

# **Chitty on Contracts 32nd Ed.**

## **Consolidated Mainwork Incorporating Second Supplement**

### **Volume I - General Principles**

#### **Part 7 - Performance and Discharge**

#### **Chapter 25 - Other Modes of Discharge**

#### **Section 1. - Merger**

##### **Merger by taking a higher security**

##### **25-001**

In general, a debt or security by simple contract is extinguished by a specialty security being given for the same if the remedy on the latter is coextensive with that which the creditor had upon the former. <sup>1</sup> Thus, if a bond or covenant by the debtor is taken for or to secure a simple contract debt, the latter is merged in the former, because in contemplation of law the specialty is an instrument of a higher nature and gives the creditor a better remedy than he had for the original debt. <sup>2</sup> But in order for this principle to apply, two conditions must be fulfilled. First, the later security must be of a higher efficacy than that which it is sought to replace. Thus, if the securities are of equal degree, as in the case of an earlier and a later bond, <sup>3</sup> no merger will take place. A negotiable instrument is not a higher security for the purposes of this rule, <sup>4</sup> although the giving and taking of a bill or note may act as a discharge of a debt if the parties so intended. <sup>5</sup> Secondly, the remedy given by the higher security must be coextensive with the lower security, that is to say, it must secure the same obligation and be made between the same parties. <sup>6</sup> Thus, if one of two makers of a joint and several promissory note gives the holder a mortgage to secure the amount with a covenant to pay it, the other maker is not thereby discharged, for the remedy on the specialty is not coextensive with the remedy of the note. <sup>7</sup> And where a specialty is given for payments of amounts due or to become due on a running account with a bank, the doctrine of merger, if it applies at all, could at most apply only to the indebtedness which existed at the date when the covenant was taken; for the specialty would otherwise be given in respect of a different future debt. <sup>8</sup>

##### **Collateral security**

##### **25-002**

If it appears on the face of the specialty or from the nature of the transaction that the specialty was intended only as an additional or collateral security, it will not operate as a merger. <sup>9</sup> So, where a banker took from A, his customer, and B, his surety, a bond conditioned for the payment of all sums already advanced or thereafter to be advanced to A, it was held that the bond was evidently intended only as a collateral security, that therefore there was no merger and that A might be sued for the balance of his account as on a simple contract debt. <sup>10</sup>

##### **Merger of contract in conveyance**

##### **25-003**

"It is well settled that, where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed. The contract is merged in the deed ... The most common instance,

perhaps, of this merger is a contract for the sale of land followed by conveyance on completion.”<sup>11</sup>

Merger is not, however, inevitable, but depends upon the intention of the parties.<sup>12</sup> Merger may occur despite the fact that the terms of the conveyance differ from those in the contract; and, where a contract applies to many parcels of land, but the conveyance to only some of them, merger may operate distributively, i.e. quoad only the parcels conveyed.<sup>13</sup>

### **Merger of rights and liabilities**

#### **25-004**

A contract may also be discharged where the rights and liabilities under it become vested, by assignment or otherwise, in the same person in the same right,<sup>14</sup> for a man cannot maintain an action against himself. This type of merger is more often encountered in the law of land,<sup>15</sup> e.g. where a tenant for a term of years retains the lease and acquires the reversion. An example in the law of contract is provided by s.61 of the Bills of Exchange Act 1882, which enacts that, when the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.<sup>16</sup>

### **Debtor becomes creditor's personal representative**

#### **25-005**

At common law, if a debtor became the personal representative of his creditor, the right of action for the debt was suspended, since he could not maintain an action against himself. But since the suspension of a personal action as the result of the voluntary act of a creditor prevented revival of the action, the result was that, if the creditor appointed the debtor his executor, the debt was extinguished when that appointment became effective on the creditor's death.<sup>17</sup> On the other hand, if the debtor became the administrator of the creditor's estate, this was not the voluntary act of the creditor, and the debt was therefore not extinguished, but was suspended for the duration of the administration.<sup>18</sup> In equity, however, a debtor who was appointed his creditor's executor was treated as having paid the debt to himself, and he was compelled to account for it as assets of the testator held by him<sup>19</sup> unless there was evidence of the testator's settled intention to release him from the debt.<sup>20</sup> But equity did not intervene in the case of a debtor who became administrator. This divergence between the rules applicable to executors and administrators has now been abolished, so that an administrator's debt is likewise extinguished (and not merely suspended), but he is likewise accountable for the amount of the debt as part of the creditor's estate.<sup>21</sup>

### **Creditor becomes debtor's personal representative**

#### **25-006**

Where a creditor becomes the executor or administrator of his debtor's estate, the debt is not thereby extinguished or suspended.<sup>22</sup> However, he may be able to retain<sup>23</sup> assets of the testator in payment of his debt.

### **Merger by judgment recovered**

#### **25-007**

The mere pendency of an action for the recovery of a debt or damages is no bar to another action for the same breach of contract on which the claim to such a debt or damages is founded.<sup>24</sup> The defendant's remedy in such a case is either to consolidate the two actions<sup>25</sup> or to have the second action struck out on the basis that there are no reasonable grounds for bringing the claim.<sup>26</sup> But when

a prior action has already been successfully brought by the claimant against the defendant in a court of record <sup>27</sup> for the identical demand, <sup>28</sup> and judgment has been recovered thereon, the cause of action is changed or merged into matter of record and the inferior remedy is merged in the higher. <sup>29</sup> In such a case, therefore, if the claimant sues upon the original promise or demand (even although it accrued upon a specialty), it will be a good defence that he has already recovered judgment against the defendant for the same cause of action. <sup>30</sup> Thus where a lender obtains judgment for the amount due under a loan agreement (including interest), then the contract merges in the judgment so that the lender no longer has a cause of action in contract for either the principal or the remaining interest and must instead seek execution of the judgment with statutory interest on the judgment until payment is made. <sup>31</sup>

### **Damages “once for all”**

#### **25-008**

The general rule is that “damages resulting from one and the same cause of action must be assessed and recovered once for all”. <sup>32</sup> So in one case <sup>33</sup> the claimant recovered from the defendant in one action as damages for the defendant’s breach of contract the damages which a third party had recovered against the claimant. He then brought a second action to recover the costs incurred by him in defending the third party’s action. It was held that recovery of judgment in the first action was a bar to the second. But where one contract contains separate promises, or there are separate breaches of the same promise, separate or successive actions may be brought for each breach, and judgment in one will be no bar to the other. <sup>34</sup> However, if a contract contains a single indivisible undertaking, different actions cannot be maintained for different breaches of it. Where, therefore, a builder who had agreed to build a bungalow in a good and workmanlike manner was sued in successive actions by the owner for breach of his contract, inefficiency of workmanship being alleged in the first action and unsuitability of materials in the second, recovery of judgment in the first action was held to be a defence in the second. <sup>35</sup>

