Indiana Law Journal

Volume 7 | Issue 6 Article 6

3-1932

Judgments-Res Judicata-Effect of Former Judgment on Express Contract in Action on Quasi-Contractual Obligation

JUDGMENTS—RES JUDICATA—EFFECT OF FORMER JUDGMENT ON EXPRESS CONTRACT IN ACTION ON QUASI-CONTRACTUAL OBLIGATION—Plaintiff sues in quasi-contract for services rendered. Defendant pleads former adjudication, setting up that plaintiff had sued defendant in a previous action on an alleged express contract for the same services now sued on; and that one of the facts found in that action was that the contract was made as alleged; but the court entered conclusions of law on all the facts found that nothing was due under said contract. Plaintiff's demurrer to this plea was overruled; defendant excepted and on appeal assigns as error the overruling of his demurrer, and the overruling of his motion for new trial which was barred on alleged error in sustaining defendant's motion for a directed verdict. *Held*, affirmed.[1]

It is to be seen that there are four possible situations in which the question of the effect of a judgment on express contract upon a subsequent suit on quasi-contract will be raised:

1. Where a party is denied recovery on contract for the reason that both parties have fully performed.

2. Where a party is denied recovery on contract for the reason that he has not proved a contract.

3. Where a party is denied recovery on contract for the reason that he has not performed all the conditions precedent to performance by the other.

4. Where a party is denied recovery on contract for the reason that the contract is unenforceable or invalid.

It is well settled in the law of quasi-contracts that though the parties have acted under a contract or supposed contract, in numerous instances falling under situations 2, 3, and 4 above a party has quasi-contractual rights which the courts will enforce, though he has no strictly contractual rights.[2] And the rule is also well settled that a judgment for defendant in a suit on an express contract for the reasons given in situations 2, 3, and 4 will not be a bar to suit in a quasi-contractual action, nor necessarily prevent a recovery therein.[3]

The language of the principal case is broad enough to be construed as taking a contrary position on situations 3 and 4 to the last rule stated because the court contents itself with giving as the reasons for plaintiff's defeat in the former action that "the court found * * * that there was nothing due under it (the contract) *for a number of reasons.*" "A number of reasons" can cover any of the four situations described above. However, the court's citation of cases includes most of the cases given above and shows the court's true meaning to be more limited than its general language would indicate. Almost the entire reasoning of the court is given over to a discussion of the case of *Young v. Farwell*,[4] in which

[1] *Johnson v. Coal Bluff Min. Co.*, Ind. App., 178 N. E. 452 (1931).

[2] For a thorough discussion of these instances, see Woodward, Quasi Contracts, 74-282.

[3] *Clifton v. Menser*, 88 Kan. 408, 129 Pac. 159, 43 L. R. A. (N. S.) 124; *Fritsch Foundry v. Goodwin Mfg. Co.*, 100 Mo. App. 414, 74 S. W. 136; *Rossman v. Tilleny*, 80 Minn. 160, 83 N. W. 42; *Henrietta Nat. Bank v. Barrett*, 25 S. W. 456 (Tex.); *Buddress v. Schaffer*, 12 Wash. 310, 41 Pac. 43; *Thayer v. Harbison*, 70 Wash. 278, 126 Pac. 625; *Water L. & G. Co. v. City of Hutchinson*, 160 Fed. 41, 19 L. R. A. (N. S.) 219; *Kirkpatrick v. McElroy*, 41 N. J. Eq. 539; *City of Davenport v. Allen*, 120 F. 172; *Buckingham v. Ludlum*, 37 N. J. Eq. 137.

[4] 165 N. Y. 341, 59 N. E. 143.

case a suit in quasi-contract was brought and plaintiff therein was defeated because the defendant showed that plaintiff had been defeated in a previous action on contract because of a finding of full performance.

