Court of Errors and Appeals, Oct. 1926 Term

NEW JERSEY SUPREME COURT
No. 38, October Term 1925

Michael Marques, Plaintiff-Respondent, vs. Lewis Mir, Defendant-Appellant.	Action at Law. On Appeal from Hudson County Court of Common Pleas. ORDER ON AFFIRMANCE OF JUDGMENT.

This cause having been duly submitted at the October Term, 1925 of this Court, by Joseph M. Alsofrom and Leo Blumberg, Esqs., of counsel for appellant, and Alex. Simpson and Alex. R. DeSevo, Esqs. of counsel for respondent, and the Court having considered the same and finding no error in the record or proceedings in the Hudson County Court of Common Pleas,

It is thereupon, on this 17th day of June, 1926,

ORDERED and ADJUDGED that the judgment of the Hudson County Court of Common Pleas, reviewed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Hudson County Court of Common Pleas to be proceeded with in accordance with the judgment and the practice of said court.

ALEX. SIMPSON,
Attorney for Plaintiff-Respondent.

Entered June 17th, 1926.

INDEX.

Notice of Appeal to Court of Errors and Appeals.

(Filed June 26, 1926.)

New Jersey Supreme Court

MICHAEL MARQUES,
Plaintiff-Appellee,

v.

LEWIS MIR,
Defendant-Appellant.

NOTICE OF APPEAL.

To

Alexander Simpson, Esq.,
Attorney of Plaintiff-Appellee.

Please take notice that the defendant-appellant, Lewis Mir, appeals to the Court of Errors and Appeals, in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause, in this Court, on the seventeenth day of June, 1926.

Yours, &c.,

JOSEPH M. ALSOFROM,
Attorney of Defendant-Appellant.

Dated June 25, 1926.

Grounds of Appeal.

(Filed N. J. Ct. of Er. & Ap., July 3, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

MICHAEL MARQUES,
Plaintiff-Respondent,

v.

LEWIS MIR,
Defendant-Appellant.

On Appeal from New Jersey Supreme Court.

Defendant-appellant, Lewis Mir, sets down the following as his grounds of appeal in this cause:

1. That the Court below, the New Jersey Supreme Court, erred in affirming the judgment rendered in this cause by the Hudson County Court of Common Pleas.

2. The Court below, the New Jersey Supreme Court, erred in refusing to reverse the judgment rendered in this cause by the Hudson County Court of Common Pleas.

JOSEPH M. ALSOFROM,
Attorney of Defendant-Appellant.

LEO BLUMBERG,
Of Counsel.

Opinion of Supreme Court.

(Filed June 11, 1926.)

NEW JERSEY SUPREME COURT,

No. 38, October Term—1925.

Before—Gummere, Chief Justice, and Justices Kalisch and Campbell.

Michael Marques,
Plaintiff-Respondent,

v.

Lewis Mir,
Defendant-Appellant.

On appeal from Hudson County Court of Common Pleas.

For the appellant, Joseph M. Alsofrom and Leo Blumberg, of Counsel.

For the respondent, Alex. R. DeSevo and Alex. Simpson, of Counsel.

Per Curiam: This is an appeal from a judgment of the Court of Common Pleas of Hudson County, in which tribunal a verdict was directed by the Trial Judge in favor of the plaintiff and against the defendant, in an action upon a promissory note for the sum of two thousand dollars with interest from January 1st, 1925, which interest was calculated to be one hundred and twenty dollars.

The two grounds of appeal relied on for reversal are, first that the Trial Judge erred in directing a verdict for the plaintiff, second, that the Trial Judge erred in refusing to direct a verdict for the defendant.

The present action was brought to recover two thousand dollars due on a promissory note, of the following tenor:

> $2000.....September 26th, 1922.
>
> January 1st, 1925, after date I promise to pay to the order of Michael Margues two thousand dollars without interest, value received.
>
> Due Jan. 1st, 1925.
>
> No. 2. LEWIS MIR.

To the plaintiff's complaint after denying the allegations contained therein, the defendant set up the following defenses: 1. *"Res Adjudicata."* 2. The note was executed without any consideration. 3. That the note was executed under duress.

The case came on for trial on May 25th, 1925, and the defendant being called on behalf of the plaintiff testified that he signed the note. He was asked: "Have you paid any part of the two thousand dollars due on it?" The witness answered "No, sir." He was not cross examined, and the plaintiff rested his case.

The defendant's counsel, on behalf of the defendant, offered in evidence the summons and complaint, in the case of Michael Marques against Lewis Mir, in the Hudson County Court of Common Pleas, tested August 2nd, 1925. He also offered in evidence the amended answer, the rule for judgment entered January 22nd, 1925, on motion of Alexander Simpson, attorney for plaintiff, in Book 22 of the minutes of the Court of Common Pleas.

Joseph Alsofrom, the defendant's attorney then took the stand and testified that he was attorney

of record in a prior suit brought by the same plaintiff, Michael Marques against Lewis Mir, the defendant, and that he was present at the trial and that the Plaintiff's Exhibit P-1, was one of the notes included in the plaintiff's complaint and offered in evidence.

In that complaint the plaintiff sued to recover from the defendant the sum of thirty-six thousand dollars, arising out of a transaction between the parties in which the plaintiff being the owner of a one-third interest in the business carried on by him with the defendant and another person, sold his interest in the business to the defendant on the 26th day of September, 1922, for the sum of $40,000.00 of which sum the defendant paid to the plaintiff $4,000.00 in cash and executed thirteen promissory notes for $2,000.00 each, payable without interest, the first note to fall due on January 1st, 1924, and of the remaining twelve notes, one was to become due and payable on January 1st of each succeeding year until the entire series was paid so that the last note of the series was made due and payable on January 1st, 1936. The complaint further alleged that one of the notes was due on January 1st, 1923 and was not paid and that under an agreement had by the plaintiff with the defendant, if any of the notes was not paid in time then the entire balance became due. And this was one of the issues involved in that action and was decided adversely to the plaintiff, by the jury. In so far as to that particular question the former case is controlling and set the matter at rest. But no such issue was involved in the present action. Counsel of appellant states his position to be that, while it is true that on January 21st, 1925, the plaintiff offered in evidence the thirteen

notes it is not claimed that the matter is *res adjudicata* on all thirteen notes, but only upon the note now sued upon, for the reason that the former action was to recover thirteen promissory notes and therefore the jury should have brought in its verdict for such of the notes as were due at the time of the trial January 21st, 1925, and there were two then due. This reasoning is apparently unsound. In the former case, the action was brought on the first note due January 1st, 1924, in August, 1924, and which note was the only note then due and upon which the plaintiff could found his action, the jury having by its verdict found as a fact that there was no agreement between the parties to the effect that if a note remained unpaid at maturity the remainder of them shall become due and payable. The fact that the second note was due at the time of the trial was a matter of no importance, since it was not due and payable at the time when the action was commenced to recover on the thirteen notes, and, furthermore, the only theory upon which a recovery could properly be predicated on the first note receives its legal force from the fact that the note was due when the plaintiff's action was brought.

