

***The significance of the rule res iudicata pro
veritate accipitur in the Common Law
and some comparisons with the equivalent
rules of droit savant***

Dafydd WALTERS

This short contribution offers a statement of the rule as to *res iudicata* (abbreviated from the maxim, *res iudicata pro veritate accipitur*) in Anglo-American common law together with some comparisons with corresponding rules of Roman civil and Canon law.

THE RULE IN THE COMMON LAW TRADITION

«A *final judgment* of a *court* in a *civil case* between a plaintiff (P) and a defendant (D) or *their privies* on a given *issue*, pronounced by a lawfully-constituted *court*, the *jurisdiction* of which is incontestable, is **conclusive** as between P and D and any issue so determined cannot be re-opened in subsequent legal proceedings».

The scope and utility of this statement depend on the words which are italicised being understood in their technical senses :

We must distinguish three elements which conclude a typical civil case. The formal judgment, in terms specified by the Rules of Court, is the order made by the judge that, for example, the defendant must pay a sum of money to the plaintiff, and obey certain other orders. This is the sense in which the word is used in

the phrase «final judgment». It is recorded by a court official, subject to approval by the judge or judges who made it. But «judgment» is also used to describe the statement of reasons which leads the judge to make or refuse the order the plaintiff requests. This is discussed below when *res iudicata* is contrasted with *stare decisis*. Judgments in these senses are distinct from the «execution», the carrying out, of the judge's order (where that is called for). It is for the judgment-creditor (the plaintiff, when successful) to take the necessary steps to execute a judgment given in his favour, returning to the court if necessary for authority to compel the defendant to obey the judgment, by having the assistance of officials charged by the State with that function (sheriff's officers, bailiffs and so on) — *manu militari* as the civilian systems say.

The binding effect of judgments : ***Res iudicata* and *stare decisis***

Res iudicata must not be confused with the doctrine (if, after the modifications it has undergone in English law since 1965 and 1966¹ it still deserves that name) of «binding precedent». As every student knows, the common law comprises two main bodies of material : *legislation* in the form of Acts of Parliament (in the USA, Acts of Congress and of State legislatures) together with written laws made by those who have been granted that power by some enactment ; and *case-law*, or more precisely, the decisions of the judges of the superior courts, whether stating or restating rules

1. In 1965 it was announced by written law (an Order in Council) that the Judicial Committee of the Privy Council (the final court of appeal from certain overseas British territories and formerly from Commonwealth countries, as well as from some domestic professional tribunals, etc) would in future report any dissenting judgments of its members, in place of a single (and thus apparently unanimous) “decision” couched in the forms of advice tendered to the Crown as had been its former practice since it was established in 1833. Students of the common law will recognise the close connexion between the publication of dissenting judgments and the strength or weakness of the majority views expressed in a reported case.

In 1966, the Appellate Committee of the House of Lords (that is, the final court of appeal from most of the inferior jurisdictions in the United Kingdom, apart from criminal appeals from Scotland) decided to regard itself thenceforward free to depart from its own previous decisions, thus ending a self-imposed restraint dating from 1898. For details of these matters see the latest editions of Sir Rupert CROSS, *Precedent in English Law*, Oxford [Clarendon Law Series].

which do not originate in written law, or by way of application and interpretation of the written law.

The doctrine of binding precedent is sometimes called *stare decisis*. In its rarely-quoted fuller form, this phrase is, *stare decisis et non quieta movere*. It belongs to the class of legal maxims like the *regulae iuris* to be found at the end of the Digest (50. 17) and of the *Liber Sextus* (5. 12)².

In this fuller form, it states an obvious principle of human behaviour : that we find it convenient to act or forbear now in the same way that we (or our ancestors) did in similar past circumstances. Going beyond rules established by the decisions of judges, it asserts that people should be entitled to expect others, whether individuals, corporations or agencies of the State, to act consistently by conforming to known patterns of their past behaviour. It favours decision-making by reference, not to caprice, but to known rules and thus promotes the rule of law.

In legal jargon, however, *stare decisis* purports to explain the rules of binding precedent, that is, the principles which can be distilled from particular judicial decisions : principles which are taken as the statement of the reasons judges claim to have for reaching their decisions. It follows that *stare decisis* denotes «the rules of judicial consistency of decision-making» whereas *res iudicata* describes the actual decision of a particular or instant case as it affects the parties to it and those claiming under them.