### **Interest**

#### **25-009**

A judgment for interest only is no bar to a claim for the principal money. <sup>36</sup> But where there is a covenant to pay a principal sum, and judgment is obtained upon the covenant for that sum, any covenant to pay interest which is merely incidental to the covenant to pay the principal sum is merged in the judgment. <sup>37</sup> If, however, the covenant to pay interest is expressed in such a manner as to be independent of the covenant to pay the principal sum, it is not merged or extinguished in the judgment. <sup>38</sup>

### **County court judgments**

#### **25-010**

A county court is a court of record. <sup>39</sup> Judgment recovered in a county court is therefore a good defence to an action in the High Court for the same cause, <sup>40</sup> provided that the county court was acting within its jurisdiction. <sup>41</sup>

### **Estoppel by judgment**

#### **25-011**

Estoppel by judgment, or estoppel per rem judicatam, is a rule of evidence <sup>42</sup> whereby a party is debarred from relitigating a cause of action which has been conclusively determined by the judgment of a court of competent jurisdiction in previous proceedings between the same parties or their privies, or an issue raised and determined in such proceedings which it was necessary <sup>43</sup> to determine for the

purpose of those proceedings. <sup>44</sup> Estoppel per rem judicatam has two principal branches: cause of action estoppel and issue estoppel. Cause of action estoppel arises:

“[W]here the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged such as to justify setting aside the earlier judgment.” <sup>45</sup>

On the other hand, issue estoppel arises:

“[W]here a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue.” <sup>46</sup>

Both estoppels are founded “upon the public interest in finality of litigation rather than the achievement of justice as between the individual litigants”. <sup>47</sup>

## Requirements

### 25-012

⚠ Three requirements must be satisfied for a plea of estoppel per rem judicatam to succeed <sup>48</sup>: first, there must have been a final and conclusive judgment <sup>49</sup> on the merits <sup>50</sup> ⚠ by a court of competent jurisdiction <sup>51</sup> in the earlier <sup>52</sup> ⚠ proceedings; secondly, there must be identity of parties in the two sets of proceedings <sup>53</sup> or else the existence of privity between the respective claimants or defendants in the earlier proceedings and those in the later proceedings <sup>54</sup>; thirdly, there must be identity of subject matter in the two proceedings. <sup>55</sup>

## Issues not raised previously

### 25-013

⚠ Both cause of action <sup>56</sup> and issue estoppel <sup>57</sup> may extend to issues which might have been put but were not raised and decided <sup>58</sup> in the earlier proceedings, although in special circumstances <sup>59</sup> the court may depart from this rule and permit the parties to raise such an issue. The court also has a power under rules of court and its inherent jurisdiction to stay or dismiss the action if a claimant seeks to raise in subsequent proceedings matters which were or should have been litigated in the earlier proceedings. <sup>60</sup> The courts will not, however, exercise their discretion in such a way as to deny to a claimant the right to bring “a genuine subject of litigation before the court”. <sup>61</sup> The burden is therefore upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action <sup>62</sup> and there will “rarely be a finding of abuse unless the latter proceeding involves what the court regards as unjust harassment of a party”. <sup>63</sup> The question whether an action is an abuse of the court is “closely related” <sup>64</sup> ⚠ to the question whether or not there is an estoppel per rem judicatam but it is not identical so that an action may be struck out on the ground that it is an abuse of the court where the plea of estoppel is not strictly made out. <sup>65</sup> Estoppel per rem judicatam may be raised as a defence, <sup>66</sup> but the more usual course is to apply to the court for an order that the statement of claim, or part thereof, be struck out and the action stayed or dismissed. <sup>67</sup>

## Issue estoppel: exceptional circumstances

## 25-014

So far as cause of action estoppel is concerned, the rule appears to be absolute<sup>68</sup>: a party cannot relitigate the same cause of action even if new facts or law have subsequently come to light.<sup>69</sup> But there may be circumstances in issue estoppel where the justice of allowing the matter to be relitigated outweighs the hardship to the successful party in the first action in having to relitigate the point.<sup>70</sup> Thus a party may not be estopped if further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him<sup>71</sup> or if there has been a change in the law subsequent to the previous proceedings.<sup>72</sup>

### Ineffective judgments

## 25-015

A judgment obtained by covin, collusion or fraud is no bar to a subsequent action in respect of the same subject matter.<sup>73</sup> Similarly, a judgment obtained in a court which had no jurisdiction to pronounce it is without legal effect.<sup>74</sup>

### Foreign judgments<sup>75</sup>

## 25-016

A judgment of a foreign court (including a court in another part of the United Kingdom) did not at common law operate in England as a merger of the original cause of action in respect of which the judgment was given.<sup>76</sup> However, by s.34 of the Civil Jurisdiction and Judgments Act 1982, no proceedings may be brought<sup>77</sup> by a person in England and Wales or Northern Ireland on a cause of action<sup>78</sup> in respect of which a judgment<sup>79</sup> has been given<sup>80</sup> in his favour in proceedings between the same parties, or their privies, in a court<sup>81</sup> in another part of the United Kingdom<sup>82</sup> or in a court of an overseas country,<sup>83</sup> unless that judgment is not enforceable or entitled to recognition<sup>84</sup> in England and Wales or, as the case may be, Northern Ireland. The principle which underpins s.34 is the avoidance of relitigation.<sup>85</sup> The effect of s.34 is to reverse the common law rule that a foreign judgment does not of itself extinguish the original cause of action in respect of which the judgment was given.<sup>86</sup> But it does not apply the doctrine of merger in judgment to foreign judgments.<sup>87</sup> So it does not exclude the jurisdiction of the court, but rather it provides a bar against proceedings by the claimant, which bar can be defeated by waiver or estoppel.<sup>88</sup> The claimant need not have been one of the original parties to the foreign proceedings, nor need the proceedings have been exclusively civil in character, provided that the judgment is enforceable or entitled to recognition in England.<sup>89</sup> In deciding whether or not the proceedings are between the same parties, or their privies, the court is likely to take a flexible approach and consider whether the reality is that the claim is between the same parties.<sup>90</sup>

