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(Filed January 12, 1935.)

Notice of Appeal

NEW JERSEY SUPREME COURT

William J. Esper, Plaintiff-Appellant, vs. Manhattan Transit Co., Inc., Defendant-Respondent
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NOTICE OF APPEAL.

To: Maurice J. McKeown, Esq., Attorney for defendant-respondent.

Please take notice, that the plaintiff, William J. Esper, hereby appeals from the whole of the judgment of the New Jersey Supreme Court, entered in the above entitled cause, to the New Jersey Court of Errors and Appeals in the last resort in all causes, upon the following ground: **20**

1. That the New Jersey Supreme Court erred in reversing the judgment of the Passaic District Court and rendering judgment in favor of the defendant-respondent.

Plaintiff-appellant will urge as his reason in support of the above ground that the judgment of the Clifton District Court was not despositive of or res adjudicata of the issue before the Passaic District Court. **30**

Respectfully,

Louis Santorf,

Attorney for Plaintiff-Appellant.

Dated: January 10th, 1935.

*Affidavit of Service of Notice and
Grounds of Appeal*

Filed January 15, 1935

NEW JERSEY SUPREME COURT.

10	William J. Esper, Plaintiff, Appellant, vs. Manhattan Transit Co., Inc., Defendant-Respondent.
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State of New Jersey County of Passaic	}	ss.
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Affidavit of Service of
Notice and Grounds
of Appeal.

20 Joseph Giannini being duly sworn according to
law, upon his oath, deposes and says:

1. That I am a law clerk in the law office of
Louis Santorf, Esq., at 208 Market Street, Pater-
son, New Jersey.

30 2. That I did on the tenth day of January,
1935, at 4 o'clock in the afternoon, serve the
Notice of Appeal and grounds of appeal in the
above entitled cause upon Maurice J. McKeown,
Esq., personally, at 9 Clinton Street, Newark, New
Jersey, attorney for the defendant-respondent, by
handing him a copy thereof.

Joseph Giannini

Sworn and subscribed to
before me this eleventh
day of January, 1935.
Evelyn L. Sportelly,
A Notary Public of New Jersey.

Transcript of Clerk's Docket

TRANSCRIPT OF CLERK'S DOCKET.

97-752.

State of New Jersey, }
 County of Passaic. } ss.:

Summons	\$ 2.10	
Listing	1.50	
Mileage30	10
Att'y. Fee	5.00	
Jury Fee	11.75	
Bond	1.00	

IN THE DISTRICT COURT OF THE
 CITY OF PASSAIC.

William J. Esper, vs. Manhattan Transit Co., Inc.,	}	Action in Tort.	20
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Hon. Peter N. Perretti, Judge.

Demands \$500.00

Plaintiff's attorney, Louis Santorf

Defendant's attorney, Maurice J. McKeown.

Jan. 7, 1933. State of Demand filed and Summons issued in the above stated cause, returnable Jan. 18, 1933, at 9:30 o'clock in the forenoon and was returned as follows:

Served this summons Jan. 9, 1933, by reading 30 the same to Benjamin Casser, Treas. of the deft. Inc. and delivering to him a copy thereof.

Thomas A. Hopkins,
 Sergeant-at-Arms.

Jan. 18, 1933. Case listed and marked ready and contested.

April 15, 1933. Deft. filed demand for jury.

April 24, 1933. Motion made by the attorney of the defendant to dismiss the action. The court

Transcript of Clerk's Docket

reserved decision and requested that the trial proceed and the court rendered its decision some time after the jury rendered their verdict. Hearing before the court and jury.

Names of Witnesses

Joseph S. Fishkind, sworn.

10

William Esper, sworn.

Fred M. Hilton, sworn.

Chas. Sattstein, sworn.

Chas. Boyle, sworn.

Frank Aunsteber, sworn.

Floyd Massath, sworn.

John M. Fitzpatrick, sworn.

The jury retired and returned with a verdict in favor of the plaintiff in the sum of \$100.00.

July 3, 1933. The court rendered decision that
20 verdict of jury stand as given.

July 21, 1933. Defendant filed notice of appeal.

July 21, 1933. Appeal bond in the amount of
\$200.00 filed.

30

*Summons***SUMMONS.****DISTRICT COURT SUMMONS.**

City of Passaic, }
 County of Passaic. } ss.:

To Wit: The State of New Jersey,
 To Sergeant-at-Arms of the District
 (Seal) Court or any Constable of said County: Summon Manhattan Transit Co., Inc., to appear before the District

Court of the City of Passaic, to be held at the District Court Room, in the O'Leary Building, 125 Prospect Street, in the said City, on the eighteenth day of January, A. D. 1933 at 9:30 o'clock in the forenoon, to answer unto William J. Esper in an action in tort.

Demand Five Hundred (\$500.00) Dollars.
 Hereof fail not. 203

Witness Peter N. Perretti, Esquire, Judge of said Court at Passaic, aforesaid, the seventh day of January in the year of our Lord, One Thousand Nine Hundred and Thirty-three.

Dominick De Muro,
 Clerk.

Served this Summons Jan. 9, 1933, by reading the same to Benjamin Casser, Treas. the defendant, Inc., and delivering to him a copy thereof.

Thomas A. Hopkins, 303
 Sergeant-at-Arms.

Summons

PASSAIC DISTRICT COURT.
Summons in an Action in Tort.

William J. Esper,
vs.

Manhattan Transit Co., Inc.

	Demand	\$500.00
10	Costs	3.60
	Mileage30

Returnable January 18, 1933.

Louis Santorf,
Attorney for Plaintiff.

20

30

State of Demand

Filed January 7, 1933.

PASSAIC DISTRICT COURT.

William J. Esper,

Plaintiff,

vs.

Manhattan Transit Co., Inc.,

Defendant.

In Tort.
State of
Demand.

10

STATE OF DEMAND.**FIRST COUNT.**

Plaintiff demands of the defendant, damages in the sum of \$100.00 for that, on the 23rd day of November, 1932, the defendant by and through its duly authorized servant and employee did so carelessly, negligently and improperly drive and operate its automobile bus in a general easterly direction on Market street, in the City of Paterson, County of Passaic and State of New Jersey, and did so carelessly, negligently and improperly fail to allow other users of the highway their respective rights, so that by reason thereof, its automobile was driven into and against an automobile owned by the plaintiff, with great force and violence, causing great damage thereto.

20

30

SECOND COUNT.

Plaintiff demands of the defendant, damages in the sum of \$400.00 for that, on the 23rd day of November, 1932, the defendant by and through its duly authorized servant and employee did so carelessly, negligently and improperly drive and operate its automobile bus in a general easterly direction on Market street, in the City of Paterson,

State of Demand

County of Passaic and State of New Jersey, and did so carelessly, negligently and improperly fail to allow other users of the highway their respective rights, so that by reason thereof, its automobile bus ran into and against the automobile in which the plaintiff was operating, with such great force and violence causing and inflicting upon the said

10

plaintiff severe and permanent injuries.
Plaintiff has been deprived of his usual gains, earnings and profits from his employment, and has been obliged to lay out and expend large sums of money for doctors' bills and treatment, and necessaries for such treatment.

Louis Santorf,
Attorney of Plaintiff.

20

30

Demand for Trial by Jury

Filed April 15, 1933.
PASSAIC DISTRICT COURT.
No. 97-752.

William J. Esper, vs. Manhattan Transit Co., Inc., 	}	Plaintiff, Defendant.	In Tort. Demand for Trial by Jury.	10
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DEMAND FOR TRIAL BY JURY.

To Clerk of the Passaic District Court:

Please take notice, that the defendant, Manhattan Transit Co., Inc., by its attorney, Maurice J. McKeown, demands a jury trial in the above entitled matter. 20

Maurice J. McKeown,
Attorney for Defendant.

Dated April 13, 1933.

Certificate of Clerk

**Certificate of Clerk
PASSAIC DISTRICT COURT.**

William J. Esper, vs. 10 Manhattan Transit Co., Inc., Defendant.	}	Plaintiff, In Tort. Certificate of Clerk.
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I, Dominick De Muro, Clerk of the District Court of the City of Passaic, do hereby certify the foregoing to be true and correct copy of the state of demand; summons, demand for trial by jury, notice of appeal and also a copy of the judgment as entered in Book 97 of records of the said court on **20** page 752.

In Witness Whereof, I hereby affix my hand and seal this seventh day of August, 1933.

Dominick De Muro,
Clerk.

(Seal)

Motion to Dismiss and Argument

PASSAIC DISTRICT COURT.

 William J. Esper,

Plaintiff,

vs.

Manhattan Transit Co., Inc.,

 Defendant.

