

## RECENT CASES

EVIDENCE—ADMISSIBILITY OF PRIOR CONVICTION IN SUBSEQUENT CIVIL SUIT—Complainants, children of defendant, brought a bill in equity praying that they be adjudged legal owners of real estate which had been owned by defendant and his deceased wife as tenants by the entirety. The bill of complaint alleged that defendant had murdered his wife and that complainants as her heirs were entitled to the property. The only evidence introduced by complainants to prove that defendant murdered his wife was a record of his conviction. *Held*, that the record of defendant's conviction was not admissible in evidence. Complainants' bill was dismissed. *Sorbello v. Mangino* 108 N.J. Eq. 292 (Ch. 1931).

It is uniformly conceded that a conviction is not *res judicata* as to the facts upon which it is based when it is offered in a subsequent civil action between the defendant in the criminal suit and a third person. 2 *Freeman, Judgments* (5th Ed. 1925) Sec. 653. See *Cox, Res Adjudicata: Who Entitled to Plead* (1923) 9 Va. L. Reg. (N.S.) 241, 253. And by the weight of authority it is not even admissible in evidence. *Cammarano v. Gimino* 234 Ill. App. 556 (1924); *Lucino Almeida Chantangco v. Aborao* 218 U.S. 476, 54 L. Ed. 1116 (1910); 31 A.L.R. 261; 57 A.L.R. 504. The English courts have shown a recent tendency to depart from the orthodox common law rule and have admitted convictions as *prima facie* evidence in subsequent civil suits. *Partington v. Partington* (1925) P. 34; *In the Estate of Crippin* (1911) P. 108. And in *Tucker v. Tucker* 101 N.J. Eq. 72, 137 Atl. 404 (1927) Vice Chancellor Backes also departed from the usual rule and granted a divorce upon proof of a conviction of adultery. See 41 HARV. L. REV. 242 (1928); 76 U. OF PA. L. REV. 97 (1927); 57 A.L.R. 505. Although the Vice Chancellor reached a desirable result his decision seems to have been contrary to the provision of a New Jersey Statute and a decision of the Court of Errors and Appeals. *C.S. p. 1813 Sec. 221*; *Kowalski v. Director General* 93 N.J.L. 340 (Sup. Ct. 1910) aff'd 96 N.J.L. 293 (E&A 1921). The case of *Stewart v. Stewart* 93 N.J. Eq. 1 (Ch. 1921) upon which the Vice Chancellor relied is clearly distinguishable. In the *Stewart* case the criminal defendant had pleaded guilty; clearly the hearsay exception receiving extra-judicial admissions in evidence rendered the conviction based on the plea of guilt admissible. Although Vice Chancellor Fielder in the principal case recognized the desirability of the result of the *Tucker* case he considered the clear terms of the New Jersey Statute as controlling. See *Swavely v. Prudential Insurance Company* 10 N.J. Misc. 1 (Sup. Ct. 1931). The *Tucker* case is distinguished on wholly untenable grounds; clarity of thought on the subject would have been better served by an express disapproval of its holding.

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NEGOTIABLE INSTRUMENTS — RESTRICTIVE INDORSEMENTS — The plaintiff bank sued on defendant's check made to the order of the Atlantic Woodworking Company, and endorsed by it "For deposit

only to the credit of Atlantic Woodworking Co." Defendant had given the check so that the depositor's balance at the plaintiff bank would cover a due note payable to defendant's order. After the bank had advanced credit on the strength of the check, payment of the check was stopped by the defendant. *Held*, that the maker was estopped to assert the defense of lack of consideration against the bank as restrictive indorsee. *Atlantic City Nat. Bank v. Commercial Lumber Co.* 9 N.J. Adv. Rep. 256 (E. & A.) 1931).