### Foreign judgments in personam

## 25-017

At common law, a foreign judgment in personam which is final and conclusive<sup>91</sup> on the merits<sup>92</sup> will be entitled to recognition in England,<sup>93</sup> provided that it is given by a court having jurisdiction to give the judgment<sup>94</sup> and is not impeachable on grounds of fraud, public policy or breach of natural justice.<sup>95</sup> In the case of a judgment given by a court of a state party to the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters,<sup>96</sup> the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters<sup>97</sup> or the Regulation (EU) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters<sup>98</sup> and which falls within the scope of either Convention or the Regulation, the judgment will (and must) be recognised in England.<sup>99</sup> Although certain exceptions are provided for in both Conventions and the Regulation,<sup>100</sup> these are very limited in nature and in particular an English court cannot ordinarily question the jurisdiction of the court by which the judgment was given.<sup>101</sup>

Where the judgment is that of a court in another part of the United Kingdom, i.e. in Scotland or Northern Ireland, it would appear that such a judgment is entitled to recognition, and may be impeached, in accordance with the common law<sup>102</sup>; but the judgment cannot be refused recognition in England solely on the ground that, in relation to that judgment, the court which gave it was not a court of competent jurisdiction according to the rules of private international law in force in England.<sup>103</sup>

### Estoppel by foreign judgment in personam

#### 25-018

A foreign judgment which is entitled to recognition in England may also, if given in favour of the defendant, be relied upon to establish an estoppel per rem judicatam<sup>104</sup> and thus afford a good defence to an action in England between the same parties, or their privies, for the same matter.<sup>105</sup> Issue estoppel may arise in respect of an issue determined by previous proceedings in a foreign court.<sup>106</sup>

### Foreign judgment in rem

#### 25-019

⚠ A foreign judgment in rem, e.g. a judgment which determines the right to, or disposition of, some res<sup>107</sup> such as a ship or other chattel within the territorial jurisdiction of the foreign court,<sup>108</sup> ⚠ probably acts as an assignment of the res.<sup>109</sup> The adjudication is recognised as binding upon the whole world.

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1. *Acton v Symon* (1635) *Cro. Car.* 414; *Twopenny v Young* (1824) 3 *B. & C.* 208; *Price v Moulton* (1835) 10 *C.B.* 561; *Bristol and West Plc v Bartlett* [2002] *EWCA Civ* 1181, [2002] 4 *All E.R.* 544 at [22].
  2. *Price v Moulton* (1835) 10 *C.B.* 561.
  3. *Kidd v Boone* (1871) 40 *L.J. Ch.* 531. See also *Norwood v Grype* (1599) *Cro. Eliz.* 727; *Chetwynd v Allen* [1899] 1 *Ch.* 353.
  4. *Drake v Mitchell* (1803) 3 *East* 251.
  5. See above, paras 21-075—21-077.
  6. *Bell v Banks* (1841) 3 *M. & G.* 258; *Ansell v Baker* (1850) 15 *Q.B.* 20; *Mowatt v Lord Londesburgh* (1854) 3 *E. & B.* 307; *Chetwynd v Allen* [1899] 1 *Ch.* 353; *Lawrence v Cassel* [1930] *W.N.* 137; *Hissett v Reading Roofing Co Ltd* [1969] 1 *W.L.R.* 1757.
  7. *Ansell v Baker* (1850) 15 *Q.B.* 20. Where the remedy is not joint and several, but merely joint, it seems that merger will operate: *Owen v Homan* (1850) 3 *Mc. & G.* 378, 410; *Ex p. Flintoff* (1844) 3 *M.D. & De G.* 726; *Ex p. Hernaman* (1848) 12 *Jur.* 642. Contrast *Sharpe v Gibbs* (1864) 16 *C.B.(N.S.)* 527; *Holmes v Bell* (1841) 3 *M. & G.* 213; *Bell v Banks* (1841) 3 *M. & G.* 258. See Williams, *Joint Obligations*, para.49, and generally on joint obligations, above, Ch.17.
  8. *Barclays Bank Ltd v Beck* [1952] 2 *Q.B.* 47, 53.
  9. *Twopenny v Young* (1824) 3 *B. & C.* 208; *Ex p. Bate* (1838) 3 *Deac.* 358; *Yates v Aston* (1843) 4 *Q.B.* 182; *Norfolk Ry Co v M'Namara* (1849) 3 *Exch.* 628; *Ex p. Hughes* (1872) 4 *Ch. D.* 34; *Commissioner of Stamps v Hope* [1891] *A.C.* 476; *Barclays Bank Ltd v Beck* [1952] 2 *Q.B.* 47.

10. *Holmes v Bell* (1841) 3 M. & G. 213.
11. *Knight Sugar Co Ltd v Alberta Ry & Irrigation Co* [1938] 1 All E.R. 266, 269.
12. *Palmer v Johnson* (1884) 13 Q.B.D. 351, 357; *Clarke v Ramuz* [1891] 2 Q.B. 456, 461; *Lawrence v Cassel* [1930] 2 K.B. 83; *Barclays Bank Ltd v Beck* [1952] 2 Q.B. 47; *Hancock v B.W. Brazier (Anerley) Ltd* [1966] 1 W.L.R. 1317; *Hissett v Reading Roofing Co Ltd* [1969] 1 W.L.R. 1757; *Tito v Waddell (No.2)* [1977] Ch. 107, 284; *Gunatunga v De Alwis* (1996) 72 P. & C.R. 161, 180.
13. *Tito v Waddell (No.2)* [1977] Ch. 107, 284–285.
14. e.g. not as executor or administrator, to which special rules apply, below.
15. See Megarry & Wade, *The Law of Real Property*, 8th edn (2012), paras 18–090–18–091. At common law merger was automatic; but by s.185 of the Law of Property Act 1925, the equitable rule now prevails; that merger depends upon the intention of the person who acquires the two estates. See *Capital and Counties Bank Ltd v Rhodes* [1903] 1 Ch. 631.
16. *Harmer v Steele* (1849) 4 Exch. 1; Chalmers and Guest on Bills of Exchange and Cheques, 17th edn (2009), paras 8–056–8–059. See Vol.II, para.34–137.
17. *Wankford v Wankford* (1704) 1 Salk. 299; *Cheetham v Ward* (1797) 1 B. & P. 630; *Freakley v Fox* (1829) 9 B. & C. 130; *Re Applebee* [1891] 3 Ch. 422. See also *Jenkins v Jenkins* [1928] 2 K.B. 501 and Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, 20th edn (2013), para.53–17, and above, para.17–023.
18. *Nedham's Case* (1610) 8 Co. Rep. 135a; *Seagram v Knight* (1867) L.R. 2 Ch. App. 620.
19. *Selwin v Brown* (1735) 3 Brown P.C. 607; *Ingle v Richards* (1860) 28 Beav. 366; *Re Bourne* [1906] 1 Ch. 697.
20. *Strong v Bird* (1874) L.R. 18 Eq. 316; *Re Pink* [1912] 2 Ch. 528; *Re James* [1935] Ch. 449. cf. *Re Freeland* [1952] Ch. 110.
21. Administration of Estates Act 1925 s.21A (inserted by s.10 of the Limitation Amendment Act 1980).
22. *Bowring-Hanbury's Trustee v Bowring-Hanbury* [1943] Ch. 104. See generally Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, 20th edn (2013), para.53–21; (1943) 59 L.Q.R. 117; (1943) 6 M.L.R. 233.
23. See below, para.28–132.
24. *Harley v Greenwood* (1821) 5 B. & Ald. 95, 101.
25. CPR Pt 3 r.3.1(2)(g).
26. CPR Pt 3 r.3.4(2)(a); County Courts Act 1984 s.35.
27. See below, para.25–010.
28. *Seddon v Tutop* (1796) 6 T.R. 607; *Hadley v Green* (1832) 2 Cr. & J. 374; *Wegg Prosser v Evans* [1895] 1 Q.B. 108; *Economic Life Assurance Society v Usborne* [1902] A.C. 147.
29. *Greathead v Bromley* (1798) 7 T.R. 455; *King v Hoare* (1844) 13 M. & W. 495; *Stewart v Todd* (1846) 9 Q.B. 759; *Re European Central Ry* (1876) 4 Ch. D. 33; *Kendall v Hamilton* (1879) 4 App. Cas. 504; *Aman v Southern Ry* [1926] 1 K.B. 59; *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] A.C. 160 at [17]. For the position in regard to judgment against one joint, or joint and several, debtor, see above, paras 17–015–17–017. For the effect