10

Transcript of testimony taken before Hon. Peter N. Perretti, Judge and a jury, on Monday, April 24th, 1933, at 10:00 o'clock A. M., at the Court House, Passaic, New Jersey.

Appearances:

For the plaintiff, Louis Santorf, Esquire.

For the defendant, M. J. McKeown, Esquire,
by Robert Howell, Esquire.

20

(Joseph S. Fishkind was sworn as stenographic reporter.)

(A jury was drawn and sworn.)

Mr. Santorf—If your Honor please, the plaintiff desires to discontinue the first count and only proceed on the second count.

Mr. Howell—If your Honor please, at this time I want to make a motion to dismiss this action on the grounds of res adjudicata, if you care to call it that, or estoppel of record.

30

Mr. Santorf—He cannot do that now after we called the jury.

Mr. Howell—If your Honor please, I think this is the proper time to do it. I would like to first give a slight background of what has occurred out of this entire accident. After the accident occurred, the Manhattan Transit Company, the defendant in this action, started an action in the Small Claims Court of Clifton—

Motion to Dismiss and Argument

Mr. Santorf—May I have the jury excused while the argument on this motion is pending?

Mr. Howell—We have no objection to that.

10 Mr. Santorf—Now, if your Honor please, counsel knows that motions for res adjudicata should be moved prior to the time the jury is drawn, or when he puts in a defense, but he cannot come in here and give a whole story to the jury at this time. It is only for the benefit of the jury that he is giving this statement.

Mr. Howell—If your Honor please, I object to that statement. The proper time to make this motion is right now.

20 The Court—Of course, I don't want to have anything in the record that will prejudice this jury. We have gone so far and we might just as well dispose of it and I will hear the argument in my chambers.

(At this point counsel and the Court adjourned to the Court's chambers.)

30 Mr. Howell—As I say, the small claims action was started by the now defendant, Manhattan Transit Company, in the Clifton Small Claims Court. Now, the plaintiff, Esper, who was the defendant in that action, filed a counter-claim which exceeded the jurisdiction of the Small Claims Court, and made it a District Court case. At the time of trial both parties proceeded, and just as the Court was about to render a decision, Esper, the defendant moved for a voluntary non-suit on his counter-claim. The Court rendered a decision in that case—I have a transcript here, a certificate of the record, which I will now introduce—in favor of the plaintiff, which, of course, indicates that there was no negligence on his part.

Motion to Dismiss and Argument

After that this action is started. Now, the crux of this entire question is negligence, either of the bus company or its driver, which would be imputed to it, and likewise, whether the plaintiff in this case had been negligent, which would bar his action. The Court has already decided, on the same case that the negligence involved in this action arose out of and from Mr. Esper, the now plaintiff's fault, and for that reason I feel that he is barred. 10

Now, in support of that, I would just like to cite to your Honor two recent cases, one the case Freitag v. Renshaw, decided in 157 Atlantic, page 55, by Judge Hartshorne. The facts in that case were that there was an action started in the District Court and there was a counter-claim filed in the District Court. Subsequent to that time an upper court action was filed for personal injuries, for the defendant in the District Court case. The Court held that regardless of the fact that one claim was for personal injuries and the other claim was for property damage, the crux of the question was the negligence involved; that this man had had his one day in court which, under the law, he was entitled to, and he was now estopped of record, the Court says, or we may call it res adjudicata, to bring this action. The Court went into a great deal of detail there, which I don't think it is necessary at this time for us to discuss, in holding that once negligence has been passed upon between the same parties, no further action as to the negligence could arise. 20 30

Now, following that decision, there is a case in the Supreme Court decided by the Circuit Court Judge Caffrey, Wirth v. Slinn, and that case is

Motion to Dismiss and Argument

reported in 158 Atlantic, at page 743. Now, the facts in that case were that Wirth started an action against Slinn in the Supreme Court. The action involved both personal injuries and property damage. Subsequent to the institution of this suit, Slinn started an action against Wirth in the Common Pleas Court. Eventually, as a result of the crowded condition of the Supreme Court calendar, the Common Pleas case, as frequently occurs, was reached first, and the jury in that case found that any negligence involved in this accident was that on the part of Wirth. When the action came on for trial in the Supreme Court, in the case of Wirth v. Slinn, counsel for Slinn immediately pleaded *res adjudicata*. Now, that case is practically the same as ours. Judge Caffrey, after going into a perusal of the law, found that this man was barred by *res adjudicata*. I remember quite distinctly one of his statements in the case and that was this: "This man has had ~~his~~ this day in court. It was then for him to prove that he was free from negligence or be forever barred from maintaining an action."

Mr. Santorf—If your Honor please, neither of these counsel were present at the District Court in Clifton. I started a suit here in Passaic shortly after they started theirs in the Small Claims Court and before we were served. However, their case came on for trial first. It was adjourned, and one day I went down to Clifton and I suddenly found the case on the Clifton Small Claims Court calendar, so I told the Court the predicament I was in and that I was not ready. Mr. Bab, attorney for the plaintiff from Newark, said he had witnesses from Newark and insisted on going on, and the

Motion to Dismiss and Argument

Court directed me to get ready at two o'clock. I then figured some way of getting out; so I filed a counter-claim, taking it out of the Small Claims Court, but they still gave me until two o'clock. When two o'clock came I had my plaintiff there, but none of the others, so I took a non-suit on the counter-claim and went ahead on the suit alone, and there was a judgment against us on the property damage claim. Now, we have a suit here for personal injuries. I say it is not *res adjudicata*, because it is not the same subject matter. The doctrine of *res adjudicata* means that there must not only be a judgment between the same parties but it must be the same subject matter, and, of course, Judge Hartshorne, in this opinion, ruled contrary to the opinion of the Court of Errors, and counsel does not cite either one of the cases he cited, *Smith v. Fisher Baking Company*, which I think your Honor is familiar with, where there were two causes of action, one for property damage and one for personal injuries and where it was held that when an injury is caused to property and persons by the same negligent act, distinct causes of action exist and, therefore, a judgment in one cause is not a bar to an action to recover in the other. The Court held the same thing in the case of *Ochs v. Public Service*—

The Court—Was that case decided upon the theory of *res adjudicata*?

Mr. Santorf—Yes.

The Court—Or was it decided merely to establish whether the man has a right of action in one case for personal injuries and then again for property damage?

Mr. Santorf—They set up the judgment as a

Motion to Dismiss and Argument

matter of res adjudicata, and they said it was not so.

The Court—Was the judgment in the first place against the plaintiff?

10 Mr. Santorf—Yes, absolutely, and reading the case of Ochs against the Public Service will show you that Judge Hartshorne tries to get around it on the theory that one was a servant, but still he does say this, that if once the question of negligence is tried the man should not be permitted to come back, but he fails, in his rule of law there, because there are two causes of action, and I have tried many cases where the same thing has occurred and where there were two trials. You can also get the same thing in an assault and battery case, where the man is convicted and you can get
20 it where there are judgments for personal injuries and then for property damage. I agree with you that the suit for property damage is res adjudicata and that is why I discontinued it.

The Court—Why is that res adjudicata?

Mr. Santorf—Because it is the same parties and the same subject matter.

The Court—What was your counter-claim filed for, property damage or personal injury?

80 Mr. Santorf—Property damage and we took a non-suit on that, too.

Mr. Howell—I think we can easily point out how fallacious the argument is here by this fact— if that were res adjudicata, as contended, because that was property damage, why did Mr. Santorf take a voluntary non-suit on his counter-claim out there? There is the crux of the whole point. The fact the property damage was being limited was not our question. The fact is negligence, whose

Motion to Dismiss and Argument

fault. Now, coming back to the Smith v. Fisher Baking Company case—

The Court—Yes, that is what I am interested in now.

Mr. Howell—In that case the question arose as to whether the District Court judgment for the driver against the company was res adjudicata in a later suit brought by the company against the owner of the car. Now, in Ochs v. Public Service, which counsel cited, in that case there was a prior judgment, as I remember it, and then there was litigation for personal injuries and when the personal injury case came up there was a plea of res adjudicata based on the theory that you could not split the causes of action, and that case went up to the Court of Errors and the Court held that there were two causes of action for personal injuries and property damage, and you may split them. In that case you will find no information concerning what happened when the case went back, and as an actual fact, I know that when the case went back it went back merely as to the assessment of damages, because the negligence had already been established. Now, that is our only question here. Whose fault? If a man has had one opportunity to prove that it was not his fault, that is all he is entitled to under the law, and I feel in this matter Mr. Esper has had his opportunity to prove that any negligence involved in the action was on the part of the Manhattan Transit Company, but he has failed to do that and he cannot come back here and vex us with other litigation, for at the same time he must prove our negligence before he can prove either his personal injury or his property damage.

