begins with a discussion of the identity of the causes of action and ends with a holding which apparently rests on the identity of the subject matter involved.[11] As long as the first determination is made, the second is irrelevant. Difficulties arise when that first determination is ignored, and the line between res judicata and collateral estoppel is consequently blurred.

Cases in South Carolina have presented two primary tests for determining the identity of causes of action in the context of res judicata: 1) would the same evidence support both suits; and/or 2) does each suit involve the same primary right and primary duty.

The first evidentiary test apparently stems from the South Carolina Supreme Court's more general procedural definition of a cause of action as that group of factual elements which gives rise to a legal right to relief.[12] If the same evidence would be necessary in both suits, the same elements would be necessary in

10. *See* Chick Spring Water Co. v. State Highway Dep't, 178 S.C. 415, 424-25, 183 S.E. 27, 31-32 (1935). *See also* Harth v. United Ins. Co. of America, 266 S.C. 1, 221 S.E.2d 102 (1975); Griggs v. Griggs, 214 S.C. 177, 185, 51 S.E.2d 622, 626 (1949); Whaley v. Stevens, 21 S.C. 221 (1883). For example, where the plaintiff has once adjudicated his right to continuing disability payments under an insurance contract and sues a second time to recover unpaid installments due under the same contract after the first judgment, his second suit involves a separate cause of action although the subject matter of both suits is the same. *See* Dunlap v. Travelers Ins. Co., 223 S.C. 150, 74 S.E.2d 828 (1953).

11. For an example of this judicial reasoning, see Davis v. Town of West Greenville, 147 S.C. 448, 450-51, 145 S.E. 193, 194 (1928) (two class actions to enjoin the issuance of bonds; the causes of action held to be the same; the second suit is barred because of identity of parties and subject matter).

12. Griggs v. Griggs, 214 S.C. 177, 184, 51 S.E.2d 622, 626 (1949); Johnston-Crews Co. v. Folk, 118 S.C. 470, 478, 111 S.E. 15, 17 (1922); Tillie v. Glens Falls Ins., 208 F. Supp. 921 (W.D.S.C. 1962). At least one case, Norton v. Planters Fertilizer & Phosphate Co., 206 S.C. 119, 33 S.E.2d 247 (1945), indicates that the identity of evidence may reflect a broader identity than that of the elements of a cause of action. The court discussed not only the material allegations but also the gravamen of each complaint and in their substantial similarity found reason to bar the second suit. *Id.* at 126, 33 S.E.2d at 429. However, the court rested its final decision on a series of holdings paralleling the *Hart* formulation, and thus the opinion cannot be read to broaden consciously the definition of a cause of action in the context of res judicata to the federal rules' "claim upon which relief may be granted." FED. R. CIV. P. 8. *See* notes 32-38 and accompanying text *infra*.

both, and hence both rest upon the same cause. This connection between evidence and causes of action is reflected in manifold cases which hold that a second suit, differing from the first only in the addition of evidence, is barred by res judicata.[13] Whether that evidence speaks to an issue raised in the first suit[14] or to an issue which, though not raised in that suit, should and could have been determined there[15] is irrelevant. In either event the plaintiff is concluded by the first judgment and is prevented from relitigating the same claim in a more complete fashion. The only exception to this general rule involves extrinsic fraud discovered after the first judgment. In circumstances where such fraud could not have been reasonably discovered at the time of the first suit,[16] the second suit may raise the new issue and support it with new evidence. This principle rests upon what the courts recognize as a different cause of action.

The most recent South Carolina Supreme Court decision which defines a cause of action within the context of res judicata,

13. *See, e.g.*, Moseley v. Welch, 218 S.C. 242, 62 S.E.2d 313 (1950).

14. Clanton's Auto Auction Sales, Inc. v. Campbell, 230 S.C. 65, 75, 94 S.E.2d 172, 177 (1956) (additional evidence of plaintiff's ownership by assignment of destroyed vehicle held insufficient to support second suit; note that the court reached its decision by considering the identity of parties and issues rather than the causes of action); Winthrop v. Mullins, 211 S.C. 351, 355, 45 S.E.2d 332, 334 (1947) (additional evidence to support changing sum allegedly owing to plaintiff insufficient to support second suit); Tate v. Hunter, 22 S.C. Eq. (3 Strob. Eq.) 136 (1849) (additional evidence of prior payments made to the defendant insufficient to support second suit); Thrift v. Bell Lines, Inc., 269 F. Supp. 214 (D.S.C. 1967) (additional allegations of fraudulent conduct involving a third party insufficient to support second suit).

15. Taylor v. Taylor, 241 S.C. 462, 128 S.E.2d 910 (1962) (divorce decree concludes plaintiff requesting alimony because of changed condition when no such caveat appears in decree); Winthrop v. Mullins, 211 S.C. 351, 356, 45 S.E.2d 332, 334 (1947) (plaintiff's claim for value of services pursuant to a contract for payment by will in second suit should have been raised in first suit to enforce a contract to make a will and is barred by res judicata); Nelson v. Parson, 187 S.C. 478, 198 S.E. 401 (1938) (claim against defendant as assignee of an insurance policy barred by prior suit seeking to recover the same funds against defendant as administrator); Barnes v. Cunningham, 30 S.C. Eq. (9 Rich. Eq.) 475 (1857) (evidence of wife's ownership of land claimed by husband's estate barred by first suit in which wife failed to claim land in original partition of husband's estate). Obviously if the issue raised by the second suit could not have been raised earlier because of inconsistencies with the allegations in the first suit, the first judgment is no bar. The same evidence would not have supported both positions and, furthermore, the causes of action are distinct. Nelson v. Parson, 187 S.C. 478, 482, 198 S.E. 401, 402 (1938); Johnston-Crews Co. v. Folk, 118 S.C. 470, 477-78, 111 S.E. 15, 17 (1922).

16. *Compare* Hart v. Bates, 17 S.C. 35 (1882) *with* Prickett v. Duke Power Co., 49 F.R.D. 116 (D.S.C. 1970), *aff'd* 429 F.2d 984 (4th Cir. 1970). *See also* Henderson v. Mitchell, 8 S.C. Eq. (Bail. Eq.) 113 (1830).

Harth v. United Insurance Co. of America,[17] initially utilizes the second test, whether the series of actions there involved a single primary right of the plaintiff and a single primary duty owed the plaintiff by the defendant. By requiring that both the right and the duty be the same before one cause of action rather than two is found, the case is in accord with some older authority in the state.[18] However, there is at least some authority for the proposition that only the duty and its breach comprise the cause of action.

In *Chick Springs Water Co. v. State Highway Department*,[19] the plaintiff first sued for water damage to his land allegedly caused by the defendant's negligent construction of a culvert; judgment was for the defendant. Subsequently the plaintiff demanded that the culvert be enlarged; it was not and, when water once again overflowed the plaintiff's land, he sued for the resultant damages, alleging that the defendant had negligently failed to enlarge the culvert. Reversing a judgment for the defendant based upon res judicata, the supreme court held that the cause of action in each case alleged a separate legal wrong (permitting the overflow) or the damage done by the overflow. The subject matter was the negligent construction of the culvert in the first suit and the negligent refusal to enlarge it in the second.[20] Because both the cause of action and the subject matter of each suit were different, res judicata was held to provide no bar to the second suit. Apparently the court, beginning with the correct statement that the cause of action is a thing separate from its subject matter,[21] in effect split the proper definition of a cause of action to avoid reaching a contrary decision under the *Johnston-Crews* formula. The subject matter of the actions is clearly identical; the court's understanding of the existence of two duties owed to the plaintiff, one involving the original construction and the other the maintenance of the culvert, provides a more accurate

17. Harth v. United Ins. Co. of America, 266 S.C. 1, 221 S.E.2d 102 (1975).

18. Davis v. Town of West Greenville, 147 S.C. 448, 450, 145 S.E. 193, 194 (1928); Johnston-Crews Co. v. Folk, 118 S.C. 470, 478-80, 111 S.E. 15, 17 (1922).

19. 178 S.C. 415, 183 S.E. 27 (1935).

20. *Id.* at 425-26, 183 S.E. at 31. It should be noted that a dissent was filed based upon an understanding of the plaintiff's first claim as one for permanent damages resulting from the negligent construction of a permanent structure. Thus arguably the second suit was only an attempt to recover additional damages dependent upon the same cause of action as the first and was barred by the judgment therein. *See* notes 22 & 24 and accompanying text *infra*.

21. *See* note 10 and accompanying text *supra*.

rationale for the existence of two causes of action and the result thus reached.[22]

In order to justify the *Chick Springs* result under *Harth*'s more stringent definition of a cause of action, it is essential that the duties of the defendant be distinct, since the mere fact of additional alleged damages is clearly insufficient to support a second suit. For example, only one cause of action accrues to a plaintiff who has suffered both personal and property damage because of a single negligent act of the defendant. An attempt to recover each element of damage in a separate suit constitutes splitting the cause of action.[23] So too, a plaintiff must claim all damages resulting from all breaches of a contract in one suit or lose the right to recover for the unpled breaches.[24] Of course, if the second breach of duty occurred subsequent to the first suit, the plaintiff may institute a second suit for the resultant damage. The clearest example of this situation is a second suit for a second installment due on a contract or a second payment on an insurance policy, the right to which had not accrued at the time of the first suit. A prior judgment for previous installments or payments may well have collateral estoppel effect, but it does not bar the second claim.[25]

Certain other fact situations which arise frequently have been viewed by the courts as subject to individual rules defining the scope of the plaintiff's cause of action. In fact, most are more easily understood as specific examples of the general rule restated

22. At least part of the court's confusion may have stemmed from language in BLISS, CODE PLEADING 214 (3d ed.), *cited in* Holcombe v. Garland & Denwiddie, Inc., 162 S.C. 379, 388, 160 S.E. 881, 884 (1931). There the approved definition of cause of action also revolved around the alleged wrong or breach of duty without a clear statement that an understanding of a wrong is dependent on a determination of a primary right in the plaintiff. However, the subject matter was defined as the thing involved in the dispute, *e.g.*, the property or contract or, here, the land and the culvert.

