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Judgments--Res Judicata as between Co-Defendants

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JUDGMENTS—RES JUDICATA AS BETWEEN CO-DEFENDANTS.—When once an issue has been litigated between parties and a personal judgment is rendered thereon, the judgment is binding upon those parties and their privies in all subsequent litigation between them in which the issue again arises.[1] The principle applied is that referred to as estoppel by verdict. It is distinguished from

[1]Restatement of Judgments, sec. 68 (1) stating, "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action," with exceptions not material here.

estoppel by judgment which bars relitigation of any part of a cause of action or any defense thereto, when once the judgment has been rendered thereon, even though the particular issue or defense later raised was not presented in the original suit. Estoppel by verdict applies only to issues actually litigated.[2] Underlying the principle is the policy which seeks to avoid subjecting the successful party and the courts to repeated litigation over the same question. It is not unfair to the loser to require him to abide by the judgment which ensues after he has presented his version of the question.[3] The issue must in fact have been litigated and adjudicated. It is not enough that an opportunity was afforded in which the question might have been raised.[4] In this respect it must be distinguished from estoppel by judgment. The issue must also have been raised with respect to the party sought to be bound by the judgment. A stranger to the suit cannot be barred thereby.[5]

The normal case in which the principle is applied is one in which the parties bound by the adjudication were arrayed on opposite sides of the case, as plaintiff on one side and as defendant on the other. But a judgment may sometimes constitute a bar as between parties to the same side of the case. Usually the question arises as between those who were defendants in the former action. Should a cross-claim be filed by one defendant against the other, as is frequently done in equitable actions[6] or as is sometimes allowed by statute[7] or court rule,[8] and judgment rendered thereon, the result is no different than that which follows upon a judgment between a plaintiff and a defendant. The defendants are bound

[2]See Holtz v. Beighley, (1941) 211 Minn. 153, 300 N. W. 445; Gustafson v. Gustafson, (1929) 178 Minn. 1, 226 N. W. 412. In the comments appended to the Restatement of Judgments, the principle is referred to as "collateral estoppel."

[3]Scott, Collateral Estoppel by Judgment, (1942) 56 Harv. L. Rev. 1; Moschzisker, Res Judicata, (1929) 3 Yale L. J. 299.

[4]Estes v. Farnham, (1866) 11 Minn. 423 (312); Fox v. Fox, (1923) 154 Minn. 169, 191 N. W. 420.

[5]Restatement of Judgments, sec. 93.

[6]Langdell, Equity Pleading (1878) sec. 159; Corcoran v. Chesapeake, etc. Canal Co., (1876) 94 U. S. 741, 744, 24 L. Ed. 190, stating, ". . . in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree."

[7]For examples, see Iowa Code 1939, sec. 11155; Wis. Stat. 1941, sec. 263.15; Ill. Rev. Stat. 1941, c. 110, sec. 163.

[8]See Federal Rules of Civil Procedure, Rule 13 (g).

by the adjudication.[9] But it is not indispensable that there exist such formal pleadings which define the issue between them. They may, in fact, litigate an issue without its having been expressly set forth in a pleading, and the adjudication may include the issue. If so, the defendants are bound thereby.[10]

Sometimes the action is brought for the express purpose of having issues between the defendants and affecting the plaintiff determined in the suit. Clearly an adjudication therein is binding on the defendants in subsequent litigation between them. The action of interpleader is an example.[11] Another is an action to enjoin one defendant from seeking to recover a claim from the other defendant, the plaintiff's being liable for the latter's debts. The defendants are the real adversaries respecting the validity of the claim and are consequently bound as between themselves by the resulting judgment.[12]

When the purpose of the action is not to compel litigation between the defendants, but rather is to enforce a claim of the plaintiff against the defendants, it often becomes more difficult to determine whether in resisting the plaintiff's claim they have not also litigated some question as between themselves and as adversaries. Not infrequently each defendant in resisting the plaintiff's case attempts to place the responsibility for the claim upon the other defendant. Conflicting views are taken on whether this constitutes a litigation of the issues involved as adversaries of each other. In some cases the view is taken that it consists of no more than resisting the plaintiff's claim and that the defendants are not litigating with each other in attempting to fasten the blame upon the other. Hence, the judgment is not binding when the defendants become adversaries respecting the same issue in subsequent litigation.[13] In other decisions the contrary, and more

[9]1 Van Fleet, Former Adjudication (1895) sec. 256; see Goldschmidt v. County of Nobles, (1887) 37 Minn. 49, 33 N. W. 544.

