JUDGMENTS - CONCLUSIVENESS OF JUDGMENT AS AGAINST PERSONS LIABLE OVER TO ORIGINAL DEFENDANT - APPLICABILITY TO CASES OF RESALE OF DEFECTIVE CHATTELS

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COMMENTS

JUDGMENTS — CONCLUSIVENESS OF JUDGMENT AS AGAINST PERSONS LIABLE OVER TO ORIGINAL DEFENDANT — APPLICABILITY TO CASES OF RESALE OF DEFECTIVE CHATTELS — \( M \) manufactures or wholesales an article which he sells to retailer \( R \), who in turn resells it to consumer \( C \). The article is defective, and \( C \) sues and recovers from \( R \) on the ground of negligence, misrepresentation or breach of warranty, for personal or other injuries received. If \( M \) can be sued in the same jurisdiction as \( R \), \( C \) may join \( M \) as a defendant, in which case \( R \) may be able to cross-claim against his co-defendant.\(^1\) Or if \( M \) is not sued, \( R \) may be able to implead him.\(^2\) But, if \( M \) cannot be brought before the same court, \( R \), if he is to pass on the loss to \( M \), must sue \( M \) in the jurisdiction of the latter's residence, and will have the burden of bringing \( C \)'s witnesses in the first suit to \( M \)'s jurisdiction and trying the whole case over again against \( M \), with no assurance that the second jury will find for him on the same proofs, though logically \( M \) must be liable to \( R \) if \( R \) is liable to \( C \).\(^3\) In this situation, will it avail \( R \) to give \( M \) notice and opportunity to defend the suit commenced by \( C \)? Will he then be able to apply the doctrine that persons liable over to the defendant in an action of which they are given notice are bound by the

\(^1\) See Weiner v. Mager & Throne, 167 Misc. 338, 3 N. Y. S. (2d) 918 (1938), relying on sec. 264 of the New York Civil Practice Act.


\(^3\) The obstacles encountered by the retailer in attempting to recover from the manufacturer are discussed by Brown, "The Liability of Retail Dealers for Defective Food Products," 23 Minn. L. Rev. 585 (1939), who considers them not so serious as to afford a ground for denying to the consumer the right to recover from the retailer.
judgment, whether they appear or not?⁴ The paucity of cases shows that this has seldom been tried, and the conflicting decisions on the subject indicate that the answer to the question is not an easy one.⁵

The doctrine of res judicata against persons liable over who are given notice and opportunity to defend has received frequent application to cases of indemnitores,⁶ reinsurers,⁷ parties to bills and notes,⁸ covenantors of title in warranty deeds,⁹ and cases where the parties bore the relationship of principal and surety,¹⁰ master and servant,¹¹ principal and agent,¹² and landlord and tenant.¹³ While the rule has been applied without exception to cases of breach of warranty of title to chattels,¹⁴ it has apparently seldom been urged as applicable to other warranties, such as warranties of soundness and merchantability, for only five decisions can be found bearing on such questions.

Three early cases in which both suits were brought for breach of warranty of soundness denied the application of res judicata. In the

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⁵ There are only five reported cases in point. One reason for the scarcity of authority may be that in order to preserve his good will, keep his retail customers and avoid giving notoriety to the accident, the manufacturer will usually repay the retailer without questioning his right to recover, realizing also that defectiveness having been established in one suit, it can in all probability be established again in a suit against him, without the assistance of res judicata. See Brown, "The Liability of Retail Dealers for Defective Food Products," 23 MINN. L. REV. 585 (1939).


⁸ See 123 A. L. R. 1153 (1939); 34 A. L. R. 152 (1925).

⁹ Morgan v. Muldoon, 82 Ind. 347 (1882); Elliott v. Saufley, 89 Ky. 52, 11 S. W. 200 (1889); Brown v. Howen, 37 Vt. 439 (1865); St. Louis v. Bissell, 46 Mo. 157 (1870); Hovey v. Smith, 22 Mich. 170 (1871).

