

Master's Office.]

HUGHES V. REES.

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the plaintiff is not entitled to any claim for his expenses themselves.

As to the final point, the rule of law has been thus stated:—The judgment of a Court of competent jurisdiction directly on the point is, *as a plea*, a bar; and *as evidence*, is conclusive between the same parties upon the same matter directly in question in another Court: 20 How. St. Trls. 538.

A reference to the cases will show whether the two things, pleading and evidence, are as inseparable of consideration as that the subject matter and the parties should be the same.

A judgment at law is classed as an estoppel by record. And in each species of action such judgment is final in its nature, and according to its class and degree in the order of actions, and for its own proper purpose and object, and upon its own subject matter and no further.

The distinction as to the effect of a judgment when pleaded and when given in evidence was early asserted. In *Trevivan v. Lawrance*, 1 Salk. 276, it was said:—"Not only the parties and all claiming under them, but the Court and jury, were bound by an estoppel, and the jury could not find against the estoppel. But the Court (in that case) took this difference, that when the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel, for there is a good title in the plaintiff, that is a good title at law, if the matter had been disclosed and relied on in pleading. But, if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel."

And in *Outram v. Morewood*, 3 East 346, Lord Ellenborough, C.J., says:—"A former verdict could only be conclusive upon the right, if it could have been used, and were actually used, in pleading by way of estoppel—which could not be in this case: 1. Because no issue was taken in the first action upon the precise point which is necessary to constitute an estoppel thereupon in the second action. 2. Because it was not even pleaded by way of estoppel in the second action, but only offered in evidence on the general issue, and in order to be an estoppel it must have been pleaded as such by apt averments."

So in *Voight v. Winch*, 2 B. & Ald. 668, Abbot, C.J., stated:—"I am of opinion that the verdict and judgment obtained for the defendant on the former action was not conclusive evidence against the plaintiff on the plea of not guilty. It would indeed have been conclusive if pleaded in bar to an action by way of estoppel." And further, "It appears to me that a party by not pleading the

former judgment in bar consents that the whole matter shall go to a jury, and leaves it open to them to inquire into the same upon evidence, and they are to give their verdict on the whole evidence then submitted to the jury."

In *Wood v. Jackson*, 8 Wend. 37, the learned judge, in commenting on the above case, says: "The distinction is a sound one, and the reasoning is satisfactory, because the general rule *nemo debet bis vexari*, is still preserved; the party to be affected may insist upon its protection by pleading; or he may waive it by leaving the matter at large upon the pleadings. If he will waive when he might insist upon it, he cannot afterwards assert it."

These observations apply to this case. The defendant had an opportunity of pleading the judgment of the Quebec Court when, on the 7th March, 1883, the plaintiff obtained leave to amend his bill of complaint generally on or before the 10th September, but he did not apply for such leave, nor did he plead as I think he might have pleaded, without leave, the estoppel of this Quebec judgment. During the argument an application was made to me for leave to plead it or to file a statement raising it in the Master's office; but I know of no authority for such amendment after judgment; and the Court has not given the Master the jurisdiction usually vested in an arbitrator "to make all necessary amendments to the pleadings as a judge at *Nisi Prius*." And as to filing a statement in the Master's office I would be introducing a novel evasion of an established practice, for the cases show that to be effectual, such a defence must appear on the pleadings and not in the papers filed in the Master's office.

I must, therefore, hold that the defendant, by not pleading the Quebec judgment, has in effect consented to the whole evidence being considered on the merits, and that he cannot now rely upon the judgment of the Quebec Court as an estoppel against the plaintiff's claim.

The second ground of defence also fails. *Smith v. Dresser*, L. R. 1 Eq. 651, is no authority in favour of the defendant, for in that case the learned judge pointed out that the trustees were, or ought to have been aware that the trusts of the deed were all invalid before they began to act upon them. But this case is the other way. The defendant is a resident of Quebec, while the plaintiff is a resident of Ontario. The defendant must be presumed to know the law of his domicile, and, by that law, this trust deed is void. Yet, having that presumptive knowledge, he induced the plaintiff to act as one of the trustees under this void trust deed. And now after it appears that the plaintiff has paid moneys for the support of his (the defendant's)