[10]Wright v. Schick, (1938) 134 Ohio St. 193, 16 N. E. (2d) 321.

[11]Hertzel v. Weber, (C.C.A. 8th Cir. 1922) 283 Fed. 921, 929.

[12]Georgia Railroad Co. v. Wright, (1905) 124 Ga. 596, 53 S. E. 251, rev'd on other grounds, Georgia Railroad Co. v. Wright, (1907) 207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134. See also Giblin v. North Wisconsin L. Co., (1907) 131 Wis. 261, 111 N. W. 499, 120 Am. St. Rep. 1040, in which the original suit was by a taxpayer to enjoin the payment of a county order. Both the holder and the county were party defendants. It was held that the adjudication therein enjoining the payment was binding in a later suit by the holder against the county.

[13]Smith Bros. & Co. v. New Orleans & Northeastern Ry., (1903) 109 La. 782, 33 So. 769; Merrill v. St. Paul City Ry., (1927) 170 Minn. 332, 334, 212 N. W. 533; Missouri Dist. Telegraph Co. v. Southwestern Bell Tel. Co., (1935) 336 Mo. 453, 79 S. W. (2d) 257.

realistic, view is adopted that in fact and substance the issue was litigated between them and that they were adversaries in the real sense of the term although it may have been incidental to resisting the claim of the plaintiff.[14] Thus, if one defendant charges that the other defendant's negligence was the sole cause of the plaintiff's negligence, and in turn the other defendant attempts to refute this and attempts to fasten the blame on his co-defendant, and the trier of fact passes upon the conflicting testimony in determining the valility of the plaintiff's claim, it can hardly be said that the issue of their respective negligence was not as completely and effectively litigated as if they had been plaintiff and defendant.[15]

A more difficult question is raised when there is no direct litigation of any issue between the defendants, either with or without pleadings between them, and yet the trial as conducted between the plaintiff and the defendants involves issues which arise again in a subsequent action between the defendants. Cases in which the issues in the two actions are not the same must, of course, be distinguished. If none of the questions in the second suit were in controversy between the plaintiff and the defendants in the first action, obviously nothing could be adjudicated that would affect the second suit.[16] Thus, in an action by an obligee against two defendants on an instrument executed by them, a judgment thereon against both of them involves no determination of whether the obligation of either defendant was secondary or primary. All that was determined was the liability to the plaintiff, and the primary or secondary nature thereof was immaterial.[17] To be distinguished also are cases in which a party is estopped to deny the correctness of the judgment that was rendered against a defendant. Thus, if the defendant in the second suit were liable as a primary party to the defendant who lost in the first action and had been notified of the action and requested to defend, he is bound by the judgment whether he took part in the defense or

[14]Central Surety & Ins. Corp. v. Mississippi Export Ry., (C.C.A. 5th Cir. 1937) 91 F. (2d) 125; A. B. C. Fireproof Whse. Co. v. Atchison, Topeka Ry., (C.C.A. 8th Cir. 1941) 122 F. (2d) 657.

[15]This is the view taken by the Restatement of Judgments, sec. 106, comment (c), p. 507.

[16]Gardner v. Raisbeck, (1877) 28 N. J. Eq. 71; Koelsch v. Mixer, (1894) 52 Ohio St. 207, 39 N. E. 417.