Motion to Dismiss and Argument

Mr. Santorf—I am willing to rest on counsel's argument. He has quoted what the Court of Errors says, that you can split them and he says we don't know what happened later on.

10 The Court—What he says is this, that the upper court has only determined the question whether a man has one cause of action or two causes of action, but the Court has never passed upon the question of *res adjudicata*. I can readily see that such an occasion will crop up.

(Further discussion.)

The Court—Why wasn't this question taken up on motion instead of waiting until a jury was called?

20 Mr. Howell—That I cannot tell you. I don't know the facts any more than I was ordered to try the case on Saturday morning. Any explanation as to why things were not taken care of prior to that time I cannot tell you. I will say this, that we were the parties who demanded the jury in the case.

Mr. Santorf—About a week ago it was on the calendar and I don't even know when it was demanded.

30 The Court—I cannot conceive of the law permitting me to hear two cases, one for personal injuries and one for property damage, where I have already decided the first case, for instance, the personal injuries, and if I decided that for the defendant I don't think that the upper court intended, or that those decisions go so far as to say that I am obliged to hear the second case for property damage.

Mr. Santorf—That is what they say specifically.

Motion to Dismiss and Argument

The Court—No, I don't think so, I don't think they decided that.

Mr. Santorf—Before your Honor throws us out of court on a proposition of law like that, I would like to bring the cases down to you.

The Court—What do you mean, keep the jury here?

Mr. Santorf—I have the Court of Errors and Appeals opinion, which specifically holds that and I am reading it to you, I copied it out of the book and they held that it was not *res adjudicata*. I can't get a case more specifically in point. You are depriving this man of his day in court. We did not get our day in court down there on personal injury. 10

The Court—I cannot go behind the record.

Mr. Santorf—Well, let us read the cases before we deprive this man of his day in court, if there is a doubt on that particular case. 20

(Argument.)

The Court—How many witnesses have you in this case, and are you ready to go ahead?

Mr. Santorf—Yes, sir.

The Court—I will go ahead with the case and I am going to reserve my decision on this motion, even after the case is determined by the jury. 30

Certificate of District Court Judge

PASSAIC DISTRICT COURT.

William J. Esper, vs. 10 Manhattan Transit Co., Inc., Defendant.	}	Plaintiff, Defendant.
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20 I, Peter N. Perretti, Presiding Judge of the Passaic District Court, Passaic, New Jersey, and the Judge who presided over the aforesaid cause, Do Hereby Certify that the foregoing contains the motion and argument of counsel on the motion before me in chambers on Monday, April 24, 1933, at 10:00 o'clock A. M., at the Court House, Passaic, New Jersey.

Peter N. Perretti,
 Presiding Judge of the
 Passaic District Court.

Dated:

Certificate of Stenographer

PASSAIC DISTRICT COURT.

William J. Esper, vs. Manhattan Transit Co., Inc., Defendant.	}	Plaintiff,
		Defendant.

10

I, Joseph S. Fishkind, the stenographer designated and duly sworn in the above entitled cause, do hereby certify that the foregoing transcript contains the entire record of the motion and argument of counsel on motion taken by me at the trial of the said cause, which trial was held before Hon. Peter N. Perretti, Presiding Judge of the above named Court and a jury on April 24, 1933. 20

Joseph S. Fishkind,
Stenographer.

Dated: _____

30

Exhibit D-1

EXHIBIT D. 1

B. 558 Small Claims Division

A. P. Bab,
Plaintiff's Attorney.
L. Santorf,
Def't. Att'y.

10 State of New Jersey, }
County of Passaic. } ss.:

IN THE DISTRICT COURT OF THE
CITY OF CLIFTON.

Manhattan Transit Co., Inc., a corp., vs. 20 William J. Esper, 11 Clark St., Paterson, Defendant.	}	In an Action On Tort. Demand \$50.00.
Plaintiff,		
Defendant.		

PLAINTIFF'S COSTS.

Summons	\$1.60
Addition Deft.32
Execution	1.35

30 Dec. 7 A. D. 1932, a summons was issued in
the above stated cause, returnable Dec. 19 A. D.,
1932, at ten o'clock in the forenoon and was re-
turned as follows:

Served this summons Dec. 12, 1932, by reading
the same to the defendant and delivering to Wm.
J. Esper a copy thereof.

H. Konzelman,
Sergeant-at-Arms.

Writings of Abbede

The within named defendant not being found.
I served this summons Dec. 12, 1932, by leaving a
copy thereof at his place of abode, in presence of

_____ of the defendant,
a person of the family, of the age of fourteen
years, who was informed of the contents thereof.

_____ Sergeant-at-Arms 10

1-9-33 Counterclaim filed.

1-12-33 Judgment for pltf. \$30.00.

Vountary non-suit as to counterclaim granted.

1933 Execution issued Jan. 19th.

I hereby acknowledge the above to be a True
and Correct Copy of the Record Docketed in the
Small Claims Division of the Clifton District Court.

Emil Krupacs,

(Seal)

Clerk, Small Claims Div.

Clifton District Court. 20

Notice of Appeal

Filed July 21, 1933.
PASSAIC DISTRICT COURT.

Wililam J. Esper, vs. 10 Manhattan Transit Co., Inc., Defendant.	}	Plaintiff, In Tort. Notice of Appeal.
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NOTICE OF APPEAL.

To William J. Esper, or Louis Santorf, Esquire,
Attorney of Plaintiff.

Sir:

Take Notice, that the defendant, Manhattan
20 Transit Co., Inc., hereby appeals to the New Jer-
sey Supreme Court from the judgment of the Pas-
saic District Court, rendered in the above stated
action on the 3rd day of July, 1933.

Maurice J. McKeown,
Attorney of Defendant.

Service of a copy of the within instrument is
acknowledged this 7th day of July, 1933.

Louis Santorf,
Attorney for Plaintiff.

Grounds of Appeal

Filed July 21, 1933.

PASSAIC DISTRICT COURT.

William J. Esper, <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">vs.</div> Manhattan Transit Co., Inc., <div style="text-align: right;">Defendant.</div>	}	In Tort. On Appeal. Grounds of Appeal.	10
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GROUND OF APPEAL.

To Louis Santorf, Esq., attorney for plaintiff,
 45 Church Street, Paterson, N. J.

Take Notice, that the defendant, Manhattan
 Transit Co., Inc., appeals from the whole of the
 judgment entered in this cause on the following
 grounds: 20

1. The action brought by the plaintiff in the
 above entitled case was res adjudicata and should
 have been dismissed by the trial court, and the
 refusal of the trial court to dismiss such action
 was improper.

2. The plaintiff was estopped of record from
 maintaining the above entitled action, and the re-
 fusal of the trial court to dismiss the action for
 that reason, was improper. 30

Maurice J. McKeown,
 Attorney for Defendant.

Service of a copy of the within instrument is
 acknowledged this 4th day of August, 1933.

Louis Santorf,
 Attorney for Plaintiff.

Specification of Determinations

NEW JERSEY SUPREME COURT.

William J. Esper, Plaintiff-below—Appellee, vs. Manhattan Transit Co., Inc., Defendant below—Appellant.	}	On Appeal. Specification of Deter- minations Appealed From.
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10

SPECIFICATION OF DETERMINATIONS.

The defendant below, Manhattan Transit Co., Inc., appellant, hereby specifies the determinations or directions of the District Court of the City of Passaic, with respect to which he is dissatisfied in point of law:

20

1. The motion of the defendant to dismiss the action on the ground that it was res adjudicata, was denied by the trial court.

2. The motion of the defendant to dismiss the action on the ground that the plaintiff was estopped of record from maintaining said action, was denied by the trial court.

Maurice J. McKeown,
 Attorney for Defendant-Appellant.

30

Filed January 16, 1934.

Opinion

NEW JERSEY SUPREME COURT.

No. 413, October Term, 1933.

William J. Esper,

Respondent,

vs.

Manhattan Transit Co., Inc.,

Appellant.)

10

Argued October Term, 1933. Decided, 1933.

On appeal from District Court of the City of Passaic.

For Appellant—Maurice J. McKeown,

Robert G. Howell, on the brief.

For Respondent:—Louis Santorf,

Joseph D. Donato, on the brief. 20

The opinion of the court was delivered by Lloyd, J.

Esper brought an action against the Transit Company to recover damages for personal injuries and also for damage to his automobile. At the trial the property damage claim was withdrawn and the case proceeded to judgment in favor of the plaintiff for the damages for the personal injuries. From this judgment the defendant appeals. 30

The ground urged for reversal is that in the progress of the trial it developed that the defendant (appellant here) had instituted an action in another court to recover for injuries to his automobile growing out of the same collision upon which the present suit was predicated. That suit proceeded to judgment against the present plaintiff resting on the averment in the complaint that respondent was guilty of negligence in the opera-

Opinion

tion of his car. While the record of the earlier cases was informally before the District Court in the present case no point is made of this feature, and the respondent conceded at the argument that if the earlier case was properly dispositive of the one now before us no irregularity in its presentation would be claimed. The case was argued
10 orally and is presented in adequate briefs on the appeal.

