days' notice before granting a preliminary injunction,[26] in the absence of immediate, substantial, and irreparable injury.

The present state of the law indicates that although the court feels that trade unions are lawful and laudable in themselves,[27] whenever they attempt to exercise a rightful power, that is, to call a strike, in order to protect themselves and their members, they will be prevented.[28] This is most unsatisfactory, from the point of view not only of the trade union, but also of the employe member of it.

RES JUDICATA—WHERE INAPPLICABLE.—*Res judicata*[1] is a rule of universal law pervading every well regulated system of jurisprudence, and is put upon the two grounds, embodied in the various maxims of the common law.[2] The one is a public policy and necessity which makes it to the interest of the state that there should be an end to the litigation; and the other is the hardship on the individual that he should be vexed twice for the same cause.[3]

The *res judicata* doctrine was first definitely formulated in the *Duchess of Kingston's case*.[4] The two main rules embodies within the doctrine are: (1) The judgment or decree, without fraud or collusion,[5] of a court of competent jurisdiction upon the *merits* concludes the parties and the privies to the litigation, and constitutes a bar to a new action or suit involving the same cause of action either before the same

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26. Chancery Rule 212.

27. Wasilewski v. Bakers Union Local No. 64, 118 N.J.Eq. 349, 179 Atl 284 (Ch. 1935).

28. Cases cited *supra*, note 11.

1. *Res Judicata* or *Res Adjudicata* is "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settle by judgment." BLACK'S LAW DICTIONARY, 2nd Edition.

2. See cases collected in 34 Corpus Juris. 743.

3. *In re* Walsh, 80 N.J.Eq. 565, 74 Atl. 563 (E. & A. 1909); Putnam v. Clark, 34 N.J.Eq. 532 (Ch. 1881); Kennedy v. New York, 196 N.Y. 19, 89 N.E. 360 (1909); Epstein v. Soskin, 86 Misc. 194, 148 N.Y.S. 323 (1914).

4. Kingston's Case, 20 How. St. Tr. 355, 2 Smith Lead. Case (8th Ed.) 784.

5. Howard v. Huron, 5 S.D. 539, 59 N.W. 833, 26 L.R.A. 493 (1894).

or any other tribunal, so long as it remains unreserved and not in any way vacated or annulled;[6] and (2) Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits, is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subjejct matter of the two suits is the same or not.[7]

At the outset of the consideration of the doctrine of *res judicata* it must be noted that there is a difference between the effect of the judgment as a bar to estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment rendered on the merits constitutes an absolute bar to a subsequent action. It is final as to matters offered or that which might have been offered to sustain or defeat the claim, or demand.[8] In the second action between the same parties upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.[9] In order that the judgment may operate as a bar to the prosecution of a second action there must be identity of subject matter of the suit,[10] of the cause of action,[11] of the persons and parties,[12] and

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6. Hoffmeier v. Trost, 83 N.J.L. 358, 85 Atl. 221 (Sup. Ct. 1912); Wooster v. Cooper, 59 N.J.Eq. 304, 45 Atl. 381 (Ch. 1900); Fish v. Vanderlip, 218 N.Y. 29, 112 N.S. 425, *aff'd*, 170 App. Div. 780, 156 N.Y.S. 38 (1916); Bell v. Alleghany County, 184 Pa. 296, 39 Atl. 227, 63 Am. S. R. 795 (1898).

7. McEligot v. Nutley, 92 N.J.L. 120, 104 Atl. 648 (Sup. Ct. 1918); Pitel v. Pitel, 90 N.J.Eq. 366, 107 Atl. 145 (Ch. 1919); Phillips v. Pullen, 45 N.J.Eq. 830, 18 Atl. 849 (E. & A. 1889); Scott v. Hall, 60 N.J.Eq. 451, 46 Atl. 611 (E. & A. 1900); New York v. New York City R. Co., 193 N.Y. 543, 86 N.E 565 (1908); Poe v. Matthies, 179 N.Y. 242, 72 N.E. 103 (1904) Conner v. Bakersfield Bank, 183 Cal. 199, 190 Pac. 801 (1920).