[17]Telephone Co. v. St. Louis, (1916) 268 Mo. 485, 188 S. W. 182; Missouri Dist. Telegraph Co. v. Southwestern Bell Tel. Co., (1935) 336 Mo. 453, 79 S. W. (2d) 257; Hedges v. Mehring, (1921) 76 Ind. App. 496, 130 N. E. 423; Geo. A. Fuller Co. v. Otis Elevator Co., (1918) 245 U. S. 489, 38 Sup. Ct. 180, 62 L. Ed. 422.

not. It was his duty to aid in the defense.[18] This is true whether he was a party to the suit[19] or not. The problem now considered is raised when each defendant conducts his own defense to the plaintiff's claim without assistance or request therefor from the other and without engaging the other in a dispute, and in the disposition of the case issues are adjudicated which subsequently come up in a suit between the defendants. Are the defendants bound by the adjudication? Stating the question in these general terms, the authorities are in conflict. The majority of the cases dealing with the problem take the position that the judgment is binding only as between the plaintiff on the one hand and the defendants on the other. It is not an adjudication of any issue as between the defendants themselves.[20] A leading federal case[21] has expressed this view as follows:

"It is true these parties were joined as defendants. But they appeared by different attorneys, made separate answers and defenses; there was no cross-pleading, nor were any issues made between these parties, nor was anything adjudged as betwixt them. . . . Neither defendant had any control over the pleading or defense made by the other, and neither could take up for review an adverse judgment against the other. To all intents and purposes, the conditions were the same as if independent suits had been brought against each of the defendants."

These decisions place their emphasis upon the fact that the defendants were not adversaries in the action in which the judgment was rendered and that issues were not litigated between them. Since the entire basis of the doctrine of res judicata rests on the fact that the adjudication was the outcome of a judicial

[18]State Bank of New Prague v. American Surety Co., (1939) 206 Minn. 137, 141, 288 N. W. 7; Restatement of Judgments, sec. 107 (a).

[19]See Missouri Dist. Telegraph Co. v. Southwestern Bell Tel. Co., (1935) 336 Mo. 453, 79 S. W. (2d) 257.

[20]Warren v. Boston & Maine R. R., (1895) 163 Mass. 484, 40 N. E. 895; City of Owensboro v. Westinghouse, Church, Kerr & Co., (C.C.A. 6th Cir. 1908) 165 Fed. 385; The Pullman Co. v. Cincinnati, New Orleans Ry., (1912) 147 Ky. 498, 144 S. W. 385; Security Co. v. Guaranty Co., (1913) 73 W. Va. 197, 80 S. E. 121, 51 L. R. A. (N. S.) 797 and note; Bakula v. Schwab, (1918) 167 Wis. 546, 168 N. W. 378; Alaska Pacific Steamship Co. v. Sperry Flour Co., (1919) 107 Wash. 545, 182 Pac. 634, on rehearing aff'd (1919) 108 Wash. 545, 185 Pac. 583; Fidelity & Casualty Co. v. Federal Express, (C.C.A. 6th Cir. 1938) 99 F. (2d) 681; Missouri Dist. Telegraph Co. v. Southwestern Bell Tel. Co., (1935) 336 Mo. 453, 79 S. W. (2d) 257; Hughes v. Union Oil Company of Arizona, (1942) 132 P. (2d) 640; see Note, (1936) 101 A. L. R. 104; Note, (1943) 142 A. L. R. 727.

[21]City of Owensboro v. Westinghouse, Church, Kerr & Co., (C.C.A. 6th Cir. 1908) 165 Fed. 385.

controversy between adversaries,[22] there is, under this view, no ground in the situation under discussion upon which the doctrine can rest. There are some cases to the contrary.[23] However, the reasoning upon which they are based has seldom been developed. The thought appears to be that since the issue was litigated in an action in which the present parties were participants, they also are bound by the resulting judgment.[24]

To a considerable extent the cases tend to fall into certain categories, although the decisions themselves do not attempt to make any such classification. One of the more common situations which come before the courts is that in which a defendant who has lost in the original suit brings a later action against his co-defendant for contribution. If judgment went against the co-defendant in the first suit, the question is raised whether he may show in the second suit, despite the judgment, that he is not liable to the original plaintiff. It is generally held that he may not. He is bound by the judgment.[25] Two bases appear to underly the reasoning of the courts in these decisions. In the first place, the principles of contribution are applied.[26] The right to contribution exists when two or more are subject to a common liability for a

[22]"The rules of res judicata are based upon an adversary system of procedure which exists for the purpose of giving an opportunity to persons to litigate claims against each other." Restatement of Judgments, sec. 82, comment (a).