The court followed the weight of authority in holding "for deposit only" to be a restrictive indorsement, *First Nat. Bank of Sioux City v. John Morrell & Co.*, 221 N.W. 95, 60 A.L.R. 866 (1928); *Haskell v. Avery* 181 Mass. 106, 63 N.E. 15; 23 L.R.A. 164, note. Under the common law and Negotiable Instruments Act defenses good against the indorser are valid against the restrictive indorsee; BRANNAN, NEG. INSTR. LAW (3d Ed.) 509; 14 HARV. L. REV. 446; DANIEL, NEG. INSTR. par. 698, *Gulbranson-Dickinson Co. v. Hopkins* 175 N.W. 93, 34 HARV. L. REV. 84. The giving of consideration by the indorsee does not alter this rule, *Thomas Wilson v. Joseph Holmes Jun*, 5 Mass. 421. The Court of Errors and Appeals created an exception to the provisions of the statute in order to reach a conclusion which is in harmony with business practice. Even under this decision, however, a bank is not safe in advancing credit or cash on a check indorsed "for deposit only", for it can recover from the maker only if the elements of estoppel are present. *Hook v. Pratt* 78 N.Y. 371. It is submitted that the bank should be protected by the courts without evading the provisions of the Uniform Act, a practice which must not be extended if the law of Negotiable Instruments is to have any coherence. The indorsement "for deposit only" should be held not restrictive but rather akin to a special indorsement. *Ditch v. Western Nat. Bank*, 29 Atl. 72, 23 L.R.A. 164; *Security Bank v. Northwestern Fuel Co.* 58 Minn. 141, 59 N. W. 987. The function of a restrictive indorsement is to limit the use of the instrument in the hands of the indorsee, while a special indorsement limits it in the hands of every one but the indorsee and those deriving title from him. *Haskell v. Avery*, *supra*. In placing "for deposit only" upon a check the depositor intends to prevent the beneficial use of the check by anyone before it reaches the bank, but not after. *Ditch v. Western Nat. Bank*, *supra*. The law should give effect to this intent by recognizing that the indorsement is special. *Titus & Scudder v. Mechanics Nat. Bank*, 35 N.J.L. 588 (E. & A. 1871) and the bank a *bona fide* holder. A just result is thus reached in harmony with the Uniform Negotiable Instruments Act.

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NEGLIGENCE—MASTER AND SERVANT—INCONSISTENT VERDICTS  
—The plaintiffs brought an action against the owner and operator of a bus, a common carrier, for injuries suffered while passengers in the bus and recovered a judgment against the owner only, the jury having found in favor of the defendant operator. It is contended that the finding in favor of the operator is conclusive of the question of

his negligence and the verdict being based solely on that negligence and the master's responsibility therefor, the judgment should be reversed. *Held*, the duty of the defendant operator being merely the exercise of reasonable care, while the duty of the defendant common carrier is the exercise of a high degree of care, verdicts in favor of the operator and against the owner are not inconsistent. Judgment affirmed. *Maldonato v. Ironbound Transportation Co.*, 9 N.J. Misc. 985, (Sup. Ct. 1931).