The judgment is affirmed, with costs.

Notice of Appeal to Supreme Court.

HUDSON COUNTY COURT OF COMMON PLEAS.

MICHAEL MARQUES, Plaintiff, *v.* LEWIS MIR, Defendant.	Action at Law.

To

ALEXANDER SIMPSON,
Attorney of Plaintiff,
921 Bergen Ave.,
Jersey City, N. J.

SIR:

PLEASE TAKE NOTICE that the defendant appeals to the Supreme Court of the State of New Jersey from the whole of the judgment rendered in the above entitled action on the Twenty-fifth day of May, 1925.

Dated June 8, 1925.

JOSEPH M. ALSOFROM,
Attorney for Defendant.

Grounds of Appeal in Supreme Court.

NEW JERSEY SUPREME COURT.

MICHAEL MARQUES, Plaintiff-Appellee, *v.* LEWIS MIR, Defendant-Appellant.	On Appeal from the Hudson County Court of Common Pleas.

Now comes the defendant-appellant, Lewis Mir, by his attorney, Joseph M. Alsofrom, and sets down the following grounds of appeal from the judgment of the Hudson County Court of Common Pleas in the above stated cause:

1. The Court erred in sustaining plaintiff's objection to the following question asked of the witness by the defendant:

> "Q. I show you a note marked Plaintiff's Exhibit P-1, and ask you whether that note was offered in evidence at that trial?"

2. The Court erred in refusing to direct a verdict for the defendant.

3. The Court erred in directing a verdict for the plaintiff.

JOSEPH M. ALSOFROM,
Attorney for Defendant-Appellant.

Filed, New Jersey Supreme Court, July, 1925.

Rule for Final Judgment.

HUDSON COUNTY COURT OF COMMON PLEAS.

MICHAEL MARQUES, Plaintiff, *v.* LEWIS MIR, Defendant.	Action at Law.

This cause having duly come on for trial before Hon. Daniel O'Regan, Judge, and a jury, on the 25th day of May, 1925, and the Court having directed the jury to find a verdict in favor of the plaintiff and against the defendant, and assessed the damages in the sum of Two thousand and forty-seven dollars ($2,047.00).

It is on this 25th day of May, 1925, ORDERED and adjudged that the plaintiff have and recover against the defendant the sum of Two thousand and forty-seven dollars ($2,047.00) with costs to be taxed.

DANIEL O'REGAN,
Judge.

On motion of Alex. Simpson, Attorney for Plaintiff.

Rule actually entered on May 25, 1925.

JOHN J. McGOVERN,
Clerk.

Summons.

THE STATE OF NEW JERSEY TO LEWIS MIR:

You are summoned to answer the annexed complaint of Michael Marques, in an action at law in the Hudson County Court of Common Pleas. And take notice that unless you file your answer to said complaint with the Clerk of said Court, within 20 days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

(Seal)

WITNESS, ADAM O. ROBBINS, Judge of the Court of Common Pleas of the County of Hudson, at Jersey City, this 22nd day of January, 1925.

JOHN J. McGOVERN,
Clerk.

ALEX. SIMPSON,
Attorney.

Complaint.

NEW JERSEY COURT OF COMMON PLEAS.

MICHAEL MARQUES, Plaintiff, *v.* LEWIS MIR, Defendant.	Action at Law.

Plaintiff, who resides at Jersey City, in the County of Hudson, says that:

1. He sues for the amount of a promissory note for $2,000.00 made by the defendant, Lewis Mir, a

copy of which note is hereto annexed, which note was payable by the terms thereof on January 1, 1925, as follows:

$2000.00 Sept. 26th, 1922.

January 1st, 1925, after date I promise to pay to the order of Michael Marques, two thousand dollars, without interest.

Value received.

No. 2 Due Jan. 1st, 1925.

LEWIS MIR.

2. Said note is due and unpaid, although payment thereof has been demanded.

Plaintiff demands as damages the sum of $2,000 with interest from January 1st, 1925.

ALEX. SIMPSON,
Attorney for Plaintiff.

Filed Clerk's Office, Feb. 10, 1925. Hudson County, N. J.

Answer.

HUDSON COUNTY COURT OF COMMON PLEAS.

MICHAEL MARQUES,
Plaintiff,

v.

LEWIS MIR,
Defendant.

} Action at Law.

The defendant, Lewis Mir, residing in the City of Jersey City, in the County of Hudson and State

of New Jersey, answering the complaint herein, says that:

He denies the allegations contained in the complaint.

FIRST SEPARATE DEFENSE:

The matter of difference between the parties hereto was fully adjudicated on January 21, 1925, by a duly convened jury and a due trial had. The defendant therefore pleads *"Res Adjudicata."*

SECOND SEPARATE DEFENSE:

That the said note was executed without consideration.

THIRD SEPARATE DEFENSE:

That the said note was executed under duress.

OBJECTION TO POINT OF LAW:

The defendant Lewis Mir, will move at the date of trial to dismiss the complaint on the ground that the subject-matter was fully adjudicated on the Twenty-first day of January, 1925.

JOSEPH M. ALSOFROM,
Attorney for Defendant.

Filed Clerk's Office, Feb. 16, 1925. Hudson County, N. J.

Reply.

HUDSON COUNTY COURT OF COMMON PLEAS.

MICHAEL MARQUES, Plaintiff, v. LEWIS MIR, Defendant.	Action at Law.

The plaintiff denies the matters set up in the answer of the defendant under title "First Separate Defense," "Second Separate Defense" and "Third Separate Defense."

ALEX. SIMPSON,
Attorney for Plaintiff.

Filed Clerk's Office, Feb. 16, 1925. Hudson County, N. J.

HUDSON COUNTY COURT OF COMMON PLEAS.

Before—Hon. DANIEL T. O'REGAN,
Judge, and a Jury.

MICHAEL MARQUES,
Plaintiff,

v.

LEWIS MIR,
Defendant.

Jersey City, N. J., May 25th, 1925.

APPEARANCES:

ALEXANDER SIMPSON, Esq., for the Plaintiff.
JOSEPH M. ALSOFROM, Esq., LEO BLUMBERG, Esq., for the Defendant.

(A jury being empanelled and found satisfactory, they were sworn.)

(Mr. Simpson opens for the plaintiff.)