Interim (or interlocutory) and final judgments

A judgment of a court may be final, or only interim. An *interim* judgment or order (sometimes called *interlocutory*) is one which is not conclusive of the issue or issues between the parties. Examples of such decisions include : an interim injunction granted at the request of a party to prevent the subject-matter of the dispute from being hidden or removed from the jurisdiction ; or a judge's interlocutory decision which resolves some procedural problem while the case is proceeding.

2. The subject is treated in P. STEIN, *Regulae Iuris — from Justice Rules to legal Maxims*, Edinburgh, 1966.

Degrees of finality

How final is «final»? In some earlier societies, including those from which English legal procedure emerged, some wrongs were too serious to be justiciable; they called for revenge. Kin-slaying was one example (since no compensation could be paid by the kin for its guilty member, to itself). Serious offences against honour were another example. Such wrongs are «bootless» (Anglo-Saxon *bótleas*, Old West Norse *obótamál*) and were regarded as beyond the possibility of formal justice (judgment according to law giving compensation and perhaps imposing lesser outlawry on the wrongdoer).

In most cases, however, when all prior procedural steps had been taken, a day would be set to determine once and for all the issue between the parties, and they faced each other in front of the judge or judges. This could truly have been called «a day for loss or gain» since the outcome of the judgment of men (that is, of the ruler or his judges, or of the people, «the country») or of God, was final and conclusive. Indeed, leaving aside the judicial combat like the appeal of felony, the terms of the judgment which were recorded were likely to include reference to the oaths sworn by the parties or their supporters to accept the outcome and never to seek to re-open their quarrel, on pain of greater outlawry. (There are very clear examples of these peace pacts, *formae pacis*, *friðowære*, in the Anglo-Saxon, Norse and Icelandic sources).

In the modern civil procedure of the Anglo-American tradition however, as with the Civilian, a judgment may be «final» even if after it has been pronounced there still remain means by which the judgment-debtor (the party against whom judgment is given) can delay or even prevent the judgment from being executed. In addition, a judgment does not cease to be final just because there are various grounds on which it can be set aside: by the judge who made it (or by a judge of equivalent jurisdiction), or because it may be overturned or varied on appeal. It almost looks as if the adjective «final» nowadays means no more than «not interim». A simplified example may help.

A *propriétaire*, in English a landlord (L) successfully sues a *locataire*, a tenant (T) to recover possession of a building (the lease of which is governed by the Rent Act 1977) because T has failed to pay the rent due. The «final judgment» of the court will recite that it is adjudged that L, the plaintiff, is entitled to recover the building from T, the defendant, because the arrears of rent amount to a sum which, according to the lease, gives L a right of re-entry or

forfeiture. In addition, T is ordered to pay these arrears into court by a certain date. (T will also be liable for costs.) However, the judgment is conditional. Attached to it will be a notice stating that, if T pays the arrears, with interest and costs, before that date, he can stay in possession. The judgment may also include an express alternative, that if T pays off his arrears by stated instalments, then the judgment will not be executed, i.e. L will not be allowed to take the steps which would give him possession³.

Thus a «final judgment» in Anglo-American procedure only means that the court seised of the case has delivered its final (as opposed to any interim) judgment on the matter. The fact that a so-called final judgment has been rendered does not hinder any competent appeal or judicial review. Nor can its existence prevent a challenge based on lack of jurisdiction, judicial bias, or any other formal defect in the trial. It is merely that the *res* which is *iudicata* finally fixes the issue which may be the subject of an appeal.

The judgment must be that of a *court*. An arbitral award is not a judgment in any sense which could bring it within the operation of this rule, nor is an out-of-court settlement final unless it is endorsed by the judge, in which case it replaces the judgment which would otherwise have been delivered.

The rule applies only in civil, not criminal, cases : see below for a comparable rule of criminal law

Those who will be bound by the terms of a final judgment include not only the plaintiff and the defendant (whether comprising one or more persons, natural or juristic, on either side) and those who make use of the rules of court to intervene as third parties, but extend to others beside the original litigants and interveners, e.g. their assigns or successors in title (cp. *les ayants cause*).

A final judgment determines or concludes the issue or issues between the parties as disclosed in their pleadings (which may, where the rules of court allow it, be amended during the hearing, i.e. even after what is called *joinder of issue* (cp. *litis contestatio*).

