recording of the conveyance wherein the surety assumed the mortgage debt.[10]

On the other hand, the surety's position is not without merit. His principal, who has contracted to pay at a fixed time and thus discharge the surety, is guilty of a breach of contract by such extension. And since it is the creditor who by the extension assists in the breach, should not a portion of the blame for the breach be placed upon him?[11] Finally, since the creditor may now sue the principal for the deficiency not only in equity by subrogation[12] but directly at law as well,[13] his attack on the surety before using such methods seems premature.

On the whole, in the light of these conflicting claims, it would be presumptuous to hold that the great weight of authority favoring the creditor in these circumstances is wrong. But, in the light of *Herbert v. Corby*,[14] the surety should at least be immune until the creditor has exhausted his rights against the principal directly.

Res Judicata—Judgment on the Pleadings.—A commenced an action in New Jersey to recover monies advanced to the X corporation in accordance with an oral agreement with B, C, and D. Relying on information received from B, C, and D, that the X corporation was financially incapable of paying the claim, A settled his claim, discontinued his suit, and executed a general release to the X corporation and its president, B. A thereafter discovered that the corporation was thriving and that he had been fraudulently induced to settle his claim. He then started suit in New York against B, C, and D alleging fraud, where-

10. Meyer v. Blacker, 120 N.J.Eq. 35, 184 A. 191 (Ch. 1936).

11. F. B. Sayre, *Inducing Breach of Contract*, 36 HARV. LAW REV. (Apr. 1923); Beekman v. Marsters, 195 Mass. 205, 80 N.E. 817 (1907).

12. Crowell v. Hospital of St. Barnabas, *supra*, note 1; Santoro v. Kleinberger, 115 Conn. 631, 163 A. 107 (1932).

13. Herbert v. Corby, 124 N.J.L. 249, 11 A. 2d 240 (S. Ct. 1940), *aff'd* 125 N J.L. 502, 17 A. 2d 541 (E. & A. 1940).

14. *Supra*, note 13.

upon the court, on a motion by defendants, entered a judgment on the pleadings in favor of defendants. A then brought this action in New Jersey in fraud against B, C, D, and the X corporation. *Held*: The New York judgment was not *res judicata. Kearny v. National Grain Yeast Corporation,* 126 N.J.L. 307, 19 A. 2d 19 (E. & A. 1941).

It is universally accepted that in order for a judgment to be *res judicata* such judgment must have been on the merits.[1] The court in the principal case considered the *res judicata* issue and disposed of it in the following language: "The issues raised by this cause of action are clearly not *res adjudicata* because of the New York judgment, which judgment was based solely on the pleadings and not on the merits."[2] The court is in accord with the overwhelming weight of authority when it requires a judgment to be on the merits before it will be given the effect of *res judicata;* but we are not prepared to agree with the proposition that a judgment on the pleadings is not, in any case, on the merits. We submit that in many cases judgments on the pleadings are on the merits and that this case falls into that class of cases.

In the New York action, plaintiff filed his complaint, the defendants filed their answers; whereupon plaintiff joined issue in a reply. The court, before it entered a judgment for defendant, considered the issues of fact and the law involved. It would seem that such consideration constituted a consideration on the merits and the judgment was, therefore, *res judicata.*

The doctrine of *res judicata* may be said to rest on the theory of expediency,[3] justice,[4] public tranquility[5] or public policy.[6] Without

1. Hughes v. United States, 71 U.S. 232, 18 L. Ed. 303 (1866); Curtis v. Maryland Baptist Union Ass'n, 176 Md. 430, 5 A. 2d 836 (1939).

2. Kearny v. National Grain Yeast Corporation, 126 N J L. 307 19 A. 2d 19 (E. & A. 1941).

3. Evers v. Williams, 43 Ohio App. 555, 184 N.E. 19 (1934).

4. Permian Oil Co. v. Smith, 129 Tex. 413, 73 S.W. 2d 490 (1930).

5. Bennett v. Commissioner of Internal Revenue (C.C.A. 1940), 113 F. 2d 837; Buffalo Fire Appliance Corp. v. City of Norwick, 281 N.Y.S. 939, 156 Misc. 486 (1935).

6. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244 (1930).

such a doctrine, litigation would be endless[7] and the parties, their rights, and the courts would be in endless confusion. The doctrine, briefly, is that once the parties have had an opportunity to have their grievances heard by a court of competent jurisdiction they should not, thereafter, be permitted to relitigate to the harassment and vexation of the successful party.[8] Not only is litigation put at rest by this doctrine but it also produces certainty as to the individual rights of the litigants and gives dignity and respect to judicial proceedings.[9] The need and desirability for finality of judgments is so great that once a judgment is rendered in a court having jurisdiction of the parties and subject matter, no amount of evidence, no matter how clear the error of the court might have been, will be admitted to impeach the judgment in a collateral attack. The issues of law and of fact are *res judicata* no matter how erroneous.[10]

It is clear and unassailable that issues of fact decided by a jury in a court of competent jurisdiction between litigants in a suit in which a judgment issues are conclusive on the parties and may not thereafter be relitigated.[11] The authorities are generally in accord when dealing with issues decided by juries, but there is disagreement on issues of law decided by the court. The entire disagreement is based on whether or not a judgment rendered by the courts is on the merits. The courts are apt to strain the normal application of this doctrine so that hardship and injustice will not result.

The courts are in accord in declaring that judgment on demurrer going to the merits of the case is *res judicata*[12] but, where the judg-

7. Los Angeles County v. Superior Ct., 128 Cal. App. 522, 18 P. 2d 112 (1933).

8. Kallberg v. Newberry, 43 N.D. 52, 170 N.W. 113 (1918).

9. State Hospital v. Consolidated Water Supply Co., 267 Pa. 29, 110 A. 281 (1920).

10. Moore v. Gas & Electric Shop, 216 Ky. 530, 287 S.W. 979 (1926).

11. Hancock v. Singer Manufacturing Co., 62 N.J.L. 289, 41 A. 846 (E. & A. 1898); Good Health Dairy Products Corporation v. Emery, 275 N.Y. 14, 9 N.E. 2d 758 (1937).

12. Devide Creek Irr. Dist. v. Hallingswarth (C.C.A. 10 1934), 72 F. 2d 859; "It is well settled that a judgment upon demurrer or upon motion to dismiss is as conclusive upon the parties as a judgment ren-

ment on demurrer does not go to the merits, the judgment is not *res judicata.*[13] The courts, in applying the doctrine of *res judicata* to directed verdicts,[14] demurrers, and judgments on the pleadings,[15] are extending the doctrine to issues of law decided by the courts without the aid of a jury. In all cases the courts stress the requirement that the judgment must be on the merits.

The cases indicate that the decision in the case under consideration should be given careful scrutiny and study. The issue cannot be brushed aside as easily as the court indicates because of the existent differences of opinion on the point.

Statutes—Invalidity of Amendatory Act as Affecting Act Amended.—In 1936 the New Jersey legislature passed an act exempting from taxation the property of all fraternal organizations or lodges.[1] This was amended in 1937, at the request of the City of New Brunswick, to remove the property of college fraternities from the exemption.[2] Plaintiff, a college fraternity claiming immunity under the 1936 act, appealed a judgment of the State Board of Tax Appeals, affirming an assessment upon its property by the defendant. The Supreme Court, by a vote of two to one, set aside the assessment, holding that plaintiff was a fraternal organization within the purview of the law, and that the 1937 amendment was unconstitutional as special legislation. The court declared that the amendment, being invalid, was as if it had never been passed. On

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dered upon proof," Brooks v. Arkansas-Louisiana Pipe Line Co. (C.C.A. 8 1935), 77 F. 2d 965, at page 968.

13. Brown v. Carpenter, 109 N.J.Eq. 208, 156 A. 471 (E. & A. 1931).

14. Mauyalis v. Philadelphia and Reading Coal and Iron Co. (C.C.A. 6 1920), 270 F. 93; McCown v. Muldron, 91 S.C. 523, 71 S.E. 386 (1912).

15. "There can be no doubt that a decision of the case on the pleadings may be as effective a bar as one on testimony." Fledderman v. Fledderman, 112 Md. 226, 76 A. 85 (1910); 38 Yale Law Journal 299.

1. Chap. 46, P.L. 1936.

2. Chap. 170, P.L. 1937.