(Mr. Blumberg opens for the defendant.)

LEWIS MIR, sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. You signed this note which I now show you? A. Yes, sir.

Q. Have you paid any part of the two thousand dollars due on it? A. No, sir.

Mr. Simpson: I offer the note in evidence.

(Admitted and marked Plaintiff's Exhibit P-1 of this date.)

(No Cross Examination.)

Plaintiff Rests.

Mr. Blumberg: I offer in evidence the jacket in the County Clerk's office of case Number 17444.

Mr. Simpson: I object to its admission in evidence. I do not object to the strict record. I do not object to the complaint, the answer, the replication, and the judgment.

The Court: That may be offered.

Mr. Blumberg: Then we offer in evidence the summons and complaint in the case of Michael Marques against Lewis Mir, in the Hudson County Court of Common Pleas, tested August 2nd, 1924.

(Admitted and marked Defendant's Exhibit D-1 of this date.)

Mr. Blumberg: I also offer in evidence the amended answer in the same case, which was filed January 9, 1925.

(Admitted and marked Defendant's Exhibit D-2 of this date.)

Mr. Blumberg: I also offer in evidence the rule for judgment in the same case, entered January 22, 1925, on motion of Alexander Simpson, attorney for plaintiff, to be found at Book 22, of Minutes of the Court of Common Pleas, page 549.

(Admitted and marked Defendant's Exhibit D-3 of this date.)

JOSEPH M. ALSOFROM, sworn for the defendant.

Direct examination by Mr. Blumberg:

Q. You are the attorney of record of the plaintiff in this suit? A. I am.

Q. You were also the attorney of record in a

prior suit brought by this same plaintiff, Michael Marques against Lewis Mir? A. I was.

Q. You were in attendance at the trial held on the 21st of January last? A. I was.

Q. I show you a note marked Plaintiff's Exhibit P-1, and ask you whether that note was offered in evidence at that trial?

Mr. Simpson: Objected to upon the ground that the record is the best evidence, that is, the minutes are the best evidence, and also upon the ground that the defense is the former judgment, and he is bound by the strict record, he is bound by his complaint, his answer, and his rule for judgment.

Mr. Blumberg: I think that the whole record is material, as it shows exactly what took place.

Mr. Simpson: There is not any record excepting what has been offered. He has offered what is known as the record; that is the complaint, the answer, the replication, the rule for judgment in favor of the plaintiff for two thousand dollars.

Mr. Blumberg: I cannot just put my finger on the authorities, but I know that there is a case in the Supreme Court that I may add to the record.

The Court: We would not be bound by this witness's testimony, if the record disclosed a different situation, or anything in addition to this.

Mr. Simpson: Of course if they offer this testimony it would contradict the entire record.

Mr. Blumberg: I am offering it simply in order to show in detail what took place.

Mr. Simpson: We object to it on the ground that the record speaks for itself.

The Court: I will exclude it.

(Defendant excepts.)

Q. I show you the complaint which has been offered in evidence as Exhibit D-1. Is this the complaint which was served upon the defendant, Mr. Mir?

Mr. Simpson: Objected to upon the ground that the record speaks for itself.

The Court: It has been offered in evidence.

Mr. Simpson: It is in evidence. If it is of any importance I will admit that it is the one.

The Court: All right, that is the one.

The Witness: This is the one.

Q. Is this note, Exhibit P-1, one of the notes included in that complaint?

Mr. Simpson: Objected to upon the ground that the record speaks for itself.

The Court: Surely there must be some way of identifying that note.

Mr. Simpson: Yes, the plaintiff will identify the note.

The Court: With this particular complaint can that note be identified?

Mr. Simpson: Yes. It speaks of thirteen notes, each for the sum of two thousand dollars.

Mr. Blumberg: I want to have the record clearer that the complaint. I think we are entitled to show that this was one of the notes.

The Court: I will allow you to identify that note.

(Plaintiff excepts.)

A. Yes, sir.

(No Cross Examination.)

Defendant Rests.

Mr. Simpson: I ask for the direction of a verdict for the plaintiff on the ground that there is no defense. The note has been proved and the amount due has been proved, and there is no former judgment on this note. If your Honor will read the complaint you will read that it is a suit on thirteen notes, claiming that they were due at a time other than that mentioned, because of an oral agreement by the defendant, that if one of the notes became due he would pay them all. We went to issue on that, and the jury found that the other notes were not yet due, but that one note was due for two thousand dollars, and gave us a judgment for two thousand dollars on the first note which came due by its terms. It is perfectly well established that there must be a formal adjudication on this distinct subject-matter, and it is a fact that this note was due and unpaid, and that that fact has never been litigated on the face of the note. All that was litigated was the alleged oral agreement which the plaintiff asserted that if he did not pay the first note all would become due. The jury found we had not supported that oral agreement, that only one note was due, and this note is due, and that was established by their judgment of a verdict in favor of the plaintiff.

Mr. Blumberg: If the Court please, I move for a direction of a verdict in favor of the defendant in this case on the following grounds:

Case.

The complaint which has been offered in evidence, reads as follows:

> "The plaintiff, at Jersey City, was the owner of a one-third interest in the business carried on by the defendant, the plaintiff, and another person. The defendant, on or about the 26th day of September, 1922, at said city, bought the said interest from plaintiff, for the sum of forty thousand dollars, paying four thousand dollars in cash, and executing thirteen promissory notes for two thousand dollars each. Defendant agreed further that if any of the said notes was not paid in time, then the entire balance would become due. That one of said notes was due on the first day of January, 1923, and was not paid by the defendant, although demanded by the plaintiff, and is still unpaid, and the remaining twelve notes are due and unpaid by reason of said default on the note due January 1st, 1924."

Now, in that case the plaintiff offered in evidence, not only this note, but the entire series of notes. Plaintiff obtained judgment, as the minutes indicate, for $2,120. This note P-1 upon which the present suit is brought was due on January 1st, 1925, and the minutes of that former trial indicate that the former trial took place January 22nd, 1925, that is twenty days after this note P-1 became due.

In other words this note was outstanding and due on that date, and what the jury should have done, I suppose, was to have brought in a verdict for the two notes instead of one. In fact the minutes show that, because I know that the

Senator expressly suggested to the Court that the Court should charge the jury that if they should find that if any of the notes are due, then the verdict should be for the first and second notes, not simply for one, and the Senator was certainly right in his contention at that time.

We are not claiming the matter is *res adjudicata* on all of the thirteen notes: We are simply claiming that this one particular note P-1 is bound by the former judgment.

In the case of Hoffmeier *v.* Trost, in the Supreme Court, the following test was suggested by Mr. Justice Trenchard:

> "The matter is not *res adjudicata* unless there be identity of the thing sued for, of the cause of action of the persons and parties, the quality of the persons for and against whom the claim is made."

