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CIVIL PROCEDURE-JUDGMENTS-RES JUDICATA EFFECT OF DISMISSAL WITH PREJUDICE

David F. Ulmer S.Ed.
University of Michigan Law School

CIVIL PROCEDURE—JUDGMENTS—RES JUDICATA EFFECT OF DISMISSAL WITH PREJUDICE—Plaintiff brought an action in the circuit court against Crane for breach of an alleged trust agreement. When Crane died, his estate, which was substituted as defendant, moved to dismiss the action, alleging that plaintiff's cause of action was barred by laches and by a previous divorce settlement. Plaintiff having failed to file counter affidavits, the court dismissed the complaint and allowed plaintiff twenty days to file an amended complaint. When he failed to do so, the court dismissed the action "with prejudice." Plaintiff's later claim, filed in the probate court, but based on the same trust agreement, was allowed. On trial de novo in the circuit court, the probate court was reversed on the ground that the dismissal of the former action was res judicata. The court refused to allow plaintiff to enter part of the transcript of testimony in the first case or to allow the judge who entered the order to testify to the effect that the dismissal was ordered because of plaintiff's failure to obtain counsel and prosecute her claim. On appeal, *held,* affirmed. An order dismissing with prejudice

is conclusive and establishes that the court has decided the defenses offered are meritorious. *In re Crane's Estate,* (Ill. App. 1951) 99 N.E. (2d) 204.

It is settled that a judgment or order cannot act as a bar to a subsequent action between the same parties on the same cause of action unless it is rendered on the merits of the claim.[1] However, it is frequently stated that a dismissal which recites that it is "with prejudice" is as conclusive of the rights of the parties as if the suit had been fully tried with a resultant judgment against the plaintiff.[2] There are some decisions in which appellate courts, without inquiring to determine whether there actually has been an adjudication on the merits, have held such dismissals conclusive.[3] However, in most of the cases where this language is used it is apparent that the dismissal in fact came only after a hearing on the merits,[4] or upon a motion of the plaintiff in the nature of a common law *retraxit,*[5] or after settlement between the parties.[6] On the other hand, there is authority to the effect that an order erroneously[7] reciting that it is with prejudice will not prevent the plaintiff from bringing another action.[8] Two reasons are given for this latter rule. First, the recital can mean only that

[1] Swift v. McPherson, 232 U.S. 51, 34 S.Ct. 239 (1913); Pease v. City of San Diego, 93 Cal. App. (2d) 706, 209 P. (2d) 843 (1949); Life Printing and Publishing Co. v. Field, 327 Ill. App. 486, 64 N.E. (2d) 383 (1946).

[2] Union Indemnity Co. v. Benton County Lumber Co., 179 Ark. 752, 18 S.W. (2d) 327 (1929); Fenton v. Thompson, 352 Mo. 199, 176 S.W. (2d) 456 (1943); Cleveland v. Higgins, (2d Cir. 1945) 148 F. (2d) 722.

[3] In Harris v. Moye's Estate, 211 Ark. 765, 202 S.W. (2d) 360 (1947), there was a dismissal with prejudice for want of prosecution, and the court held that although usually a dismissal for want of prosecution was not res judicata, the addition of the words "with prejudice" showed that this was a complete adjudication of the controversy and was a complete bar to future action. See also Esquire v. Varga Enterprises, (7th Cir. 1950) 185 F. (2d) 14.

[4] Noakes v. Noakes, 290 Mich. 231, 287 N.W. 445 (1939); Hayes v. Mercantile Inv. Co., 73 Wash. 586, 132 P. 406 (1913).

[5] United States v. Parker, 120 U.S. 89, 7 S.Ct. 454 (1887); Mars v. McDougal, (10th Cir. 1930) 40 F. (2d) 247; Shorten v. Brotherhood of Railroad Trainmen, 182 Ark. 646, 32 S.W. (2d) 304 (1930).

[6] Cleveland v. Higgins, supra note 2; Bank of America v. Jorjorian, 303 Ill. App. 184, 24 N.E. (2d) 896 (1940).

[7] It would seem that the Federal Rules of Civil Procedure have changed the rule that a judgment is not a bar unless it has been rendered on the merits. Federal Rules of Civil Procedure, Rule 41(b) [5 MOORE, FEDERAL PRACTICE, 2d ed., 1035 (1951)] provides in part: "Unless the court in its order . . . otherwise specifies, a dismissal under this subdivision [providing for motion of the defendant to dismiss if plaintiff has failed to prosecute or comply with any rules or order of the court, or after plaintiff has entered all his evidence] and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." However, in Peardon v. Chapman, (3d Cir. 1948) 169 F. (2d) 909, it was held that it was an abuse of the trial court's discretion not to add "without prejudice" to its dismissal for want of prosecution where there were only two delays and both were excusable.

[8] Goddard v. Security Title Ins. & Guaranty Co., 83 P. (2d) 24 (1938), affirmed on rehearing, 14 Cal. (2d) 47, 92 P. (2d) 804 (1939); Pueblo de Taos v. Archuleta, (10th Cir. 1933) 64 F. (2d) 807; Chirelstein v. Chirelstein, 12 N.J. Super. 468, 79 A. (2d) 884 (1951); Bliss v. Omnibus Corp., 169 Misc. 662, 7 N.Y.S. (2d) 979 (1938).

it is the intention of the trial judge that the matter be concluded. It has been effectively pointed out that this should not be the determining factor in deciding whether the case has been heard on the merits.[9] Second, the effect of holding the recital conclusive would be to deprive the plaintiff of his day in court entirely. The courts have held that an erroneous recital of "with prejudice" will be stricken on appeal;[10] it therefore appears that the plaintiff, in order to preserve his rights to a trial on the merits, is required only to appeal the erroneous order. The question then becomes whether the plaintiff should be required to appeal at the peril of losing his right to bring another action, or should be allowed to show in a subsequent proceeding that although the dismissal recited that it was with prejudice it was not in fact rendered after a hearing on the merits. It is submitted that since, by hypothesis, the dismissal has come prior to a trial, the small saving of judicial time and the convenience to the defendant which is gained by not allowing plaintiff to start a new action if he fails to appeal is outweighed by the injustice to the plaintiff which results if he is denied any hearing on the merits.[11]

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[9] "In the first place, if the intention of the court, gathered from its order or other source, were the test of the effect of the judgment on subsequent actions, the doctrine of res judicata would disappear as a legal principle, and the bar of a judgment would depend wholly upon the whim of the first judge, or, more properly, on the form of proposed order drafted by successful counsel." Goddard v. Security Title Ins. & Guaranty Co., supra note 8, 83 P. (2d) 24 at 28.

[10] Caruso v. Metropolitan 5 to 50 Cent Store, 214 App. Div. 328, 212 N.Y.S. 199 (1925); Matterson v. Klump, 100 Cal. App. 64, 279 P. 669 (1929); Lindblom v. Mayar, 81 Wash. 350, 142 P. 695 (1914).

[11] "The unwillingness on the part of the courts to cut off . . . substantive rights of a party whose claim never was heard and decided upon its merits seems to override the technical difficulty stemming from the rule prohibiting a collateral attack upon a valid judgment from which the aggrieved party ought to have appealed." 149 A.L.R. 553 at 628 (1940).