of an arbitration award, see Vol.II, paras 32-145 et seq.

- [30.](#) But see *Buckland v Palmer* [1984] 1 W.L.R. 1109, 1115.
- [31.](#) *Economic Life Assurance Society v Usborne* [1902] A.C. 147; *Lloyds Bank Plc v Hawkins* [1998] 47 E.G. 137; *Commercial First Business Ltd v Munday* [2014] EWCA Civ 1296, [2015] 1 P. & C.R. 7. In order to avoid this conclusion mortgages frequently provide that the covenant to pay continuing interest does not merge in the judgment: see *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, [2002] 1 A.C. 481 at [4].
- [32.](#) *Brunsdon v Humphrey* (1884) 14 Q.B.D. 141, 147; *Darley Main Colliery Co v Mitchell* (1886) 11 App. Cas. 127, 132; *Conquer v Boot* [1928] 2 K.B. 336, 343; *Clark v Urquhart* [1930] A.C. 28, 54; *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] A.C. 160 at [17] (a principle which “is not easily described as a species of estoppel”). See also County Courts Act 1984 s.35. The general rule applies also to arbitrations.
- [33.](#) *Furness, Withy & Co v Hall* (1909) 25 T.L.R. 233.
- [34.](#) *Bristowe v Fairclough* (1840) 1 M. & G. 143; *Brunsdon v Humphrey* (1884) 14 Q.B.D. 141; *Ebbetts v Conquest* (1900) 82 L.T. 560; *Bake v French* [1907] 1 Ch. 428; *Brooks v Beirnsstein* [1909] 1 K.B. 98; *Isaacs v Salbstein* [1916] 2 K.B. 139; *South Bedfordshire Electrical Finance Ltd v Bryant* [1938] 3 All E.R. 580; *National Coal Board v Galley* [1958] 1 W.L.R. 16; *Overstone Ltd v Shipway* [1962] 1 W.L.R. 117; *Telfair Shipping Corp v Inersea Carriers SA* [1983] 2 Lloyd’s Rep. 351. See below, paras 26-011—26-013. But see also below, paras 25-011—25-014 (stay of proceedings where matters could and should have been raised).
- [35.](#) *Conquer v Boot* [1928] 2 K.B. 336. But see (arbitrations) Vol.II, para.32-145.
- [36.](#) *Morgan v Rowlands* (1872) 41 L.J.Q.B. 187.
- [37.](#) *Ex p. Fewings* (1883) 25 Ch. D. 338. The judgment bears interest: see below, para.26-246.
- [38.](#) *Popple v Sylvester* (1882) 22 Ch. D. 98; *Economic Life Assurance Society v Usborne* [1902] A.C. 147.
- [39.](#) County Courts Act 1984 s.A1(2).
- [40.](#) *Austin v Mills* (1853) 9 Exch. 288. See also *Vines v Arnold* (1849) 8 C.B. 632; *Webster v Armstrong* (1885) 54 L.J.Q.B. 236.
- [41.](#) *Briscoe v Stephens* (1842) 2 Bing. 213.
- [42.](#) *Vervaeke v Smith* [1983] 1 A.C. 145; *Republic of India v India Steamship Co Ltd* [1993] A.C. 410, 422.
- [43.](#) *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] A.C. 993; *Penn Texas Corp v Murat Anstalt (No.2)* [1964] 2 Q.B. 647; *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 Q.B. 630, 640; *Mills v Cooper* [1967] 2 Q.B. 459, 468; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.3)* [1970] Ch. 506; *Helmville Ltd v Astilleros Espanoles SA* [1984] 2 Lloyd’s Rep. 569; *In Re State of Norway’s Application (No.2)* [1990] 1 A.C. 723, 743, 752; *In Re B. (Minors) (Care Proceedings: Issue Estoppel)* [1997] Fam. 117, 121–122.
- [44.](#) The subject is one of considerable difficulty and refinement: see Cross and Tapper on Evidence, 12th edn (2010), pp.85 et seq. For estoppel by a default judgment, see *Howlett v Tarte* (1861) 10 C.B.N.S. 813; *New Brunswick Ry Co v British and French Trust Corp Ltd* [1939] A.C. 1; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] A.C. 993. Neither dismissal for want of prosecution (*Pople v Evans* [1969] 2 Ch. 255) nor the withdrawal of proceedings (*Owens v Minoprio* [1942] 1 K.B. 193) is a foundation for res judicata.
- [45.](#) *Arnold v National Westminster Bank Plc* [1991] 2 A.C. 93, 104. See also *Virgin Atlantic Airways*




*Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] A.C. 160 at [17].

46. [1991] 2 A.C. 93, 105. See also *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] A.C. 160 at [17].


47. *Republic of India v India S.S. Co Ltd* [1993] A.C. 410, 415. See also *Duchess of Kingston's Case* (1776) 20 St. Tr. 573; *R. v Inhabitants of the Township of Hartington Middle Quarter* (1855) E. & B. 780; *Flittens v Allfrey* (1874) L.R. 10 C.P. 29; *Hoystead v Commissioner of Taxation* [1926] A.C. 155, 170; *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 Q.B. 630, 640; *Thoday v Thoday* [1964] P. 181, 197–198; *Mills v Cooper* [1967] 2 Q.B. 459, 468; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 A.C. 853, 916, 917; *Vervaeke v Smith* [1983] 1 A.C. 145; *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 A.C. 273, 289; *Johnson v Gore Wood & Co (A Firm)* [2002] 2 A.C. 1, 30–31 and 59; Cross and Tapper on Evidence, 12th edn (2010), pp.85–86.