23. *See* note 20 and accompanying text *supra*.

24. Smith v. Volunteer State Life Ins. Co., 201 S.C. 291, 308, 22 S.E.2d 885, 891-92 (1942). *See also* Allen v. Southern Ry., 218 S.C. 291, 295, 62 S.E.2d 507, 509-10 (1950); Floyd v. American Employers' Ins. Co., 187 S.C. 344, 197 S.E. 385 (1938). Even if the plaintiff in the second suit is requesting an entirely different remedy rather than merely a differing amount of damages, no new cause of action is made out. Evans v. Creech, 187 S.C. 371, 378, 197 S.E. 365, 367-68 (1938).

25. Dunlap v. Travelers Ins. Co., 223 S.C. 150, 157-58, 74 S.E.2d 828, 831 (1953). *See also* Martin v. Sears Roebuck & Co., 189 S.C. 48, 200 S.E. 87 (1938); Bank of S.C. v. Bridges, 45 S.C.L. (11 Rich.) 87 (1857). The same logic prevents utilization of res judicata as a bar to subsequent litigation if the first judgment involved a verdict directed only at one of two claims presented by the pleadings. On the second claim, the plaintiff has not had his day in court. *See* Duren v. Kee, 41 S.C. 171, 19 S.E. 492 (1894).

in *Harth* that both the primary right and duty must be identical in order for res judicata to bar a second suit. For example, a defendant may be sued separately for damages resulting from the wrongful death of plaintiff's deceased and for injuries to the deceased under a survival statute.[26] The duty breached in both cases may be the same but the rights are separate. Similarly, a suit for damages resulting from personal injuries does not bar another suit by the injured party's spouse[27] or parent[28] for loss of services or for medical care. Again, the rights of the plaintiff which were breached by a single negligent act of the defendant are distinct.[29] The South Carolina rule which prevents a plaintiff from suing joint tort-feasors seriatim[30] rests on the same logic: one primary right was breached once; the fact that breach was allegedly the result of joint activity does not multiply it. The state has by legislation created one exception to this (or any other) definition of res judicata, permitting a plaintiff to sue twice to recover possession of real property.[31] However, this is clearly an exception to,

26. Deaton v. Gay Trucking Co., 275 F. Supp. 750 (D.S.C. 1967); Peeples v. Seaboard Air Line Ry., 115 S.C. 115, 104 S.E. 541 (1920).

27. Gillespie v. Ford, 225 S.C. 104, 112-13, 81 S.E.2d 44, 47-48 (1954) (wife's suit for injuries presents different cause of action than does husband's claim for loss of consortium). *See also* Priester v. Southern Ry., 151 S.C. 433, 436, 149 S.E. 226, 227 (1929); Arant v. Stover, 307 F. Supp. 144, 148 (D.S.C. 1969).

28. Hall v. Waters, 132 S.C. 117, 128 S.E. 860 (1925). Of course, damages awarded to a child for personal injuries bar a claim for the same damages by the parents. Kapuschinsky v. United States, 259 F. Supp. 1 (D.S.C. 1966).

29. Another example of separate rights breached by a single act of the defendant giving rise to separate causes of action arises when a debt is secured by one or more bonds or mortgages. A determination that the mortgage was not properly executed will not defeat a claim made on the underlying, otherwise proved, debt. Wagener & Co. v. Kirven, 52 S.C. 25, 34, 29 S.E. 390, 393 (1898). Nor will a judgment on a guarantee preclude suit on a bond. Meinhard, Greeff & Co. v. Brown, 199 F.2d 70 (4th Cir. 1952).

That these decisions rest upon the concept of multiple rights in the plaintiff is clearly shown by Ayers v. Guess, 217 S.C. 233, 60 S.E.2d 315 (1950). There, the court permitted the plaintiff to foreclose a real estate mortgage upon breach of a condition of bond which it secured and also to foreclose a mortgage on personal property which secured the same bond. The dissent maintained that the second suit was barred by the first since the plaintiff had split one cause of action; the plaintiff had one right secured by multiple instruments rather than a separate right deriving from each instrument as the majority held. The position of the dissent, however, is best understood as a definition of the scope of the cause of action which includes all claims arising out of one transaction. *See* notes 32-38 and accompanying text *infra*. It is difficult to justify the proposition that, if one mortgage were found ineffective, the right of the plaintiff to foreclose the other would be nonexistent.

30. Atlantic Coast Line R.R. v. Whetstone, 243 S.C. 61, 132 S.E.2d 172 (1963); Camp v. Petroleum Carrier Corp., 204 S.C. 133, 28 S.E.2d 683 (1944).

31. S.C. CODE ANN. § 10-2402 (1962). The second suit may be brought only when the

rather than a definition of, the scope of a cause of action and does not affect any situation other than that directly subject to the statute.

Finally, a few cases in South Carolina utilize a third definition of cause of action which is similar to the transactional definition of the *Restatement*.[32] This approach, in addition to the primary right-duty test discussed above, is reflected in *Harth*, where the plaintiff had allegedly been fraudulently induced to continue making premium payments after the underlying policy had expired. An agent collected twelve such premiums and the plaintiff brought twelve suits. The defendant moved to dismiss the last eleven complaints and appealed the lower court's refusal to do so. The supreme court agreed that the plaintiff had only one cause of action and ordered the complaints consolidated.[33] While initially relying on the more traditional definition revolving around primary rights and duties,[34] the court nonetheless stated:

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plaintiff is out of possession and has lost the first suit. Winn v. Grantham, 263 S.C. 368, 210 S.E.2d 602 (1974). The statute is inapplicable in all other situations. For example, if *A* has been ousted of possession as a result of a suit by *B*, he may not sue *B* for possession of the same realty; he is barred by res judicata. Ladd v. DuPre, 247 S.C. 328, 331, 147 S.E.2d 253, 255 (1966).

Cases which deal with the same exception under older authority and which define the scope of the cause of action which may be brought twice include Farmer v. Miller, 9 S.C.L. (5 Rich.) 480 (1852) (right to second suit lost when trespass to try title replaced ejectment); *accord*, Thomas v. Geiger, 11 S.C.L. (2 Nott & McC.) 528 (1820). *Contra*, Dyson v. Leek, 36 S.C.L. (5 Strob.) 141 (1850); Bradley v. McBride, 9 S.C. Eq. (Rich. Cas.) 202 (1832) (suit for trespass to try title does not include ability to obtain the setting aside of a sale and the refund of the purchase money); Coleman v. Parish, 12 S.C.L. (1 McC.) 264 (1821) (trespass to try title includes both the older actions of ejectment and the recovery of mesne profits); *accord*, Sumter v. Lehie, 6 S.C.L. (1 Tread.) 102 (1812).

32. RESTATEMENT (1), *supra* note 4, at § 61. Discussing the scope of a cause of action within the context of what this article has termed res judicata, the section in pertinent part states:

> (1) [T]he claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

33. The court refused to bar the last eleven claims for damages because, since the first suit had as yet to be tried, the plaintiff had not had her day in court. The purpose of the interlocutory appeal was to determine the number of her causes of action, not to bar her from full relief. 266 S.C. at 7, 221 S.E.2d at 105.

34. *See* text accompanying notes 17 & 18 *supra*.

> Although [plaintiff] has a right to be free from fraud and each of the agent's trips to collect [each premium] *might contain all the technical elements necessary to constitute a separate invasion of [plaintiff's] right*, when judicial relief is sought the court must consider alleged wrongs in their factual environment, taking into consideration the totality of circumstances. Nothing is served by allowing [plaintiff] to prosecute her action piecemeal, harassing [defendant] and the courts by maintaining twelve separate suits all identical except dates which run consecutively. . . .[35]

In support of its decision, the court cited *Brice v. Glenn*.[36] There the court, instead of finding a separate cause of action arising from each wrongful act of the defendant, held that the totality of the property lost through the series of breaches of duty was the limit of the cause, and the defendant's motion to dismiss for improper joinder therefore failed.[37] Other earlier cases, although failing to recognize or to state the implication of their holdings, also point toward a transactional rather than right-duty definition.[38] Such a departure from the state's general concern

35. 266 S.C. at 7, 221 S.E.2d at 105 (emphasis added). It should be noted that each invasion of the plaintiff's right would be proved by different, though similar, evidence.

36. 165 S.C. 509, 164 S.E. 302 (1932).