Everything here is the same, the same cause of action on this note, the same parties, the same persons, and so on.

> "A proper test in determining whether a prior judgment between the same parties concerning the same matters is a bar to a subsequent action is to ascertain whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first. If so the prior judgment is a bar."

Now I say that exactly the same evidence if offered at the first trial and which was offered, would sustain a recovery there. It seems to me that the tests laid down in that case which apparently was taken from 23 Cyc., 1158, would bar the plaintiff in this case.

(Counsel argue the motions.)

The Court: I will direct the jury to bring in a verdict for the plaintiff in the sum of two thousand dollars, with interest from January 1st, 1925. The note has been presented to the maker, who acknowledges his signature, and does not deny that the note has not been paid, and under those circumstances I will direct the jury to bring in a verdict for two thousand dollars with interest from January 1st, 1925, to date.

(Defendant enters an exception to the refusal of the Court to direct a verdict for the defendant and to the action of the Court directing a verdict for the plaintiff.)

Plaintiff's Exhibit P-1.

$2,000.00 September 26th, 1922

January 1st, 1925, after date I promise to pay to the order of MICHAEL MARQUES, Two Thousand Dollars, without interest. Value received.

No. 2 Due January 1st, 1925.

LEWIS MIR.

Defendant's Exhibit D-1.

SUMMONS.

THE STATE OF NEW JERSEY TO LOUIS MIR:

You are summoned to answer the annexed complaint of Miguel Marques, in an action at law in the Common Pleas Court of the County of Hudson. And take notice, that unless you file your answer to said complaint with the Clerk of said Court, within Twenty days after the service upon you of this

(Seal)

writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, CHARLES M. EGAN, Judge of the Court of Common Pleas of the County of Hudson, at Jersey City, this 2nd day of August, nineteen hundred and twenty-four.

JOHN J. McGOVERN,
Clerk.

ALEX. SIMPSON,
Attorney.

COMPLAINT.

HUDSON COUNTY COURT OF COMMON PLEAS.

MIGUEL MARQUES, Plaintiff, *v.* LOUIS MIR, Defendant.	Action at Law.

The plaintiff, who resides at Jersey City, in the County of Hudson, says that:

The plaintiff, at Jersey City, was the owner of a one-third interest in the business carried on by the defendant, the plaintiff and another person. The defendant, on about the 26th day of September, 1922, at said City, bought the said interest from plaintiff, for the sum of $40,000.00 paying $4000.00 in cash, and executing thirteen (13) promissory notes for $2000.00 each. Defendant agreed further that if any of the said notes was

not paid in time, then the entire balance would become due. That one of said notes was due on the 1st day of January, 1923, and was not paid by the defendant, although demanded by the plaintiff, and is still unpaid, and the remaining twelve (12) notes are due and unpaid by reason of said default on the note due January 1st, 1924.

The plaintiff demands judgment for $36,000.00, with interest from January 1st, 1923.

ALEX. SIMPSON,
Attorney of Plaintiff.

To the Defendant:

TAKE NOTICE that unless within 10 days from the service of the within Summons and Complaint you file an affidavit that you have a legal defense to said suit, judgment will be entered against you.

ALEX. SIMPSON,
Attorney of Plaintiff.

I hereby deputize John Wall to serve the within Writ.

Witness my hand and Seal this 2nd day of August, 1924.

JOHN M. HANNAN, Sheriff.
By THOS. MADIGAN, Under Sheriff.

Served within Summons and Complaint August 4, 1924, personally on the defendant Louis Mir, at 592 Montgomery Street, Jersey City.

JOHN M. HANNAN, Sheriff.
By JOHN WALL, S. D. S.

Filed Clerk's Office, August 8, 1924, Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Exhibits.

Defendant's Exhibit D-2.

AMENDED ANSWER.

HUDSON COUNTY COURT OF COMMON PLEAS.

MICHAEL MARQUES, Plaintiff, *v.* LEWIS MIR, Defendant.	Action at Law.

The defendant, Lewis Mir, residing in the city of Jersey City, in the County of Hudson and State of New Jersey, in answer to the Complaint herein, says that:

He denies the allegations contained in the Complaint.

FIRST SEPARATE DEFENSE:

1. By way of First Separate Defense, the defendant says, that he executed the note or notes set forth in the Bill of Complaint without consideration, that is to say, the plaintiff, Michael Marques, coerced and compelled the defendant to sign the notes mentioned in the complaint by reason of force and by reason of the fact that the plaintiff threatened the life of the defendant.

SECOND SEPARATE DEFENSE:

1. The defendant further says that whatever instrument he executed, was executed by reason of threats made by Michael Marques to kill the defendant and the members of his immediate family and the said notes were not executed of his own free will and accord.

Wherefore the defendant demands a judgment in his favor.

JOSEPH M. ALSOFROM,
Attorney for Defendant.

Filed Clerk's Office, January 9, 1925, Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

REPLY TO AMENDED ANSWER.

HUDSON COUNTY COURT OF COMMON PLEAS.

MIGUEL MARQUES,
Plaintiff,

v.

LEWIS MIR,
Defendant.

} Action at Law.

The plaintiff denies the truth of the matters set up in the Amended Answer of the defendant.

ALEX. SIMPSON,
Attorney of Plaintiff.

Filed Clerk's Office, January 15, 1925, Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Exhibits.

Defendant's Exhibit D-3.

RULE FOR FINAL JUDGMENT.

HUDSON COUNTY COURT OF COMMON PLEAS.

MICHAEL MARQUES, Plaintiff, *v.* LEWIS MIR, Defendant.	Action at Law.

This case having duly come on for trial before Hon. Adam O. Robbins, Judge and a jury on the 21st day of January, 1925, and the jury having heard the evidence as adduced by the respective parties, returned its verdict in favor of the plaintiff and against the defendant, and assessed damages in the sum of Two Thousand Dollars ($2,000) plus interest of One Hundred and Twenty ($120.00) Dollars;

IT IS HEREBY ORDERED, that the plaintiff Michael Marques, have and recover from Lewis Mir, the sum of Twenty-one Hundred and Twenty ($2,120.00) Dollars, with costs to be taxed, and that judgment be entered accordingly.

ADAM O. ROBBINS,
Judge.

On motion of Alexander Simpson,
Attorney for plaintiff.

Rule actually entered, January 22, 1925.

New Jersey Court of Errors and Appeals

MICHAEL MARQUES, Plaintiff-Respondent, *v.* LEWIS MIR, Defendant-Appellant.	On Appeal from the Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

Statement.

