The Thing Decided: Rule 1:6's Rediscovery of Res Judicata in Virginia

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Some jurists and lawyers find res judicata confusing, others outright impenetrable — an unnerving observation given that the entire point of the doctrine is to provide predictability and finality to litigation. If courts apply the doctrine in an unpredictably final manner or, worse still, a predictably non-final manner, we undermine the very reason for having it.

The unsettled nature of this ostensibly settled doctrine became apparent in Davis v. Marshall Homes, Inc., 265 Va. 159, 576 S.E.2d 504 (2003), a case sharply dividing the Virginia Supreme Court not only on the core question of Virginia's formulation of the doctrine, but also on how our case law has historically applied it. In Davis, the same real estate financing transaction spawned two theories of recovery by a lender against a debtor: one in tort, the other in contract. Because the tort claim involved different elements of proof than the contract claim, Davis held that res judicata did not apply. Thus, the lender could file the tort suit, lose on the merits, and then file a second suit on the contract claim.

Res judicata traditionally focused, however, on whether the plaintiff in the second case had a fair opportunity to present his claim in the first. In the earliest formulations of the doctrine, res judicata served as a kind of compulsory joinder rule insisting that what could have been litigated should have been litigated. As the former category expanded, due to procedural reforms in pleading and joinder rules, so too did the latter. The underlying concept of claim preclusion remained fixed, but its application necessarily varied to accommodate the evolution in procedure.

In 2006, the Virginia Supreme Court exercised its rule-making authority to supersede Davis with the promulgation of Rule 1:6. Bringing Virginia law in harmony with the consensus view adopted by the federal judiciary and forty-seven states,[1] Rule 1:6 makes clear that, subject to recognized exceptions, all claims arising out of the same conduct, transaction, or occurrence that *could be* asserted in litigation *should be*. Rule 1:6 rediscovered the first principles of res judicata and applied them to the procedural context of modern litigation. How it does so, and why Davis made it necessary to do so, are the two questions I take up in this essay.

I. History of Res Judicata

Res judicata traces its "origin to no statute or rule of the common law." Burks Pleading & Practice § 357, at 672 (4th ed. 1952). It is "the judicial reflections of a public policy." Id. Some scholars claim the "whole doctrine bears a close resemblance to the *exceptio rei judicatae* of the Roman law." Robert von Moschzisker, Res Judicata, 38 Yale L. J. 299, 299 (1929). "The Roman principle, based on the solemnity of the judicial pronouncement, was early adopted in English law, developing into the principle now known as merger and bar." Note, Developments in the Law — Res Judicata, 65 Harv. L. Rev. 818, 820 (1952) (footnote omitted).[2]

Whatever its precise origins, the doctrine is "a fundamental concept in the organization of every jural society." 2 Henry Campbell Black, A Treatise on the Law of Judgments Including the Doctrine of Res Judicata § 500, at 760 (2d ed.1902).[3] It protects not only the individual litigant from the weariness of trying the same case twice, but also society from having to pay for it. The incremental cost of sustaining redundant litigation is itself a reason for insisting upon finality. So strong are these policies that it has been said that "res judicata renders white that which is black, and straight that which is crooked." Jeter v. Hewitt, 63 U.S. 352, 364 (1860).[4]

Res judicata involves both issue and claim preclusion. Issue preclusion bars relitigation of common factual issues involving the same or related parties. "Under the concept of collateral estoppel, 'the parties to the first action and their privies are precluded from litigating [in a subsequent suit] any issue of fact actually litigated and essential to a valid and final personal judgment in the first action.'" Rawlings v. Lopez, 267 Va. 4, 4-5, 591 S.E.2d 691, 692 (2004) (quoting Norfolk & W. Ry. v. Bailey Lumber Co., 221 Va. 638, 640, 272 S.E.2d 217, 218 (1980) (quoting in turn Bates v. Devers, 214 Va. 667, 671, 202 S.E.2d 917, 921 (1974))).