¹⁰ Hare v. Grant, 77 N. C. 203 (1877); Konitzky v. Meyer, 49 N. Y. 571 (1872).


¹² Baynard v. Harrity, 6 Del. 200 (1856); Harvie v. Turner, 46 Mo. 444 (1870).


case of *Morgan v. Winston,*\(^ {15}\) the Tennessee court stated that the judgment against the vendor of a slave was not even admissible in evidence in his suit against his vendor. The language of the court might be considered dictum, however, since, at the end of the opinion, the court said that even if it were wrong in its theory, still "the defendant was not notified, and required to defend," so that the former adjudication could not be conclusive in any event. The principal argument of the court to differentiate that case from cases of breach of warranty of title of chattels, where it is well settled that the former adjudication is conclusive, is that soundness at a different time is a collateral fact, not connected with a direct material issue, since the quality of goods is subject to constant change, whereas a title, being an absolute and static thing, is unaffected by the mere passage of time. This argument seems unconvincing. For title, too, may not remain stationary, and a defect therein may arise or disappear between the two sales, e.g., in estoppel by deed or adverse possession cases. If the argument has validity in cases where the unfitness is itself the product of time, i.e., deterioration, it would seem to have none in cases where faulty manufacture is established in the original litigation or in the typical food case where the goods remain in a sealed container the entire time they are in the retailer's possession.

In the very similar South Carolina case of *Smith & Melton v. Moore,*\(^ {16}\) a case where both suits were for breach of implied warranty of soundness of cotton, the doctrine was again found inapplicable. The former judgment was held to be not even prima facie proof of any fact in issue, and plaintiff was nonsuited. Two new arguments appear in this case. One is the concept that a judgment itself affects the title but not the soundness of a chattel, so that it is admissible in warranty of title cases only. Such a doctrine is questionable. It is hard to see why a judgment can be said to create a status rather than simply to declare an existing status in the case where title instead of soundness is in issue. The principal distinction between the title issue and the soundness issue is that the former depends more often on an issue of law than one of fact, but that should be no reason for saying that a law judgment (as opposed to an equity decree for partition, specific performance, quieting of title, rescission, reformation of a deed, etc.) actually passes or creates a title. The other argument of the court in the *Smith* case is that the title warranty is not a promise of good title but a promise to *defend* the title, so that the original vendor has contracted to come in and participate as a party and be bound by the judgment. But this argument forgets that the original vendee is suing for failure to pass title, not for failure to defend title. Otherwise he could prevail only if he could demonstrate that he would have won the first suit if his vendor had come in and

\(^{15}\) 32 Tenn. 47 (1852).  
\(^{16}\) 7 S. C. 209 (1875).
defended the action for him; and even then he would probably lose, since his duty to mitigate should have compelled him to defend with equal competency himself.

The third such case denying the applicability of res judicata was the Kansas case of *Booth v. Scheer*, involving two suits for breach of warranty of soundness of a stallion. The court admitted the evidence (unlike the court in the *Morgan* case), but held it inconclusive, so that a jury verdict for defendant was sustained. The court predicated its decision on the fact that warranties do not run with chattels, an untenable argument in view of the following facts: (1) in all these cases each purchaser is suing on his own vendor's separate warranty; (2) since warranties of title similarly do not run with chattels, the theory offers no basis for distinction between soundness and title cases. Concurring only on grounds of stare decisis, one judge saw the fallacy in the court's reasoning, observing that the problem of the running of warranties is involved only in suits by the ultimate buyer against the original seller. Another new argument suggested in the opinion is the notion that soundness is largely a matter of opinion and hence there is a greater likelihood of two juries disagreeing in soundness cases than in title cases. But this possibility of one jury's making a mistake would seem rather to militate in favor of the application of res judicata, for it is never desirable that the ultimate burden should fall on the intermediate purchaser, since logically the juries should agree and the loss should fall either on the original vendor or on the ultimate buyer.