This is an appeal from a judgment of the New Jersey Supreme Court, which judgment affirmed a judgment of the Hudson County Court of Common Pleas.

Suit was brought upon a promissory note for $2,000.00, *due January 1, 1925,* made by the defendant to the order of the plaintiff, and dated September 26, 1922 (Case, p. 21, Exhibit P-1).

The defense to the action is *res judicata,* the defendant contending that this note had been sued upon and offered in evidence in a previous trial between the same parties, which took place a few months before the trial *sub judice,* and at which trial a final judgment had been entered.

The promissory note upon which this action is brought was the second note of a series of thirteen notes, each in the sum of $2,000.00, all executed September 26, 1922, and payable in a series commencing January 1, 1924, and yearly thereafter, made to the order of the plaintiff and signed by the defendant.

In August, 1924, the plaintiff sued upon the entire series of thirteen notes (Case, pp. 21-23, Exhibit D-1). To this action commenced in August, 1924, the defendant in due course filed his answer (Case, p. 24, Exhibit D-2), in which answer several defenses were set up, among them the defense of unlawful duress.

The case duly came on for trial and on the 21st day of January, 1925, the jury, after hearing the evidence of the parties, returned a verdict in favor of the plaintiff and against the defendant in the sum of $2,120.00 (Case, p. 26, Exhibit D-3).

Subsequently, on the 22nd day of January, 1926, suit was brought upon the second note, this being the action in question. The answer of the defendant set up the defense of *res judicata.* An examination of the state of the case submitted on this argument will indicate that the defense of *res judicata* was the only defense relied upon by the defendant at the trial.

At the conclusion of the trial *sub judice,* both the plaintiff and the defendant asked for a direction of a verdict in their respective favors, a summary of the argument of counsel being included in the state of the case (pp. 18-20).

The Trial Court directed a verdict in favor of the plaintiff for the full amount of the note with interest, the defendant entering an exception to the refusal of the Court to direct a verdict for the defendant, and to the action of the Court in directing a verdict for the plaintiff (Case, p. 21).

The jury's verdict was for the plaintiff for the full amount, and judgment was entered thereon, and thereupon the defendant appealed to the New Jersey Supreme Court (Case, p. 7), alleging as his grounds of appeal (Case, p. 8) the Trial Court's error in refusing to direct a verdict for the defendant, and its further error in directing

a verdict for the plaintiff. The Supreme Court affirmed the judgment below. The opinion of the Supreme Court is contained in the state of the case, pages 3-6, inclusive, and we shall comment thereon in our argument herein. Upon affirmance by the Supreme Court, the defendant took his appeal to this Court.

Argument.

At the outset, it is submitted that this Court is guided solely by the state of the case presented at this argument.

An examination of the case will indicate that the error of the Trial Court was a two-fold error.

In the first place, it is submitted that the motion of the defendant for a direction of a verdict in his favor, should have been granted because the evidence offered by the defendant, which was in nowise rebutted or refuted by any evidence of the plaintiff, demonstrated clearly that at the previous trial this note had been offered in evidence, and that a judgment had been rendered.

In the second place, the Trial Court should not have granted the motion of the plaintiff for a direction of a verdict in his behalf. The connotation of such a direction for the plaintiff must be that as a matter of law the plaintiff had established his case, and that the defendant had set up no defense sufficient for a jury to pass upon. From this latter aspect, and taking the most favorable case for the plaintiff-appellee, the Trial Court was clearly wrong, in that a question of fact was undoubtedly raised which the jury alone should have passed upon.

The Trial Court not only erred in refusing to direct a verdict for the defendant, but there was likewise error in the Court's directing a verdict for the plaintiff.

It is submitted that the vulnerable part of the opinion of the Supreme Court is in its failure to note that the first action, that is, the action commenced in August, 1924, was an action based not merely upon one note, but upon the entire thirteen notes. The defense of duress was applicable to the entire thirteen notes, and any verdict of the jury unexplained was, naturally, a verdict upon the thirteen notes which had been offered in evidence.

POINT I.

The Trial Court erred in directing a verdict for the plaintiff.

Upon motion of the plaintiff the Trial Court directed a verdict in favor of the plaintiff (Case, p. 21), the defendant duly entering his exception to the action of the Court, directing a verdict for the plaintiff (Case, p. 21).

The rule is well settled in this State that a Trial Judge is only justified in directing a verdict upon a court question arising from admitted or uncontroverted facts, and that where there is a conflict of testimony, or a conflict of inferences, the matter should be submitted to the jury for their consideration and determination.

Klitch v. *Betts,* 89 N. J. Law, 348; 98 Atl., 427;

Devicenzo v. *John Sommer Faucet Co.,* 87 N. J. Law, 646; 94 Atl., 573;

Tilton v. *Pennsylvania R. R. Co.,* 86 N. J. Law, 709; 94 Atl., 304;

Clark v. *Public Service Electric Co.,* 86 N. J. Law, 151; 91 Atl., 83;

Fulton v. *Grieb Rubber Co.,* 72 N. J. Law, 35; 60 Atl., 37.

At best, in this case, the jury should have passed upon the question whether the defense of *res judicata* was applicable, whether, in other words, the defendant had established what he had set out in his first separate defense, to wit, *that the matter of difference between the parties in this action had been fully adjudicated on January 21st, 1925, by a jury duly convened and a trial duly had.*

The defendant had presented testimony demonstrating that a former trial had been held between the same parties (Case, p. 15), that this note was one of thirteen notes which had been offered in evidence at the former trial (Case, p. 16), and that the jury at the former trial had brought in a verdict for $2,120.00 (Case, p. 26, Exhibit D-3). The plaintiff offered no explanation and introduced no testimony in rebuttal. It seems to us that the bare record, consisting of Defendant's Exhibits D-1, D-2 and D-3 and the brief testimony in this case, puts the plaintiff out of court, because as far as the bare record is concerned, that is, the record submitted at this argument, the defense of *res judicata* had been established.

Of course there is an explanation and an inference that what the jury had found in the first trial was that the first note was due and owing to the plaintiff, *but that there was no acceleration agreement, making all other notes due,* but whether the jury in the first trial had really so found, or had not so found, would depend upon inferences to be drawn from the complaint, answer and rule for final judgment, all of which was in evidence, and from the evidence in the former trial and the charge of the Court in the former trial, which neither the defendant nor the plaintiff sought to offer in evidence at this trial. In other words, our point is that it is not the function of the Trial Court to draw any inferences

from the facts as presented, but that it is the function of the jury to pass upon the disputable issues in the case, and return its verdict after argument of counsel and charge of the Court.

It is submitted that the Trial Court was clearly in error in directing a verdict for the plaintiff, as a jury question was raised, and for this error a *venire de novo* should issue.