In contrast, claim preclusion bars the assertion of legal or equitable rights of action even if they were not specifically resolved in earlier litigation. Called "merger" when the claimant won the first suit and "bar" when the claimant lost it, claim preclusion treats unasserted claims as being subsumed in the disposition of the related, previously adjudicated, claims. See Restatement (Second) of Judgments §§ 18, 19 (1982). For all of the legal argot making the doctrine sound tiresomely erudite, the thought is really no more complicated than saying you cannot have two bites at the apple. As Henry Black (of Black's Law Dictionary fame) put it, res judicata simply requires litigants to "make the most of their day in court." 2 Black, *supra*, § 731, at 1096. The law will afford one full, fair trial — but not two.

A. *The Role of Pleading & Joinder Rules*

Claim preclusion has always been the stepchild of pleading and joinder rules. Determining which claims should have been brought in earlier litigation largely depended on which claims could have been brought. See id., § 618, at 944 ("A judgment is not conclusive of any matter which, from the nature of the case, the form of action, or the character of the pleading could not have been adjudicated in the former suit."). As pleading and joinder rules changed, so too did the application of res judicata.

In early common law, a "plaintiff, in order to have an effective remedy in the common-law courts, must have been able to fit his problem into or within one of the fixed, established original writs or forms of actions." W. Hamilton Bryson, Virginia Civil Procedure 201 (3d ed. 1997). These forms of action "dictated the type of process, the content of the declaration (the first pleading), the method of proof, and the type of remedy." Id.; see also Henry John Stephen, A Treatise on the Principles of Pleading 5, 7 (8th Amer. ed. 1859). The common law permitted joinder of claims in a single suit so long

as all were "proper to the form of action adopted." Stephen, *supra*, Second Appendix by the American Editor, at cxvii n.4. What was proper or improper could sometimes be debated, but this much was certain: "At common law, joinder of tort and contract claims was forbidden." Kent Sinclair & Leigh B. Middleditch, Jr., Virginia Civil Procedure § 8.6(b), at 483 (4th ed. 2003).

The segregation of law and equity also played a role in the development of claim preclusion principles.[5] Prior to the merger of law and equity in the federal courts, legal and equitable claims "could not be united in the same suit in a court of the United States." Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 651 (1890).[6] Other jurisdictions, like Virginia, permitted legal claims to be asserted in a chancery suit under the "clean up" doctrine, but only at the price of forfeiting the historic right to a jury. See 1 Dan B. Dobbs, Law of Remedies § 2.6(4), at 169-70 (2d ed. 1993); see, e.g., Packett v. Herbert, 237 Va. 422, 424 n.5, 377 S.E.2d 438, 441 n.5 (1989). While equity could clean up for law, the favor could not be reciprocated. A court sitting at law could not order coercive equitable remedies. See, e.g., Simmons v. Miller, 261 Va. 561, 570 n.1, 544 S.E.2d 666, 672 n.1 (2001). Early claim preclusion principles tracked these illiberal pleading and joinder rules. Because what could have been brought in the former suit should have been brought, the merger-bar principle of claim preclusion depended on the procedural constraints on the first suit. If the later asserted claim could not have been raised in the earlier trial or, if it could have been raised, but at an unacceptably high juristic cost (like losing the right to a jury), claim preclusion permitted the second trial— no matter that both trials involved the same contest between the same litigants. Though antithetical to the policies underlying res judicata, the second trial was a necessary accommodation of confused and peculiar procedural rules governing pleadings and joinder.[7]

B. *The Same Evidence Test*

The great variety of differing applications of the merger-bar doctrine led to the use of the "same evidence" formulation. The first Restatement of Judgments used it to describe the boundaries of a single cause of action, incapable of being split between two civil actions. See Restatement of Judgments § 61 (1942). This approach, however, was but one way of capturing the could-have-litigated-should-have-litigated principle of res judicata. "Although the 'same evidence' standard was '[one] of the tests' used at the time, The Haytian Republic, 154 U.S. 118, 125 (1894), it was not the only one." Nevada v. United States, 463 U.S. 110, 130 n.12 (1983).