If someone wishes to rely on a judgment as being conclusive under this rule, for example to use the judgment to assert some right, the assertion can be challenged by showing that the court

3. See the County Court Rules, Order 22, rule 1, applicable to cases under the Rent Act 1977. For an imaginary case setting out such a judgment, see D. BARNARD, *The Civil Court in Action*, 2nd ed., 1985, p. 207-8.

which pronounced it lacked competent *jurisdiction* over the persons and the subject-matter of the case.

In modern English law, rules of court normally limit the jurisdiction of courts below the rank of the High Court (the County courts, for example) by reference both to the value of the matter in dispute and to its identity.

The rule can be supplemented by the following three additions :

— the judgment proposed as final and conclusive between those defined above can be that of a foreign court (*Tarleton v. Tarleton* King's Bench, (1813-1817) 4 Maule & Selwyn's Reports 21) ;

— although the original issues cannot be re-opened, other issues e.g. arising out of the same event, can. The rule does not prevent evidence produced in one action from being repeated at another (*M. Omar v. C.I. Omar*, The Times Law Report for 27.12.1994) ;

— if it is proved that the judgment was obtained by fraud, it can be set aside (cancelled) (*Cole v. Langford* [1898] 2 QB 36).

This also applies to other unconscionable conduct. As an example, consider the well-established rule of equity, by which the forfeiture of an asset which had been given as security for a loan by a borrower who later defaults, can be set aside (i.e. reversed) if it is proved that the lender used unfair means to get judgment. Under the very strict principles of equity which govern the law of mortgages, not only unconscionable behaviour but even the slightest technical fault by the judgment-creditor (the secured lender) can be invoked by the plaintiff (the former borrower) or his successors to cancel the forfeiture. This severely limits the advantage of the forfeiture remedy in such cases.

Criminal proceedings

Criminal proceedings on the same facts that are in issue in subsequent civil proceedings do not give rise to this rule, so that such civil proceedings are competent⁴. Given the almost total

4. *Caine v. Palace Shipping* [1907] 1 KB 670; *Anderson v. Collinson* [1901] 2 KB 107; Civil Evidence Act 1968 s.11 (evidence of conviction can be put in evidence at civil trial).

absence of *partie civile* procedure in the Common law, this perhaps provides a useful comparison.

Criminal law does however have an equivalent in the rule «against double jeopardy» (*nemine judicabitur bis in idipsum*). It is illustrated by the plea of *autrefois acquit* or *a. convict*, i.e. the defendant's plea that he or she has already been acquitted, or convicted (as the case may be) of the offence now being charged : *Civil Evidence Act 1968* s.13, codifying an ancient rule.

Sources

The main *formal* sources of modern English law for the principle and effect of *res iudicata* are : the 19th century procedural reforms, notably *the Common Law Procedure Act 1854* and the *Judicature Acts 1873-80* which led to the promulgation of the Rules of the Supreme Court (RSC) 1883, revised completely in 1964 and frequently amended, and the County Court Rules (CCR), revised in 1981. Taken together, these extremely detailed sets of rules serve the same purpose as the Belgian *Code Judiciaire* or the French *Code de Procédure Civile*. For detailed historical material see e.g. the *Final Report of the Committee on Supreme Court Practice & Procedure, 1953*, Cmd 8878 (the Evershed Committee report) ; and note that at present (1994/95) plans are advanced for completely restructuring the management of civil cases at all levels, including extensive revision of the current Rules of Court⁵.

(For the United States, reference must be made to the civil procedure rules, largely codified, of each state and to the rules governing cases heard by Federal judges. Students of the history of procedure will find that rules survive in the various American jurisdictions which are obsolete in English law, e.g. *demurrer*, one of the ways by which a defendant might plead that the plaintiff's formal claim discloses no cause of action.)

When the *historical* sources of the joinder of issue (*litis contestatio*) and *res iudicata* in the common law are examined, some parallels and even some incorporation of civilian procedure becomes apparent. This is the subject of the second section.

5. See the review of civil procedure in England and Wales, interim report on *Access to Justice* (266 pp.) by Lord Woolf (a judge of the House of Lords) presented to the Lord Chancellor in June 1995. The aim of the review is «to improve access to justice and reduce the cost of litigation ; to reduce the complexity of the rules and modernise terminology ; [and] to remove unnecessary distinctions of practice and procedure».