There is perhaps no rule of law of greater importance than that of *res adjudicata*. There must come a time when litigation is at an end and this doctrine came into being for the purpose of determining when this result should be reached, and what it should be. The doctrine has been proclaimed in the jurisprudence of all civilized nations, Freeman on Judgments, Vol. 2, p. 1321)
20 found its most distinctive recognition in England in 1776 in the Duchess of Kingston's case, (Smith's Leading cases, Vol. 3, p. 1998), has found general acceptance in the states of the Union, and in this state as defined and applied in *In re Walsh Estate*, 80 Eq., 596. In the latter case it was declared by the court of Errors and Appeals to be the law that the "judgment of a court of competent jurisdiction on a question of law or fact, or a question of mixed
30 law and fact, once litigated and determined, is, so long as it remains unreversed, conclusive upon the parties and their privies, not only as to the particular property involved in the suit in which it is pronounced, but as to all future litigation between the same parties or their privies touching the subject matter, though the property involved in the subsequent litigation is different from that which was involved in the first."

Opinion

Tested by this rule it is quite clear that in the earlier action here involved it was determined that the accident was caused by the negligence of the present plaintiff and not by the negligence of the present defendant. This was a question of fact definitely determined between the parties and when pleaded here was a barrier to recovery by the present plaintiff, for it established conclusively and finally the negligence of the plaintiff which precluded recovery here. This result should forever set at rest any right of either party resting upon negligence in the accident which is the basis of litigation in both cases. 10

The respondent has cited a number of cases which he claims are at variance with the view here expressed. A careful analysis we think demonstrates that they not only are not at variance, but that they are in complete accord with the present conclusion. 20

The first of these is *Ochs vs. Public Service Ry. Co.*, 81 N. J. L., 661. In that case the plaintiff recovered for property damage arising out of a collision between his horse and carriage and a trolley car of the defendant. He later instituted an action for personal injuries growing out of the same accident and recovered there as well. The court held in substance that the property damage and the personal injuries were different causes of action and that recovery on the first did not bar a subsequent suit for the latter. In effect this simply determined that the rule that a party who has suffered damages by reason of the wrong of another must present his entire claim in one action did not go so far as to require that both property and personal injury damages should be so includ- 30

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ed. There was no contrary finding on the fundamental question of liability as in the present case.

10 In *Carter vs. Public Service Gas Co.*, 100 N. J. L., 374, (Errors and Appeals) the plaintiff sued the Gas Company for an assault and battery by a servant of the company. Previously this same
10 servant had recovered damages against Mrs. Carter for injuries growing out of the same affray. This earlier judgment was successfully pleaded as *res adjudicata* by the gas company and affirmed on appeal. It will thus be seen that the case goes a step further than is here required in holding that the earlier judgment determines not only the absence of liability of the employee, but the like non-liability of the employer as well.

20 In *Smith vs. Fischer Baking Co.*, 105 N. J. L., 567; the plaintiff brought suit against the Baking Company for damages to her automobile caused by a collision with the defendant's automobile and recovered judgment. Previously one Vernoy, a servant of the plaintiff, had brought suit against the Baking Company for injuries growing out of the same accident and in that action judgment was rendered for the defendant. This judgment was
30 tendered in evidence as *res adjudicata* at the trial of the Smith case, was rejected and this action of the trial court was affirmed on appeal by the Court of Errors and Appeals.

While *Carter vs. Public Service Gas Co.* was distinguished upon the ground that the action in that case was for an assault and battery while the action in the Smith case was for negligence, it may be added that the parties were not the same and were suing independently and each in individ-

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ual right. The action by Vernoy represented himself alone. While he was the chauffeur of Mrs. Smith's car he was employed to drive her car, but not to bring actions for damages.

More recently came *Bergin vs. Ganley*, 107 N. J. L., 242. In that case a previous adjudication on the question of negligence in the District Court was tendered in evidence on a trial in the Supreme Court and rejected. This action was affirmed by the Court of Errors and Appeals, but solely on the ground that the District Court, in an action begun after one already instituted in the Supreme Court, could not oust the latter of its jurisdiction, and it is clear from the opinion of the late Chief Justice Gummere that but for this fact the earlier judgment would have been held conclusive. The facts in that case were that suit was brought in the Supreme Court in July, 1929. Later an action was begun in the District Court against the plaintiff Margaret Bergin, by the defendant Mrs. Ganley for personal injuries arising out of the same facts, a collision between two automobiles, and judgment rendered for the plaintiff. The Supreme Court issue was tried and resulted in a judgment for the plaintiff herein. Except that both cases were for personal injuries the facts do not differ from those presented in the case now before us.

The trial judges of the state, recognizing the necessity of setting litigation at rest and avoiding the anomalous and intolerable situation of recovery in negligence cases by both parties upon the same state of facts, have appreciated the distinction between the cases cited above in the Court of Errors and Appeals; and in at least two cases, (*Freitag vs. Renshaw*, 9 Misc., 1161, and *Wirth vs.*

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Slinn, 10 Misc., 361, a prior finding between the same parties on the question of negligence was held conclusive and barred a recovery in the then pending action.

10 In the present action the parties are the same. The primary issue was the responsibility of one or the other or both. That issue was tried out in the first District Court case and resulted adversely to the present plaintiff (respondent here). It cannot be again litigated between them.

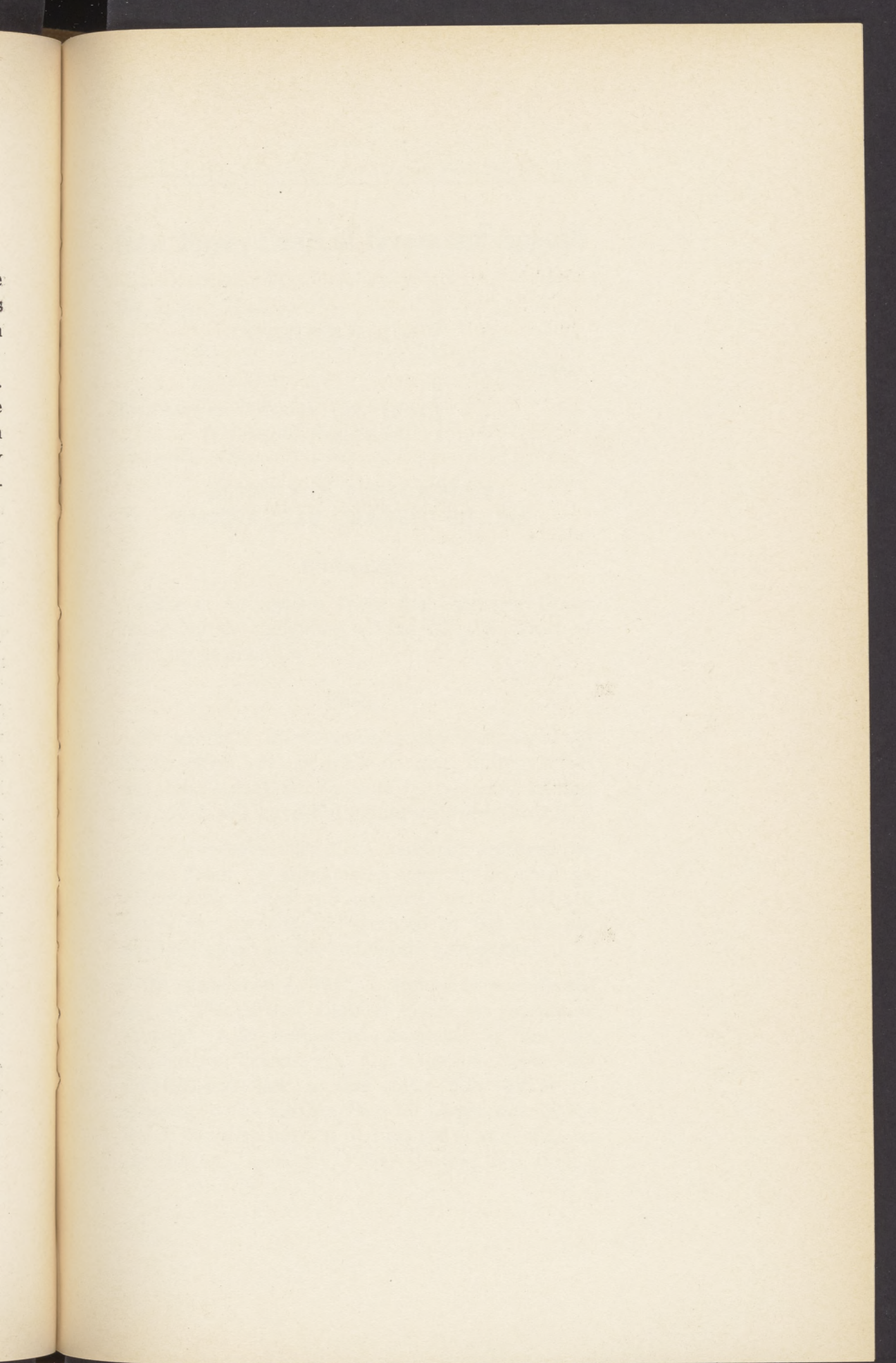
The judgment is reversed.