More important, the same evidence test served best as "a test for inclusion" rather than as a "test for exclusion." Robert C. Casad & Kevin M. Clermont, Res Judicata: A Handbook on its Theory, Doctrine & Practice 66 (2001). It made clear when the res judicata merger-bar doubtlessly applied, but said nothing about when it did not apply. As the first Restatement explained:

> Although it is true that the judgment in the prior action precludes the plaintiff from subsequently maintaining the second action based upon the same transaction if the evidence needed to sustain the second action would have sustained the first action, *the negative is not true. Although the evidence needed to sustain the second action would not have sustained the first action, the plaintiff may be precluded by the judgment in the first action from maintaining the second action.*

Restatement of Judgments § 61 cmt. a (1942) (emphasis added). Put another way, the identity of evidence supporting the two causes can show that the second action is so closely related to the first that only one lawsuit should be permitted. The lack of identity of evidence, however, does not necessarily mean that the second action should be allowed. Many cases recognize this, and this is the view reflected in the Restatements. Accordingly, other criteria have to be used to determine whether a second action should be precluded when it did not depend upon the same evidence that would have supported the first action. Casad & Clermont, *supra*, at 66 (footnote omitted) (citing Restatement (Second) of Judgments § 24 cmts. a-b, § 25 cmt. b; Restatement of Judgments § 61 (1942)).

C. *The Same Transaction Test*

Because "[d]efinitions of what constitutes the 'same cause of action' have not remained static over time," Nevada, 463 U.S. at 130, res judicata necessarily had to adapt. This adaptation evolved alongside pleading and joinder reforms.[8] In perfect symmetry, as the could-have-litigated category broadened, so too did the reach of the should-have-litigated principle. To describe this conceptual relationship, repeatedly acknowledged by both federal and state courts, the Second Restatement of Judgments adopted a transactional view of claim preclusion. Under it, a valid prior claim extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second) of Judgments § 24(1) (1982). Whether claims are products of the same "transaction" is to be determined by "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Nevada, 463 U.S. at 130 n.12 (quoting Restatement (Second) of Judgments § 24(2) (1982)).

Given its continuity of purpose and rationale, the transactional approach represents a refinement of, rather than a departure from, traditional res judicata principles. Both rest on the same could-have-litigated-should-have-litigated foundation. Thus, what was "said with respect to this doctrine more than 80 years ago is still true today," id. at 129, despite its new adaptations.

II. Virginia's Res Judicata Tradition

Virginia's understanding of res judicata was best stated nearly a century ago: "Every litigant should have opportunity to present whatever grievance he may have to a court of competent jurisdiction; but having enjoyed that opportunity and having failed to avail himself of it, he must accept the consequences." Miller v. Smith, 109 Va. 651, 655, 64 S.E. 956, 957 (1909). Thus, the "effect of a final decree is not only to conclude the parties as to every question actually raised and decided, but as to

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every claim which properly belonged to the subject of litigation and which the parties, by the exercise of reasonable diligence, might have raised at the time." Smith v. Holland, 124 Va. 663, 666, 98 S.E. 676, 677 (1919) (citing Diamond State Iron Co. v. Alex K. Rarig Co., 93 Va. 595, 25 S.E. 894 (1896), and Miller, 109 Va. at 651, 64 S.E. at 956). Variations on this premise go back to the earliest formulations of Virginia res judicata law.[9]

Common law pleading and joinder rules, however, limited the reach of res judicata by forbidding the joinder of tort and contract claims in a single suit. At that time, it was "well settled that causes of action arising in tort [could not] be joined with causes of action arising from contracts except in rare instances." Gary v. Abingdon Pub. Co., 94 Va. 775, 779, 27 S.E. 595, 596 (1897); see also Kavanaugh v. Donovan, 186 Va. 85, 93, 41 S.E.2d 489, 493 (1947) ("It is elementary that causes of action in tort and contract should not be joined in the same notice of motion or declaration. They are not of the same nature.").