[23]Hobbs v. Hurley, (1918) 117 Me. 449, 104 Atl. 815; Town of Flagstaff v. Walsh, (1925) 9 F. (2d) 590, cert. denied (1926) 273 U. S. 695, 47 Sup. Ct. 92, 71 L. Ed. 844. The case last cited shows an unusual disregard and misconstruction of cases on the question and claims the weight of authority to be in favor of its position.

[24]"The questions raised and actually litigated in the Gomez Case were whether the several defendants therein were responsible for the death of Victoria Gomez. All parties were heard thereon, and the final judgments exonerated the contractors and charged the town. To the extent that the contractors were exonerated and the town was held, the judgments concluded the defendants for all purposes." Town of Flagstaff v. Walsh, (1925) 9 F. (2d) 590, 592, cert. denied (1926) 273 U. S. 695, 47 Sup. Ct. 92, 71 L. Ed. 844.

[25]Westfield Gas & Milling Co. v. Noblesv'le & Eagletown Grav. Road Co., (1895) 13 Ind. App. 481, 41 N. E. 955, 55 Am. St. Rep. 244; Wait v. Pierce, (1926) 191 Wis. 202, 209 N. W. 475, 48 A. L. R. 276, opinion on rehearing (1926) 191 Wis. 225, 210 N. W. 822, 48 A. L. R. 289, (refusing to follow Bakula v. Schwab, (1918) 167 Wis. 546, 168 N. W. 378, so far as it suggests the contrary rule).

[26]"To hold that under such circumstances a judgment which establishes the common liability is not *res judicata* upon that question is to ignore the principle upon which the right of contribution rests." Wait v. Pierce, (1926) 191 Wis. 202, 209 N. W. 475, 48 A. L. R. 276, opinion on rehearing (1926) 191 Wis. 225, 229, 210 N. W. 822, 48 A. L. R. 289. See also Missouri District Tel. Co. v. Southwestern Bell Tel. Co., (1935) 338 Mo. 692, 93 S. W. (2d) 19.

single claim to another and one of them pays more than his share.[27] Here the judgment establishes the common liability of the two defendants to the original plaintiff. The defendant may not in fact have been liable for the claim on which the judgment is based, but this is no longer material. Whether rightly or wrongly rendered, the judgment is there. Under it both defendants are liable and hence the principles of contribution apply. In the second place, the underlying policy of the doctrine of res judicata has been served. The defendant has had his day in court on the question involved. It must be assumed that in the original suit he contested the original plaintiff's claim as vigorously as his available defenses permitted. It is therefore no injustice to him to compel him to abide by the result. The fact that the present plaintiff has not been heard on the question of his co-defendant's liability is immaterial, for he is accepting the judgment in that respect.

Different considerations apply when the co-defendant in the original suit obtained a judgment in his favor but an action is nevertheless brought against him by the losing defendant for contribution, and the latter attempts to show that his co-defendant, notwithstanding the judgment, was in fact liable with him to the original plaintiff. The majority view is that the losing defendant is not bound by the judgment and may, therefore, show a common liability.[28] Of course, this liability is not established by the original judgment.[29] It can only be shown by ignoring the judgment and

[27] 1 Brandt, Suretyship & Guaranty (3d ed. 1905) sec. 279; Arnold, Suretyship and Guaranty (1927) sec. 166; Restatement of Security, sec. 149.

[28] Warren v. Boston & Maine Ry., (1895) 163 Mass. 484, 40 N. E. 895; City of Owensboro v. Westinghouse, Church, Kerr & Co., (C.C.A. 6th Cir. 1908) 165 Fed. 385; The Pullman Co. v. Cincinnati, New Orleans Ry., (1912) 147 Ky. 498, 144 S. W. 385; Security Co. v. Guaranty Co., (1913) 73 W. Va. 197, 80 S. E. 121, 51 L. R. A. (N. S.) 797 and note; Bakula v. Schwab, (1918) 167 Wis. 546, 168 N. W. 378; Alaska Pacific Steamship Co. v. Sperry Flour Co., (1919) 107 Wash. 545, 182 Pac. 634, on rehearing aff'd (1919) 108 Wash. 545, 185 Pac. 583; Fidelity & Casualty Co. v. Federal Express, (C.C.A. 6th Cir. 1938) 99 F. (2d) 681.