48. *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 A.C. 853, 909–910, 935, 943, 967–971; *D.S.V. Silo-und Verwaltungsgesellschaft mbH v Owners of the Sennar* [1985] 1 W.L.R. 490, 499.

49. *Marchioness of Huntley v Gaskell* [1905] 2 Ch. 656; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.3)* [1970] Ch. 506; *Midland Bank Trust Co Ltd v Green* [1980] Ch. 590; *Hines v Birkbeck College (No.2)* [1992] Ch. 33; *Buehler AG v Chronos Richardson Ltd* [1998] 2 All E.R. 960. See also the cases cited in para.25-017 n.91, below.


50.  A decision on procedure alone is not a decision on the merits. A decision on the merits is one which establishes certain facts as proved or not in dispute, states what are the relevant principles of law applicable to such facts and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned: *DSV Silo-und Verwaltungsgesellschaft mbH v Owners of the Sennar* [1985] 1 W.L.R. 490, 499; *Saleh v Director of the Serious Fraud Office* [2017] EWCA Civ 18 at [51]–[54]. Where there has been a dismissal on the sole ground that the particular court has no jurisdiction, there has been no decision on the merits which would prevent the claimant from commencing proceedings before a court which did have jurisdiction: *Hines v Birkbeck College (No.2)* [1992] Ch. 33. Similarly, where the dismissal of the earlier claim did not involve the actual adjudication of any issue and no action was taken by the claimant, expressly or by implication, which would justify the conclusion that he had conceded the issue by choosing not to have the matter formally determined, then the claimant should not be estopped from bringing a subsequent claim: *Nayif v The High Commission of Brunei Darussalam* [2014] EWCA Civ 1521, [2015] I.R.L.R. 134. Particular difficulties arise in the context of interlocutory rulings (*Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 A.C. 853). A decision on an application to set aside a default judgment is unlikely to give rise to an estoppel in this context (*Mullen v Conoco Ltd* [1998] Q.B. 382). See below, para.25-017 n.92.

51. *The European Gateway* [1987] Q.B. 206; *Crown Estates Commissioners v Dorset CC* [1990] Ch. 297. In the case of adjudications subject to a comprehensive statutory code, there is a presumption that, where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, *res judicata* applies unless an intention to exclude the principle can properly be inferred as a matter of construction of the relevant statutory provisions (*Thrasyvoulou v Secretary of State for the Environment* [1990] 2 A.C. 273, 289). *Res judicata* has been held to be applicable to arbitral tribunals (*Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 Q.B. 630; *Dallal v Bank Mellat* [1986] Q.B. 441); the award of an ombudsman (*Clark v In Focus Asset Management and Tax Solutions Ltd (Financial Ombudsman Service intervening)* [2014] EWCA Civ 118, [2014] 1 W.L.R. 2502); and to industrial tribunals (*Munir v Jang Publications Ltd* [1989] I.C.R. 1). For the effect of findings of an industrial tribunal on subsequent common law actions, see *Turner v London Transport Executive* [1977] I.C.R. 952; *Green v Hampshire CC* [1979] I.C.R. 861. See also below, paras 25-016–25-019.

52.  But see below n.58. There does not appear to be a requirement that the earlier proceedings must have been dismissed when the second proceedings were initiated. While that will normally

be the case when *res judicata* is invoked, it is the pursuit of the second proceedings notwithstanding the disposal of the first which is objectionable and so it suffices that the earlier proceedings have been disposed of even if the disposal occurred subsequent to the initiation of the second proceedings: *Srivatsa v Secretary of State for Health* [2016] EWHC 2916 (QB) at [86].

53. *Townsend v Bishop* [1939] 1 All E.R. 805; *Gleeson v J. Wippell & Co Ltd* [1977] 1 W.L.R. 510; *Hunter v Chief Constable of West Midlands* [1982] A.C. 529, 540–541; *C. (A Minor) v Hackney LBC* [1996] 1 W.L.R. 789; *Powell v Wilshire* [2004] EWCA Civ 534, [2005] Q.B. 117; cf. *North West Water Ltd v Binnie & Partners* [1990] 3 All E.R. 547, where Drake J. rejected the argument that identity of parties was an essential ingredient of an issue estoppel. The parties must have litigated in the same capacity in both actions: *Marginson v Blackburn BC* [1939] 2 K.B. 426; cf. *House of Spring Gardens Ltd v Waite* [1991] 1 Q.B. 241, 252, where Stuart-Smith L.J. reserved his opinion as to whether the plaintiff's claim in *Marginson* should have been struck out as an abuse of process. See also his rationalisation of *Marginson* in *Talbot v Berkshire CC* [1994] Q.B. 290, 296–297. *Res judicata* and abuse of process have, however, been held to be “juridically very different”: *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] A.C. 160 at [25].
54. *Kinnersley v Orpe* (1780) 2 Dougl. K.B. 517; *Outram v Homewood* (1803) 3 East 346, 366; *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1894] 1 Ch. 578; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.3)* [1970] Ch. 506; *Gleeson v J. Wippell & Co Ltd* [1977] 1 W.L.R. 510; *Hunter v Chief Constable of West Midlands* [1982] A.C. 259; *House of Spring Gardens Ltd v Waite* [1991] 1 Q.B. 241, 252–254.
55. *Hoystead v Commissioner of Taxation* [1926] A.C. 155; *Marginson v Blackburn BC* [1939] 2 K.B. 426; *Bell v Holmes* [1956] 1 W.L.R. 1359; *Society of Medical Officers of Health v Hope* [1960] A.C. 551; *Randolph v Tuck* [1962] 1 Q.B. 175; *Wood v Luscombe* [1966] 1 Q.B. 69; *Re Mantey's Will Trusts (No.2)* [1976] 1 All E.R. 673. See also *Khan v Golechha International Ltd* [1980] 1 W.L.R. 1482; *Republic of India v India S.S. Co Ltd* [1993] A.C. 410; *Buehler AG v Chronos Richardson Ltd* [1998] 2 All E.R. 960 and Cross and Tapper on Evidence, 12th edn (2010), pp.96–97. In the case of issue estoppel, the decision on the issue must have been essential for the decision of the court and not merely collateral: see the cases cited in n.43, above.
56. *Arnold v National Westminster Bank Plc* [1991] 2 A.C. 93, 104, citing *Henderson v Henderson* (1843) 3 Hare 100, 114–115; *Hoystead v Commissioner of Taxation* [1926] A.C. 155, 170; *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] A.C. 581, 590.
57. *Arnold v National Westminster Bank Plc* [1991] 2 A.C. 93, 106, citing *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 Q.B. 630, 642; *Brisbane City Council v Att-Gen for Queensland* [1979] A.C. 411, 425.
58. The issue should have been decided as well as raised in the earlier proceedings: *Barrow v Bankside Agency Ltd* [1996] 1 W.L.R. 257 (plaintiff's claim not barred because it would not have been decided by the court in the earlier proceedings). A court can be expected to display a degree of caution before reaching the conclusion that the point in issue was decided by the earlier court. A court is likely to insist that the issue in question be “fundamental” to the substantive decision in the earlier case: *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 1632 (TCC), [2010] All E.R. (D) 18 (Jul) at [86]. It is, however, important to emphasise that cause of action estoppel remains absolute in relation to all points which had to be and were decided in order to establish the existence or nonexistence of a cause of action. The discretion to permit an issue to be raised in subsequent proceedings relates only to matters which were not decided but might have been raised in the earlier proceedings: *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] A.C. 160 at [26].
59. *Henderson v Henderson* (1843) 3 Hare 100, 115; *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] A.C. 581, 590; *Talbot v Berkshire CC* [1994] Q.B. 290, 298–300; *Barrow v Bankside Agency Ltd* [1996] 1 W.L.R. 257; *Republic of India v India S.S. Co Ltd (No.2)* [1998] A.C. 878, 897–898.