In 1977, the Virginia General Assembly enacted Code §§ 8.01-272 and 8.01-281, permitting the joinder of tort and contract claims and authorizing the pleading of alternative theories of recovery. See Powers v. Cherin, 249 Va. 33, 37, 452 S.E.2d 666, 668 (1995) (recognizing that "§ 8.01-272 overruled the long-standing prohibition against joinder of tort and contract claims found in Virginia case law"). Both statutes use the "same transaction or occurrence" phrase to define the boundaries of joinable claims. Code §§ 8.01-272 and 8.01-281. These statutes represented a "radical departure" from the common law, Fox v. Deese, 234 Va. 412, 423, 362 S.E.2d 699, 705 (1987) — radical enough, perhaps, to have some effect on res judicata.[10]

A handful of Virginia cases seemed to notice this connection. Using transactional language, these cases implicitly recognized that, as pleading and joinder reforms widened the permissible scope of litigation, res judicata narrowed the permissible scope of relitigation.[11] Davis, however, dropped anchor by expressly rejecting the transactional approach and by applying a strict view of the same evidence test. Whether different "claims are part of a single cause of action," Davis held, can only be determined by considering "whether the same evidence is necessary to prove each claim." Davis, 265 Va. at 166, 576 S.E.2d at 507 (quoting Brown v. Haley, 233 Va. 210, 216, 355 S.E.2d 563, 567 (1987)). And because the lender in Davis limited her first suit to a fraud claim, it did not bar her — even after losing the fraud case on the merits — from later filing a second suit against the same debtors alleging breach of contract arising out of the same loan transaction.

It did not take long for commentators to argue that Davis "redefined the doctrine of res judicata," John R. Walk, Civil Practice & Procedure, 39 U. Rich. L. Rev. 87, 91 (2004), and "confused" experienced litigators and trial judges. Sinclair, *supra*, § 14.11[B][5], at 268 (4th ed. Supp. 2007). One court characterized Davis as a "temporary aberration" in Virginia res judicata law. Caperton v. A.T. Massey Coal Co., No. 33350, slip op. at 81-82 n.45, 2008 W. Va. LEXIS 22 at *126 n.45 (Apr. 3, 2008). I think several features of Davis explain this reaction.

Davis clung to the mooring lines of prior cases but failed to notice that these lines had slipped off the bollards of first principles. If taken literally, Davis gave little role for the could-have-litigated-should-have-litigated thesis that has animated res judicata since the earliest expressions of the doctrine. To Davis, it was all a tautology anyway: "A claim which 'could have been litigated' is one which 'if tried separately, would constitute claim-splitting.'" Davis, 265 Va. at 164, 576 S.E.2d at 506 (quoting Bill Greever Corp. v. Tazewell Nat'l Bank, 256 Va. 250, 254, 504 S.E.2d 854, 856-57 (1998)). That is, a claim that could have been litigated in the first case is one that could not be litigated in the second case. This conceptual redundancy, however, did not explain why the contract claim in Davis could not have been litigated in the earlier fraud suit. To be sure, it was just this kind of reasoning that provoked some scholars to lament the "frequent misadventures in attempting to transport 'cause of action' thinking from one procedural context to another" without recognizing "that procedural reform has transformed the scope of claim preclusion." Wright & Miller, *supra*, § 4407, at 163.

Equally puzzling, Davis invoked the traditional same evidence test but applied it in an untraditional manner. "It is a fundamental principle of jurisprudence," Davis reasoned, "that evidence which is not relevant is not admissible. Most of the evidence necessary to prove plaintiff's fraud action would have been inadmissible at a trial of plaintiff's contract action because of the lack of relevance." Davis, 265 Va. at 166-67, 576 S.E.2d at 507. In other words, because evidence of the contract claim would not prove the fraud claim, it was unnecessary for the claimant to assert the contract claim. This observation, while undoubtedly true, missed the point of the same evidence test. Under that test, claim preclusion applied "if the evidence needed to sustain the second action would have sustained the first action" filed by the plaintiff. Restatement of Judgments § 61 cmt. a (1942). However, "the negative is not true. Although the evidence needed to sustain the second action would not have sustained the first action, the plaintiff may be precluded by the judgment in the first action from maintaining the second action." Id. Put another way, the same evidence test operated best as "a test for inclusion" rather than as a "test for exclusion." Casad & Clermont, *supra*, at 66. And even as a test for inclusion, it was "not the only one." Nevada, 463 U.S. at 130 n.12.