37. In discussing *Brice*, the *Harth* court discussed its definition of subject matter. 266 S.C. at 6, 221 S.E.2d at 105. However, from the context of the decision and its use of the *Brice* precedent, it is clear that the court's approval of a broad view was directed toward the definition of a cause of action. Whether the courts in either *Brice* or *Harth* would have been willing to use such a broad definition had the result been to bar the plaintiff from recovery is uncertain. However, the court did not comment on this factor in reaching its result, and it would not affect the logic of either opinion.

38. Greer v. Western Union Tel. Co., 105 S.C. 147, 89 S.E. 782 (1916). Defendant allegedly failed to deliver a telegram to the plaintiff informing him of his father's death. Plaintiff sued first for breach of a statutory duty and resultant damages from mental anguish. His second suit for a breach of common law duty involving a willful failure to deliver the telegram was barred.

> The transaction is the same in every detail . . . . It was the duty of the plaintiff to put in issue in [the first] suit every issuable matter which *naturally and directly arose out of that transaction*. If the single transaction, the omission by the defendant, involved the breach of a statute and at the same time a breach of the common law, then for such breaches the defendant ought to be sued only once.

Id. at 151, 89 S.E. at 783 (emphasis added).

Possibly the court was relying *sub silentio* on the idea that a cause of action arises when the injury is done. While that rule, utilized in decisions involving statutes of limitations, may well define the time a right to sue accrues, it does not speak directly to the question of how many such rights accrue. Alternatively, the case can be explained on the basis that the plaintiff elected his remedy in the first suit and hence may not sue again.

with the elements of a cause of action would be dramatic and cannot be confidently expected anytime in the near future. It would, however, serve the policies underlying res judicata[39] and, in the absence of a more clearly defined doctrine of collateral estoppel, may be the simplest way to prevent relitigation of issues already determined.

2. The Defendant's Viewpoint

Once it has been determined that two suits rest upon the same cause of action, res judicata bars the pursuit of the second; the plaintiff is said to have impermissibly split his cause of action.[40] The primary corollary of the rule which affects the defendant thus prohibits him from using in a second suit defenses which were available to him but not used in the first suit. All defenses must be pled or they are lost.[41] For example, *A* sues *B* on a promissory note; *B* defaults and judgment is entered for *A*. Res judicata bars a suit by *B* against *A* to recover sums paid to *A* under the note on the ground that the note was improperly executed.[42] Similarly, the foreclosure of a mortgage pursuant to a default judgment for *A* against *B* prevents *B* from attempting to set aside the resulting sale of the property alleging an invalid

However, the court clearly understood itself to be applying the doctrine of res judicata. In any event, the right-duty analysis strictly applied would have surely allowed the second suit, and the evidence to support a claim of willful withholding would certainly differ from that necessary to sustain a claim of negligence. While the court treated the second suit as involving the same telegram, apparently two telegrams were actually involved, a fact which was obscured by the repetition in the second suit of the first complaint. The logic of the opinion remains unaffected by the change in the facts. *See also* Washington v. Western Auto Supply Co., 230 S.C. 424, 428, 96 S.E.2d 63, 65 (1957) (the state claim and delivery statute contemplates "the settlement in one suit of all questions that might arise out of the unlawful taking or detention of the property"); Watson v. Goldsmith, 205 S.C. 215, 223, 31 S.E.2d 317, 320 (1944); Rowand v. Fraser, 30 S.C.L. (1 Rich.) 325, 330 (1845) (in determining whether a defendant, in the absence of any compulsory counterclaim rule, may utilize facts which support a defense as the basis of a separate and independent claim against the plaintiff, "if the matter of defence be *connected with* the plaintiff's cause of action, by originating in the same transaction," the first judgment bars the second suit) (emphasis added).

39. Of course, the adoption of any such broad definition of cause of action within the context of res judicata assumes that, under other state procedural rules, litigation of the entire controversy was possible in a single suit. If, because of rules regarding joinder of claims, inconsistent theories, etc., such litigation is not initially permissible, the second suit should not be barred. *See* RESTATEMENT (1), *supra* note 4, at § 61.2(c).

40. Melton v. Melton, 229 S.C. 85, 91 S.E.2d 873 (1956).

41. McLeod v. Sandy Island Corp., 264 S.C. 463, 466-67, 215 S.E.2d 903, 905 (1975); Griggs v. Griggs, 214 S.C. 177, 189, 51 S.E.2d 622, 628 (1949).

42. Davis v. Murphy, 31 S.C.L. (2 Rich.) 560 (1846).

foreclosure; any defense to the foreclosure should have been raised in the first suit.[43]

Not only must the defendant raise or lose all his defenses, but he must also support them to the best of his ability the first time they are used. Just as the plaintiff may not create a new cause of action by the addition of new evidence,[44] so too a defendant may not create a new defense by a similar method.[45]

Facts which support a defense to one suit may also support a claim for relief against the plaintiff therein. Obviously if the defendant has presented those facts as a defense[46] to the original suit and lost, he may not relitigate the same facts in an independent second suit; he is barred by res judicata.[47] However, if either the facts are not used as a defense to the first action or those facts supported a successful defense to that action, the defendant's ability to utilize the same facts as the basis of an independent claim against the first plaintiff is less certain. Provided that the facts not used as a defense to the first action actually support a separate claim for relief, in the absence of any compulsory coun-

43. Antrum v. Hartsville Prod. Credit Ass'n, 228 S.C. 201, 89 S.E.2d 376 (1955). *See also* Baitary v. Gahagan, 195 S.C. 520, 525, 12 S.E.2d 735, 737 (1940); Earle v. Earle, 33 S.C. 498, 504, 12 S.E. 164, 165 (1890); Rice v. Mahaffey, 9 S.C. 281, 282 (1878); Upson v. Horn, 34 S.C.L. (3 Strob.) 108, 111 (1848). The court in *Antrum* stated that the application of a bar to issues which might have been but were not litigated in a former action rests upon a doctrine of estoppel rather than of res judicata. 228 S.C. at 209, 89 S.E.2d at 379-80. That statement stems, however, from the definition of the doctrine contained in Hart v. Bates, 17 S.C. 35 (1882), and serves only to confuse the applicable law. When compared to holdings that, if the causes of action are separate, parties are estopped from relitigating only issues *actually* litigated in a former suit, its absurdity becomes apparent. *See* notes 114 & 115 and accompanying text *infra*. The comment is understandable only if South Carolina defines res judicata not as encompassing both res judicata and collateral estoppel, but rather defines res judicata as collateral estoppel and collateral estoppel as res judicata. Fortunately, no other case directly states such a position (*but see* similar indications in Watson v. Goldsmith, 205 S.C. 215, 221, 31 S.E.2d 317, 319 (1944)) and the all-encompassing usage of the term remains common.

44. *See* notes 13-15 and accompanying text *supra*.

45. Sharpe v. Huggins, 114 S.C. 40, 102 S.E. 788 (1920); Jones v. Weathersbee, 35 S.C.L. (4 Strob.) 50 (1849).

46. Watson v. Goldsmith, 205 S.C. 215, 223-24, 31 S.E.2d 317, 320 (1944); Greenwood Drug Co. v. Bromonia Co., 81 S.C. 516, 521, 62 S.E. 840, 842 (1908).

47. Such a bar depends, of course, on the legal ability of the defendant in the first suit to present the facts which constitute his defense as a request for affirmative relief. If state law precludes a counterclaim under the facts involved, *see* Complete Auto Transit, Inc. v. Bass, 229 S.C. 607, 93 S.E.2d 912 (1956), if the amount claimed by the defendant is in excess of the court's jurisdiction, *see* Brother Int'l Corp. v. Southeastern Sales Co., 234 S.C. 573, 109 S.E.2d 444 (1959), or if the first court for any other reason refuses to hear the defendant's claim, *see* Salinas & Co. v. Aultman & Co., 45 S.C. 283, 22 S.E. 889 (1895), a second suit based on the same facts is permitted.

terclaim rule in the state,[48] the initial defendant may institute a separate suit subsequent to the first judgment.

Virginia-Carolina Chemical Co. v. Kirven[49] involved an initial suit on a note for the payment of goods sold and delivered. Originally, the defendant's answer alleged want of consideration, maintaining that the goods were defective, and it was accompanied by a statement of damages caused to his property from the use of those goods. A supplemental answer, accepted by the trial court, deleted that defense; judgment was for the plaintiff. The defendant then sued the plaintiff for damages suffered as a result of his use of the goods sold to him by the plaintiff; a defense of res judicata was denied. The United States Supreme Court found the causes of action were separate and distinct. While Kirven could not have sued to rescind the note for want of consideration (a defense to the first suit), he could have maintained his claim for unliquidated damages, which had not been raised or decided in the former suit. Subsequent criticism of the case has been devoted to a denial not of its legal premise but rather of its interpretation of the separate nature of a claim for damages.[50] Absent such a separate cause of action, the defendant is clearly barred, since he is in effect simply presenting an unused defense to the first suit.[51]

If the defendant counterclaims against the plaintiff in the first suit, relitigation of the cause of action underlying the counterclaim is barred by the same basic principle which prevents a plaintiff from suing twice on the same cause of action;[52] the differ-

48. *See* H. LIGHTSEY, JR., SOUTH CAROLINA CODE PLEADING 199-205 (1976).

49. 215 U.S. 252 (1909), *aff'g* 77 S.C. 493, 58 S.E. 424 (1907).