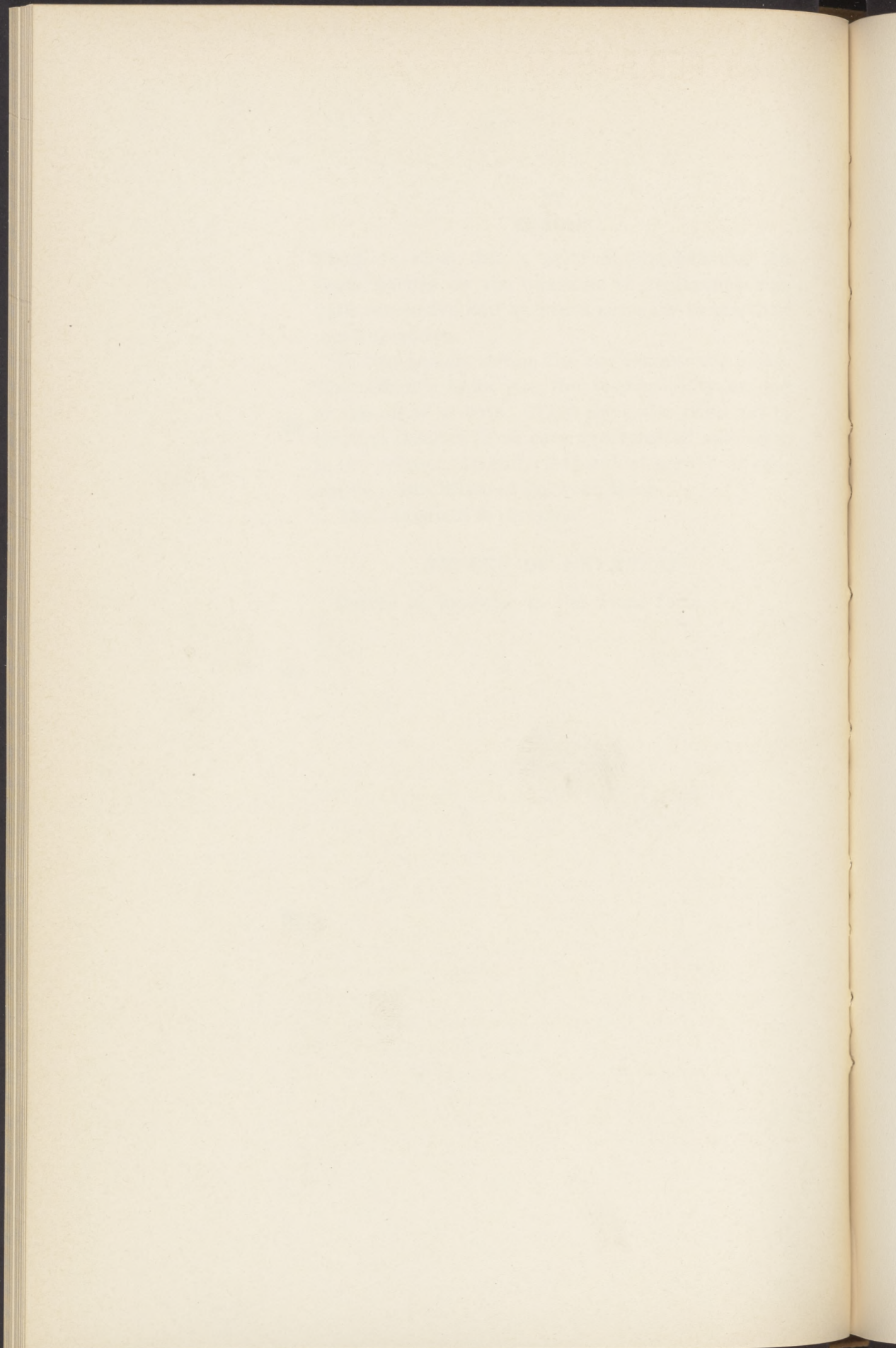
DECREE OF REVERSAL

Decree of Reversal in the usual form.

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89 FEB.T.1935

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

WILLIAM J. ESPER,

Plaintiff-Appellant,

vs.

MANHATTAN TRANSIT CO., INC.,

Defendant-Respondent.

On Appeal.

BRIEF FOR RESPONDENT, MANHATTAN TRANSIT CO., Inc.

Statement.

This is an appeal from the Supreme Court reversing the judgment of the District Court of the City of Passaic.

Facts.

Appellant's brief contains the Statement of Facts which are not quite correct, thereby making it necessary for them to be repeated so that the court will have the actual record before it.

On November 23, 1932, plaintiff suffered injuries from an automobile accident between an automobile owned and operated by the plaintiff and a bus owned and operated by the duly authorized agent of the defendant-respondent.

On December 7, 1932, a summons was issued out of the Clifton District Court, in an action brought by the defendant-respondent in this suit, Manhattan Transit Co., Inc., against Esper, the plaintiff-appellant in this suit. The suit so instituted in the Clifton District Court was in the Small Claims Division of that court and came on for trial on January 9, 1933. On that date Esper,

the defendant in that suit, filed a counter-claim for the property damage sustained by him, which counter-claim was in excess of the jurisdiction of the Small Claims Court, thereby making the case a District Court case. When the case proceeded to trial on that date, despite the filing of the counter-claim the defendant (plaintiff-appellant), took a voluntary non-suit as to the counter-claim.

Judgment was recovered by the Manhattan Transit Co., Inc., against the plaintiff-appellant for the property damage sustained (State of Case, pages 22 and 23).

Subsequently, on January 7, 1933, the present action was started by the issuing of a Summons and State of Demand out of the Passaic District Court. This suit instituted on January 7, 1933, in the Passaic District Court is for damages received in the same accident which gave rise to the litigation of the cause in the Clifton District Court. The action was brought for the property damage and personal injuries which the plaintiff-appellant alleges he sustained as a result of the aforesaid accident. At the time of the trial plaintiff-appellant discontinued the property damage claim and wished to proceed as to his personal injury action.

At the time of the trial of the present action a motion was made on behalf of the defendant-respondent to non-suit the plaintiff-appellant, on the grounds that the present action was *res adjudicata* and that the plaintiff was *estopped of record* to maintain this suit. The court reserved decision on the motion and permitted the case to go to the jury, which resulted in a verdict in favor of the plaintiff-appellant.

Defendant-respondent appealed to the Supreme Court on the grounds that:

1. The action brought by the plaintiff in the above entitled cause was *res adjudicata* and should have been dismissed by the trial court, and the refusal of the trial court to dismiss such action was improper.

2. The plaintiff was estopped of record from maintaining the above entitled action, and the refusal of the trial court to dismiss the action for that reason was improper.

POINT I.

The verdict of the Clifton District Court in favor of the present defendant-respondent in the case of Manhattan Transit Co., Inc. vs. Esper, is **RES ADJUDICATA** as to the present action and the determination of that court as to the negligence between the plaintiff and the defendant herein constitutes an **ESTOPPEL OF RECORD** between the parties and the plaintiff herein is by that judgment legally **ESTOPPED** from proceeding with the present suit and re-litigating an identic issue already decided.

As in the Supreme Court, defendant-respondent will combine both grounds under the one point.

It appears that the causes of action both in Clifton and in the Passaic District Court are founded in negligence. The plaintiff in this cause being the operator of one of the cars and the duly authorized agent of the defendant-respondent the operator of the other, and for either party to recover against the other he must prove that the sole negligence of such other party was the proximate cause of the accident.

If the plaintiff-appellant were guilty in the slightest degree of any negligence proximately contributing to the accident, he is barred from any recovery.