Finally, even if the same evidence test could be used as the exclusive test of exclusion (rather than a permissive test of inclusion), it is still questionable whether the historic understanding of that test would have produced the result in Davis. As Henry Black pointed out in his influential treatise on res judicata, "in all cases where the plaintiff has his option in the outset to bring tort or contract to recover damages for one and the same injury, upon a state of facts which will support either, an adjudication in one, whichever he may elect, is upon principle a bar to the other." 2 Black, *supra*, § 729, at 1093 (citation omitted). As a result, an unsuccessful suit asserting breach of contract bars a later suit for fraud arising out of that contract. See Cutler v. Cox, 2 Blackf. 178, 180, 1828 Ind. LEXIS 23, at *3 (Ind. 1828) ("The first inquiry then is, were the causes of action the same? All the counts in the present action, it is true, are founded in tort; but, at the same time, they all set out a contract, and show that this action is brought for a deceit in the performance of that contract."), cited in 2 Black, *supra*, § 729, at 1094 n.309.

III. RULE 1:6 — RES JUDICATA REDISCOVED

In the wake of Davis, the 2004 Boyd-Graves Conference recommended that Virginia expressly adopt a transactional test on the ground that it best furthered the traditional goals of res judicata law. The transactional test, the Conference suggested, should par-

allel the "same transaction and occurrence" formulation in Code §§ 8.01-272 and 8.01-281 and be consistent with the Restatement (Second) of Judgments § 17 *et seq.* (1982). The Rules Advisory Committee of the Judicial Council agreed and proposed Rule 1:6. Subsection A of Rule 1:6 provides:

A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action against the same opposing party or parties on any claim or cause of action that arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought. A claim for relief pursuant to this rule includes those set forth in a complaint, counterclaim, cross-claim or third-party pleading.

The Virginia Supreme Court formally adopted Rule 1:6 and made it effective July 1, 2006.

Under Rule 1:6(A), a final judgment on the merits bars all later claims arising out of the "same conduct, transaction or occurrence." It does not matter, as it did in Davis, that the second suit involves different legal theories or dissimilar evidence. What matters is the practical commonality of the factual circumstances. Claims arising out of a unified cluster of facts should be, and now must be, litigated in the same lawsuit.

Rule 1:6 does not change the accepted truth that sometimes one trial will not suffice, making the second trial a worthy price of full and complete justice. "Unlike issue preclusion," for example, "claim preclusion can never apply when the ostensibly barred claim falls outside the subject-matter jurisdiction of the tribunal and thus could not have been adjudicated in the prior action." Va. Imports, Ltd. v. Kirin Brewery of Am., LLC, 50 Va. App. 395, 410, 650 S.E.2d 554, 561 (2007); see also Restatement (Second) of Judgments § 26 cmts. c and c(1) (1982). Similar concerns exist when insurance subrogation principles segment a single transaction into severable litigation units. A claimant in a car wreck case, for example, should not be barred from filing a suit for personal injuries simply because the subrogated insurer chooses to seek a separate recovery for insured property losses. See Rule 1:6(C).[12]

In addition, all of the ordinary caveats to res judicata likewise apply to the transactional approach — thus preserving the historic limitations on the doctrine. See generally Kent Sinclair, Guide to Virginia Law & Equity Reform & Other Landmark Changes § 11.01 *et seq.* (2006). Claim preclusion, for example, does not apply to invalid or non-final judgments, see Restatement (Second) of Judgments § 17 (1982); to dismissals for lack of jurisdiction, for improper venue, or for nonjoinder or misjoinder of parties, id. § 20(1)(a); to nonsuits and dismissals without prejudice, id. § 20(1)(b); or to dismissals for prematurity or some other violation of a precondition to suit, id. § 20(2). Nor does claim preclusion apply where the parties to the first suit agreed to waive its preclusive effect on later suits or where the court in the first suit expressly withheld any preclusive effect of its judgment. Id. § 26(1)(c). See generally 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4415, at 351-85 (2d ed. 2002) (collecting well-recognized claim preclusion exceptions).

In short, Rule 1:6 rediscovered traditional res judicata doctrine and applied it to the context of modern litigation governed by permissive joinder principles. While some may argue that the strict same evidence test employed by Davis has become, as Mark Twain might say, an "extinct tribe that never existed,"[13] others will look back on Davis as a necessary, albeit short-lived, jurisprudential step toward clarifying prior precedent. However we focus the lens of hindsight, this much is certain: By adopting Rule 1:6, the Virginia Supreme Court improved the future of res judicata by looking to what is best in its past.