The only case in point holding squarely the other way is the New York case of *Carleton v. Lombard, Ayres & Co.*, in which both suits were brought for breach of contract in failing to deliver oil of merchantable quality and the original vendor was held liable after notice to defend. The former judgment was held "admissible" to show the oil to be unmerchantable. At another point the court says, "It did . . . establish the fact that the oil . . . was unmerchantable." Thus it is impossible to tell from the opinion whether the judgment was held to be conclusive or only prima facie proof. But there is good reason to distinguish this case, since the time factor was not present here, the original buyer having shipped to his consignee at the latter's risk immediately on receipt, so that delivery in both cases occurred at substantially the same time and hence no change could have taken place in

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18 Post v. Burnham, (C. C. A. 3d, 1897) 83 F. 79; Bordwell v. Collie, 45 N. Y. 494 (1871); Fulton Bank v. Mathers, 183 Iowa 226, 166 N. W. 1050 (1918).
20 149 N. Y. 137, 43 N. E. 422 (1896) (quotation from 149 N. Y. at 152).
the goods through the passage of time. But such an attempt to reconcile this case with the three previous cases breaks down when we consider that in the *Booth* (stallion) case it was specifically found in the original suit that no change in the condition of the animal took place between the two sales, though it is difficult to see how that issue could have arisen or been essential to a determination of the prior suit.

One other New York case might be used as authority for application of the doctrine of res judicata. In *Butterworth & Sons Co. v. B. F. Sturtevant Co.*\(^{21}\) defendant furnished plaintiff a guaranteed machine which plaintiff resold. The machine was faulty, and plaintiff repaired it at defendant's expense, losing a judgment to his vendee for damages for delay while fixing the machine and making it fit for use. In the second action the defense was contributory negligence. The court held that the judgment would be competent evidence to prove the inadequacy of the machine so that some delay was needed to repair it. But since defendant had already admitted the inadequacy and the sole issue was on whom lay the fault for the additional delay, the evidence was held irrelevant and inadmissible.

It may not be amiss here to mention one of the cases concerning the situation where the chattel is not resold but its defect causes personal injury to a third person who sues and recovers from the buyer for negligent failure to inspect or for furnishing an unsafe chattel. In *London Guarantee & Accident Co. v. Strait Scale Co.*,\(^{22}\) the buyer of a scale in this situation successfully sued the seller for breach of warranty of fitness, and the first judgment was held to determine conclusively the vendee's liability to the injured person and hence to show the unfitness of the machine and the amount of the damages. But this line of cases verges on the questions of pari delicto and right to contribution among joint tortfeasors, etc., which are not the topic of this comment.

What then may be said to be the state of the law in the light of the five reported cases on breach of warranty of resold chattels?

A. As to the weight of the judgment as evidence: one case says that the evidence is inadmissible;\(^ {23}\) one says that it is admissible but that it is not enough in itself to support a verdict;\(^ {24}\) one says that it establishes a prima facie case but is rebuttable;\(^ {25}\) one says that it is conclusive;\(^ {26}\) and one case seems to say that it is conclusive if all the issues in

\(^{21}\) 176 App. Div. 528, 163 N. Y. S. 314 (1917).
\(^{22}\) 322 Mo. 502, 15 S. W. (2d) 766 (1929). See also Hoskins v. Hotel Randolph Co., 203 Iowa 1152, 211 N. W. 423 (1927).
\(^{23}\) Morgan v. Winston, 32 Tenn. 47 (1852).
\(^{24}\) Smith & Melton v. Moore, 7 S. C. 209 (1875).
the second suit were involved in the first suit, but otherwise it is only prima facie evidence. This last alternative seems to forget that the doctrine of res judicata can be applied to single specific issues by way of collateral estoppel as well as to entire suits by way of bar.