Therefore, the plaintiff in the Clifton District Court, defendant-respondent in this cause, must have proved three things to have recovered that judgment. First: that the defendant therein (plaintiff-appellant in this cause) was negligent. Second: that such negligence was the proximate cause of the injuries, and, third: that the Manhattan Transit Co., Inc. (plaintiff in that action and defendant-respondent herein), was not guilty of the slightest degree of negligence which contributed to its damage. These salient facts the judgment of the Clifton District Court bespeak and since that judgment still remains in full force and effect, unreversed, they must be accepted as true. For as was said by our Court of Chancery in *Mayor, etc. of City of Paterson v. Baker*, 51 N. J. Eq. 49, 26 Atl. 324:

“After judgment final, in case no appellate proceedings are taken, in the words of Mr. Justice Field, in *Bissell v. Spring Valley Tp.*, 124 U. S. 224, 236, 8 Sup. Ct. Rep. 501: ‘The facts and law are adjudged matters between the parties and not open, therefore, to any further contest.’ ”

Necessarily, for the plaintiff-appellant to recover in the present action he must prove by the preponderance of the evidence; first, the defendant-respondent was negligent; second, that the defendant-respondent's negligence was the proximate cause of the injury complained of; and, third, that he, the plaintiff-appellant, was not guilty of any negligence which contributed to his injury. It is only after proof of these matters that the court may lend its attention to the damages sustained, be they in their nature personal

injuries or property damage. The foregoing necessary elements of the plaintiff-appellant's necessary proof have been decided against him by the decision of the Clifton District Court in the case of *Manhattan Transit Co., Inc. v. Esper*. They are not subject to controversion; the findings of that court are of so high a nature that no testimony, no matter how strong, can be introduced to either negative it or discredit it; *Mayor, etc. of City of Paterson v. Baker*, 51 N. J. Eq. 49, 26 Atl. 324; *In re Walsh's Estate*, 80 N. J. Eq. 565, 75 Atl. 563; *W. D. Cashin & Co. v. Alamac Hotel Co.*, 98 N. J. Eq. 432, 131 Atl. 117.

The plaintiff had his day in court—the day of the District Court trial in Clifton. If he were not at fault he then had his opportunity to prove it; this he failed to do. He cannot now come into this court and ask it to again hear his cause, and in practical effect grant it appellate jurisdiction over a sister court.

A perusal of the cases in New Jersey disclose but two which are directly in point; *Freitag v. Renshaw*, 9 N. J. Misc. R. 1161, 157 A. 455; *Wirth v. Slinn*, 10 N. J. Misc. R. 361, 158 A. 743.

Turning our attention to the first of these; *Freitag v. Renshaw, supra*, we find the facts to be as follows: Freitag was the driver of an automobile which collided with a car driven by Renshaw. Renshaw sued Freitag and one Meyer, the owner of the car driven by Freitag, in the District Court of the First Judicial District of Essex County, for negligence in the same accident as in the reported case. The suit was for property damage only, and Meyer counter-claimed for property damage. The District Court found contributory negligence both as to the main action and as to the counter-claim, and rendered a verdict of no

cause for action on both. Freitag then instituted the present action against Renshaw in the Essex County Court of Common Pleas for personal injuries received in the same accident. The attorney for Renshaw moved for a dismissal of the action on the grounds of *res adjudicata*. The court in deciding that the action should be dismissed upon the ground that the matter was *res adjudicata*, or at least *estoppel of record*, said:

“When the second cause of action is tried, any issue in that cause identic with an issue decided in the first cause is concluded by the decision in the first cause, by what is called an estoppel of record. In other words, the judgment in the first cause presents evidence of the fact of so high a nature that nothing which could be proved by evidence aliunde would be sufficient to overcome it. Hence, it would be useless to adduce such evidence, and the party seeking to do so is estopped or precluded by law from doing so. *Sawyer v. Woodbury*, 7 Gray (Mass.) 499, 502, 66 Am. Dec. 518; *City of Paterson v. Baker*, 51 N. J. Eq. 49, 26 A. 324.”

The court then went further and gave a very practical reason for such decision, by saying:

“To reach a different result in this cause would mean that we would permit the same party to force the same court to try the same issue; that of negligence, twice. We might also reach the ridiculous result that this same party might be found entitled to recover for personal injuries, because not negligent, yet not entitled to recover for property damage to a car he might own because negligent. Nothing would better serve to foster litigation, and at the same time a disrespect for our system of jurisprudence.”

The other case in point, that of *Wirth v. Slinn*, *supra*, presented the following facts: Wirth and Slinn were both drivers of vehicles involved in a

collision. Wirth started an action against Slinn for personal injury, alleging the said accident resulted from Slinn's negligence. This action was instituted in the New Jersey Supreme Court. Shortly thereafter Slinn sued Wirth for property damage for the same accident in the Common Pleas Court of Bergen County. The Common Pleas case was tried first, and Slinn recovered against Wirth, the jury finding the accident resulted from Wirth's negligence. A plea of *res adjudicata* is now interposed by Slinn against Wirth's Supreme Court action. It is submitted that these facts represent essentially the case at bar.

The court in deciding the matter was *res adjudicata* said:

“The right to relief here rests upon the same point or question, that of negligence, which in essence and substance was litigated and determined in the Common Pleas case, and it would be unjust and improper to now permit the plaintiff here to question the propriety of the jury's finding, that he (Wirth) was negligent. Commenting on the doctrine of *res adjudicata*, 34 *Corpus Juris*, at page 743, states that ‘any right, fact or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits, is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose of subject-matter of the two suits is the same or not.’ ”

Again, the court said:

“Both Wirth and Slinn were parties to the former (Common Pleas case) suit; the right to relief there resting on the question of negligence. In the instant case, I believe

it is conceded that proof submitted in the Common Pleas case with particular reference to the question of negligence resulted in the jury in that court finding as a fact that Wirth was negligent in the operation and control of the Brady car and that there was no negligence on the part of Slinn, whereupon judgment was accordingly entered in favor of the Slinns. *The issue being one of negligence there as well as here and that point or question having been already litigated and determined and resolved in favor of Slinn, I am of the opinion that the judgment in the Common Pleas case is conclusive and so in point as to control the issue in the pending action here.*''

Counsel in his brief lays great stress on the cases of *Ochs v. Public Service*, 81 N. J. L. 661, 80 A. 495, and the case of *Smith v. Fischer Baking Co.*, 105 L. 567, 147 A. 455, which cases Justice Lloyd of the Supreme Court determined were not at a variance with the conclusions arrived at by the Supreme Court, but rather in accord with the same.

To render a matter *res adjudicata* one of the component requisites is that the parties be the same in both actions. This does not necessarily mean that their position be the same, but merely that they all be joined in both suits. In *Smith v. Fischer Baking Co.*, *supra*, plaintiff's automobile was being operated by one Versoy; the suit was one for property damage. Prior to the institution of the suit, Versoy, the agent, had sued for personal injuries in the Second District Court of Newark, in which case there was a judgment for the defendant. The defendant in the later Supreme Court action attempted to set this judgment up to support a plea of *res adjudicata*. Mrs. Smith had not been a party to the original suit, she had never had an opportunity

to be heard. Obviously, that judgment could in no way affect her rights. It is interesting to note that in both *Freitag v. Renshaw, supra*, and *Wirth v. Slinn, supra*, the court points out the inapplicability of the Smith case for the above-stated reason.

In *Freitag v. Renshaw, supra*, the court in showing the inapplicability of the Smith case said:

“Nor is this conclusion contrary to *Smith v. Fischer Baking Co., et al.*, 105 N. J. Law 567, 147 A. 455. In that case, since neither the same parties nor their privies were involved, the doctrine of *res adjudicata* could not apply whether the *res* were a cause of action or a single issue in the first cause; the parties in the two suits were not identic, the plaintiff in the second suit not having been a party to the first action.

Nor was there any privity between the driver and owner of the automobile, parties plaintiff in the first and second actions respectively. The basis of the second action was injury to the automobile of the owner, in which the driver had no interest whatever and consequently no privity with the owner.”

In the case of *Wirth v. Slinn*, the court in distinguishing the Smith case said:

“In the later case of *Smith v. Fischer Baking Co., supra*, the question there arose as to whether the District Court judgment in the previous action of the driver, Versoy, against the company was such as to be *res adjudicata* in a subsequent suit instituted against the company by the owner of the car driven by Versoy. The owner of the car, Mrs. Smith, had not been a party in the District Court proceedings. However, in the case at bar, both *Wirth* and *Slinn* were parties to the suit instituted in the Bergen County Court of Common Pleas, and their rights as against each other arising out of

the question of negligence were determined by a jury before a court of competent jurisdiction, and that judgment there is controlling here."