NOTES

[*] The views advanced in this essay represent commentary "concerning the law, the legal system, [and] the administration of justice" as authorized by Virginia Canon of Judicial Conduct 4(B) (permitting judges to "speak, write, lecture, teach" and otherwise participate in extra-judicial efforts to improve the legal system). These views, therefore, should not be mistaken for the official views of the Virginia Court of Appeals or my opinion as an appellate judge in the context of any specific case.

I presented an earlier version of this essay to a committee of the 2004 Boyd-Graves Conference. Portions of that essay were incorporated into Professor Sinclair's Guide to Virginia Law & Equity Reform & Other Landmark Changes § 11.01 *et seq.* (2006) (noted in chapter 11, at 245 n.2), and Virginia Civil Procedure § 14.11[B][5], at 267-78 (4th ed. Supp. 2007).

[1] Kent Sinclair, Guide to Virginia Law & Equity Reform and Other Landmark Changes § 11.04, at 254 & n.32 (2006).

[2] Some scholars discount the historical lineage and see the doctrine as a natural phenomenon in nearly every legal system. 2 Henry Campbell Black, A Treatise on the Law of Judgments, Including the Doctrine of Res Judicata § 500, at 760 (2d ed. 1902); Robert C. Casad & Kevin M. Clermont, Res Judicata: A Handbook on its Theory, Doctrine & Practice 6 (2001) ("Some other commentators find roots in Germanic, Roman, and other ancient systems. But in truth these are analogies rather than roots.").

[3] See generally Allen v. McCurry, 449 U.S. 90, 94 (1980); Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917) (Res judicata "is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect." (citation omitted)).

[4] See also Bill Greever Corp. v. Tazewell Nat'l Bank, 256 Va. 250, 254, 504 S.E.2d 854, 856-57 (1998) ("Courts have imposed a rule prohibiting claim-splitting based on public policy considerations similar to those underlying the doctrine of res judicata: avoiding a multiplicity of suits, protecting against vexatious litigation, and avoiding the costs and expenses associated with numerous suits on the same cause of action."); Bates v. Devers, 214 Va. 667, 670, 202 S.E.2d 917, 920 (1974) ("A judicially-created doctrine, res judicata rests upon considerations of public policy which favor certainty in the establishment of legal relations, demand an end to litigation, and seek to prevent the harassment of parties." (quoting Pickeral v. Fed. Land Bank of Baltimore, 177 Va. 743, 750, 15 S.E.2d 82, 84-85 (1941) (other citation omitted))).

[5] See generally 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4410, at 252-53 (2d ed. 2002) ("The merger of law and equity into a single civil action provides the most dramatic demonstration of the impact of procedural reform on claim preclusion. . . . Claim preclusion requires what merger has made possible. Demands for equitable and legal remedies on a single claim or cause of action must be advanced in the first action or lost." (footnote omitted)).

[6] See Restatement (Second) of Judgments § 26 cmt. c(2) (1982) (noting that when "a plaintiff in earlier times was disabled from presenting his full claim in a single action because of formal inhibitions imposed by the historical division between 'law' and 'equity,' or the forms of action, or related procedural modes," the "rules of merger and bar reflected those disabilities and in

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various situations permitted a plaintiff to present in a second action what he was disabled from presenting in the first").

[7] Most American jurisdictions eventually abolished formal common law writs, relaxed pleading and joinder rules, and merged law and equity. New York led the trend when it enacted its 1848 Field Code, which "abolished the writ system, merged law and equity procedures, and simplified pleading in many other ways." W. Hamilton Bryson, Virginia Civil Procedure 198 (3d ed. 1997). The Field Code initiated a nationwide trend toward fact pleading. See John B. Oakley & Arthur F. Coon, The Federal Rules In State Courts: A Survey of State Court Systems of Civil Procedure, 61 Wash. L. Rev. 1367, 1375 (1986). The federal judiciary expanded upon these procedural reforms in 1938 with the promulgation of the Federal Rules of Civil Procedure. As of 1986, thirty-three states had adopted the Federal Rules of Civil Procedure. See id. at 1374, 1377. Jurisdictions not duplicating the Federal Rules nevertheless enacted similar pleading and joinder reforms. Id. at 1381-1422. And all but a handful of jurisdictions merged law and equity. See Kent Sinclair & Leigh B. Middleditch, Jr., Virginia Civil Procedure § 8.3, at 480 n.44 (4th ed. 2003).