50. Greenwood Drug Co. v. Bromonia Co., 81 S.C. 516, 62 S.E. 840 (1908). The court noted that this also formed the basis for the South Carolina Supreme Court's dissent in *Kirven*:

> The [dissenting] opinion . . . was based upon the view that where a judgment goes against the defendant, and he afterwards sues plaintiff on a cross claim which he might have presented in the first suit but did not, *if the facts which he must establish to authorize his recovery are inconsistent with or opposed to the facts on which recovery was had in the first action*, the former judgment operates as an estoppel.

Id. at 521, 62 S.E. at 842 (emphasis in original). In other words, the policy which in part underlies res judicata and which abhors two inconsistent judgments, *see* note 1 *supra*, demands that a second claim based on facts contrary to those established by the first suit be considered a part of that first cause of action. This position is in accord with that taken by RESTATEMENT (1), *supra* note 4, at § 56.1.

51. Rowand v. Fraser, 30 S.C.L. (1 Rich.) 325, 330 (1845). *See also* notes 41-43 and accompanying text *supra*.

52. Worley v. Greenwood Mfg. Co., 223 S.C. 249, 75 S.E.2d 298 (1953).

ent title which the defendant bears in the first suit is irrelevant. The similar result reached, however, by using facts first as a successful defense and only then as the basis for independent relief in a subsequent suit is not as easily explained.

Mitchell v. Federal Intermediate Credit Bank of Columbia[53] held that such dual usage of the same facts "first as a shield, and then as a sword"[54] constituted the splitting of a single cause of action arising out of the existence of a single primary right and duty and thus barred the second suit for damages. So Mitchell, who had been sued on two notes held by the bank and had successfully defended that action by proving the receipt by the bank of proceeds from the sale of his crop in excess of the amount due under the notes, was prevented from recovering that excess in a subsequent suit. If the state had a compulsory counterclaim rule similar to that of the federal system,[55] or if a cause of action was defined in transactional terms,[56] the result would be clearly justifiable and, for policy reasons such as those which support those doctrines, might well be desirable. However, it is conceptually difficult to maintain that a cause of action is exhausted so as to prevent its second appearance when it is not the basis of any attempt to obtain relief. So too is it difficult to accept that Mitchell's primary right in both suits was the same. In fact, as a defendant, he had the right not to be forced to pay that which had already been paid; as a plaintiff, he certainly should have had the right to recover that which the bank wrongfully withheld from him.[57] The effect of the holding is to enforce a compulsory

53. 165 S.C. 457, 164 S.E. 136 (1932).

54. *Id.* at 471, 164 S.E. at 140, *citing* O'Connor v. Varney, 76 Mass. (10 Gray) 231 (1857).

55. FED. R. CIV. P. 13(a) states in pertinent part:

> **Compulsory counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

56. *See* notes 32-38 and accompanying text *supra*.

57. This becomes more obvious if the bank had held the proceeds from two crops, one of which was sufficient to pay the notes. If Mitchell's proof that the bank held one set of proceeds also necessarily involved proof that it held the other, it is inconceivable that Mitchell would be precluded from recovering the second set of proceeds in a separate suit.

The result of the *Mitchell* decision is contrary to the position taken both by RESTATEMENT (1), *supra* note 4, at § 56.1, Comment d and by RESTATEMENT OF JUDGMENTS § 58, Comment b (1943), which recognize that facts constituting a successful defense might later form the basis of a claim for relief.

counterclaim rule under the rubric of res judicata, an unfortunate result given the lack of clarity in other applications of the doctrine.

B. Judgment on the Merits

Although not included in the *Hart* formulation of the doctrine of res judicata, and therefore not cited as a requirement for its use in all subsequent cases, there is no doubt that South Carolina will not invoke res judicata to prevent a second suit unless the first judgment was rendered on the merits of the case. For this purpose a judgment alone is sufficient; a verdict upon which no judgment has been entered will not support the bar.[58]

Clearly, any judgment for the plaintiff is on the merits.[59] If, however, judgment is entered for the defendant, it is necessary to determine the reason behind the judgment before deciding whether it may be given res judicata effect. State procedure does provide for voluntary nonsuits of the plaintiff,[60] and such a dismissal does not bar a second suit on the same cause of action. In addition, those judgments which dismiss the plaintiff's complaint for want of jurisdiction,[61] as premature,[62] for improper joinder,[63]

58. Whetsell v. Sovereign Camp, W.O.W., 188 S.C. 106, 114-15, 198 S.E. 153, 157 (1938); Durst v. Southern Ry., 161 S.C. 498, 508, 159 S.E. 844, 847 (1931). In *Durst*, however, since all parties and the appellate court had treated the verdict as a judgment, the court held that it was too late for the defendants to raise the objection.

59. *See* Norton v. Planters Fertilizer & Phosphate Co., 206 S.C. 119, 126, 33 S.E.2d 247, 249 (1945) (consent); McCown v. Muldrow, 91 S.C. 523, 540, 74 S.E. 386, 392 (1912) (directed verdict); Weathersbee v. Weathersbee, 82 S.C. 4, 8, 62 S.E. 838, 839 (1908) (consent).

60. Gulledge v. Young, 242 S.C. 287, 130 S.E.2d 695 (1963); Allen v. Southern Ry., 218 S.C. 291, 297, 62 S.E.2d 507, 509 (1950); Kay v. Meadors, 216 S.C. 483, 486-87, 58 S.E.2d 893, 895 (1950); *cf.* RESTATEMENT (1), *supra* note 4, at § 48.1(1)(b) (voluntary nonsuit without prejudice does not bar second suit).

61. Mack v. United States, 29 F. Supp. 65 (E.D.S.C. 1939); Turner v. Walker, 110 S.C. 155, 96 S.E. 481 (1918). Such a decision, however, does conclude the question of jurisdiction as such; *see* Thrift v. Bell Lines, Inc., 269 F. Supp. 214, 218 (D.S.C. 1967) (first dismissal, holding that plaintiff not entitled to bring a de novo action after arbitration bars second suit in same court following same arbitration); *cf.* Abbeville Elec. Light & Power Co. v. Western Elec. Supply Co., 66 S.C. 328, 44 S.E. 952 (1902), *writ of error dismissed*, 197 U.S. 299 (1905), and may conclude as well any other issue actually litigated and ruled upon in the dismissing opinion. *See* Cooper Agency v. McLeod, 247 F. Supp. 57 (D.S.C. 1965); *cf.* RESTATEMENT (1), *supra* note 4, at § 48.1(1)(a) (voluntary nonsuit without prejudice does not bar second suit).

62. Ellison v. Mattison, 112 S.C. 183, 98 S.E. 840 (1918); Timmons v. Turner, 55 S.C. 490, 33 S.E. 571 (1899); *cf.* RESTATEMENT (1), *supra* note 4, at § 48.1(2) (voluntary nonsuit without prejudice does not bar second suit).

63. Thackston v. Shelton, 178 S.C. 240, 244-45, 182 S.E. 436, 438 (1935). *See also*

or for insufficient allegations to sustain the cause of action[64] do not provide the basis for a plea of res judicata. When, however, the dismissal is involuntary and subsequent to the presentation and consideration of evidence, the question of its res judicata effect is less clear.

The court in *Morrow v. Atlanta & Charlotte Air Line Railway*[65] set out the following distinction, dependent upon the reason for the nonsuit:

> A nonsuit is not usually a judgment upon the merits. It was originally given against the plaintiff when he introduced insufficient evidence to support a verdict, or when he refused or neglected to proceed to the trial of the cause, after it had been put at issue. It is different, however, where the plaintiff is nonsuited . . . because the evidence introduced by the plaintiff proves affirmatively as a matter of law that he is not entitled to recover. The difference is that in one instance the plaintiff fails to make out his case; in the other instance he proves affirmatively facts which as a matter of law show that he is not entitled to recover.[66]

The courts have consistently barred a plaintiff from relitigating a claim he has once proved invalid.[67] They have, however, also barred the relitigation of a claim which failed once for a lack rather than a surfeit of evidence.[68] These latter decisions compare two groups of cases, those in which no evidence has been adduced to support an allegation (in which the decision is not on the merits) with those in which the evidence adduced is insufficient to support a verdict and the consequent judgment does bar reliti-

McCrary v. United States Fidelity & Guar. Co., 110 F. Supp. 545 (W.D.S.C. 1953) (dismissal of Georgia suit for failure to join an indispensable party does not bar a suit in South Carolina on the same claim, nor, because of the procedural nature of the rule involved, does it prevent that suit from proceeding absent the third party).

64. Hodge v. Atlantic Coast Lumber Corp., 90 S.C. 229, 232, 71 S.E. 1009, 1010, *rehearing denied*, 90 S.C. 249, 73 S.E. 71 (1911); *cf.* Bell v. Boyd, 252 S.C. 289, 166 S.E.2d 104 (1969). The first dismissal does, of course, conclude the question of the sufficiency of the allegations. *See* Antrum v. Hartsville Prod. Credit Ass'n, 228 S.C. 201, 89 S.E.2d 376 (1955) (in responding to an order to show cause why he should not be forced to vacate property, Antrum argued that foreclosure sale to his predecessor in title was faulty. The return was held insufficient and could not be used later to support an independent claim).

65. 84 S.C. 224, 66 S.E. 186 (1909).

66. *Id.* at 242, 66 S.E. at 192.