Nor is the case of *Ochs v. Public Service*, 81 N. J. L. 661, 80 Atl. 495, contrary to the defendant-respondent's contention. The facts of that case are these: Ochs was the owner and driver of a horse and wagon which was in a collision with the vehicle operated by the Public Service Co. Ochs first instituted suit for his property damage and recovered a judgment. He then instituted suit against the same defendant for personal injuries. The Supreme Court, reversing the trial court, ruled that the prior judgment on the property damage claim was *res adjudicata* and that at the time of the first suit, all damages arising out of the accident had to be proved or the plaintiff be forever barred from recovering. The appellate courts had before them in the appeal of this case, one question and one question only; namely, how many causes of action accrue to an individual as a result of a negligent act? The Court of Errors and Appeals decided there were two; one for property damage and one for personal injuries. By discontinuing the property damage claim in the present action (see State of Case, page 11) counsel cannot avert a plea of estoppel of record or *res adjudicata*. To recover for personal injury he must prove that the defendant-respondent's negligence was the proximate cause of the action; this has been decided against the plaintiff-appellant by the Clifton District Court. The defendant-respondent does not deny that if the plaintiff-appellant has any cause of action he has two, viz.: one for property damage and one for personal injury, but the defendant-appellant contends that in bringing an action to establish either of these causes of action the

plaintiff-appellant is conclusively bound by the verdict and judgment of the Clifton District Court on the question of whose negligence caused the injury, which question is the essential element to the plaintiff-appellant's case, and which question was decided against the plaintiff-appellant by that court.

If the plaintiff-appellant is permitted to maintain this action, and the judgment recovered permitted to stand, we have the ludicrous situation where both parties to an accident are permitted to recover in different courts of the same jurisdiction for damages received by each in the same accident. Nothing could encourage more vexatious litigation than this, nor create a greater contempt for our courts. In effect, it would evolve into a ridiculous situation where on the same question, negligence, both parties were at the same time right and at the same time wrong. It is hard to conceive of anything which would be more destructive at one stroke to the jurisprudence which the courts have carefully and judiciously been building for centuries than a decision permitting everyone to recover and requiring everyone to pay.

It is, therefore, respectfully submitted that for the reasons herein urged, that the judgment of the Supreme Court should be affirmed and this appeal should be dismissed.

Respectfully submitted,

MAURICE J. McKEOWN,
Counsel for Respondent.

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89 FEB.T.1935

New Jersey Court of Errors & Appeals

William J. Esper,
Plaintiff-Appellant,
and
Manhattan Transit Co., Inc.,
Defendant-Respondent.) On Appeal.

Appellant's Brief

STATEMENT OF FACTS.

This is an appeal from the Supreme Court which reversed a judgment of the Passaic District Court. The judgment in the court of the first instance was in favor of the plaintiff and against the defendant, and this, the Supreme Court reversed to one in favor of the defendant.

On November 23rd, 1932, an automobile owned and operated by the plaintiff and a bus owned by the defendant and driven by one of its agents collided in Paterson.

Immediately thereafter the transit company instituted a small claims action in the Clifton District Court against Esper for damage done to its bus. Before the plaintiff, Esper, was served, he instituted an action in the Passaic District Court for both property damage and personal injury. However, the action instituted by the transit company in the small claims division was reached first and a judgment was rendered in favor of the transit company and against Esper for property damage only.

REASON

THE JUDGMENT in the Small Claims Division OF THE CLIFTON DISTRICT COURT IN THE CASE OF MANHATTAN TRANSIT COMPANY, INC., vs. WILLIAM J. ESPER, WAS NOT DIS- POSITIVE OF OR RES ADJUDICATA OF THE ISSUE BEFORE THE PASSAIC DISTRICT COURT.

As the court has already been told, the transit company in the above cause obtained a judgment against Esper in the Clifton District Court, Small Claims Division for property damage only, in the sum of \$30.00. (State of Case, page 22 and 23.) Even though in the exhibit produced at the trial below, the State of Demand was not produced, no irregularity was claimed by reason of such failure and none will be claimed now. It was agreed that the action in the Clifton District was for property damage as the court will see from the entire State of Case and from the opinion of the Supreme Court. (State of Case, page 27, line 34.) The action now before the court is one for personal injuries. (State of Case, page 7, Second Count.) The First Count was discontinued.

It is the appellant's contention that the judgment of the Clifton District Court for property damage was not res adjudicata of an action pending between the same parties for a different subject matter, to wit: personal injuries in the Passaic District Court. It is the appellant's contention that when an accident occurs and injury is done to both person and property that the person so injured has two separate and distinct causes of

Dear Justice:

The printer omitted one entire page from the printed brief. I am taking the liberty of attaching it hereto in original.

I ask your indulgence in reading it.

I thank you.

Dear Sir,

I have the pleasure to inform you that the
same has been forwarded to the
Liberty of the City of London.

I am, Sir, your obedient servant,

11.

I remain, Sir, your
obedient servant,

I A.

Thereafter Esper's action in the Passaic District Court was reached for trial and moved. Esper's attorney discontinued the first count in the State of Demand which read for property damage and only moved the trial on the second count, which was for personal injuries. Motion was made that the action then before the Passaic District was res adjudicata on theory that the judgment in the Clifton District on property damage was dispositive of the present action for personal injuries. It was also made on the further ground that Esper was estopped of record by the record of the Clifton District to maintain his present action. But that is almost the same thing as the first ground. The court reserved decision and let the case go to the jury. They rendered a verdict in favor of the plaintiff and against the defendant,

that is almost the same thing as the first ground. The court reserved decision and let the case go to the jury. They rendered a verdict in favor of the plaintiff and against the defendant, transit company. The district court thereafter decided that there were two causes of action, one for personal injuries and one for property damage, and that a judgment in one, was not a bar to a judgment in the other, and entered judgment in accordance with the verdict of the jury.

An Appeal was taken by the transit company to the Supreme Court and that tribunal determined that the transit company's contention was correct and, therefore, reversed the judgment.

There is only one ground of appeal; namely, that the Supreme Court erred and only one reason in support thereof.

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action: one for injuries to the person and the other for injuries to the property. It is also the appellant's contention that a judgment in an action to recover for one, will not bar an action to recover in the other.

The Supreme Court in its opinion decided that merely because the question of negligence had been determined in the prior action, it wiped out and barred all future actions between the same parties, even though the future actions may have been for different subject matters.

The question to be determined in this case has already been presented to the Court of Errors and Appeals. The very first time this court had the question before it for decision was in the case of *Ochs vs. Public Service*, 81 N. J. L. 661. In that case the plaintiff had instituted an action for property damage and recovered. Later he instituted an action for personal injuries, and the defendant attempted to have the judgment in the first action declared to be *res adjudicata* of the second action. It was the first time the court had the question before it and there was submitted to it decisions of all our sister states, some in favor of the proposition and some to the contrary. The court said at page 662:

“As the question is now before this court for the first time, we are at liberty to adopt the rule of law, which appears to us to be most logical and reasonable, and we are of opinion that there is a clear distinction between the two classes of injuries, and that it is the injury and not alone the negligent act, which gives rise to the right of action;

for a negligent act is not in itself actionable, and only becomes the basis when it results in injury to another. In order to support an action there must be not only the negligent act, but a consequential injury which is the gravamen of the charge and this distinction between the negligent act and its consequences is recognized in deciding when a cause of action arises in cases where the bar of the statute of limitations is interposed."

"We are of the opinion that where injury is caused to property and person by the same negligent act, distinct causes of action exist and, therefore, a judgment in one cause is not a bar to an action to recover in the other."

This short excerpt will show exactly upon what ground the court based its rule. The respondent contends that this case is not authority for the reason that the plaintiff obtained an affirmative judgment in his favor in the first case and it simply held that a plaintiff did not have to insert both causes of action at one time. Justice Lloyd said the same thing in the Supreme Court. The appellant contends, however, that that is not so; that the Court of Errors and Appeals never mentioned that ground, never touched that phase of it, and it had no bearing on the decision whatsoever. The court simply decided that there were two separate causes of action and it gave two good reasons; one of which, that even the legislature had recognized the distinction. For it said at page 662:

“That our legislature has recognized a distinction between the right to recover for injuries to property and those to the person is indicated by its course of legislation in respect thereto.”

Isn't the rule a sound one? The legislature enacted a statute of limitations and it set up that in cases of injuries to the person you must institute the action within two years from the date the cause of action accrued. In the matter of injuries to property damage, one has to institute his action within four years from the date the cause of action accrued. The subject matter of a suit is never the question of negligence. The subject matter of a suit is the thing sued for. Negligence is the reason why you sue. The subject matters in both actions are positively different. They are also different to the extent that one, a cause of action to property damage can be assigned under the statute, whereas a cause of action for personal injuries can not be assigned. We have no statute permitting the assignment of a cause of action for personal injuries. A cause of action is never a negligent act, but it is the thing sued for; for the court said at page 663:

“The cause of action is not the negligent act but the consequences following it, for to support an action there must be not only the negligent act but a consequential injury. The injury being the gravamen of the charge.”