Thus it appears that the question presented in the principal case was this: "What is the effect of the adjudication that a contract has been fully performed in an action on quasi-contract for the same services originally sued on?" This cannot be answered without first deciding whether or not a cause of action in contract is distinct from a cause of action in quasi-contract. It appears indisputable that it is, under any of the various definitions of cause of action. The cause of action in contract involves rights and obligations springing from a consensual arrangement of the parties and such arrangement must be proved to sustain such cause of action, whereas the cause of action in quasi-contract involves rights and obligations given and imposed by law regardless of whether or not the parties ever expressed an assent thereto. The proof required in the latter is different from that required in the former.[5] The plaintiff in a quasi-contractual action must show an "unjust enrichment" of the defendant, whereas such is not an essential ingredient of the successful prosecution of the action for breach of an express contract. A number of cases definitely hold they are distinct and separate causes of action.[6]

The rule of *res judicata* has two aspects: 1. A judgment as a bar to another action on the same legal right; 2. Conclusiveness of a judgment on facts or questions involved. Courts speak of the rule of *res judicata* but frequently leave it in doubt as to what aspect they have in mind. Such practice is regrettable. 1. *Res judicata* as a bar to a legal right is thus: A judgment on the merits is a bar to the prosecution of a second action between the same parties on the same cause of action and concludes the parties to the suit and those in privity with them.[7] In *Kitts v. Wilson*,[8] the court held that "before the rule of former adjudication can be invoked, it must appear that the thing demanded was the same, that the demand was founded on the same cause of action, that it was between the same parties, and found for one of them against the other in the same quality. The party must not only be the same person but he must also be suing in the same right."[9] A few Indiana cases are confusing on this matter.[10] The *Stuck* case held, "A judgment is not a bar to a second action unless it is founded on a substantially identical cause of action * * *; and, if the evidence in the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the first judgment is no bar to recovery." Strictly speaking, a "bar to recovery" is obviously different from a "bar to the action." One prevents a recovery

[5] *Water L. & G. Co. v. Hutchinson, supra; Buckingham v. Ludlum*, 37 N. J. Eq. 137.

[6] *Clifton v. Menser, supra*, n. 3; *Henrietta Nat'l Bank v. Barrett, supra*, note 3; *Frisch v. Goodwin, supra*, note 3; *Mallory v. City of Olympia*, 145 Pac. 627 (Wash.); *Buckingham v. Ludlum, supra*, note 3.

[7] *Cromwell v. County of Sac*, 94 U. S. 351; *Buckingham v. Ludlum, supra*, note 3; *Jones v. Vert*, 121 Ind. 142, 22 N. E. 882.

[8] 140 Ind. 604, 39 N. E. 313.

[9] *Indianapolis & M. Rapid Transit Co. v. Reeder*, 42 Ind. A. 520, 85 N. E. 1042; *Chicago & Eastern Ill. R. R. Co. v. The State*, 153 Ind. 134, at 143.

[10] See *Kirkpatrick v. Stingley*, 2 Ind. 269 (1850), and *Stuck v. Town*, 201 Ind. 66 (1928).

only; the other goes further and prevents the maintenance of the action. If by "bar to recovery" the court meant "bar to action," then it said that a judgment in some instances might not be a bar to another suit on the same cause of action previously adjudicated. If the court used "bar to recovery" in its strict sense, then it said that a party could be successful in a suit although a judgment has been previously rendered against him on the same cause of action. This latter proposition embraces the former. So the court must be considered as at least to have made the former statement and is thus unsupported by precedent. It seems that in these cases the courts are seeking to follow the test used by the great weight of authority to determine whether causes of action are the same in the problem of *res judicata* as a bar to an action and have misstated it. This test is that stated in 2 Black, *Judgments*, Sec. 726: "For the purpose of ascertaining the identity of the causes of action, the authorities generally agree in accepting the following test as sufficient: Would the same evidence support and establish both the present and the former causes of action? If so, the former recovery is a bar; if otherwise, it does not stand in the way of a second action." Following this test, if the same evidence required to entitle the party to succeed in the second action would not have altered the result against him in the former action, then the judgment in the former action will not be a bar to the second action. The Indiana Supreme Court in *Bunell v. Jean*,[11] supports this test.