- [60.](#) *Henderson v Henderson* (1843) 3 Hare 100, 115; *Greenhalgh v Mallard* [1947] 2 All E.R. 255; *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 Q.B. 630, 640; *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] A.C. 581, 590; *L.E. Walwin & Partners Ltd v West Sussex CC* [1975] 3 All E.R. 604; *Brisbane City Council v Att-Gen for Queensland* [1979] A.C. 411, 425; *Green v Hampshire CC* [1979] I.C.R. 861, 865–866; *Vervaeke v Smith* [1983] 1 A.C. 145; *Dallal v Bank Mellat* [1986] Q.B. 441, 452; *The European Gateway* [1987] Q.B. 206, 212, 221; *S.C.F. Finance Co Ltd v Masri (No.3)* [1987] Q.B. 1028, 1049; *Talbot v Berkshire CC* [1994] Q.B. 290, 296; *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] A.C. 160 at [17]. While the principle in *Henderson v Henderson* is concerned with the abuse of process, it is also a part of the law of res judicata (*Virgin Atlantic Airways* at [25]).
- [61.](#) *Johnson v Gore Wood & Co (A Firm)* [2002] 2 A.C. 1, 22. The speech of Lord Bingham contains a particularly valuable review of the authorities.
- [62.](#) *Johnson v Gore Wood & Co (A Firm)* [2002] 2 A.C. 1, 59–60. Note also the impact of art.6 of the European Convention on Human Rights on the reasoning of Lord Millett (59).
- [63.](#) *Johnson v Gore Wood & Co (A Firm)* [2002] 2 A.C. 1, 31.
- [64.](#)  *Dallal v Bank Mellat* [1986] Q.B. 441, 452. The closeness of the link can be seen in the fact that *Henderson v Henderson* (1843) 3 Hare 100 has been explained as an example of the extension of cause of action estoppel (*Arnold v National Westminster Bank Plc* [1991] 2 A.C. 93, 105) and of the exercise of the inherent jurisdiction of the court (*Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] A.C. 581, 590). See to the same effect *Greenhalgh v Mallard* [1947] 2 All E.R. 255; *Hunter v Chief Constable of West Midlands* [1982] A.C. 529, 540; *The European Gateway* [1987] Q.B. 206, 212, 221; *S.C.F. Finance Co Ltd v Masri (No.3)* [1987] Q.B. 1028, 1049; and *Johnson v Gore Wood & Co (A Firm)* [2002] 2 A.C. 1, 31 (“separate and distinct” but having “much in common”) and 59 (they are “all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions”); cf. *Barrow v Bankside Agency Ltd* [1996] 1 W.L.R. 257. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] A.C. 160 at [17] Lord Sumption J.S.C. stated that “the more general procedural rule against abusive proceedings” may be regarded as underlying the principles of res judicata with the possible exception of the doctrine of merger. However, he also noted (at [25]) that res judicata and abuse of process are “juridically very different” with the former being a rule of substantive law, while the latter is “a concept which informs the exercise of the court’s procedural powers”. See also *Dickinson v UK Acorn Finance Ltd* [2015] EWCA Civ 1194 at [20] (“the principles of abuse of process ... are quite different from the somewhat technical doctrines of cause of action estoppel and issue estoppel”).
- [65.](#) *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] A.C. 581, 590; *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd’s Rep. 132, 137, 138–139; *J.H. Rayner (Mincing Lane) Ltd v Bank fur Gemeinwirtschaft AG* [1983] 1 Lloyd’s Rep. 462, 469; *North West Water Ltd v Binnie & Partners* [1990] 3 All E.R. 547, 553; *House of Spring Gardens Ltd v Waite* [1991] 1 Q.B. 241, 254–255. The rule in *Henderson v Henderson* (1843) 3 Hare 100 has been held to apply where the first action concludes in a settlement, whereas the strict doctrine of res judicata would not apply in such a situation: *Johnson v Gore Wood & Co (A Firm)* [2002] 2 A.C. 1, 32–33 and 59.
- [66.](#) Although the CPR do not expressly require the defence to be specifically pleaded, it is advisable to continue to plead it specifically. The rules relating to the contents of the defence are set out in CPR Pt 16.5. See also *Morrison, Rose and Partners v Hillman* [1961] 2 Q.B. 266; *Lee v Citibank NA* [1981] H.K.L.R. 470 (irrelevancy of which proceedings were first commenced).
- [67.](#) *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.3)* [1970] Ch. 506.
- [68.](#) Subject to cases of covin, collusion and fraud and lack of jurisdiction; below, para.25-015.
- [69.](#) *Arnold v National Westminster Bank Plc* [1991] 2 A.C. 93, 104.