The Court of Errors and Appeals in the recent

case of *Smith vs. Fisher Baking Company*, cited and affirmed the above rule on the bottom of page 569 of 105 N. J. L.

Justice Lloyd in his opinion at the bottom of page 29 (State of Case) said that the *Ochs* case merely decided that both actions would not have to be entered in one and gave as his reason at the top of page 30, that there was no contrary finding on the fundamental question of liability. The appellant contends that the court fell into error there, for the reason that the Court of Errors and Appeals said no such thing and did not qualify their opinion to that extent. The court said:

“We are of the opinion that where injury is caused to both property and person by the same negligent act, distinct causes of action exist, and, therefore, a judgment in one cause is not a bar to an action to recover in the other.”

Did they say anything in that opinion about the fact that the plaintiff had to have an affirmative judgment in the prior action before such rule applied? Their language can leave no doubt, for the words are: “a judgment in one will not bar an action **TO RECOVER IN ANOTHER.**” If the Court of Errors had intended, that the rule should only apply where there was an affirmative judgment and not a contrary one on the question of negligence, they would have inserted the word “affirmative” before the word “judgment” or had decided that:

“Where a person recovers an affirmative judgment in the one it would not bar his action to recover in the other.”

The appellant, therefore, contends such rule of the Supreme Court was an error and that the rule is such as the one stated in the Ochs case supra.

The next case the appellant cites in support of his contention, and which is stronger in many respects than the Ochs case, is the case of Smith vs. Fisher Baking Company, 105 N. J. L. 167. In this case, Mrs. Smith's chauffeur or servant, one Vernoy, was driving her car when an accident occurred. Vernoy sued the baking company for personal injuries and a judgment was rendered in favor of the defendant baking company. There are only two theories upon which that judgment could be rendered. One, that the defendant was not guilty of any negligence or secondly that the defendant was guilty of negligence, but the plaintiff was also guilty of contributory negligence. Thereafter, Mrs. Smith brought suit for damages to her car. Now, if the transit company in the instant case or if the Supreme Court is correct in the instant case in its opinion, then Mrs. Smith should be barred of her action, because the question of negligence had already been determined in favor of the baking company. If the defendant baking company, was not guilty of any negligence, Mrs. Smith could not recover for any property damage. If her agent and servant at the time of the accident was guilty of contributory negligence, she still would not be entitled to recover because Vernoy was her servant and agent, was

on her business and the doctrine of respondeat superior necessarily applied, *Carter vs. Public Service Gas Co.*, 100 N. J. L. 374. In both instances, she then would be barred. The baking company attempted to put the record of Vernoy's action into evidence on Mrs. Smith's case, so that it would be *res adjudicata*. The lower court refused to admit it in evidence to support the defense of *res adjudicata*. The Court of Errors and Appeals sustained the trial court, and the very first thing they said: (page 568)

“But a matter is not *res adjudicata* unless there be identity of the thing sued for—”

The first syllabus of the court and its decision on page 568, was following the *Ochs* case *supra*:

“Where injury is caused to property and person by the same negligent act, distinct causes of action exist, and, therefore a judgment in one cause is not a bar to an action to recover in the other.”

I don't think there can be any words that are more on all fours with the case at bar. It is stronger than the *Ochs* case, because there is a negative verdict in the first action in favor of the defendant. The respondent in the instant case and Justice Lloyd in the Supreme Court attempted to get around the *Smith* case by saying that they were not the same parties in both actions. But they fall into error in this respect for the reason that under the doctrine of *res adjudicata*, it was

never a necessary element to the plea that the parties be the same. If the party either to the first or the second action was a privy to the other, the plea held and was good in law. The doctrine of *res adjudicata* from the very first case enunciating it, (*The Dutchess of Kingston's Case*, 1776) always was that the judgment of a court of competent jurisdiction, once litigated and determined, was conclusive upon the parties as to all future litigations between the same parties or their privies, touching the same subject matter. It can be seen that it is not necessary to have the same parties in both actions.

If your agent and servant is guilty of contributory negligence in the operation of your vehicle, there is no question about the rule of law that you would be denied recovery on the ground that you are bound by your agent's acts under the circumstances. The doctrine of *respondeat superior* applies, *Carter vs. Public Service*, 100 N. J. L. 374. When the respondent argues as he does, his theory is against the *Carter* case *supra*, because that case held that an action between a servant and a plaintiff is *res adjudicata* of an action between that plaintiff and the master, when it arises out of the same subject matter. The *Carter* case arose out of an assault and battery. The Public Service agent sued Mrs. Carter and got a judgment of six cents. Later Mrs. Carter sued the Public Service and this court held that the judgment in the case of the agent against Mrs. Carter was *res adjudicata* of the issue between Mrs. Carter and the Public Service. What, then, has the respondent to say about the rule of law applying in the *Carter* case? They certainly were not the same parties.

One case was Ryerson vs. Carter, and the second case was Carter vs. Public Service. But the doctrine of respondeat superior applied, and the acts of the agent were the acts of the corporation, and a judgment in the one would bar a recovery in the other. The same was applicable to the Smith case supra, in so far as agency was concerned, because in the Smith case she was suing for the acts of her agent. Mrs. Smith would certainly be liable for the acts of her driver. There can be no question of that. But yet because there were two separate and distinct causes of actions, Mrs. Smith was permitted to maintain her second action, because it was for a different subject matter. Let us take the situation in the Smith case. The baking company had already won a judgment against the driver of Mrs. Smith. It could then have turned around and sued Mrs. Smith for damage to its truck. The prior adjudication in the suit against the baking company necessarily determined that either the baking company was not guilty of negligence, or if it was, Mrs. Smith's driver was guilty of contributory negligence. That question was then according to the respondent's contention decided once and forever. If that be a fact, then the baking company, if it sued, could ask the court to assess damages only, because the question of negligence had already been decided in its favor. But that is not a fact. They would have to go on with their case and prove all over again the same issues of negligence that would involve the prior suit, without a question of a doubt. They would again have to show why the driver of Mrs. Smith's car was the negligent person.

Very recently the rule, now being submitted to this court in the instant case, was again reiterated by this court in the case of Sodowich vs. Heimert, 109 N. J. L. 265, which affirmed the Supreme Court decision.

There again the court re-affirmed the rule in the Ochs case. This is the rule that the appellant desires to maintain in the instant case. If the rule is changed so that the instant case is res adjudicata then we are face to face with this situation. A is being driven down Main Street by B, his chauffeur. An accident is had with C's car. C institutes a suit against B for damages to his car and the jury finds that B is at fault, that C is not guilty of contributory negligence and returns a verdict in favor of C. A who was personally injured is still lying in the hospital. When A gets out of the hospital he institutes suit against C. Under the decision in the instant case in the Supreme Court, the question of negligence having been determined, A's action would be barred. When Justice Lloyd in the opinion on top of page 31 (State of Case) said that while the chauffeur is employed to drive a car he is not employed or has any right to bring an action for damage, I assume that he means by that, a chauffeur can be an agent or servant while driving, but not to institute an action for damages. The appellant does not think this is so. A servant does not have to have authority to institute suit. The suit depends upon his acts at the time of the accident. His acts were under authority and that would be sufficient to create the doctrine of respondeat superior. Once that doctrine arises, the master is bound by the servant's acts. If that

be so, and if this court sustains the Supreme Court, then in the hypothetical case above, A would be barred of his damages for personal injuries. Again we must repeat that it is the appellant's contention that the subject matter of the suit in the instant case was different than that which was before the Clifton District Court and, therefore, the prior adjudication could not be res adjudicata of the instant case.

The appellant, therefore, respectfully submits that he desires this court to uphold the rule in the case of Smith vs. Fisher Baking Company, supra, and that he has two causes of actions and that if he lost in one it would not bar him in his action to recover for the other.

Respectfully submitted,
LOUIS SANTORF,
Attorney for Plaintiff-Appellant.

February Term
1935.

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The court in this case has held that the plaintiff's claim for the value of the property is not barred by the statute of limitations. The court has held that the plaintiff's claim is not barred by the statute of limitations because the plaintiff's claim is for the value of the property and not for the value of the contract. The court has held that the plaintiff's claim is not barred by the statute of limitations because the plaintiff's claim is for the value of the property and not for the value of the contract.

The defendant, therefore, respectfully submits that he desires this court to affirm the verdict in favor of the plaintiff. The defendant respectfully submits that he has two causes of action and that he is entitled to recover for the other.

Respectfully submitted,
 THOMAS J. HANCOCK
 Attorney for Plaintiff

For the Defendant
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