It is further submitted that the Supreme Court was likewise in error in failing to recognize that a jury question was presented in this case. Let us amplify our argument a little further:

The only testimony before the Trial Court as to what transpired at the previous trial, as we gather it, is as follows:

(a) A summons and complaint were served, the complaint alleging that thirteen notes for $2,000.00 were executed; that the first of the notes had not been paid; that an agreement had been made for accelerating if one note were not paid, and a judgment being demanded for $36,000.00.

(b) The defendant's answer, which set up very clearly the defense of duress, to the effect that whatever instruments were executed were executed under duress—that is, under the threats of the plaintiff to kill the defendant.

(c) The reply which put this matter at issue.

(d) The rule for judgment which indicated solely that the question was presented to the jury; that the jury heard the evidence and rendered a verdict in favor of the plaintiff for $2,120.00.

(e) The testimony to the effect that the note in the case *sub judice* was one of thirteen notes offered in evidence at the earlier trial.

As we have said, the plaintiff in nowise produced testimony to explain or to indicate what took place at the trial.

There could have been an inference, for example, that the evidence at the trial indicated that but one note was executed without duress, and that the duress of the plaintiff affected all twelve of the other notes.

Or there could have been an inference, for example, that the jury upon the evidence was satisfied that all that was due and owing from the defendant was the sum of $2,120.00. And so on.

In other words, we repeat that it was error prejudicial to the defendant for the Court to take this case away from the jury and to usurp the jury's function in passing upon the evidence.

The Supreme Court in its opinion adverts to the fact that the defendant, upon being examined by the plaintiff, testified that he had not paid any part of the $2,000.00 due on the note in question. Just what bearing this has we fail to see, as the fact of payment was not at issue, the defendant relying solely upon the defense of *res judicata.*

POINT II.

The Trial Court erred in refusing to direct a verdict for the defendant.

Defendant, at the conclusion of the case moved for a direction of a verdict in favor of the defendant (Case, p. 18), stating fully the grounds of the motion (Case, pp. 19 and 20). The Court did not direct a verdict for the defendant, to which action the defendant duly entered an exception (Case, p. 21). It is submitted that if a court question was raised in this case, that question should have been decided not as the Trial Court decided it, but in favor of the defendant.

The defense in this case is that of *res judicata.* The doctrine of *res judicata* is not a fanciful doctrine of the common law, but is a thoroughly es-

tablished doctrine, and its principles have been applied in a vast number of cases. The extent to which it is applied may be gleaned from the space devoted to this principle in any treatise on judgments. For instance, the exhaustive treatment of the subject "judgments" in the recently published volume of Corpus Juris contains almost 400 pages of reading matter and notes devoted to the subject of *res judicata.*

See

34 *Corpus Juris,* pp. 742-1134.

The writers of the treatise say:

> "*Res Judicata* is a rule of universal law pervading every well regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the state that there should be an end to litigation—*interest rei publicae ut sit finis litium;* the other, the hardship on the individual that he should be vexed twice for the same cause—*nemo debet bis vexari pro eadem causa.* The doctrine applies and treats the final determination of the action as speaking the infallible truth as to the rights of the parties as to the entire subject of the controversy, and such controversy and every part of it must stand irrevocably closed by such determination. The sum and substance of the whole doctrine is that a matter once judicially decided is finally decided."

The first action commenced by Michael Marques against Lewis Mir was one in which judgment for $36,000.00 was demanded (Case, p. 22), and the complaint alleged that the defendant

> "on the 26th day of September, 1922, at said City bought the said interest from plaintiff for the sum of $40,000.00, paying $4,000.00 in cash, and executing thirteen (13) promis-

> sory notes for $2,000.00 each. Defendant agreed further that if any of the said notes was not paid in time, then the entire balance would become due. That one of said notes was due on the 1st day of January, 1923, and was not paid by the defendant, although demanded by the plaintiff, and is still unpaid, and the remaining 12 notes are due and unpaid by reason of said default on the note due January 1, 1924."

In the first action, January 21, 1925, the plaintiff offered in evidence all 13 notes. As we need not claim that the matter is *res judicata* on all thirteen notes, but simply upon the note in the case *sub judice* (Exhibit P-1), it is sufficient to say that we have established that this note (Exhibit P-1) was offered in evidence at the previous trial (see Testimony).

One phase of our argument is this: The previous action having been on thirteen promissory notes, the jury should have brought in its verdict for such of the notes as were due at the time of the trial, *January 21, 1925,* because the two notes were then due, and more particularly, there was no dispute whatsoever that the note due January 1, 1925, was overdue on that day—the day of the first trial—January 21, 1925.

There is some difficulty, to be sure, in determining whether a matter is *res judicata* or not, but it is submitted that the proper test is that suggested in 23 *Cyc.,* 158, which test was adopted by the Supreme Court in the case of

> *Hoffmeier* v. *Trost,* 85 Atl., 221; 83 N. J. Law, 360.

In that case Mr. Justice TRENCHARD says:

> "(1) But the matter is not *res adjudicata* unless there be identity of the thing sued for, of the cause of action, of the persons and par-

ties, the quality of the persons for and against whom the claim is made, and the judgment in the former action be so in point as to control the issue in the pending one. *Mershon* v. *Williams,* 63 N. J. Law, 398, 44 Atl. 211.

"(2) A proper test in determining whether a prior judgment between the same parties concerning the same matters is a bar to a subsequent action is to ascertain whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first; if so, the prior judgment is a bar. But if the evidence offered in the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the failure of the plaintiff in the first suit is no bar to his recovery in the other suit. 23 Cyc. 1158."

The reasoning of the Supreme Court in the case of *Hoffmeier* v. *Trost, supra,* was adopted *in toto* by this Court in the case of

Meirick v. *Witteman-Lewis Aircraft Co.,*
121 Atl. Rep., 670.

In fact, the Court in the case of *Meirick* v. *Witteman-Lewis Aircraft Co.,* sets forth the same test in the same language as set forth in the opinion of *Hoffmeier* v. *Trost.*

Applying that test to the case at hand, it is quite plain that the former judgment is a bar to the present action. Most decidedly the same evidence which is necessary to sustain this action would have been sufficient to authorize a recovery in the first action. The evidence is simply the introduction of the note. The note was introduced in evidence in the other trial, and therefore, a judgment should have been obtained on that note also, because the note was due, and an obligation of the defendant at that time.