- [70.](#) *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 A.C. 853, 947; *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] A.C. 581, 590; *Arnold v National Westminster Bank Plc* [1991] 2 A.C. 93, 108–109. The better approach may, however, be to ask whether, in all the circumstances, a party's conduct is an abuse rather than to ask whether it amounts to an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances: *Johnson v Gore Wood & Co (A Firm)* [2002] 2 A.C. 1, 30–31.
- [71.](#) *Mills v Cooper* [1967] 2 Q.B. 459, 468. See also *Phosphate Sewage Co v Mollison* (1879) 4 App. Cas. 801; *Ladd v Marshall* [1954] 1 W.L.R. 1489, 1491; *McIlkenny v Chief Constable of West Midlands* [1980] Q.B. 283, 319–320; *Hunter v Chief Constable of West Midlands* [1982] A.C. 529, 541.
- [72.](#) *Arnold v National Westminster Bank Plc* [1991] 2 A.C. 93.
- [73.](#) *Duchess of Kingston's Case* (1776) 20 St.Tr. 573; *Girdlestone v Brighton Aquarium Co* (1879) 4 Ex. D. 107; *Abouloff v Oppenheimer & Co* (1882) 10 Q.B.D. 295; *Vadala v Lawes* (1890) 25 Q.B.D. 310; *Birch v Birch* [1902] P.130; *Nixon v Loundes* [1909] 2 Ir.Rep. 1; *Reg. v Humphreys* [1977] A.C. 1, 39. In the case of an English judgment, it is impeachable in an English court on the ground that it was obtained by fraud but only by the production and establishment of evidence newly discovered since the trial and not reasonably discoverable before the trial (*Boswell v Coaks (No.2)* (1894) 86 L.T. 365n). But in the case of a foreign judgment fresh evidence is not required before it can be attacked on the ground of fraud in an English court (*Abouloff v Oppenheimer & Co* (1882) 10 Q.B.D. 295). In *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 W.L.R. 44 the Privy Council noted this disparity of treatment in disapproving terms and, while they indicated a preference for the general application of the rule which presently governs English judgments, they stopped short of overruling *Abouloff* (as did the Privy Council in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 All E.R. (Comm) 319 at [109]–[121]). However, the Privy Council went on to hold that the court does have an inherent power to prevent misuse of its process and that that power can be exercised to strike out a defence based on an allegation that a foreign judgment has been obtained by fraud where full particulars of the fraud have not been given. *Abouloff* has since been held to be inapplicable to the enforcement of a foreign arbitration award (*Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 Q.B. 740).
- [74.](#) *Rogers v Wood* (1831) 2 B. & Ad. 245.
- [75.](#) See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), Ch.14. See also Barnett, *Res Judicata, Estoppel and Foreign Judgments* (2001).
- [76.](#) *Smith v Nicolls* (1839) 5 Bing. N.C. 208; *Bank of Australasia v Harding* (1850) 9 C.B. 661; *Bank of Australasia v Nias* (1851) 16 Q.B. 717; *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 A.C. 853, 917, 927, 938; *Re Flynn (No.2)* [1969] 2 Ch. 403, 412; *Republic of India v India S.S. Co Ltd* [1993] A.C. 410, 417, 423.
- [77.](#) Proceedings which are “continued” after judgment has been obtained in other proceedings involving the same parties or their privies fall within the scope of “brought” for this purpose: *Republic of India v India S.S. Co Ltd (No.2)* [1998] A.C. 878, 912.
- [78.](#) “Cause of action” is used in the technical sense of every fact which it would be necessary for the claimant to prove, if traversed, to obtain the relief which he claims: *Republic of India v India S.S. Co Ltd* [1993] A.C. 410, 419–421; *Black v Yates* [1992] Q.B. 526, 543–545.
- [79.](#) Defined in Civil Jurisdiction and Judgments Act 1982 s.50.
- [80.](#) “Given” is not to be interpreted narrowly. Thus if the judgment “given” has been set aside there is no longer anything to enforce. In this sense “given” should be read as if it stated “given and remains in his favour”: *Alliance Bank JSC v Aquanta Corp* [2011] EWHC 3281 (Comm), [2012] 1 Lloyd's Rep. 181 at [35].
- [81.](#) s.50.




- [82.](#) s.50.
- [83.](#) s.50.
- [84.](#) A judgment which is not enforceable or entitled to recognition in England does not prevent a claimant from commencing proceedings in England and this is so even if the claimant does not take steps to set aside the unrecognised foreign judgment: *Karafarin Bank v Mansoury-Dara* [2009] EWHC 1217 (Comm), [2009] 2 Lloyd's Rep. 289 at [24]. The result is that a defendant may be required to take steps to set aside the unrecognised foreign judgment and also to defend the proceedings brought in England.
- [85.](#) *Alliance Bank JSC v Aquanta Corp* [2011] EWHC 3281 (Comm), [2012] 1 Lloyd's Rep. 181 at [35].
- [86.](#) *Republic of India v India S.S. Co Ltd* [1993] A.C. 410, 418; *Republic of India v India S.S. Co Ltd* (No.2) [1998] A.C. 878, 912; Davenport (1994) 110 L.Q.R. 25.
- [87.](#) [1993] A.C. 410, 423.
- [88.](#) [1993] A.C. 410, 423–424; *Showlag v Mansour* [1995] 1 A.C. 431, 441; *Republic of India v India S.S. Co Ltd* (No.2) [1998] A.C. 878.
- [89.](#) *Black v Yates* [1992] Q.B. 526, 546–549, distinguishing *Marginson v Blackburn BC* [1939] 2 K.B. 426 on the ground that it was a case of estoppel and not a case of merger (quaere, whether this argument can stand in the light of *Republic of India v India S.S. Co Ltd* [1993] A.C. 410) and on the broader ground that Parliament, when enacting s.34, could not have intended to limit the application of the section to previous proceedings in those countries which have an identical form of action to the English form of action brought by the claimant.
- [90.](#) *Republic of India v India S.S. Co Ltd* (No.2) [1998] A.C. 878, 896 CA.
- [91.](#) *Plummer v Woodburne* (1825) 4 B. & C. 625; *Scott v Pilkington* (1862) 2 B. & S. 11; *Nouvion v Freeman* (1889) 15 App. Cas. 1; *Beatty v Beatty* [1924] 1 K.B. 807; *Blohn v Dessler* [1962] 2 Q.B. 116; *Colt Industries Inc v Sarlie* (No.2) [1966] 1 W.L.R. 1287; *Berliner Industriebank A.G. v Jost* [1971] 2 Q.B. 463; *Helmville Ltd v Astilleros Espanoles SA* [1984] 2 Lloyd's Rep. 569. cf. *Harrop v Harrop* [1920] 3 K.B. 386; *Re Macartney* [1921] 1 Ch. 522; *Westfal-Larson & Co A.S. v Ikerigi Compania Naviera SA* [1983] 1 Lloyd's Rep. 424. A foreign judgment may be final and conclusive even though it is subject to appeal or is under appeal; but cf. Administration of Justice Act 1920 s.9(2)(e); Foreign Judgments (Reciprocal Enforcement) Act 1933 ss.1(3), 5(1); *Joint Stock Company "Aeroflot-Russian Airlines" v Berezovsky* [2014] EWCA Civ 20, [2014] 1 C.L.C. 53 ("the English courts will not hold that a later foreign judgment infringes the finality principle when it interferes with a prior judgment if under the foreign law the prior judgment was not final and binding": at [29]).
- [92.](#) *Carl-Zeiss Stiftung v Rayner & Keeler Ltd* (No.2) [1967] 1 A.C. 853, 917, 925, 967 (estoppel per rem judicatam). In the context of issue estoppel, a decision "on the merits" may be procedural in nature: *D.S.V. Silo-und Verwaltungsgesellschaft mbH v Owners of the Sennar* [1985] 1 W.L.R. 490. cf. *Charm Maritime Inc v Kyriakou* [1987] 1 F.T.L.R. 265 CA; *Harris v Quine* (1869) L.R. 4 Q.B. 653 (limitation); *Black-Clawson International Ltd v Papierwerke-Aschaffenburg A.G.* [1975] A.C. 591 (limitation), but see now the Foreign Limitation Periods Act 1984 s.3.
- [93.](#) See Dicey, Morris and Collins at 14R–020. See also Administration of Justice Act 1920; Foreign Judgments (Reciprocal Enforcement) Act 1933; Dicey, Morris and Collins at 14R–173–14–196. Where there are two competing foreign judgments, each of which is pronounced by a court of competent jurisdiction and is final and not open to impeachment on any ground, then the general rule is that the earlier of them in time must be recognised and given effect to, to the exclusion of the latter, although there may be circumstances under which the party holding the earlier judgment may be estopped from relying on it: *Showlag v Mansour* [1995] 1 A.C. 431.