DROIT SAVANT : SOME INFLUENCES AND COMPARISONS

Romano-canonical law

The influence of Romano-canonical procedure on the development of English procedure, not only in the Chancery, has begun to be better understood in studies on the 17th and early 18th century books of procedure by D.E.C. Yale and others and by biographical studies of the careers of 16th century Chancery clerks who were also members of Doctors' Commons (the College of practitioners in the ecclesiastical, university and admiralty Civil law courts) by G.D. Squibb and others. It would distort this brief account of Anglo-American procedure to cite the late 12th and 13th century Romano-canonical *Ordines Iudiciorum* or *Iudiciarii*, for example that of Tancred (c.1216)⁶ ; or to attempt to explain the canon law judges' reluctance to pronounce final judgments. The subject deserves separate treatment, but the familiarity with the Justinianic texts, albeit in the Vulgate version, displayed in the first 150 years or so after Gratian's *Decretum* (c.1140) inaugurated the canonists' *ius novum*, illustrates the thoroughness of the Reception of Roman law.

For the present, it may be remarked that in Roman law, the drastic reduction in the kinds of appeals under Justinian was not followed in classical canon law, though from the 12th century onwards the Church reintroduced the practice of appointing judges-delegate because of the growth in the number of appeals. The practice concerns us because if such judges were unquestionably the delegates of the pope, their decisions might be thought to be final (*Roma locuta, causa finita*).

But the possibility of appeal (by whatever name) continued to exist, if not against the judgment directly, then at least by attacking the competence or the qualifications of the judge. For example, because the delegate's decision had to be confirmed, there could be stated grounds on which the pope could be

6. Modern editions of these *ordines* are listed by K. W. NÖRR, «Die Literatur zum gemeinen [i. e. Roman and Canon] Zivilprozess» dans H. COING ed., *Handbuch der Quellen und Literatur der neueren europäischen Rechtsgeschichte*, I (1100-1500), Munich, 1973. Many are printed by WAHRMUND, *Quellen der röm.-kan. Prozessrecht*. For Tancred's *Ordo* see C. BERGMANN ed., *Pillii, Tancredi, Gratiae libri de iudiciorum ordine*, Göttingen, 1842, repr. 1965.

petitioned to refuse confirmation. Another example is where the suspect judge's jurisdiction could be challenged by a rival ecclesiastical judge. A common case was where a diocesan Ordinary (the bishop) or his *officialis*, as *judex ordinarius*, sought to exercise jurisdiction over a Religious house which lay within the Ordinary's diocese but which claimed to be exempt from his jurisdiction and as such, subject to another judge⁷. Attacking the judge's fitness to hear the case could be done by invoking some well-established impediment to the performance of his office : for example, that he was guilty of *ambitio laudis, timor, ira, amor, odium [vel] cupiditas*, which were the judicial disqualifications listed by Bernard of Pavia in his *Summa Decretalium* (c1190), 2.20.15, *in fine*.

The source of most of Bernard's list is Gratian's *Decretum*, *Causa* 11, q.3, c.78 and Gratian's dictum on the text, which says there are four ways to pervert justice : *timore... cupiditate... odio... [vel] amore*. Rufinus, in his *Summa Decretorum* (mid-12th cent.) commenting on this passage, noted a fifth, in Gratian C.23, q.4, c.34, where it is recognised that sometimes, excessive mercy to the *reus* (defendant) can be unjust to the *actor* (plaintiff)⁸.

Self-help, *litis contestatio* and judgment : the Roman background to the canon law of the *ius novum*

The evolution of dispute-settlement in Roman law until the 6th century AD appears to have been from self-help to *litis contestatio* and from *l. c.* to judgment (*res iudicata*) : that is, to *condemnatio* or *absolutio* as the judge decided. The typical judgment of the classical era was for money, as in English common law⁹ : the idea was that payment must be made for the non-

7. See C. R. CHENEY, *Episcopal Visitation of monasteries in the 13th century*, Manchester, 2nd. ed., 1983, esp. p. 36-48.

8. I have discussed these and other texts in the *Recueil de mémoires et travaux de la Société d'histoire du droit et des institutions des anciens pays de droit écrit* (Université de Montpellier), 1991, fasc. XV, 67-102 at p. 90-91.