B. As to when the judgment will be conclusive: to reconcile the cases and to answer this question we must remember that the basic argument of the decisions denying the application of the rule was the possibility of the chattel's being of different soundness at the times of the two sales. Hence if we eliminate this factor only the dictum of the concurring judge in the *Booth* case stands in the way of reconciliation. Thus we may surmise the law to be that the former judgment is conclusive (1) if the two sales took place at substantially the same time, or (2) if the defect was found in the first case to be one in the process of manufacture, or (3) if the goods are of a kind not subject to deterioration or to defectiveness through mishandling in transportation and the goods could never have been taken out of their container by the retailer.

If none of these three fact situations can be found to exist, the doctrine of res judicata will probably be held not to apply on the basis of the *Morgan*, *Smith*, and *Booth* cases. But even so it is hard to see why the judgment should not be held admissible for some purposes. For example, one might argue that the judgment should be conclusive of the fact that the goods were defective at the date of the second sale and thus throw on the manufacturer the burden of showing that the defect arose in the interval between the two sales. Further, it should at least be conclusive that the retailer had no other defenses to the first suit, that he complied with his duty to mitigate damages, and that the retailer's damages are the amount of the first judgment (so long as he can show that there was no change in the condition of the chattel in the interval between the two sales). And, from a practical standpoint, it is hard to see why the prior adjudication should not always be admissible at least as prima facie evidence on the basic issues of breach of warranty and amount of the damages, its probative or persuasive force depending on the length of the period between the two sales, the durable

29 If it is not conclusive, a judgment in a suit between other parties involving the same issues is generally held inadmissible. 4 Wigmore, Evidence, 3d ed., § 1346a (1940); 5 id., § 1671a. Wigmore, however, disapproves of this rule.
30 But since the retailer had possession of the chattel in the interval, he would ordinarily know more about what had happened in that period to make it defective; hence it might be more practical to place the burden on him.
qualities of the chattel, the nature of the defect, and the way in which
the chattel was handled in the interval between sales.

Suppose we have a case like Carleton v. Lombard, Ayres & Co.,
satisfying the requirements for the application of res judicata. What
issues then will be concluded by the judgment? The courts are not
helpful in this respect, since they usually say merely that the adjudica-
tion is conclusive of the fact that plaintiff was liable to his vendee.31
Clearly this issue per se does not arise in the second case. The issues on
which the prior judgment will be conclusive are thus those issues in-
volved in the second suit which were also necessarily determined by the
first court in deciding that the retailer was liable to his customer. Hence
the first case may be said to determine conclusively that the chattel was
defective32 (i.e., that the manufacturer breached his warranty if the
warranties were identical or if the manufacturer’s warranty was broader
than the retailer’s), that the retailer had no other defenses,33 (i.e., that
the retailer’s duty to mitigate damages was fulfilled), and that he was
damaged in that amount.34 This leaves the retailer to establish the
existence of the warranty, the consideration therefor, and the perfor-
mane of all conditions.35

One other caveat, never mentioned in the cases, should be added. If
one of the suits is brought on an affirmation theory and the other on a
disaffirmance or rescission theory, the first suit will not be conclusive of
the amount of the damages. In a suit brought on a rescission theory, the
purchase price will be added to the amount of personal or property
damage sustained. If brought on an affirmation theory, the difference
between the actual value and the value it would have had if it had been
sound as warranted or represented must be added to personal or prop-
erty damage.36 Thus also if both suits are brought on a disaffirmance
theory, there will still be a difference in the amount of the damages if