8. Cromwell v. Sac County, 94 U.S. 351, 24 L. Ed. 195 (1876).

9. Fuller v. Metropolitan Life Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 A.S.R. 84 (1896).

10. Mauldin v. Greenville, 53 S.C. 285, 31 S.E. 252, 69 A.S.R. 855 (1898).

11. Wright v. Griffey, 147 Ill. 496, 35 N.E. 732, 37 A.S.R. 228 (1893); Markley v. People, 171 Ill. 260, 49 N.E. 502, 63 A.S.R. 234 (1898).

of the capacity in which the parties appear as litigants.[13]

The law of *res judicata* is frequently treated as a branch of the law of estoppel. Opinions have held this doctrine to be grounded in estoppel,[14] and that it is not the recovery but the matter alleged by the parties, and upon which the recovery proceeds, that creates the estoppel.[15] Such treatment has been criticized as a confusing and erroneous misapplication of terms which should be distinguished,[16] and the recognized rule of *res judicata*[17] is different from that of technical estoppel.[18] Some authorities have held that the law of *res judicata* applies to decisions on points of law, as well where the estoppel is by verdict as where it is by judgment,[19] and what is known as the "law of the case," that is, the effect and conclusiveness of a former decision on appeal, in the subsequent proceedings in the same cause, has been generally put upon the ground of *res judicata.*[20] On the other hand the law of *stare decisis*,[21] and not that of *res judicata* has been held to apply to findings on questions of law, where the estoppel is by verdict, or the doctrine

12. Brechlin v. Night Hawk Min. Co., 49 Wash. 198, 94 Pac. 928, 126 A.S.R. 863 (1908); Morrison v. Clark, 89 Me. 103, 35 Atl. 1034, 56 A.S.R. 395 (1896).

13. Womach v. St. Joseph, 201 Mo. 467, 100 S.W. 443, 10 L.R.A. (N.S.) 140 (1907).

14. Thompson v. Washington Nat. Bank, 68 Wash. 42, 122 Pac. 606, 39 L.R.A. (N.S.) 972 (1912).

15. Burt v. Sternburgh, 4 Cow. (N.Y.) 559, 15 Am. Dec. 402 (1825).

16. Rowell v. Smith, 123 Wis. 510, 102 N.W. 1, 3 Am. Cas. 773 (1905): "The distinction between estoppel and *re adjudicata* is sometimes so shadowy that one, without careful analysis, would blend into the other. Nevertheless there is a distinction. We will not stop in our labor here to point it out, but assume that its existence is well understood." Agnew v. Nebr, 99 N.W. 820 (1904).

17. Foster v. Posson, 105 Wis. 99, 81 N.W. 123 (1898).

18. Salcedo v. Alvarez, 8 Porto Rico Fed. 529, 547: "*Res judicata* is not the same as estoppel. Estoppel rests on equitable principles, and *res judicata* rests on maxims which are taken from the Roman law." Sargent v. New Haven Steamboat Co., 65 Conn. 116, 31 Atl. 543 (1894).

19. Hancock v. Singer Mfg. Co., 622 N.J.L. 289, 41 Atl. 846, 42 L.R.A. 852 (E. & A. 1898).

20. *In re* Pulaski Ave., 220 Pa. 276, 69 Atl. 749 (1908); Wilkes v. Davies, 8 Wash. 112, 35 Pac. 611, 23 L.R.A. 103 (1894); Gibbs v. Peterson, 163 Cal. 758, 127 Pac. 62 (1912).

21. *Stare Decisis*—"To stand by decided cases; to uphold precedents; to maintain former adjudications." 1 KENT, COMM. 477.

invoked is that of the "law of the case" and the decision on the former appeal does not have the requisite of a final judgment.[22]

While the doctrine of *res judicata* is usually regarded as a defense, it is equally available to the plaintiff where the circumstances warrant it,[23] either by pleading it as an element of his cause of action or in reply to defendant's answer,[24] or, where no such opportunity is afforded, by introducing evidence of the former adjudication.[25]

By the general rule, a party entitled to claim the benefits of a former judgment may waive or estop himself from asserting such right,[26] but he cannot waive the benefit of an estoppel to the benefit of another.[27] It has also been held that the fact that an action to recover back money paid to satisfy a valid judgment, brought on grounds which would have been sufficient to reverse the judgment, is submitted on agreed facts, so that all objections to the form of the action are waived, will not authorize the court to disregard the effect of the judgment which is still unreversed.[28]