The plaintiff may argue as he argued at the trial, that the first suit was a suit upon one note only, and as it was commenced when only one note was due, the judgment is properly *res judicata* only as to the first note, and not as to the other notes, and particularly not as to the note in the case at hand (Exhibit P-1). But this argument is fallacious. The plaintiff chose to introduce the note in evidence at the former trial. The plaintiff molded his case so as to include that second note. Therefore, the action was equally upon that second note (Exhibit P-1), and therefore, the judgment is *res judicata* as to that second note.

> "The great preponderance of authority sustains the rule that the estoppel of the judgment covers all points which were actually litigated and which actually determine the verdict or finding, whether or not they were technically in issue on the face of the pleadings." *34 Corpus Juris 921,* and cases cited in Note 78, including New Jersey cases.
>
> "(1282) C. Conclusiveness of Adjudication—1. Doctrine. A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, upon either the same or a different cause of action. This doctrine, that a fact or question which has been actually and directly in issue in a former suit and has been judicially passed upon and determined by a domestic court of competent jurisdiction cannot be litigated again in a subsequent suit between the same parties or their privies, is simple and universally recognized in almost

innumerable cases, the only difficulty or conflict being in its application to particular cases.

"The force of estoppel lies in the judgment itself; it is not the finding of the Court or the verdict of the jury which concludes the parties, but the judgment entered thereon. The reasoning of the Court in rendering a judgment forms no part of the judgment, as regards its conclusive effect, nor are the parties bound by remarks made or opinion expressed by the Court in deciding the cause, which do not necessarily enter into the judgment." 34 Corpus Juris 868-874, and cases cited in notes.

An interesting case in this State which is authority for the contention of the defendant in this case is the case of

> *McEligot & Chenoweth* v. *Town of Nutley*, 92 N. J. Law, 120; 104 Atl., 648; affirmed *per curiam* 92 N. J. Law, 636; 106 Atl., 892.

In that case the plaintiff, through inadvertence, had final judgment against it. A second trial was instituted, and the Supreme Court held that the doctrine of *res judicata* applied, saying, by Mr. Justice KALISCH:

> "The legal rule is well settled that a judgment in a former case between the same parties relating to the same subject-matter settles all matters which came before the court under the pleadings, and also every other ground which might have been presented. *Cromwell* v. *Sac*, 94 U. S., 352, 24 L. Ed., 195; *Roney* v. *Westlake*, 216 P. A., 374, 65 Atl., 807, 116 Am. St. Rep. 772, 9 Ann. Cas., 184; *Dickenson* v. *D. L. & W. R. Co.*, 90 N. J. Law, 158, 100 Atl., 203."

The Court went on to say that the plaintiff could not properly complain of any hardship imposed

upon it, because what the plaintiff should have done, if there had been a hardship, was to have asked for a new trial. As the Court put it:

> "It is not out of place to mention here that the plaintiff was under no legal obligation to accept the fruits of the judgment rendered in its favor upon the defenses set up and the counterclaims, and might have applied to the court for a rule to show cause why the judgment should not be vacated and the verdict of the jury set aside, and upon the hearing of the rule it would have been free to present such facts which the court could properly consider and deal with, in the exercise of a sound discretion, whether or not a new trial should be granted.
>
> "As the matter now stands, there is a judgment record in the same cause of action in which the present issue tendered by the pleading was known to the plaintiff, at the first trial, and might have been presented but was not, and, that being so, the trial judge is advised that such judgment is *res adjudicata* of the question now raised by the present pleading."

The same suggestion as advanced by Mr. Justice KALISCH in the case of *McEligot & Chenoweth* v. *Town of Nutley, supra,* is applicable in the case *sub judice.*

It seems to us then, that any analysis of the testimony in this case, including the exhibits referring to the previous action, must necessarily lead to the conclusion that as a matter of law, the defendant had established his defense. What an introduction of evidence by the plaintiff might have done or how such introduction of evidence would have affected the aforesaid reasoning, is beside the point, because no such evidence was introduced. The case as it stands, is clearly one in which the defendant was justified in asking the Court to direct a verdict in his favor, and the Court's refusing to do so, constituted error.

It is therefore respectfully submitted that the Trial Court in the case *sub judice* erred in two respects:

(a) In directing a verdict for the plaintiff;

(b) In refusing to direct a verdict for the defendant.

It is further submitted that the Supreme Court, in the case *sub judice*, erred in affirming the judgment of the Court of Common Pleas, and accordingly the appellant requests the reversal of the judgment of the Supreme Court, and a reversal of the judgment of the Court of Common Pleas, and the issuance of a *venire de novo*.

Respectfully submitted,

JOSEPH M. ALSOFROM,
Attorney of Defendant-Appellant.

LEO BLUMBERG,
Of Counsel.

APPEAL PRINTING CO., 22 THAMES ST., NEW YORK CITY
[5788]

New Jersey Court of Errors and Appeals

MICHAEL MARQUES, *Plaintiff-Respondent,* vs. LEWIS MIR, *Defendant-Appellant.*	On Appeal from Supreme Court.

BRIEF IN BEHALF OF THE RESPONDENT.

Statement of the Case.

This appeal brings before this court for review a judgment of the Supreme Court, which affirmed a judgment of the Hudson County Court of Common Pleas (S. C., pages 3-6).

Suit was started on a promissory note for $2,000 made by the defendant to the plaintiff, and due January 1, 1925. There were three separate defenses set up, only one of which was relied upon by the defendant at the trial, and that was the defense of res adjudicata.

After the note was offered into evidence, the plaintiff rested. The defendant then offered into

evidence the summons and complaint, the amended answer and the rule for judgment in a former suit between the same parties. Both the plaintiff and the defendant then requested the trial Court to direct a verdict in their respective favors,—State of Case reveals the substance of the argument of counsel (S. C., pages 18, 19, 20)—and the trial Court, upon the conclusion of the argument, directed a verdict in favor of the plaintiff (S. C., page 21).

The appellant then appealed to the Supreme Court and although there were two grounds of appeal urged, the direction of a verdict in favor of the plaintiff and the refusal to direct a verdict in favor of the defendant, in reality the only bone of contention was whether res adjudicata had been established by the defendant.

The first suit was instituted by the plaintiff on August 2, 1924, as shown by the Defendant's Exhibit D-1 (S. C., page 21), upon 13 promissory notes made to the order of the plaintiff and signed by the defendant for $2,000 each, and executed on September 26, 1922, and payable in a series commencing January 1, 1924, and yearly thereafter. The notes were given for the purchase of stock in the business in which the plaintiff and defendant held stock. The plaintiff contended in this suit, as set forth in the complaint (S. C., page 22), that the defendant orally agreed that if any of the notes were not paid in time, then the entire balance of the notes would become due. The defendant, in his amended answer (S. C., page 24), denied that there existed such an oral agreement, and also set forth other matters of defense, which have no bearing on this appeal. The 13 notes were offered in evidence at this former

trial (S. C., page 19, lines 27, 28). The case was submitted to the jury simply on the matter of the alleged oral agreement, and the jury found, by its verdict, that the plaintiff had not supported the alleged oral agreement and that only one note was due, and accordingly, brought in their verdict for the amount of one note (S. C., page 18, lines 35-38). Rule for final judgment was entered for the amount of this one note (S. C., page 26). Incidentally an appeal was taken from this judgment to the Supreme Court, which Court affirmed the judgment of the lower court (130 Atl., 516), and which judgment has been paid in full.