31 London Guarantee & Accident Co. v. Strait Scale Co., 322 Mo. 502, 15 S. W. (2d) 766 (1929); Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola,
134 N. Y. 461, 31 N. E. 987 (1892).
34 Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724 (1888); Littleton v. Richard-
son, 34 N. H. 179 (1856); Estep v. Bailey, 94 Ore. 59, 185 P. 227 (1919). The
judgment is also conclusive of the fact that plaintiff in the first action was not guilty of
contributory negligence, Milford v. Holbrook, 91 Mass. 17 (1864); Boston v. Worth-
ington, 76 Mass. 496 (1858), and that the injury was not caused by the intervening
35 But it was said in New York Title & Mtg. Co. v. Title Guarantee & Trust Co.,
187 App. Div. 537, 175 N. Y. S. 763 (1919), that res judicata can only be applied
when the ultimate liability of the defendant in the second suit is conceded.
36 See McCormick, DAMAGES 448-454 (1935) (misrepresentation) and id., 672-
679 (breach of warranty). Suits brought for negligence can, of course, be predicated
only on a disaffirmance theory.
the purchase price was different in the two sales. But, in any event, the
first suit should be conclusive at least on one element of damages, i.e.,
the amount of personal or property damages. And since this will very
often be the only element of damages in the case, the whole problem
may be largely academic.

It must be observed that in all the reported cases in point on resale
of defective chattels, both suits were brought as causes of action for
breach of warranty. While much has been written about the meaning of
the word “warranty” in sales cases and about whether actions for breach
of warranty sound in contract or in tort,\(^87\) it is now fairly well settled
that such actions are brought for damages for failure to perform a
promise.\(^88\) Although the theory of many of the modern cases of personal
injury from defective chattels, such as *Baxter v. Ford Motor Co.,*\(^89\) is
uncertain (it may be fraud, negligence, absolute liability, negligent ad-
vertising, breach of warranty, or breach of promise in failing to deliver
the designated type of goods\(^40\)), this uncertainty has usually arisen
solely in direct suits by the consumer against the manufacturer, in which
case no res judicata problem will arise. While it is true that the doctrine
of notice and opportunity to defend has been occasionally employed by
the plaintiff rather than the defendant in the original suit,\(^41\) such cases
where the consumer sues the manufacturer after suing the retailer are
beyond the scope of this comment. The problem of estoppel there is
ordinarily different in character, since it depends not so much on the
document of notice and opportunity to defend as on the doctrine of res
judicata against persons who “openly and avowedly” take over the
conduct of the defense.

Suppose that both suits are not brought on a breach of warranty
theory but one or both is instead brought on a cause of action for negli-
gence or misrepresentation. Assuming the possibility of any of these
three bases being used, there are thus nine possible combinations or pairs
of theories on which the two cases may be brought, of which we have
dealt with only one. In these other eight situations, there are no appli-
cable decisions, but in what way should the results vary?

Regardless of the theories on which the suits are brought, the first
suit should be res judicata on the fact that the retailer was liable to his
vendee,\(^42\) that he had no other defenses,\(^43\) the amount of the damages,\(^44\)

\(^87\) I WILLISTON, SALES, 2d ed., § 197 (1924). A warranty in different fields of
the law may be a promise, a condition, a representation, or mere words.

\(^88\) I WILLISTON, SALES, 2d ed., § 197 (1924).

\(^89\) 168 Wash. 456, 12 P. (2d) 409, 15 P. (2d) 1118 (1932).


\(^42\) Contra, Gist v. Davis, 2 Hill Eq. (S. C.) 335 (1835).

\(^43\) See note 33, supra.

\(^44\) See note 34, supra.
and the defectiveness of the chattel. If both suits are brought on a fraud theory or one on a fraud and one on a warranty theory, the first judgment should also conclusively determine the fact that the representation, if such was made, was material and false or that the warranty, if such was made, was breached—so long as the two warranties or representations were identical or the manufacturer's was broader than the retailer's. If the second suit is brought for negligence and the first for fraud or breach of warranty, the fact that the defect was the proximate cause of the injury should be conclusively determined by the prior judgment, though plaintiff must still show that the defect was caused by the act of negligence, if such negligence can be established. But if the first suit was also brought on a negligence theory, causation would not be shown; in fact, it might be argued that the first suit is conclusive of the fact that defendant's negligent act was not the cause of the injury, since by usual tort law, an intervening negligent act is often said to isolate the defendant's negligence and break the causal chain. Or we might instead say that the first suit conclusively established plaintiff's contributory negligence and so bars the second suit, unless we are in a state which employs a comparative negligence theory. No such cases have been recorded where it is the defendant in the second suit who seeks thus to take advantage of the doctrine of res judicata by notice to defend, and it would be dangerous to permit it to be done. For if it were allowed, he would be able merely to answer the notice, appear and take over the defense, admit the negligence of his vendee (defendant in the case), lose the suit, and thus immunize himself from later litigation.