A final decree on the merits in a suit in equity will operate as a bar to any further litigation between the same parties on the same cause of action in a court of law,[29] although the rule does not preclude the defendant in a suit in equity from maintaining an action at law or a cause of action which he might have set up by cross bill in the equity suit.[30] Conversely, a final judgment on the merits in an action at law

22. New Brunswick Water Comrs. v. Cramer, 61 N.J.L. 270, 39 Atl. 671, 68 Am. S. R. 705 (E. & A. 1898); Cliff v. Day, 141 N.Y. 580, 36 N.E. 182 (1894).

23. Union Pac. R. Co. v. Chicago etc. R. Co., 57 Ill. Atl. 430, *aff'd*, 164 Ill. 88, 45 N.E. 488 (1896).

24. St. Louis v. United R. Co., 263 Mo. 387, 174 S.W. 78 (1914).

25. Wilson v. Devine, 67 Cal. 341, 7 Pac. 776 (1885); Ahlers v. Smiley, 11 Cal. Atl. 343, 104 Pac. 997 (1909).

26. *In re* Evans, 42 Utah 282, 130 Pac. 217 (1913); Fledderman v. Fledderman, 112 Md. 226, 76 Atl. 85 (1910).

27. Pray v. Hegeman, 98 N.Y. 351 (1885).

28. Peoples Sav. Bank v. Heath, 175 Mass. 131, 55 N.E. 807, 78 Am. S. R. 481 (1900).

29. Hoboken Mfr. R. Co. v. Hoboken, 76 N.J.L. 122, 68 Atl. 1098 (Sup. Ct. 1908); New York Mut. L. Ins. Co. v. Newton, 50 N.J.L. 571, 14 Atl. 756 (Sup. Ct. 1888).

30. Sheffer v. Perkins, 83 Vt. 185, 75 Atl. 6 (1910).

will bar any further action between the same parties on the same cause of action in a court of chancery[31] except in cases where, because the subject matter is within the exclusive jurisdiction of equity, or for some other reason, the matter could not rightfully have been determined in the action at law,[32] and other exceptions to or limitations of the rule have been laid down in some cases.[33]

In *Stambovsky v. Cohen,*[34] the question of the applicability or inapplicability of *res judicata* was raised. A bill in chancery was filed praying for recission of a partnership dissolution agreement on the ground of fraud. The court found that there was fraud but that the defrauded person had not acted with sufficient promptness to be entitled to the equitable remedy of recission by court order, and for that reason granted a dismissal of the bill. The Court of Errors and Appeals decided that the decree of dismissal was not, as *res judicata,* ground for a later decree in chancery permanently enjoining the defrauded party from prosecuting an intermediate action at law in deceit for damages arising out of a specific fraudulent act. The basis of this decision was that when the first chancery decree was entered which dismissed the prayer for recission, the court had not decided this on the merits of the case because nowhere in the memorandum, in the decree, was there any decision or expression of opinion that Cohen had been defrauded or any order that he be forever barred from seeking some other form of relief for the wrong done him. The Vice-Chancellor limited his findings to the one issue, that of laches, and directed that the decree be taken in accordance with that finding. In view of this result, it cannot be said that the merits were *res judicata.* The question was narrowed down to whether an earlier decree of dismissal of a bill in chancery for recission was *res judicata* against an action at law for damages in deceit? The answer was, due to the fact that the earlier decree was not based on the merits, in the negative.

In the case of *Sarson v. Maccia,*[35] the complainant sought to re-

31. West New York Silk Mill Co. v. Laubsch, 53 N.J.Eq. 65, 30 Atl. 814 (Ch. 1894).

32. Metropolitan Sav. etc. Assoc. v. Dughi, 49 Atl. 542 (N. J. Ct. of E. & A. 1901).

33. Robnett v. Howard, 61 S.W. 1082 (1901).

34. 124 N.J.Eq. 290 (E. & A. 1938).