In *Goekel v. Erie*, 100 N.J.L. 279, (E. & A. 1924), a verdict against the master was upheld although the servant was exonerated by the jury, but the court carefully pointed out that the allegations of negligence were severable and that some of them charged the master with the breach of a duty which was not required of the servant. The question whether or not in a case where the responsibility is based upon the same act and the application of the doctrine of *respondere superior* a similar severance of liability would be approved is expressly left undecided in the case. An examination of the pleadings in the instant case shows that the allegations of negligence against the owner and the operator are identical, and that no allegation is made charging the owner with the breach of any duty other than failure to observe care in the operation of the bus. It is fundamental that pleadings should be construed most strongly against the pleader, *Stephens etc. Transp. Co. v. Central R.R. Co.*, 33 N.J.L. 229 (Sup. 1869); *State v. Jersey City*, 94 N.J.L. 431, 111 Atl. 544 (E. & A. 1920); *Hackensack Trust Co. v. Tracy*, 86 N.J. Eq. 301, 99 Atl. 846 (Ch. 1916); *Apgar v. Altoona Glass Co.*, 92 N. J. Eq. 352, 113 Atl. 593 (Ch. 1921). It follows that allegations not clearly charging breaches of separate duties on the part of the master will be held to charge only the negligence of the servant. *Southern Railway v. Davenport*, 148 S.E. 171. Separate verdicts against joint tortfeasors are proper where the duties are diverse and the jury negatives the negligence charged against one. *Matthews v. D. L. & W. R.R. Co.* 56 N.J.L. 34 (Sup. 1893); *Goekel v. Erie*, 100 N.J.L. 279 (E. & A. 1924). Where the action is based solely upon the negligent act of the servant, who is exonerated by the jury, a judgment against the master in the same case is unauthorized. *Williams v. Hines, Director-General of Railroads*, 86 So. 695 (Fla. 1920); *Zaney v. Rieman*, 151 N. E., 625 (Ind. 1926); *Begin v. Liederbach Bus Co.*, 208 N. W. 546 (Minn. 1926); *Lowney v. Butte Elec. Railway Company*, 204 Pac., 485 (Mont. 1921); *Michely v. Mississippi Valley Structural Steel Company*, 299 S. W., 830 (Mo. 1927).

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RES JUDICATA — AUTOMOBILE COLLISION — JUDGMENT IN INFERIOR COURT AS BINDING IN EARLIER SUIT IN HIGHER COURT—Plaintiff instituted action in the New Jersey Supreme Court in July, 1929, to recover damages for injuries sustained in an automobile accident. Defendant filed an answer in September, 1929. After the case was at issue and had been listed for trial defendant applied to the Court for leave to file an amended answer setting forth that she had

instituted an action in the District Court against plaintiff to recover damages for personal injuries sustained by her arising out of the automobile collision upon which plaintiff's cause of action was based, that the suit there instituted had been tried on November 29, 1929, and resulted in a judgment in her favor and that this judgment was *res judicata*. The Court refused to permit the amendment to be filed. At the subsequent trial the jury rendered a verdict for plaintiff and judgment was entered thereon from which judgment defendant appealed. The only error complained of was the Court's refusal to permit the filing of the amendment. *Held*, the action of the Court in refusing to permit the filing of the amendment was proper. *Bergin v. Ganley*, 9 N.J. Adv. R. 345 (E. & A. 1931).

The Court based its decision on the sole ground that a higher court, once having acquired jurisdiction, cannot be deprived of it by a judgment of an inferior court in an action commenced subsequent to the time the action was started in the higher court. Accordingly, it is unnecessary to consider what other elements must be present to constitute one judgment a bar to another action. In fact, their existence is inferentially admitted in the opinion of the Court. (P. 346). It is the established and familiar rule that where there are two actions between the same parties involving the same cause of action it is the first judgment rendered which constitutes a bar to the other action regardless of the order of time in which the suits were commenced. *McDougal v. Black Panther Oil & Gas Co.*, 273 Fed. 113 (C.C.A. 8th, 1921); *Case v. Mountain Timber Co.*, 210 Fed. 565 (D.Ct. W.D. Wash., S.D. 1914); *Gates v. Preston*, 41 N.Y. 113 (Ct. of A. 1869). This doctrine does not rest upon any superior authority of the Court rendering the judgment. It is invoked even though the second suit is commenced and concluded in an inferior court. See *Gates v. Preston supra*, where the second suit was instituted in a Justice's Court and judgment there obtained was held to bar a prior action commenced in a higher court. See also the cases collected in 34 C. J. 759. No authority is cited in support of the decision in the principal case and it appears contrary to the overwhelming weight of authority in the United States. It is, therefore, to be regretted that the Court did not elaborate upon the reasons for reaching its conclusion. Whether the result is desirable is at least doubtful, but the decision stands as further evidence of the high court's tendency to limit the application of the doctrine of *res judicata* in automobile collision cases. See *Ochs v. Public Service Corp.*, 81 N.J.L. 661 (E. & A. 1911); *Smith v. Fischer Baking Co.*, 105 N.J.L. 567 (E. & A. 1929). But see *Freitag v. Renshaw*, 9 N.J. Misc. 1161 (Ct. of C. P. 1931).