[29] On this ground a few cases have refused to grant recovery for contribution. Ledoux v. Durrive, (1855) 10 La. Ann 7; but cf. Cross v. Scarboro, (1873) 6 Baxt. (Tenn.) 134; Smith Bros. & Co. v. New Orleans & Northeastern Ry., (1903) 109 La. 782, 33 So. 769. "The rights of the parties were fixed by that judgment [in the original suit], and it constitutes the impregnable basis of this suit [for contribution]." Hobbs v. Hurley, (1918) 117 Me. 449, 453, 104 Atl. 815. This view ignores the fact that the losing defendant is obliged to look to the judgment to establish the common liability only if the principle of res judicata is applied. In its absence he may rely on the original liability.

showing that while the original plaintiff was not successful in respect to the co-defendant, liability in fact nevertheless existed. The question is whether he is barred by the original judgment from doing so. Most courts refuse to so hold. Applying the general principles previously stated[30] they point to the fact that the losing defendant had no opportunity to contest the liability of his co-defendant to the original plaintiff. The original judgment for the co-defendant may have been due as much to disinterest or unskillful presentation of the case or even partiality or collusion on the part of the original plaintiff as to the fact of non-liability. It would be unjust to the losing defendant to make his right to contribution depend upon the conduct of litigation by another in which he had not participated.

Another group of cases in which the effect of res judicata as between co-defendants is presented includes those which involve suits for indemnity rather than contribution. In so far as the question of common liability is involved, no different considerations or principles are applicable than in cases in which contribution is asked for. But additional questions are introduced such as the existence of an agreement to indemnify or the existence of primary negligence upon which the right to indemnity rests. With respect to issues of this character it is generally held that the judgment in the original suit is not an adjudication as between the defendants.[31] The reason is that these issues were not involved in the original suit. That action was concerned only with the liability of the defendants to the plaintiff. The degree of liability and arrangements between the defendants as to who should bear the ultimate responsibility were immaterial and hence not adjudicated.

The foregoing discussion indicates in some measure the degree of confusion and conflict which exists among the decisions. The recent Restatement of Judgments in dealing with the problem has not offered any substantial clarification. The relevant sections are as follows:

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[30]See footnotes 20 to 22.

[31]Smith Bros. & Co. v. New Orleans & Northeastern Ry., (1903) 109 La. 782, 33 So. 769; Geo. A. Fuller Co. v. Otis Elevator Co., (1918) 245 U. S. 489, 38 Sup. Ct. 180, 62 L. Ed. 422; Hedges v. Mehring, (1921) 76 Ind. App. 496, 130 N. E. 423; Missouri Dist. Telegraph Co. v. Southwestern Bell Tel. Co., (1935) 336 Mo. 453, 79 S. W. (2d) 257; see Westfield Gas & Milling Co. v. Noblesv'le & Eagletown Grav. Road Co., (1895) 13 Ind. App. 481, 41 N. E. 955, 55 Am. St. Rep. 244; Missouri District Tel. Co. v. Southwestern Bell Tel. Co., (1935) 338 Mo. 692, 93 S. W. (2d) 19.

Sec. 82—"The rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings as to their rights inter se upon matters which they did not litigate, or have an opportunity to litigate, between themselves."

The meaning of the phrase "or have an opportunity to litigate" is not defined. As to this the comment to the section refers to Section 106 which provides:

Sec. 106—"Where an action is brought against two persons who are claimed to be parties in a single contract or liable for a single harm, and valid and consistent judgments are rendered with respect to each, the judgment for or against one of them is conclusive upon the other as to matters decided therein, in a subsequent action between them for indemnity or contribution, if and only if the other had an opportunity to defend or to participate in the defense."