67. *See, e.g.*, McIntosh v. Kolb, 112 S.C. 1, 6, 99 S.E. 356, 357 (1918); Hodge v. Atlantic Coast Lumber Corp., 90 S.C. 229, 71 S.E. 1009 (1911).

68. Winthrop v. Mullins, 211 S.C. 351, 356, 45 S.E.2d 332, 333 (1947); Smith v. Volunteer State Life Ins. Co., 201 S.C. 291, 22 S.E.2d 885 (1942).

gation of the claim.[69] The differing results may be justified by an analogy in the first instance to a voluntary nonsuit and in the second to the definition of the scope of a cause of action in the context of res judicata. If no evidence is presented, no issue is decided; new or additional evidence, however, cannot construct a second cause of action.[70] If the language in the *Morrow* opinion referring to insufficiency of evidence extends to include in this first group cases where evidence is introduced which supports a separate cause of action while failing to support the cause pled and also to recognize the continuing ability of the plaintiff to pursue in a second suit his appropriate remedy,[71] then case law has constructed a viable definition of judgments on the merits.[72] The definition is, unfortunately, also an extremely complex one.[73]

C. *Persons Affected by Res Judicata*

The *Hart* formulation of South Carolina's res judicata doctrine sets out clearly the requirement that the parties must be the same or their privies in order for a second suit to be barred. This limitation is universal and relatively uncomplicated on its face. Questions arise in two contexts: 1) if plaintiff and defendant in the first action retain their roles in the second but another party is joined, is the action barred by res judicata; 2) if one of the named parties in the second suit is different from the party named in the first suit, is he in privity with the first litigant and

69. *See* McCown v. Muldrow, 91 S.C. 523, 539-40, 74 S.E. 386, 391-92 (1912).

70. *See* notes 12-15 and accompanying text *supra*.

71. Lancaster v. Smithco, Inc., 241 S.C. 451, 455-56, 128 S.E.2d 915, 919 (1962) (evidence of violation of warranty insufficient to support an allegation of intent to deceive; second suit for breach of warranty not barred); Wood v. Champion Paper & Fibre Co., 157 F. Supp. 393, 394 (W.D.S.C. 1957) (evidence of constructive possession insufficient to support trespass *quare clausum fregit*; second suit for trespass to try title not barred).

72. *But see* Gary v. Nationwide Mut. Ins. Co., 249 S.C. 101, 105, 152 S.E.2d 689, 691 (1967), in which the court, justifying its grant of a voluntary nonsuit despite the defendant's claim of prejudice, stated that the result would have been the same had the defendant's earlier request for an involuntary nonsuit been granted. The plaintiff had introduced evidence prior to the defendant's motion; when his rebuttal evidence was denied, he requested and was granted a voluntary nonsuit. "The law is well established in this jurisdiction that the granting of an involuntary nonsuit for insufficiency of evidence is not a decision on the merits, and is not res judicata. Had appellant's motion been granted, the plaintiff could have brought *the action* again." *Id.* at 105, 152 S.E.2d at 691 (emphasis added).

73. *Cf.* FED. R. CIV. P. 41 (b), which states that all dismissals, other than those for lack of jurisdiction, improper venue, or failure to join an indispensable party shall be adjudications upon the merits unless otherwise specified in the order of the rendering court.

hence bound by the judgment. The first determination is made with reference to the scope of the initial cause of action;[74] it is the second which is the concern of this section.

The most obvious kind of privity which will bind those not named in the first suit is that which exists between predecessor and successor to title in real property. Manifold decisions hold (or assume) the judgments concerning the property rendered for or against the owner bind those who claim their title through him.[75]

Equally well established is the privity relationship which exists between members of a proper class action.[76] If the named plaintiff and the class are once defeated on the merits of the claim, that claim may not be given new life if brought by another named plaintiff on behalf of the same class.[77] Alternately, it is clear that no privity in this context exists between an employer and employee so as to bind one by a judgment rendered against the other.[78]

In other contexts, when the fact situation presented is not as common, the courts have consistently defined privity by reference to the realities of the first litigation.[79] If one party's interest has been legally represented during prior litigation, he may be bound by that result in a second suit; absent such representation, the enforcement of res judicata would contradict due process.[80] For example, although a guardian's suit on his ward's claim may bar the ward from subsequent assertion of the same claim,[81] a child is not barred from relitigating title to land previously litigated by his parent when the source of his claim is distinct from that of the parent.[82] The relationship is such that one *may* represent the interest of the other, but unless the interest has in fact been so

74. *See* section IA *supra*.

75. *See* Smith v. Smith, 55 S.C. 507, 33 S.E. 583 (1899); Barnes v. Cunningham, 30 S.C. Eq. (9 Rich. Eq.) 475 (1857); Farmer v. Miller, 39 S.C.L. (5 Rich.) 480 (1852); Thomas v. Geiger, 11 S.C.L. (2 Nott & McC.) 528 (1820).

76. Evans v. Creech, 187 S.C. 371, 197 S.E. 365 (1938); Davis v. Town of West Greenville, 147 S.C. 448, 145 S.E. 193 (1928).

77. Neither, of course, may a class member institute an individual suit for recovery. Ellison v. Rock Hill Printing & Finishing Co., 64 F.R.D. 415 (D.S.C. 1974).

78. Mackey v. Frazier, 234 S.C. 81, 86-87, 106 S.E.2d 895, 899 (1959); Williams v. Atlantic Coast Line R.R., 274 F. Supp. 216, 218 (D.S.C. 1974).

79. Tate v. Hunter, 22 S.C. Eq. (3 Strob. Eq.) 136 (1849); Mitchell v. Board of Trustees, 380 F. Supp. 197, 199 (D.S.C. 1973).

80. Heaton v. Southern Ry., 119 F. Supp. 658, 660-61 (W.D.S.C. 1954).

81. First Nat'l Bank of Greenville v. United States Fidelity & Guar. Co., 207 S.C. 15, 35 S.E.2d 47 (1945).

82. Wilkins v. Mulkey, 252 S.C. 615, 167 S.E.2d 619 (1969).

represented, res judicata presents no bar. Similarly, while previous litigation between one creditor and his debtor will not bind another creditor,[83] it may well bind another debtor of the same creditor.[84] The identity of interest is again controlling, as it is in cases involving assignees.[85] The continuing concern to guarantee each party his day in court is here well-defined and well-reasoned and supports the decisions which limit the impact of res judicata.

II. COLLATERAL ESTOPPEL

A determination that a second suit rests upon a different cause of action than did the first eliminates the possibility of barring the suit in its entirety: res judicata is inapplicable. Nonetheless, South Carolina does recognize that parties may still be prevented from relitigating specific issues of fact in the second suit if such issues were previously decided in litigation. This operation of collateral estoppel, termed res judicata by the state courts,[86] follows the tripartite formulation of *Hart v. Bates*:[87] if the parties and subject matter of the two suits are identical, a precise point ruled on in the first case may not be relitigated.[88] While the binding effect of the first decision may well determine the outcome of the second suit, it is imperative to distinguish this practical result of the application of collateral estoppel from the total bar created by res judicata.[89]

83. First Nat'l Bank of Florence v. Edwards, 134 S.C. 348, 132 S.E. 824 (1926).

84. Campbell v. Briggs, 25 S.C. Eq. (4 Rich. Eq.) 370 (1852).

85. *Compare* Brown v. New York Life Ins. Co., 22 F. Supp. 82 (W.D.S.C. 1938), *rev'd on other grounds*, 99 F.2d 199 (4th Cir. 1938), *cert. denied*, 306 U.S. 638 (1938) (assignee bound by prior litigation of assignor) *with* Hart v. Bates, 17 S.C. 35 (1882) (assignee claiming title from different source not bound by prior litigation of assignor).

86. *See* note 8 and accompanying text *supra*. *See also* Birnbaum v. Hall, 101 F. Supp. 605, 606 (E.D.S.C. 1951), in which the court, citing South Carolina authority, sets out the distinction in local case law and identifies the operation of a prior judgment in a second suit on a separate cause of action as collateral estoppel.

87. *See* text accompanying note 4 *supra*.

88. Bell v. Boyd, 252 S.C. 289, 293, 166 S.E.2d 104, 106 (1969); Coleman v. Rush, 123 S.C. 236, 239, 116 S.E. 449, 450 (1923).

89. *See* text accompanying note 4 *supra*. In Coleman v. Rush, 123 S.C. 236, 116 S.E. 449 (1923), the plaintiff had originally sued *A*, claiming title to land through his mother; judgment was rendered for *A*. In his second suit against those who claimed title through *A* for a partition of the land, he was prevented from asserting his own title to the land and thus effectively prevented from recovery. However, the claim itself was not barred; it was only unsuccessful. *See also* Prather v. Owens, 25 S.C.L. (Chev.) 236 (1840) (first suit for damages for obstruction of easement prevents relitigation of plaintiff's right to the easement in second suit for further damages).

A. *Issues Affected by Collateral Estoppel*

South Carolina courts structure their decisions with reference to three types of identities present in litigation, two of which, identity of subject matter and of issues, are dealt with in this section.[90] The identity of subject matter necessary to the utilization of collateral estoppel is required by the *Hart* formulation and is always found when the doctrine is applied. This determination is never difficult: if the issue raised in two cases is the same, so too must be the subject matter. The phrase is used to identify the general concern of the litigation: a contract,[91] a piece of property,[92] a marital relationship.[93] In this usage it approaches a transactional definition of the scope of a cause of action[94] and should not be read to imply the need, for example, of a similar theory of recovery. The requirement becomes confusing when a determination is made that the issue raised in the second suit is not identical to that raised in the first; the statement of this decision is frequently couched in terms of the dissimilarity of subject matter.[95] It could as easily refer only to the distinction between the issues. Since the term causes additional confusion in other contexts[96] as well, it would be desirable to abandon it.