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STATUTE OF LIMITATIONS—EFFECT OF DEATH OF OBLIGEE BEFORE ACCRUAL OF CAUSE OF ACTION—The plaintiff sued as administrator of the estate of an intestate who died March 5, 1914, the holder of a promissory note executed by defendant and her intestate, which fell due April 1, 1914. Plaintiff's letters were granted January 16, 1924, and this action was commenced June 14, 1927. The statute of

limitations was pleaded by defendant. The substance of plaintiff's contention was that the cause of action did not accrue until there was someone legally qualified to enforce it, and that the statute should not run against the claim until the person so qualified had been ascertained. *Held*, that the claim was barred and that a non suit granted below was proper. *Valente v. Boggiano*, 9 N.J. Adv. Rep. 304 (E. & A. 1931).

A cause of action at law is composed of a right and an obligation. Statutes of limitation must be considered with respect to their potential effect upon either of these elements. The propriety of the decision in this case rests upon the determination whether the predominant purpose of the statute is to deprive the plaintiff of his right or to relieve the defendant of his obligation. If the purpose is to penalize the plaintiff and the effect is to be logical, only plaintiffs at fault should be barred. Such is not the case, as the statute will run against plaintiffs even though acting in good faith and not guilty of intentional delay. *Ely v. Norton*, 6 N.J.L. 187 (Sup. Ct. 1822); *Summerside Bank v. Ramsey*, 55 N.J.L. 385 (Sup. Ct. 1893); *Jersey City v. Jersey City etc R.R. Co.*, 71 N.J.L., 367 (Sup. Ct. 1904). The implication of our statute that the disabilities provided therein shall be available to a plaintiff only if the disability exists at the accrual of the cause of action has been followed by our cases, and the intervention of a disability after the cause of action is complete will not stay the operation of the statute. *Pinckney v. Burrage*, 31 N.J.L. 21 (Sup. Ct. 1865); 3 C. S. 3164, Sec. 4. The defendant has it in his power to abandon the protection of the statute. He may do so by making a new promise and thus revive an obligation outlawed by the statute. 3 C. S. 3167, Sec. 10. He may waive the defense to the statute by a failure to plead it. *Brand v. Longstreet*, 4 N.J.L. 375 (Sup. Ct. 1860); *Hoboken v. Syms*, 49 N.J.L. 546 (Sup. Ct. 1887). It would seem that the primary purpose of the statute is to secure repose to defendants who see fit to avail themselves of this protection, rather than to penalize plaintiffs, whether dilatory or not. *Adams v. Coon*, 36 Okla., 644; 129 Pac. 851; 44 L. R. A. (N.S.) 624; *Hale v. Vandegrift*, 3 Binn (Pa.) 374. A large majority of the American cases following the leading English case of *Murray v. East India Co.*, 5 Barn. & Ald. 204 (1821) have reached a conclusion opposite to that of the court in the instant case. *Ruff v. Bull*, 7 Har. & J. (Md.) 14; 16 Am. Dec. 290; *Gronna v. Goldammer*, 26 N. D. 122, 143 N. W. 394, Ann. Cas. 1916A 165; *American R. Co. v. Coronas*, 230 Fed. 545, L. R. A. 1916E 1095; *Collier v. Goessling*, 160 Fed. 604, 166. California alone, among common law jurisdictions, has reached the same result as the New Jersey court in this case. *Sullivan v. Gillon*, 26 Cal. A. 421, 147 Pac. 215; *Courtelyou v. Imperial Land Co.*, 166 Cal., 14, 134 Pac. 981; *Tynan v. Walker*, 35 Cal. 634; 95 Am. Dec. 152. It is submitted that upon proper analysis of the function of the statute the better result is that of the minority holding, which secures the defendant repose from stale demands.