This section by its terms is limited to cases of contribution or indemnity. Again it makes its application depend on whether the defendant sought to be bound by the former judgment "had an opportunity to defend or to participate in the defense." Comment (d) to this section indicates that this brief phrase is intended to cover a number of situations. It has reference first to the well-settled rule that where one is under a duty to indemnify a defendant to an action and he is notified of the suit and requested to take over or participate in the defense and fails to do so, he is bound by the resulting judgment nevertheless.[32] The comment goes further and suggests that where, under the procedure in the state in which the action is brought, a defendant had "an opportunity of presenting evidence for the protection of himself or his co-defendant" he is likewise bound.[33] These suggestions cover cases where the defendant against whom indemnity or contribution is sought seeks to deny the liability of his co-defendant as determined in the original suit. The comment indicates that the section is intended to cover other situations as well. If the defendant against whom indemnity or contribution is sought lost in the original suit, he cannot, under this section, deny the fact that he is liable to the original plaintiff. He *participated* in that defense in the first action. Apparently, also, he may claim the advantage of the original judgment if he has won. According to an

[32]See footnote 18.

[33]Support for this view may be found in Fulton Co. G. & E. Co. v. Hudson Riv. T. Co., (1911) 200 N. Y. 287, 93 N. E. 1052; contra, Missouri Dist. Telegraph Co. v. Southwestern Bell Tel. Co., (1935) 336 Mo. 453, 79 S. W. (2d) 257.

illustration given in support of the section, the losing defendant is bound and cannot show that the winning defendant was in fact liable, if he had an opportunity under the procedure of the state to show in the original suit that liability to the original plaintiff on the part of his co-defendant in fact existed. Despite the violence of the language used, showing that his co-defendant had no defense is "participating" in the defense. Section 106 still leaves undefined what is meant by "an opportunity" to litigate or to defend or participate in the defense. If it be meant that a defendant is barred if the procedure of the state permit him to interpose a cross-claim against his co-defendant, even when he does not take advantage of it, the section is without support in either the decisions or the statutes. Such cross-claims are uniformly optional and not compulsory.[34] If "opportunity" refers to the right to produce witnesses against the co-defendant, to cross-examine, and to appeal from a decision affecting the co-defendant, it makes the solution depend upon matters which themselves are largely unsettled and in part begs the question.[35] Furthermore, in making the binding effect of the judgment turn on the opportunity to litigate rather than on an actual litigation, the distinction, made elsewhere by the Restatement itself[36] between estoppel by judgment and estoppel by verdict, is ignored.

Beginning with a decision[37] by Mr. Justice Mitchell, and until recently, the Minnesota court has consistently followed the majority view to the effect that a judgment in favor of a plaintiff does not operate as res judicata between co-defendants. In *Merrill v. St. Paul City Ry.*[38] it was held that a defendant could not appeal from a directed verdict in favor of his co-defendant, and the court expressly rejected the contention that the judgment would operate as res judicata against him in a later suit for contribution. The court said:

"The only issue is between plaintiff and each of the defendants, who were made parties at the will of plaintiff who could have dismissed as to either and the other could not have been heard to

[34]See statutes and rules cited in footnotes 7 and 8.

[35]The doctrine of res judicata, when applied to cases where the issue has not in fact been litigated, is but a means of compelling the parties to litigate the issue. Yet the Restatement evidently intends to leave to the procedure of the state whether the defendant must engage in litigation with his co-defendant or whether he is given an option to bring a later action of his own.

[36]Restatement of Judgments, sec. 68, comment (a).

[37]Pioneer Sav. & Loan Co. v. Bartsch, (1892) 51 Minn. 474, 53 N. W. 764, 38 Am. St. Rep. 511.

[38](1927) 170 Minn. 332, 212 N. W. 533.

complain. The co-defendants were not in law adverse parties simply because they were not by the pleadings arrayed on opposite sides."

This decision was adhered to in *Hardware Mutual Casualty Co. v. Anderson*[39] in which a losing defendant brought an action for contribution against his co-defendant who had won in the first action. It was held that the former action was not res judicata. In a still later decision[40] it was held that a judgment rendered against both of the defendants in the first suit did not adjudicate matters between them respecting the right to contribution such as the fact that the conduct of one of them was wilful and so barred the right of contribution.