The identity of issues which permits a party to preclude relitigation involves a question of fact[97] and is best understood by reference to specific situations.[98] For example, a decision that an

90. *See* section IIB for a discussion of the requirements of the doctrine with respect to identity of parties.

91. Hines v. Farr, 235 S.C. 436, 442, 112 S.E.2d 33, 36 (1960); Willoughby v. North Eastern R.R., 52 S.C. 166, 172, 29 S.E. 629, 632 (1898).

92. Newell v. Neal, 50 S.C. 68, 27 S.E. 560 (1897).

93. Murphy v. Brown, 262 S.C. 513, 205 S.E.2d 839 (1974).

94. *See* notes 32-38 and accompanying text *supra*.

95. *See* notes 104-110 and accompanying text *infra*.

96. *See* notes 10 & 11 and accompanying text *supra*.

97. The courts of South Carolina do not utilize the doctrine of collateral estoppel to preclude relitigation of issues of law once determined between two parties. Compare this view with RESTATEMENT (1), *supra* note 4, at § 68.1(b).

98. The only formal test delineated with respect to such identity in South Carolina is found in Cooper Agency v. United States, 327 F. Supp. 948, 952-53 (D.S.C. 1971), in which the court stated that if the same evidence would sustain both issues, the issues are identical. *Cf.* notes 12-16 and accompanying text *supra*. The opinion is confusing, however, as it speaks in terms first of issues (here misrepresentation), then of actions, and finally again of issues. Assuming the decision to have been perceived by the court as one involving collateral estoppel, the enunciated test, while yielding accurate results, seems unnecessary. Since it also inferentially supports one definition of the scope of a cause of action in the context of res judicata, it is confusing as well. The apparent decision of the state courts to answer the question of identity pragmatically is wise.

insurance company is liable on a policy for payments to the insured because of a covered disability prevents relitigation of the issue of liability in a second suit for after-acquired premiums;[99] a decision that the defendant was negligent in a suit for personal injuries prevents relitigation of the issue of negligence in a second suit for property damages, which would be permitted under the facts of the case;[100] a decision that a wife left her husband for good cause in her suit against him for support prevents relitigation of the issue in his suit for divorce based on her desertion;[101] and a decision that a divorce decree was invalid in a suit by a husband pursuant to that decree to require his wife to vacate their house prevents relitigation of the validity of the divorce in the wife's suit against her husband's estate for dower rights.[102] In each of these instances, the fact which a party was collateraly estopped from relitigating was an element of both the first and the second claims,[103] although such a relationship between the fact and the

99. Prudential Ins. Co. of America v. Cannon, 211 S.C. 134, 44 S.E.2d 25 (1947). It should be noted that the causes of action presented in each suit, as in all of the following examples, are distinct. Therefore, the company may dispute the continuance of the disability even though the first action held it to be permanent. That finding shifts the burden of proof as to a change in the insured's condition to the insurer but does not preclude the issue from being raised.

100. Jones v. Hamm, 253 S.C. 283, 170 S.E.2d 206 (1969). Although ordinarily the plaintiff would have only one cause of action for both personal and property damages, Holcombe v. Garland & Denwiddie, Inc., 162 S.C. 379, 160 S.E. 881 (1931), and would be barred by res judicata from maintaining the second suit, the order of the first court here included a statement that "[t]he findings and conclusions . . . are without prejudice to the right to pursue for property damages in any proper forum," 253 S.C. at 284, 170 S.E.2d at 206, and the plaintiff's right to maintain the second suit was neither challenged nor decided.

101. Powell v. Powell, 249 S.C. 663, 156 S.E.2d 305 (1967).

102. Murphy v. Brown, 262 S.C. 513, 205 S.E.2d 839 (1974). *See also* Kirby v. Gulf Oil Corp., 230 S.C. 11, 94 S.E.2d 21 (1956) (landlord's right of possession established in his suit to eject the tenant cannot be challenged in the tenant's suit for conspiracy); Earle v. City of Greenville, 84 S.C. 193, 65 S.E. 1050 (1909); Union Bleachery v. United States, 73 F. Supp. 496 (W.D.S.C. 1947), *aff'd* 176 F.2d 517 (4th Cir. 1949), *cert. denied*, 339 U.S. 964 (1950).

In the context of collateral estoppel, provided that the parties involved in each suit are identical, it is irrelevant that one suit was criminal, the other civil. If the issue raised in the civil proceeding is identical to one determination in the criminal prosecution, collateral estoppel may be utilized. *See* Inman v. United States, 151 F. Supp. 784 (W.D.S.C. 1957). Of course, if the order of suits is reversed, the determination of the issue in a civil proceeding cannot constitutionally bar its relitigation in a criminal prosecution.

103. Other courts have formalized this factor as a test necessary to the imposition of collateral estoppel; a distinction is made between mediate (evidentiary) and ultimate facts, and the doctrine is limited in application to those facts which were ultimate in the first litigation. *See, e.g.*, King v. Chase, 15 N.H. 9, 41 Am. Dec. 675 (1844). An additional

claims was either unnoticed or not commented on by the court and consequently formed no part of the basis of any of the decisions.

Certain issues which arise between the same parties engaged in later litigation involving the same subject matter might also meet this second requirement of preclusion as well, but might nonetheless not have been raised in the first suit. In a second distinct cause of action, no party may claim the benefits of collateral estoppel, because the issue sought to be established by the use of this doctrine was not actually litigated. Examples of this situation include the issue of title to realty in a second suit, which realty was mistakenly excluded from a surveyor's plat in an initial suit for authority to sell the minor plaintiff's interest in the surveyed realty to the defendant;[104] the issue of a boundary between plaintiff's and defendant's land in a suit which followed one to set aside a judicial sale of the defendant's land;[105] a claim of malicious prosecution subsequent to the plaintiff's victory in a suit for claim and delivery for his car, which had been taken by the defendant to enforce a mechanic's lien;[106] the defense of ad-

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requirement is sometimes imposed: the fact must be ultimate in the second suit. *See* Evergreens v. Nunan, 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944). Of course, any combination of the above two demands is possible, *i.e.*, a court might allow any fact mediate in the second litigation to be precluded by collateral estoppel. If South Carolina were to utilize this terminology, apparently the fact would have had to be ultimate in the first litigation and perhaps in the second as well.

RESTATEMENT (1), *supra* note 4, avoids the necessity of differentiating mediate from ultimate facts by directing the court's attention to the degree of relationship between the claims (*see id.*, § 68, Introductory Note) and the foreseeability at the time of the initial action that the issue would arise in a different context. *See id.* § 68.1(e)(ii). Specifically, if the parties in the first action recognized the issue as important and if the trier of fact recognized it as necessary to judgment, relitigation of the issue, whether mediate or ultimate in either suit, is precluded. *See id.* § 68, Comment j.

To some extent, South Carolina's demand that the subject matter of the actions be the same before precluding relitigation of an issue achieves results similar to those sought by the RESTATEMENT (1). However, the failure of the court to justify specifically the requirement on those grounds, as well as the indefinite nature of the requirement itself, detract considerably from its potential effectiveness.

104. Smith v. DuRant, 236 S.C. 80, 113 S.E.2d 349 (1960). The court also pointed out that the first proceeding had not been adversary in nature; whether this would have prevented utilization of the doctrine in any event in a subsequent, clearly adversarial proceeding is unclear.

105. Nash v. Gardner, 232 S.C. 215, 101 S.E.2d 283 (1957).

106. Martin v. Keith, 214 S.C. 241, 52 S.E.2d 22 (1949). This case presents a good example of the court's understanding of subject matter within the context of collateral estoppel. A definition based strictly on a transactional test would obviously encompass both suits, yet the court found the subject matter as well as the issue of the second

verse possession to plaintiff's suit to recover possession following a suit by the defendant claiming title under a conditional deed from the plaintiff;[107] the issue of a testator's residency in the probate of her will following a finding as to the testator's mental capacity and appropriate place of commitment;[108] the issue of a predecessor guardian's accountability following a discharge of a subsequent guardian as to the estate handed her;[109] and the issue of the appropriate management of one estate following an adjudication as to the management of a second estate.[110] As has already been mentioned in another context,[111] fraud is an issue which is not identical to the fact which it attacks.[112]

South Carolina recognizes one exception to its rule of collateral estoppel preclusion where there is identity of issues. If in one case the burden of proof or the presumptions which aid a party in meeting that burden are different than they are in a second suit, relitigation of an identical issue is not barred.[113]

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litigation to be different. The former finding was unnecessary as well as confusing, but apparently the concept of differing issues in different causes of action compels in the mind of the court a finding of differing subject matter. *See* notes 10 & 11 and accompanying text *supra*. If the concern of the court was caused by the completely distinct nature of the claims and the issues appropriate to each, it would have been well to state that concern clearly. As it is, the decision seems to equate subject matter with cause of action, an approach elsewhere rejected as nonsensical in the context of collateral estoppel.