The second aspect of *res judicata* is as follows: The determination of a fact or question which was actually and directly in issue in a former action is conclusive as to that fact or question in another suit between the same parties or their privies upon a different cause of action.[12] The distinction between these two aspects of *res judicata* is that in the former, the judgment may be pleaded to bar the maintenance of a second action; whereas in the latter the judgment operates only to prevent litigation of and concludes the parties only as to those facts in issue or points controverted upon the determination of which the finding or verdict was rendered.[13]

The principal case states there is no merit in the present action because all the matters complained of have been duly adjudicated. This does not show which aspect of *res judicata* the court intended to apply, inasmuch as it is capable of either construction. However, it would be immaterial in a case in which a contract has been previously held to be fully performed which theory of *res judicata* is applied, so far as actual result is concerned. Under either theory the plaintiff could not recover in quasi-

[11] 196 Ind. 187, 146 N. E. 754.

[12] *Cromwell v. County of Sac, supra,* note 7; *Hartford Life Ins. Co. v. Ibs,* 237 U. S. 662; *Southern Pacific Co. v. United States,* 168 U. S. 48-49; *Forsyth v. Hammond,* 166 U. S. 518; *Hanks v. Swett,* 4 Hun (N. Y.) 146; *Greenfield Gas Co. v. Trees,* 165 Ind. 209, 75 N. E. 2; *Gutheil v. Goodrich,* 160 Ind. 92, 66 N. E. 446; *Duncan v. Holcomb,* 26 Ind. 378.

[13] *Cromwell v. County of Sac, supra,* note 7, where the court said: "On principle, a point not in litigation in an action cannot be received as conclusively settled in any subsequent action upon a different cause because it might have been determined in the first action. In all cases where it is sought to apply the estoppel of a judgment reduced upon one cause of action to matters arising in a suit upon different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the first action."

contract; under the one, because he could not maintain the action; under the other, because the fact of full performance by defendant would prevent any quasi-contractual obligation from arising since there would be no unjust enrichment and would constitute a complete defense. In *Williams v. McDonald*[14] the plaintiff brought action on an express contract for services and was defeated because the services were worthless. He then sued in quasi contract. The court held: "This fact (worthlessness of services), if true, was a good defense, not only to the first, but to the second action, and its truth having been established as a finality between the parties, the judgment so establishing it is a bar to the second action, or possibly putting it more accurately, although the difference here is immaterial, is a final and conclusive defense to the second action." It would seem that the effect of the prior adjudication in the principal case would be governed by the second aspect of *res judicata* so as to establish a complete defense. It is submitted that strictly speaking a judgment on the legal rights arising out of an express contract is never a bar to an action in quasi-contract. *Clifton v. Menser, supra,* held: "The same petition may include, in separate counts, a claim based on an express contract to pay an agreed sum for services, and one based on an implied contract to pay their reasonable value. Each count states a complete cause of action. Proof in support of one is not admissible under the allegations of the other. The causes of action are not the same. They are distinct and different, although not wholly independent, being connected by this tie; there may not be a separate recovery on each. It follows that a plaintiff who sues on an express contract, without adding a count upon a *quantum meruit,* waives nothing, and, if defeated, is not thereby barred from maintaining a subsequent action upon an agreement arising by implication of law."[15] It is apparent that this remains true when the "same evidence" test stated by Black is applied. In the suit on express contract plaintiff would have to introduce evidence proving a valid contract and performance by himself of all conditions precedent to the defendant's duty of immediate performance; and the contract price would be controlling, regardless of the reasonable value of the plaintiff's services. In the suit on quasi-contract plaintiff must prove the facts of unjust enrichment which gave rise to a promise implied in law to pay the reasonable value thereof. The evidence required to justify a recovery in quasi-contract is not the same evidence which would justify a recovery in express contract.