These decisions indicated no disposition to view the principles thus followed in any light of disfavor or dissatisfaction. In *Hardware Mutual Casualty Co. v. Anderson*,[41] however, the court indicated that it was troubled by the case in which the defendant against whom contribution was sought had won in the original suit. The court observed that the two defendants "were not joint debtors under that judgment. Plaintiff by paying that judgment did not discharge a liability common to its insured and this defendant. The liability so paid and discharged was the liability of the former." The point was not decided and it was expressly distinguished from res judicata. The thought again found brief expression in a subsequent case.[42] It became the dominating consideration and the basis of decision in *American Motorists Ins. Co. v. Vigen*.[43] It was held that a losing defendant could not in a later suit claim contribution against a co-defendant who had won. The court said:

". . . a suit for contribution is an action derived from a common liability arising out of a relationship originally assumed by contract or arising from common responsibility to the victim of a tort. . . . Where it has been adjudicated that there never was any responsibility of the defendant to the injured person, there is absent that common liability which is the fundamental basis for contribution."

The court distinguishes between contract cases and tort actions.

[39](1934) 191 Minn. 158, 253 N. W. 374.

[40]Kemerer v. State Farm Mutual Auto Ins. Co., (1937) 201 Minn. 239, 276 N. W. 228, 114 A. L. R. 173 and note.

[41](1934) 191 Minn. 158, 253 N. W. 374.

[42]". . . the reach of the judgment as *res judicata* includes only the question of liability of the judgment debtors 'to the plaintiff.'" Kemerer v. State Farm Mutual Auto Ins. Co., (1937) 201 Minn. 239, 242, 276 N. W. 228, 114 A. L. R. 173 and note.

[43](Minn. 1942) 5 N. W. (2d) 397.

In the former, it is said, the contract creates the common liability, but in tort actions there is no such common liability until there has been an adjudication of it.[44] In cases where there is no adjudication "the question is open . . . and the adjudication in the contribution case supplies the relationship to the original transaction."

Had the decision been confined to this reasoning, it would have been confined in its effect to actions for contribution or indemnity. However, much of the language in the opinion indicates that the conclusion reached was considered to have been arrived at by the application of the doctrine of res judicata.[45] This is confirmed by the latest decision on the question in *Fidelity & Casualty Co. v. Minneapolis Brewing Co.*[46] In this case the two defendants were held liable in the original suit under instructions to the jury which were construed to make them liable for identical acts of active negligence and as parties *in pari delicto*. In the present action one of the defendants sought to recover indemnity on the ground that the co-defendant was guilty of primary negligence and that the negligence of the defendant seeking indemnity was passive and secondary only. The court, relying on *American Motorists Ins. Co. v. Vigen*,[47] held that the adjudication in the first suit was decisive of these questions and that the defendants in the original suit were bound thereby as between themselves.[48]

[44]Why a right based on a tort should have any less existence prior to an adjudication of it than a right based on contract is not apparent. That either requires an adjudication before it can be said to exist is a unique judicial position.

[45]". . . sound reason would seem to dictate that, where as between the injured person and a codefendant it has been finally adjudicated that there is no liability, an action for contribution will not lie. . . . Such a judgment is res judicata upon any essential element of a claim or action subsequently brought by one of them against the other." American Motorists Ins. Co. v. Vigen, (Minn. 1942) 5 N. W. (2d) 397, 401, 142 A. L. R. 727 and note.

[46](Minn. 1943) 8 N. W. (2d) 471. For the facts of this case, see RECENT CASES, p. 538.

[47](Minn. 1942) 5 N. W. (2d) 397, 142 A. L. R. 727 and note.

[48]The court cites Edinger & Co. v. S. W. Surety Insurance Co., (1918) 182 Ky. 340, 206 S. W. 465. There the present plaintiff was defendant in a former suit for damages caused by his mule. He held an indemnity policy with the present defendant insurance company which, however, excepted damages caused by vicious animals. The present plaintiff lost in that suit under instructions which placed liability on him only if the mule were vicious. The Kentucky court held that the plaintiff could not now show that the animal was not vicious. While there is language in the opinion which might have some application to the problem under discussion, the case seems distinguishable. The judgment was decisive not because it was res judicata as to the insurance company but because it showed that the plaintiff's liability under