35. 90 N.J.Eq. 433, 108 Atl. 109 (Ch. 1919).

strain the defendant from prosecuting her action in the Supreme Court to recover damages for an alleged deceit on the ground that the cause of action had been determined by the Court of Chancery on its merits, adversely to the defendant and was *re adjudicata.* The Vice-Chancellor quoted from the opinion in *Putnam v. Clark,*[36] that, "If, after a decree in equity, a party shall proceed in law for the same matter, equity will restrain him by an injunction. Such suit at law is treated as a contempt of court, for it is a gross oppression to vex another with a double suit for the same cause of action." In that action, however, while the bill did not specifically set up the cause of action now alleged in the suit at law, *viz.*, that the complainant with intent to cheat and defraud the defendant, falsely represented the second mortgage to be a guilt-edged security for $1500, it was clear that it was one of the issues tried, and it was treated by the Vice-Chancellor as raised by the pleadings, and that the decree of dismissal turned upon its decision. The question of fraudulent representation was uppermost, and the case was decided upon its merits.

In *Henninger v. Heald,*[37] the bill filed was dismissed without adding the saving clause "without prejudice" for want of proper parties and the case was not tried on its merits. The court decided that when the first suit is dismissed on any ground which did not go to the merits of the action of the decree rendered, it is not necessarily a bar to another suit and in the interest of justice it should not be permitted to deprive the complainant of a just cause of action.

It was stated by the Court of Errors and Appeals in *Phillips v. Phillips,*[38] that in a subsequent action between the same parties for a different claim or demand, the final judgment in the former case is conclusive and absolute upon the parties in the latter case, but only as to the issues litigated in the first case and upon which the judgment was predicated.

Hoffmeier v. Trost,,[39] laid down the rule that the proper test in determining whether a prior judgment between the same parties con-

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36. 34 N.J.Eq. 532 (E. & A. 1881).

37. 51 N.J.Eq. 74 (Ch. 1893); *Accord*: Benjamin v. Van Voorhis, 106 N.J. Eq. 196, 150 Atl. 393 (E. & A. 1930).

38. 83 N.J.L. 358, 85 Atl. 221 (Sup. Ct. 1912).

39. 83 N.J.L. 358 (Sup. Ct. 1912).

cerning the same matter 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 have authorized 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 have authorized a recovery, but could not have produced a different result, the failure of the plaintiff in the first suit is no bar to his recovery in the other suit.

In *Gunderson v. Halvorson*[40] and *Marshall v. Gilman*,[41] it was held that a dismissal, because of plaintiff's laches in seeking recission of a contract on the ground of fraud, is not a bar to a recovery of damages for the fraud in a subsequent action at law. This doctrine is sound and equitable. The Court of Chancery should not extend its protection by injunction to one who is charged with having perpetrated a fraud, unless the issue of fraud has already been adjudicated in his favor. Common justice demands that one who cannot get relief in a Court of Chancery should not be barred from seeking it in a court of law.

In the final analysis, the doctrine of *res judicata* is but a rule of procedure, based on public policy; and it should not be construed in such a manner as to work injustice. The purpose of the doctrine is to prevent vexatious and mischevious litigation; to save a party from being sued several times for the same cause of action; to have unnecessary duplication in the work of the courts, and to avoid unnecessary expenditure of the taxpayer's money. When the court of competent jurisdiction has heard the case on its merits and ably reviewed the issue, the parties have had their day in court.

Like all rules, the doctrine of *res judicata* must be applied with wisdom and in the light of reason. While the avoidance of duplicating work already done and the prevention of waste of public funds undoubtedly are meritorious objects, the system of jurisprudence to which we adhere has for its ideal the maxim that for every wrong there shall be a remedy. When the remedy first sought is found to be beyond the seeker's reach, there is no reason why the law should not help him, rather than hinder him, in finding that remedy to which in justice and good conscience he is most certainly entitled. Should this remedy not be allowed, there would be gross injustice done the plain-

40. 140 Minn. 292, 168 N.W. 8 (1918).
41. 47 Minn. 131, 49 N.W. 688 (1891).

tiff, since he is being deprived of his right to redress. Allowing this remedy is not causing the defendant unnecessary harm since he has as yet not been tried on the merits of the charge against him.