Subsequently suit was started on the note which was due January 1, 1925, which is the case sub judice, and the defendant's answer, among other things, set forth the plea of res adjudicata (S. C., pages 11-12).

Argument.

The contention of the defendant is, that inasmuch as the jury did not find the existence of the oral agreement, which would have accelerated the due date of all the notes, that its verdict should have been for two notes instead of one, because at the time of the trial, which took place on January 21, 1925, although suit was instituted on August 2, 1924, the due date of the second note had arrived, namely, January 1. 1925.

This is a fallacious argument, for, as the Supreme Court said in its opinion (S. C., page 6, lines 13-20):

> "In the former case, the action was brought on the first note due on January 1, 1924, in August, 1924, and which note was the only

note then due and upon which the plaintiff could found his action, the jury having by its verdict found as a fact that there was no agreement between the parties to the effect that if a note remained unpaid at maturity, the remainder of them shall become due and payable. The fact that the second note was due at the time of the trial was a matter of no importance, since it was not due and payable at the time when the action was commenced to recover on the thirteen notes, and, furthermore, the only theory on which a recovery could properly be predicated on the first note receives its legal force from the fact that the note was due when the plaintiff's action was brought."

The mere fact that the note for which suit was brought in this case was offered into evidence with the rest of the notes, does not make the matter res adjudicata. There was not a former adjudication on this distinct subject matter. The former judgment had simply to do with the number of notes due and the number not due and had nothing to do with the recoverability of the second note.

In the case of MERSHON vs. WILLIAMS, 63 N. J. L., Justice Lippincott, speaking for this Court, on page 401, said:

"A matter is not to be regarded res adjudicata unless there be identity of the thing sued for, of the cause of action, of the persons and parties, and of the quality of the persons for and against whom the claim is made, and the judgment in the former suit

be so directly in point as to control the issue in the pending action."

Further on in the opinion, Justice Lippincott said:

"The record must show that the issue was taken on the same allegations which are the foundation of the second action. The test is, whether the proof which would fully support the one case would have the same effect in tending to maintain the other."

The suit in the first case was not on the note which is the subject of this second case. All that was litigated in that case was the alleged oral agreement, which the plaintiff asserted was in existence when all of the notes were executed. No adjudication took place in so far as this note is concerned, and there is no former judgment on this note. In order to have res adjudicata there must be shown that the issue involved the same allegations which are the foundation of the second action. If the defendant's contention is sound, then it can be said that the matter is res adjudicata with reference to all of the notes; the mere fact that the note in the case sub judice was offered into evidence with the rest of the notes does not make the matter res adjudicata, because there is no identity of the thing sued for. In the former suit we have an action on an oral agreement, while in the present suit we have an action on one note.

What was said in the case of HOFFMEIER & SON vs. TROST, 83 N. J. L., page 359, aptly applies to this case.

"A proper test in determining whether a prior judgment between the same parties concerning the same matters is a bar to a subsequent action, is to ascertain whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first; if so the prior judgment is a bar. But if the evidence offered in the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the failure of a plaintiff in the first suit is no bar to his recovery in the other suit."

Looking at the issue involved in the case sub judice, it is apparent that it does not come within the test as laid down in the HOFFMEIER case, supra, because the judgment in the former suit was not so in point as to control the issue in the second suit. The action in the first suit involved a matter entirely different from that in the second suit. If the same evidence which was offered in the case sub judice was offered in the first suit, it would not have been sufficient to authorize a recovery in the first suit, because the first suit involved the issue of the alleged oral agreement and the accelleration of the due date of the balance of the notes, and had nothing to do whatsoever with the recoverability of the second note. There is no identity at all between the first case and the second case, with the exception of the parties, but that is not sufficient to bring it within the recognized rule or rules applicable to res adjudicata. In the former suit the controversy was about an oral agreement, while in the second suit it was on the recoverability of a note,

which is admitted by the defendant to be due and unpaid. There is no identity of the thing sued for in each case. In the case of MEIRRICK vs. WITTEMANN LEWIS & CO., 98 N. J. L., 531, the Court of Errors and Appeals held:

> "A judgment entered in a suit brought to recover compensation as secretary, under a contract, is not a bar to a suit between the same parties brought afterwards by the plaintiff to recover the value of services under a quantum meruit. There is no identity of the things sued for. The judgment in the first suit is not res adjudicata as to the second suit."

The defendant relies on the case of McELIGOT & CO. vs. NUTLEY, 92 N. J. L., 120, as being dispositive of this appeal. But the facts in this case are not in any way analogous to the case sub judice. In the McEligot case, supra, the plaintiff, in the first suit, sued to recover a balance due on a contract for work done, which contract contained a stipulation that the evidence of the completion of the work shall be a written certificate of the Director of the Department of Streets and Public Improvements, and the plaintiff averred that the director had certified the payments of the balance due. The issue was tried out and disposed of adversely to the plaintiff claim. In the second suit, the plaintiff averred that the director fraudulently and wilfully withheld the certificate. Here the matter was res adjudicata, because as the court held

> "it (meaning the plaintiff) must have known that no such certificate was issued, and, there-

fore, in proceeding to trial under the state of the pleadings it did so at its peril."

The issue presented in the first trial in the McEligot case were identical in the second trial, but in the case sub judice the facts in the first case were different from those in the second, one dealing with an oral agreement and the other with the recoverability of a note.

See case of KIRKPATRICK vs. McELROY, 41 N. J. Eq., 539, which holds:

> "An adverse decree in a suit for a share of the profits of partnership business, as compensation for services rendered to a firm, is not a bar to an action upon a quantum meruit for the value of such services."

The fact that both the first cause of action and the second cause of action originated in the same series of transactions does not show that they are the same. See 34 Corpus Juris., page 804.

The trial Court was justified in directing a verdict in favor of the plaintiff, because the former adjudication had no bearing whatsoever to the second suit, and because the defendant admitted that the note offered in evidence had been executed by him and that he had not paid anything on it.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

ALEX. R. DE SEVO,
Attorney for Plaintiff-Respondent.

ALEX. SIMPSON,
of Counsel.

INDEX