These latest decisions appear then to have completely reversed the Minnesota law on this subject and to have adopted a view which the great majority of courts have rejected, namely, that a judgment in an action is binding on all parties on all issues litigated whether on opposite sides of the case or not. There is no indication in the decisions themselves as to the reason for this reversal of position. The principles formerly adhered to appear to have operated satisfactorily. That the principles now followed will work more effectively may be doubted, if for no other reason than that the decisions leave some important questions unanswered. It is not clear from them to what extent and in what manner the co-defendants will be permitted to litigate in the original suit as between themselves the various issues which are held to be adjudicated by the judgment. That they will be permitted to litigate these questions seems inevitable. Since an adjudication between one defendant and the plaintiff now vitally affects the right of the other defendant, to hold that the latter is bound by the judgment but that he cannot participate in the trial of the issues on which it is based would very probably deny to him the due process to which he is entitled under the United States Constitution.[49]

Since there is no legislation prescribing the procedure to be followed when questions are litigated between co-parties, the procedure by which the opportunity is afforded a defendant to litigate the question which will be adjudicated will have to be developed by the court. Two courses appear to be open to it. In the first place, it may insist that one defendant may litigate a question with another defendant only if he has interposed a cross-pleading in which the issues are set forth. In order to avoid duplication, such cross-pleading might be confined to issues not raised by the pleadings between the plaintiff and the adverse defendant. The court in an earlier decision has already indicated the desirability of resort to pleadings "in the nature of a cross bill" in situations of this

it did not come within the terms of the policy. The parties had contracted with respect to liability based on other grounds. See Jacobson v. Anderson, (1898) 72 Minn. 426, 75 N. W. 607; Pierce v. Maetzold, (1914) 126 Minn. 445, 148 N. W. 302; County of Martin v. Kampert, (1915) 129 Minn. 151, 151 N. W. 897; Restatement of Judgments, sec. 111, comment (b). On the effect of a judgment as between co-defendants, the Kentucky court follows the majority view. The Pullman Co. v. Cincinnati, New Orleans Ry., (1912) 147 Ky. 498, 144 S. W. 385.

[49]See Fisher v. Wineman, (1901) 125 Mich. 642, 84 N. W. 1111, 52 L. R. A. 192; Schwegman v. Neff, (1940) 218 Ind. 63, 29 N. E. (2d) 985.

kind.[50] If this course were followed, the result would be that such cross-pleading would be compulsory, for without it the defendant could not litigate any question with his co-defendant and yet the resulting judgment would bind him. A compulsory cross-pleading is undoubtedly unique, but the suggested course would meet any constitutional objections. In the second place, the court may permit a defendant to litigate with his co-defendants on matters which will affect him without the use of a cross-pleading. In that event the defendant could introduce evidence of his own to prove the liability of the co-defendant to the plaintiff, he could cross-examine the witnesses of the co-defendant, and he could prove grounds of liability to the plaintiff not raised by the plaintiff's pleadings. Since this would subject the defendant to litigation on matters of which he had no notice, it does not offer a particularly satisfactory solution.

In *American Motorists Ins. Co. v. Vigen*[51] the suggestion is made that the supreme court could refer the case back for trial limited to the defendants alone without subjecting the plaintiff to the delay and inconvenience incident thereto. This indicates that an appeal will be permitted and that the earlier case[52] to the contrary will not be followed, but it does not indicate the scope the new trial, or, for that matter, the original trial as between the defendants, is to have. For example, it does not indicate whether or not it will be limited to the issues developed by the pleadings between the plaintiff and the defendants.

Answers to questions of this character will have to await further decisions of the court. In the meantime, in cases in which co-defendants exist, the defendants as between themselves are bound by the judgment rendered. In all probability, they are entitled, therefore, to litigate between them issues on which the judgment is based and which may affect them later, either with or without cross-pleadings.

[50]Kemerer v. State Farm Mutual Auto Ins. Co., (1937) 201 Minn. 239, 276 N. W. 228, 114 A. L. R. 173 and note; see also American Exchange Bank v. Davidson, (1897) 69 Minn. 319, 72 N. W. 129; Kewitsch v. Beer, (1926) 168 Minn. 165, 209 N. W. 871.

[51](Minn. 1942) 5 N. W. (2d) 397, 400, 142 A. L. R. and note.

[52]Merrill v. St. Paul City Ry., (1927) 170 Minn. 332, 212 N. W. 533. See footnote 38.