[8] As comment a to Section 24 of the Second Restatement of Judgments notes: "In defining claim to embrace all the remedial rights of the plaintiff against the defendant growing out of the relevant transaction (or series of connected transactions), this Section responds to modern procedural ideas which have found expression in the Federal Rules of Civil Procedure and other procedural systems." See U.S. Indus., Inc. v. Blake Constr. Co., 765 F.2d 195, 204 n.20 (D.C. Cir. 1985) ("Many preclusion rules are closely entwined with rules of procedure, and the civil rules often are clearly intended to require preclusion." (quoting C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4472, at 733 (1982))).

[9] See, e.g., Southern R. Co. v. Washington, A. & M. V. R. Co., 102 Va. 483, 491, 46 S.E. 784, 787 (1904) (recognizing that res judicata "applies, except in special cases, not only to points upon which the court was actually required, by the parties, to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" (quoting Diamond State Iron Co. v. Alex K. Rarig Co., 93 Va. 595, 603-04, 25 S.E. 894, 897 (1896)); McCullough v. Dashiell, 85 Va. 37, 41, 6 S.E. 610, 612 (1888) ("[W]here every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented at that trial, the matter must be considered as having passed in *rem judicatam*, and the former judgment in such case is conclusive between the parties." (citations omitted)); Withers' Adm'r v. Sims, 80 Va. 651, 660-61, 1885 Va. LEXIS 105, at *18-19 (1885) ("'[A]ll those matters which were offered and received, or which might have been offered to sustain the particular claim or demand litigated in the prior action, and those matters of defence which were presented or which might have been introduced under the issue to defeat such claim, are concluded by the judgment or decree in the former suit,' for to this extent the authorities certainly do go." (citations omitted)); Blackwell's Adm'r v. Bragg, 78 Va. 529, 541, 1884 Va. LEXIS 28, at *21 (1884) (quoting Le Guen v. Gouverneur & Kemble, 1 Johns. Cas. 436, 492 (N.Y. 1798)) ("Judge Radcliffe [in Le Guen] said: 'The principle, however, extends farther. It is not only final as to matters actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided.'"); Shenandoah V. R. Co. v. Griffith, 76 Va. 913, 925, 1882 Va. LEXIS 93, at *20-21 (1882) ("The doctrine of res judicata applies to all matters which existed at the time of giving the judgment or rendering the decree, and which the party had the opportunity of bringing before the court.").

[10] See also Kamlar Corp. v. Haley, 224 Va. 699, 707, 299 S.E.2d 514, 518 (1983). Consider too Code § 8.01-6.1, enacted in 1996, which likewise used the "same transaction or occurrence" test to determine whether an amendment related back to the time of filing of the initial pleading for purposes of the statute of limitations.

[11] "A 'cause of action,' for purposes of res judicata, may be broadly characterized as an assertion of particular legal rights which have arisen out of a definable factual transaction." Bates v. Devers, 214 Va. 667, 672 n.8, 202 S.E.2d 917, 921 n.8 (1974). Similar language appeared in more recent opinions. See, e.g., Allstar Towing, Inc. v. City of Alexandria, 231 Va. 421, 425, 344 S.E.2d 903, 905-06 (1986); Waterfront Marine Constr., Inc. v. North End 49ers Sandbridge Bulkhead Groups, A, B & C, 251 Va. 417, 434, 468 S.E.2d 894, 904 (1996).

[12] See Restatement (Second) of Judgments § 37 cmt. d & illus. 6 (1982) (discussing cases in which "a person has a loss that is covered by insurance and subject to subrogation in favor of the insurer and another loss that is not so covered, such as a person who in one accident suffers property loss which is insured and also personal injury the claim for which remains his own. . . . Under the rule of this Section, a judgment favorable to the obligor in these circumstances is not preclusive against the transferor as to the issues determined in the action.").

[13] 1 Mark Twain, The Innocents Abroad 264 (Harper & Bros. ed. 1899) (reprint of 1st ed. 1869).