If the first suit is brought on a negligence theory, regardless of the theory on which the second suit is brought, the fact of defectiveness at the time of the original sale should be concluded by the first judgment so long as the defect itself was not caused by the plaintiff in the second suit, e.g., if the negligence proved was failure to inspect or repair. But the fact that the first suit was one for negligence might prevent the amount of damages awarded by the first judgment from being conclusive in the second suit, for the retailer's negligence, while no bar to his second suit for fraud or breach of warranty, would quite possibly require the doctrine of the duty to mitigate to be invoked against him; or

45 See note 32, supra.

46 Thomas v. Quartermaine, L. R. 18 Q. B. D. 685 (1887); Prosser, Torts 364 (1941).

47 Ga. Code Ann. (1941), § 105-603. See Savannah Electric Co. v. Crawford, 130 Ga. 421, 60 S. E. 1056 (1908). But even where contributory negligence is a complete bar, as in most states, the manufacturer will be liable to the retailer for the decreased value of the chattel caused by the defect, since the retailer's own negligence had no bearing on this element of the damages.

48 1 Sedgwick, Damages, 9th ed., 386-388 (1912).
conceivably the rule of Hadley v. Baxendale against allowing speculative or unforeseeable damages might be employed on the theory that intervening negligent acts are not foreseeable.

There are certain objections to the applicability of res judicata against persons liable over in general which are particularly cogent in the case of resale of defective chattels. For example, the rule really places the manufacturer in a dilemma: (a) If he does not respond to the notice, the suit may be badly defended by a disinterested defendant who knows that he can obtain reimbursement and he may suffer in consequence when such defendant sues him, even though such defendant should have prevailed in the original litigation. He is protected where plaintiff and defendant act fraudulently, but he is not protected where the original defendant handles the defense in a careless manner. (b) On the other hand, if the person liable over does appear and defend, he may be made a party by the original plaintiff as a joint tortfeasor or be otherwise estopped by the judgment in a later suit by such plaintiff, according to the rule that one who "openly and avowedly" takes over the defense is bound by the judgment as if he were a party. This would often be true in cases of resale of chattels, since the only reason the consumer customarily sues the retailer rather than the manufacturer in the first place is that the latter is ordinarily less accessible.

Another complication arises in these cases. Defendant may give notice to his vendor and yet still participate in the trial and refuse to let him take over the defense. The rule is that if defendant fails to use a good defense offered by his vendor the bar does not operate. But is such protection adequate? It leaves it to a second court to determine

50 In Fort Worth Grain & Elevator Co. v. Walker Grain Co., (Tex. Civ. App. 1914) 168 S. W. 470, the original seller was interpleaded in the first suit and judgment was rendered for the same amount against each defendant on his own warranty. Pending appeal after the judgment, the original purchaser settled by compromise with the plaintiff, his vendee, for an amount much smaller than the judgment. The original vendor, who had refused to compromise, appealed from the judgment, and it was held that he was not entitled to the benefit of the favorable compromise made by his purchaser but was liable for the entire amount of the judgment originally awarded against him.
53 Seattle v. Northern Pacific R. R., 47 Wash. 552, 92 P. 411 (1907); appeal from new trial, 63 Wash. 129, 114 P. 1038 (1911). Similarly the rule does not apply if defendant was refused the right to aid in any way in the defense of the former action. City of Lewiston v. Isaman, 19 Idaho 653, 115 P. 494 (1911).
whether a defense not offered in the first court would have been held valid by that first court. The second court has, of course, no way of determining the effectiveness of such defense until it ascertains what reply it would have brought from the original plaintiff, who is not a party before the court. And the rule ignores the personal factor. Who can tell whether a court which held a defense to be bad would have still held it ineffectual if it had been argued more persuasively by a more interested party?