107. Griggs v. Griggs, 214 S.C. 177, 51 S.E.2d 622 (1949). Neither was litigation as to adverse possession precluded by a prior demonstration by the defendant of a prima facie case of such possession as a defense to the plaintiff's attempt to obtain a writ of assistance to recover possession. *Id.* at 189, 51 S.E.2d at 628.

108. Reed v. Lemacks, 207 S.C. 137, 35 S.E.2d 34 (1945).

109. Bagwell v. Hinton, 205 S.C. 377, 32 S.E.2d 147 (1944).

110. Ross v. Beacham, 33 F. Supp. 3 (W.D.S.C. 1940).

111. *See* note 16 and accompanying text *supra*.

112. *See* Wold v. Funderburg, 250 S.C. 205, 157 S.E.2d 180 (1967) (a mother suing for custody of her children may maintain that her signature to the adoption papers was obtained fraudulently, although a prior judgment had rested on a jury finding that she had signed the papers); Hart v. Bates, 17 S.C. 35 (1882) (an argument that a deed is fraudulent is not precluded by a prior judgment resting on that deed).

113. Falconer v. Beard-Laney, Inc., 215 S.C. 321, 54 S.E.2d 904 (1949). In reaching its decision, the court also mentioned that additional testimony was present in the second suit concerning the issue. However, if preclusion means anything at all, it must mean that such considerations are irrelevant. Since the decision is justified on other grounds, it is possible to ignore this part of the opinion and the court has correctly done so in subsequent cases. *Cf.* RESTATEMENT (1), *supra* note 4, at § 68.1(d).

It is interesting to note that the *Falconer* court did not rest its holding on the lack of identity between the parties to the first and second suits. The first suit had been brought by an injured party against the employer of the deceased employee whose negligence was found to have caused the accident. The second suit was by the deceased employee's estate against the employer for damages arising out of the employee's death while employed. *See* notes 130-133 and accompanying text *infra*.

It must be noted that identity of issues (or even of issues and subject matter) alone is not sufficient to invoke collateral estoppel; according to *Hart* the issue must have been ruled upon.[114] The general rule of thumb that collateral estoppel does not operate if the first judgment was based upon the defendant's default springs from this demand. The South Carolina Supreme Court has never directly addressed the relationship between default and collateral estoppel, but its decisions do reflect a logical refusal to extend the impact of a default judgment to a second and separate cause of action.[115]

Finally, in order for an issue once decided to be determined by collateral estoppel, the decision of the issue must have been necessary to the first judgment: "[A] gratuitous finding by the court, unnecessary to the decision which had already been made and . . . not a basis for the judgment . . . could not form the basis of an estoppel."[116] However, two decisions in the state contradict this requirement. In one, the court collaterally estopped a plaintiff from litigating the concessions which had been made by his opponent in compromise negotiations. This estoppel was

114. For examples of cases which specifically include this requirement in their holdings, see Lowe v. Clayton, 264 S.C. 75, 212 S.E.2d 582 (1975); Surety Realty Corp. v. Asmer, 249 S.C. 114, 153 S.E.2d 125 (1967); Griggs v. Griggs, 214 S.C. 177, 51 S.E.2d 622 (1949); Bagwell v. Hinton, 205 S.C. 377, 32 S.E.2d 147 (1944); Brown v. Huskamp, 141 S.C. 121, 139 S.E. 181 (1927); and Willoughby v. North Eastern R.R., 52 S.C. 166, 29 S.E. 629 (1898). It is perhaps most clearly shown in two cases involving a prior judgment against two co-defendants. In the subsequent suits by one defendant against the other, since the issues involved as between them had never been ruled on, collateral estoppel was inapposite. Branton v. Martin, 243 S.C. 90, 132 S.E.2d 285 (1963); Kinard v. Polk, 241 S.C. 555, 129 S.E.2d 527 (1963). It is interesting that the *Kinard* court considered the case to be of first impression.

115. *See* Horton v. Horton, 214 S.C. 141, 51 S.E.2d 425 (1949). Melton v. Melton, 229 S.C. 85, 91 S.E.2d 873 (1956) does, however, demonstrate the kind of confusion caused in this limited context by the state's failure to distinguish clearly res judicata from collateral estoppel. Couched in collateral estoppel language ("issues actually litigated", *id.* at 90, 91 S.E.2d at 875), the decision prevents relitigation of the validity of a marriage and separation agreement because of a default judgment for unpaid installments under that agreement. Further explanation by the court does indicate that the subsequent litigation in its entirety was barred by res judicata, as a contention which should have but was not previously raised as a defense. The result is thus consistent with other decisions.

116. Lowe v. Clayton, 264 S.C. 75, 85, 212 S.E.2d 582, 587 (1975). *Compare* RESTATEMENT (1), *supra* note 4, at § 68, Comment h. This rule is generally known as the first of three corollaries to the rule of collateral estoppel. The two remaining, that if a judgment is based on two independently sufficient determinations, neither issue may be relitigated (*contra*, RESTATEMENT (1), § 68, Comment l), and that if a judgment might have been based on one or two grounds but the ground used is unknown, either issue may be relitigated, find neither support nor denial in South Carolina case law.

based on a prior judgment which, while the case admittedly involved those same concessions and commented on them adversely, was rendered for lack of jurisdiction.[117] In the other, the court conceded a limited collateral estoppel effect to a judgment based on the passage of the applicable statute of limitations.[118] Neither decision is justified, and neither has been or should be followed in determining the applicability of collateral estoppel.

B. Parties Affected by Collateral Estoppel

Collateral estoppel, according to *Hart*, will not be invoked to preclude relitigation of an issue unless the parties to the two litigations are the same or their privies. To a large degree the courts have rendered decisions on this requirement which parallel those within the res judicata context.[119] Thus, for example, general property rules regarding privity are applicable: an estate and its heirs are bound by prior judgments affecting the testator[120] provided that their claim is traceable to him.[121] The same reluctance to expand the concept of privity also operates here as it does in res judicata holdings.[122] The South Carolina courts have consequently refused to allow a judgment rendered in favor of the

117. Cooper Agency v. United States, 327 F. Supp. 948, 952-53 (D.S.C. 1971). The decision could be read as one concerned with res judicata, in which case difficulties arise because of its cavalier treatment of the requirement that such judgments be rendered on the merits. *See* notes 58-73 and accompanying text *supra*. It is to this issue that the court addresses itself, apparently recognizing but not rectifying the problem. However, the opinion rests on a determination of the identity of issues, never mentioning any identity of causes of action; it reads as a collateral estoppel holding.

118. Lyerly v. Yeadon, 199 S.C. 363, 19 S.E.2d 648 (1942). Admittedly the court, in recognizing a limited preclusion, denied the greater preclusionary effect requested.

119. *See* notes 75-85 and accompanying text *supra*.

120. *See, e.g.*, Murphy v. Brown, 262 S.C. 513, 516, 205 S.E.2d 839, 840 (1974) (in a widow's suit against the executors and devisees of her husband's estate for dower, a prior judgment that the divorce procured by the husband was null and void precluded a defense based upon that divorce).

121. Wilkins v. Mulkey, 252 S.C. 615, 167 S.E.2d 619 (1969) (grandchildren claiming land under the remainder clause of grandmother's will not bound by an adjudication as to the ownership of the land which involved their parents, since their claim of title was not through those parents).

122. It should be noted, however, that a finding of no privity, while it disposes of an argument that all litigation as to an issue should be barred, does not necessarily prevent the use of a prior judgment as evidence. *See* Koogler v. Huffman, 12 S.C.L. (1 McC.) 495 (1821) (prior judgment that *X* acted as agent for *Y* and that consequently title to realty was in *Y* admissible as evidence of the plaintiff's claim of title through *Y*). Such usage, of course, is subject to the state's rules of evidence. *See generally* W. REISER, A COMPARISON OF THE FEDERAL RULES OF EVIDENCE WITH SOUTH CAROLINA EVIDENCE LAW (1976).

defendant in a suit by plaintiff as administrator for wrongful death to preclude litigation of the same issues in a second suit by the plaintiff as beneficiary under a survival statute.[123] A declaratory judgment that an insurer is not liable to an insured for damages arising from an accident will not prevent relitigation of its liability in a suit by the injured party,[124] nor will an adoption controversy litigated by the natural mother prevent relitigation of the validity of that adoption involving the natural father.[125] Finally, litigation between an employer and a party will not prevent relitigation of the same issue between the employee and the party.[126]

When originally formulated, the South Carolina requirement of identity of parties or their privies reflected a traditional and well-entrenched limitation on the doctrine of collateral estoppel. The inevitable corollary resulting from this demand for identity of parties was the requirement for so-called mutuality of estoppel, *i.e.*, unless a prior determination of fact concludes both parties to a subsequent litigation, it concludes neither.[127] However, during the past thirty years the requirement of mutuality has been abandoned in jurisdiction after jurisdiction.[128] Provided that the party against whom collateral estoppel is asserted was a party or in privity with a party to the initial litigation in which an issue was raised and determined adversely to him, the doctrine will prevent relitigation of the identical issue even though the party utilizing the doctrine was not involved in the first suit.[129] No

123. Peeples v. Seaboard Air Line Ry., 115 S.C. 115, 104 S.E. 541 (1920). The court based its decision on the separate nature of the causes of action, which would prevent application of the doctrine of res judicata, but also said that "[i]t follows that all efforts made to go into the record of the former trial must fail." *Id.* at 118, 104 S.E. at 542. The assertion again demonstrates the confusion between res judicata and collateral estoppel. In the latter context, however, the decision is in accord with other cases distinguishing parties by reference to their capacities. Gleaton v. Southern Ry., 212 S.C. 186, 46 S.E.2d 879 (1948); Deaton v. Gay Trucking Co., 275 F. Supp. 750 (D.S.C. 1967). *See also* note 26 and accompanying text *supra*.