9. The remedy consisting of something other than a money judgment (damages), for example that an item in disputed ownership be handed over, or an obligation (other than one to pay) be carried out, were granted only by courts of equity, not by courts of common law. From the mid-19th century however, both common law remedy of damages and equitable remedy of specific performance, were by statute progressively made available according

performance of an obligation, and money judgments are relatively easy to enforce — or rather, non-money judgments are notoriously difficult to enforce.

At each stage, the original obligation was regarded as extinguished and replaced by the appropriate procedure to which (until submission to judicial control was imposed) the parties contractually agreed. Thus self-help by the *actor*, the plaintiff, was replaced by the agreement of *litis contestatio*, which in turn was replaced by the obligation created by *condemnatio*, or extinguished if the *reus*, the defendant, were absolved. It was only the recovery of Gaius' *Institutes* that has provided us with an authoritative text for the rule that *l. c.*, and later, judgment against the party condemned, consumed the action : G.3.180. Gaius also reported an old rule, that the obligations arising at each stage were not identical : before *l. c.*, the debtor's obligation is to pay (as it was in English law under the older common law procedure) ; afterwards, it is to carry out the terms of his condemnation (G.3.180-1, 4.103-9).

Later jurists described this process by the (non-classical) phrase, that the original obligation of the defeated party *transit in rem iudicatam*, an expression still found in civilian and common law usage. It is a sort of subrogation : in Anglo-American civil procedure, the judgment-creditor's rights date from the judgment (which is important under the rules which limit or prescribe those rights) and has new remedies for enforcement available, e.g. various writs of execution, which were not available before judgment.

Litis contestatio

In the classical period, *litis contestatio* described the procedure *in iure*, before a magistrate, by which the parties defined the issues which divided them so that it was fit to be decided by a *judex* thereupon appointed for that purpose. With the post-classical change to the system of *extraordinaria cognitio*, the plaintiff's case was subject to the inquisition of an official who decided on the steps to be taken to resolve the parties' dispute, and the contractual nature of *l.c.* disappeared. It ceased to be an impediment to subsequent actions and the only *exceptio* available to the defendant was *e. rei iudicatae* : D.44.2. It has been assumed that the

to the nature of each case. See F. H. LAWSON & H. TEFF, *Remedies of English Law*, s. 1., 1972.

defendant could plead an *exceptio litis pendentis* if he were sued on the same matter when an action had already been brought against him but had not been determined : C.2.2.4.2, and Voet on D.44.2.7.

The significance of this change lies in the fact that under the classical procedure, the contractual nature of *l.c.* barred (in English legal language, «estopped» : the word is derived from Old French *estouppail*, a plug or *bouchon*), the plaintiff from starting another action on the issue thus agreed, even when the case had not proceeded to judgment. The *l.c.* agreement was «final» and a defendant who faced a new action on the same issue could raise an *exceptio* (though curiously, one which was called *e. rei iudicatae vel in iudicium deductae*, despite the non-occurrence of any judgment : cp. Lenel, (1925) 45 ZSS/rA 30-38¹⁰).

Res iudicata

According to some renaissance jurists (like Huber, Voet or Heineccius), *res iudicata* was perpetually binding only if three conditions were met : *eadem personae, eadem res, eadem causa*. (e.g. Huber, *Praelectiones* 3, ad D.44.2). These principles apply in the Common law as well.

To take only the first of these requirements, *res iudicata (r.i.)* bound the parties to the lawsuit and their privies. The Roman rule is found in D.20.1.13.5 and 21.1.43.9 ; and see Inst 4.6.33. It also covered the parties' universal and singular successors : D.44.2.28 and 29.1 ; C.8.36.2. Certain other persons might be bound : those affected by *praeiudicia* concerning legitimate descent, for example, or those establishing whether a person was of free or servile birth (which is the origin of the maxim, *r.i. pro veritate accipitur*) : D.1.5.25 ; 50.17.207.

It became possible to circumvent this rule once the formulary system allowed party representation, first by a *cognitor*, and later by a *procurator*. The formula was worded so that the *iudex* gave judgment for or against, not the true party, but the representative, thus allowing the true party to raise the matter again if he so wished. Under the *extraordinaria cognitio* procedure with its professional judges, of course, the point became barren.

10. See M. KASER on Roman procedure, *passim*, and H. F. JOLOWICZ's posthumous *Roman Foundations of Modern Law*, 1957, c. IX : «The effect of procedure on substantive rights», sections 1-3, p. 82-100.