One other argument, though a somewhat legalistic one, might appear against the application of res judicata in these cases, though it is never mentioned by the authorities. This is, that by the doctrine of mutuality,\(^54\) the person liable over should not be bound unless the plaintiff in the first case would be bound if that case had been decided the other way. If the original defendant prevails in the first action, the person liable over will not win the second suit because of the doctrine of res judicata but only by virtue of the fact that only nominal damages have been sustained by the plaintiff in the second suit.\(^55\) But this argument is not persuasive since: (1) the important thing is that the second defendant will not in fact lose this suit if the first suit goes the other way; (2) the courts are always more anxious to apply res judicata against than in favor of a nonparty;\(^56\) and (3) as in the fields of consideration\(^57\) and specific performance,\(^58\) the doctrine of mutuality in the field of res judicata has been criticized\(^59\) and many exceptions to the rule have been developed.\(^60\)

As a matter of salutary policy, there would seem to be strong reason for applying the doctrine of res judicata to these cases of resale of defective chattels. The manufacturer almost invariably knows more about the product, what would cause it to become defective, how it was made, and what it is worth, than does his vendee.\(^61\) Thus there would seem to be good reason to require him to appear in the first suit or suffer the

\(^{54}\)Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U. S. 111, 32 S. Ct. 641 (1912).

\(^{55}\)Plaintiff is always entitled to at least nominal damages for breach of contract, even where he has sustained no actual loss. See 1 SEDGWICK, DAMAGES, 9th ed., § 106 (1912). Perhaps the doctrine of mutuality does apply to this field, or rather would be applied if the problem ever arose. But since a prevailing defendant will never sue the person liable over to him, it is safe to say that the question will never be adjudicated.

\(^{56}\)See 40 MICH. L. REV. 307 (1941).

\(^{57}\)1 WILLISTON, CONTRACTS, rev. ed., 504-508 (1936).

\(^{58}\)WALSH, EQUITY 341-356 (1930).


\(^{60}\)Notably in cases of derivative liability. See Portland Gold Mining Co. v. Stratton's Independence, (C. C. A. 8th, 1907) 158 F. 63.

\(^{61}\)See Brown, "The Liability of Retail Dealers for Defective Food Products," 23 MINN. L. REV. 585 (1939).
consequences rather than to let the loss fall on the retailer through the latter's ignorance. And if he does appear it is certainly proper to bind him, so that he will not conduct the defense in haphazard fashion or experiment by trying out different defenses in the two suits, not pleading his perfect defense in the first case in the hope of winning that litigation without divulging facts that for business reasons he would prefer to keep secret. Logically the loss should ultimately fall on either the consumer or the manufacturer, except in cases where the retailer is guilty of some independent fault (such as negligence) or voluntarily assumes greater obligations than did his vendor (such as making a warranty or representation which his vendor did not make to him). And such defenses will always be open to the manufacturer in any event, since res judicata will never be applied to these issues.

What then is the answer to the question propounded at the beginning of this comment? Enough has been written to show that there is no complete answer. Surely there is at least sufficient doubt under the decisions so that the retailer, when sued, should serve on his vendor notice to defend in the hope that the second court will hold the doctrine applicable. Three fact situations have been indicated in which, in the light of the cases, a court would probably estop the manufacturer as to certain issues, and it has been demonstrated to what extent the issues concluded should depend on the theories on which the two suits are brought. It has been suggested that even if res judicata is deemed inapplicable, the former judgment might be allowed as admissible evidence regarding certain issues. But unless it is in itself considered at least sufficient evidence to establish a prima facie case, it would be hard to justify its admissibility despite the notice to defend, since its value as mere cumulative evidence would not appear great enough to warrant the confusion resulting from the introduction of such a collateral issue.

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