124. Pharr v. Canal Ins. Co., 233 S.C. 266, 104 S.E.2d 394 (1958); Bailey v. United States Fidelity & Guar. Co., 185 S.C. 169, 193 S.E. 638 (1937).

125. Wold v. Funderburg, 250 S.C. 205, 157 S.E.2d 180 (1967).

126. Williams v. Atlantic Coast Line R.R., 274 F. Supp. 216 (D.S.C. 1967).

127. Birnbaum v. Hall, 101 F. Supp. 605, 608 (E.D.S.C. 1951). *See also* Mack Mfg. Co. v. Massachusetts Bonding & Ins. Co., 114 S.C. 207, 103 S.E. 499 (1920); Continental Ins. Co. v. Seaboard Air Line Ry., 106 S.C. 43, 90 S.E. 318 (1916).

128. Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942). *See* RESTATEMENT (2), *supra* note 4, at § 88 and the Reporter's Note thereto.

129. Tully v. Pate, 372 F. Supp. 1064 (D.S.C. 1973). This case is a good, if unique, example of the broadening result achieved by abandonment of the mutuality requirement.

longer is the stranger denied the benefits of preclusion simply because no such preclusion may operate against him.

The courts of this state, however, have failed to follow this modern trend and continue to require, with one exception, complete identity of parties or their privies before barring relitigation of an issue once determined.[130] In 1959, the court did recognize a single situation in which a party would be estopped absent mutuality.[131] The owner of a vehicle brought suit against the driver of a second vehicle as a result of an accident, alleging damages caused by the defendant's negligence, and the defendant counterclaimed alleging that the accident was caused by the negligence of the plaintiff's employee who was driving the other vehicle. Judgment was rendered for the plaintiff and was held to bar relitigation as to the facts of the accident (and hence to support a judgment on the pleadings) in the defendant's subsequent suit against the employee. The court rested its decision on grounds of public policy,[132] seeing it as a situation not covered by the *Hart* formulation which should nonetheless be subject to that holding's bar.[133] The case clearly is encompassed by the more general aban-

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Although the case was decided by a South Carolina federal court, it must be noted that the governing law, and hence the collateral estoppel definition, was found under the facts to be that of Georgia.

In those jurisdictions which do recognize the expanded role of collateral estoppel, it is always necessary that the party *against whom* the bar is asserted have been a party to the former litigation. Such decisions as Williams v. Atlantic Coast Line R.R., 274 F. Supp. 216 (D.S.C. 1967), and Heaton v. Southern Ry., 119 F. Supp. 658 (W.D.S.C. 1954), would thus remain unaffected by the expansion.

130. Birnbaum v. Hall, 101 F. Supp. 605 (E.D.S.C. 1951).

131. Mackey v. Frazier, 234 S.C. 81, 106 S.E.2d 895 (1959).

132. *Id.* at 88, 106 S.E.2d at 899.

133. Much earlier, the court had reached a similar conclusion in an analogous situation involving the relationship between a lessee and lessor. Jenkins v. Atlantic Coast Line R.R., 89 S.C. 408, 71 S.E. 1010 (1911). Suing for injuries allegedly caused by the lessee's negligence, the plaintiff lost and was prevented from relitigating issues determined in that case in his second suit against the lessor:

> [T]he true ground upon which a former judgment, in a case like this, should be allowed to operate as a bar to a second action is not *res judicata*, or technical [collateral?] estoppel, because the parties are not the same, and there is no privity between them as is necessary for the application of that doctrine; but that in such cases, on grounds of public policy, the principle of estoppel should be expanded, so as to embrace within the estoppel of a judgment, persons who are not, strictly speaking, either parties or privies. It is rested upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity.

Id. at 412, 71 S.E. at 1012. [The case, without mentioning the fact, overrules contrary earlier decisions, such as Logan v. Atlanta & Charlotte Air Line R.R., 82 S.C. 518, 64 S.E.

donment of the mutuality doctrine noted above. It has not, however, been the signal for such abandonment in any other context in the state.

CONCLUSION

The courts of South Carolina for nearly one hundred years have precluded relitigation of either entire suits or issues on the basis of three tests: the identity of subject matter, the identity of parties, and the identity of issues or causes of action. It is only with respect to the third concern that any distinction between res judicata and collateral estoppel is made, and even within that context many cases confuse the two doctrines in language if not in result.

The demand that the subject matter of two litigations must be the same before relitigation is barred should be adandoned. In res judicata cases it adds nothing to the requirement that the causes of action be identical and may well hinder any attempts by the courts to broaden the defined scope of the latter. Cases indicate that the concepts are distinct, yet a transactional definition of one inevitably approaches any rational definition of the other. In collateral estoppel cases, the demand as it is utilized adds nothing to the requirement that the issues be identical and may well hinder any attempts by the courts to formulate an addition to the doctrine, *i.e.*, that the initial determination of the issue be understood by the parties and the court to be important and necessary to the first judgment.

While the complete identity of parties or their privies is obviously essential if a person is to be precluded by the operation of res judicata, it is not essential in the context of collateral estoppel. To bar a party from relitigating an issue once decided against him, even though his current adversary was a stranger to that decision, well accords with the policies underlying the doctrine, works no unfairness on the affected party, and has been widely accepted as an appropriate expansion of the doctrine. In addition to such reasons for abandoning the mutuality requirement, a practical advantage with broader impact would result. It would be necessary to redefine the *Hart* holding and to distinguish res judicata from collateral estoppel in a more dramatic fashion than

515 (1909).] The quoted rationale is now used as the basis for a general refusal to require mutuality; it has not called forth that result in its state of origin.

that undertaken to date. In that process, it is at least possible that the court would also consider dropping reference to subject matter and setting out clearly its current concept of the scope of a cause of action.

The identity of issues within the context of collateral estoppel is as necessary as is the identity of parties within the context of res judicata, and for the most part case law has dealt accurately with questions arising under this requirement. The judiciary has not, however, sufficiently considered subsidiary requirements generally recognized as essential prerequisites to the preclusion of relitigation and has even occasionally indicated that the initial determination of an issue need not have been necessary to the judgment. Particularly if mutuality of estoppel is foresaken, the court must graft onto a new test considerations of the role of the issue in the first litigation and the perception of its importance by the parties and the court.

Numerous decisions reflect the necessity of identity between causes of action before a party is barred by res judicata. Less clear than this necessity is the definition of the scope of one cause of action, but there are indications that some transactional concept may be appropriate. To force a litigant to deal in one suit with all claims arising out of a related set of facts or to lose all claims not so litigated best serves not only the policies of res judicata but those of convenience, expediency and complete justice between the parties. If combined with a clearly stated and parallel compulsory counterclaim rule, it also avoids the now rampant confusion concerning defenses which are the equivalent of claims and the results of their use or nonuse by the defendant. To the extent that other rules of procedure, such as those limiting joinder or forcing the election of a single remedy, conflict with the effect of such a definition, exceptions to that definition may be recognized.[134]

134. Of course, it is also possible to avoid such conflict by changing or dropping the other procedural rules. In particular, the doctrine of election of remedies was created originally to serve two purposes: to prevent relitigation of issues once determined and to ensure truthfulness in pleading. The first is accomplished by res judicata and collateral estoppel, the second by an understanding of the attorney's ethical obligations (*see* FED. R. CIV. P. 11) and an awareness that alternative and inconsistent allegations are not necessarily indicative of untruth. The plaintiff may either not be in a position to know which set of facts is true or, more frequently, not be able to determine which of two possible interpretations he will be able to prove (for example, fraud or breach of contract). To deny him the opportunity to present all of his arguments is unreasonable as well as

Finally, the courts of the state have long held that, in the context of res judicata, the three identities are insufficient unless the first judgment was on the merits. The requirement is accepted, but the South Carolina decisions on point which involve the effect of an involuntary nonsuit are confusing. The relationship between res judicata and election of remedies is here at its most pernicious. At the least it is necessary for each judgment nonsuiting a plaintiff to indicate whether that judgment is rendered on the merits and to create a general assumption that, absent a contrary indication, a judgment was on the merits.

For the most, the suggestions and recommendations above are supported by existing case law. A restatement by the court of what it has actually done in the past, rather than a mechanical reiteration of an old formula, would do much to clarify the doctrines and their areas of application. A reevaluation by the court of the purposes underlying those doctrines might well lead to substantive and necessary change. And a reexamination by the court of the impact on the doctrines of other procedural rules in the state could result in the beginnings of a system designed to serve the modern needs of its participants.

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unnecessary and may prevent the court from accomplishing total justice between the parties. *See Developments in the Law - Res Judicata*, 65 HARV. L. REV. 818 (1952). *See also* H. LIGHTSEY, JR., SOUTH CAROLINA CODE PLEADING 240-43 (1976).