Thus far the rule of *res judicata* as a bar has been discussed from an orthodox viewpoint. There are indications that a new rule may supplant this rule. According to the orthodox rule it is only an action on the same cause of action previously adjudicated which is barred. A few cases have followed the new rule which may be stated thus: The same cause of action and any other causes of action *which might have been* adjudicated are barred.[16] The principal case by a dictum is opposed to this new rule. This dictum is found in the statement, conforming to numerous authorities, that one who sues on a contract and fails to prove that there

[14] 182 Pac. 29 (Cal., 1919).

[15] To the same effect, see *Buddress v. Schaffer,* 41 Pac. 43; *Henrietta Nat. Bank v. Barrett, supra,* note 3.

[16] 6 Ind. L. Journal, 296; 30 Columbia L. Rev. 820.

was a contract may bring another action in quasi-contract. It is quite clear that the action on contract might have been joined with the action in quasi contract, both being "money demands on contract."[17] The two actions fall under the general heading "assumpsit." The probabilities are that the new rule will be generally accepted since it is conducive to less litigation. This new rule arises from a literal application of the orthodox rule. The old rule was that a judgment concludes the parties not only as to matters decided but also on all matters which might have been considered and decided.[18] But this rule was applied only when the second suit was on a part of the same cause of action as the first. Where the second cause was different from the first, the judgment was conclusive only as to those points or questions actually litigated and determined in the original action, not what *might* have been litigated and determined.[19] The new rule takes the phrase "what might have been litigated" and applies it absolutely literally. Every cause of action which might have been adjudicated is barred. Thus quoting Professor Gavit in 6 Ind. L. J. 296, 30 Col. L. Rev. 820, "If a party might have amended;[20] might have joined;[21] might have answered by setting up a counterclaim;[22] might have fused;[23] he is now barred by the new doctrine of *res judicata.*"

The Indiana case cited, *Royal Ins. Co. v. Stewart,* held that the judgment in a prior legal action to recover on an insurance policy as it was written barred an equitable action to reform said policy, and is thus contrary to the dictum in the instant case. S. K.

SCHOOLS—RACE SEGREGATION—CONSTITUTIONAL LAW—Appellant, a next friend of the relatrix, began suit in the Lake County superior court for the purpose of mandating appellees either to reinstate relatrix in a certain named high school or to transfer and admit her "as a high school pupil in one of the accredited high schools of the * * * school city of Gary, Indiana." At the opening of schools of Gary in September, 1927, relatrix enrolled as a pupil of the 10B grade (second year high school) in Virginia Street school. On that date, this school was organized to offer the eight years of grade work and two years of high school work. Shortly after, all tenth grade work was discontinued in this school, and relatrix, a member of the colored race, was transferred to Emerson High School. Shortly thereafter, a large number of white pupils "struck" at Emerson as a protest against the transfer of colored pupils to that school. The school officials refused to make any changes at that time, and the strikers returned to their classes. It is charged that they were induced to return by the promise that the colored pupils would be removed within 90 days. Within such period, relatrix was notified by the Gary superintendent of

[17] 286 Burns, *Hawke v. Thorn,* 54 Barb (N. Y.) 164.

[18] *Wong Sun v. United State,* 293 F. 273.

[19] *Cromwell v. County of Sac, supra,* note 7.

[20] *Dodson v. Southern Ry. Co.,* 137 Ga. 583, 73 S. E. 834 (1912).

[21] *Royal Ins. Co. v. Stewart,* 190 Ind. 444, 129 N. E. 353 (1921).

[22] *Holman v. Tjosevig,* 136 Wash. 261, 239 Pac. 545 (1925); *Bates v. Bodie,* 245 U. S. 520 (1918); *Fairview Chase Corp. v. Schorf,* 232 N. Y. S. 530; *Gust v. Edwards Co.,* 129 Ore. 409, 274 Pac. 914 (1929).

[23] *Hahl v. Sugo,* 169 N. Y. 109, 62 N. E. 135 (1901).