- [94.](#) i.e. according to the rules of English private international law: see Dicey, Morris and Collins at 14R-054—14-107. See also Administration of Justice Act 1920 s.9(2)(a), (b); Foreign Judgments (Reciprocal Enforcement) Act 1933 ss.4(1)(a)(ii), 2(a); Civil Jurisdiction and Judgments Act 1982 s.33 (as amended).
- [95.](#) See Dicey, Morris and Collins at 14R-137—14-172. By statute, an overseas judgment may also be refused recognition if it is given in proceedings brought in breach of an agreement for settlement of a dispute: see Civil Jurisdiction and Judgments Act 1982 s.32 (as amended); *Tracom SA v Sudan Oil Seeds Co Ltd (Nos 1 and 2)* [1983] 1 W.L.R. 1026; Dicey, Morris and Collins at 14R-097—14-100. See also Administration of Justice Act 1920 s.9(2)(c), (d), (f); Foreign Judgments (Reciprocal Enforcement) Act 1933 ss.4(1)(a)(iv), (v), 8(1), (2); *Owens Bank Ltd v Bracco* [1992] 2 A.C. 443; *House of Spring Gardens Ltd v Waite* [1991] 1 Q.B. 241; *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 W.L.R. 44.
- [96.](#) Brussels Convention (1968) together with the 1971 Protocol thereto, both as amended by the Convention on Accession (1978). See the Civil Jurisdiction and Judgments Act 1982 s.2(2) and Schs 1, 2, 3. See generally Dicey, Morris and Collins, at 14R-197—14-257.
- [97.](#) Lugano Convention (2007). This replaces the previous convention (1988) and took effect in the European Community and Norway on January 1, 2010 (see [2007] O.J. L339/3, given effect in the UK by the Civil Jurisdiction and Judgments Regulations 2009 (SI 2009/3131)).
- [98.](#) Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] O.J. L351/1. The Regulation came into force on January 10, 2015 and recasts and replaces Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L12/1. See the Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929) art.3 and Schs 1, 2 (as amended by the Civil Jurisdiction and Judgments (Amendment) Regulations 2014 (SI 2014/2947)).
- [99.](#) The general duty to recognise the court judgment is to be found in arts 26, 29 and 30 of the Brussels Convention, arts 33, 36 and 37 of the Lugano Convention, and arts 36 and 37 of EU Regulation 1215/2012. The relationship between the two Conventions is regulated by art.64 of the Lugano Convention. The relationship between the Regulation and the two Conventions is regulated by arts 68 and 73 of the Regulation.
- [100.](#) Brussels Convention arts 27, 28, Lugano Convention arts 34, 35 and Regulation 1215/2012 arts 45, 46. An English court should not normally entertain a challenge to a Convention judgment in circumstances in which it would not permit a challenge to an English judgment: *Interdesco SA v Nullifire Ltd* [1992] 1 Lloyd's Rep. 180, 187–188.
- [101.](#) Brussels Convention art.28, Lugano Convention art.35 and Regulation 1215/2012 art.36.
- [102.](#) This would appear to be the effect of s.19 of the Civil Jurisdiction and Judgments Act 1982, since the section is negative in its wording. But see s.18 and Schs 6 and 7 (enforcement). See further Kirsty Hood, *Conflict of Laws Within the UK* (2007), paras 3.69 et seq.
- [103.](#) s.19(1), (2) (subject to s.19(3)). For definitions, see s.50.
- [104.](#) See above, paras 25-011—25-014.
- [105.](#) *Ricardo v Garcias* (1845) 12 Cl. & Fin. 368; *Société Generale de Paris v Dreyfus Bros* (1887) 37 Ch. D. 215; *Taylor v Holland* [1902] 1 K.B. 676, 681; *Jacobson v Frachon* (1927) 138 L.T. 386; *House of Spring Gardens Ltd v Waite* [1991] 1 Q.B. 241. See Dicey, Morris and Collins at 14-030—14-043, 14R-118—14-127.
- [106.](#) *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 A.C. 853, 918, 925–927, 966–967 (contrast at 937–938, 948–949); *Helmville Ltd v Astilleros Espanoles SA* [1984] 2 Lloyd's Rep. 569; *D.S.V. Silo-und Verwaltungsgesellschaft mbH v Owners of the Sennar* [1985] 1 W.L.R. 490, 499; *Black v Yates* [1992] Q.B. 526, 551–552; *Desert Sun Loan Corp v Hill* [1996] 2 All E.R. 847 (no issue estoppel arose because not sufficiently clear that the specific issue which



arose before the court had been identified and decided against the defendant in the foreign court).

[107.](#) *Fracis, Times & Co v Carr* (1900) 82 L.T. 698, 701.

[108.](#)  *The Henrich Björn* (1886) 11 App. Cas. 270, 276, 277; *Castrique v Imrie* (1870) L.R. 4 H.L. 414, 429; *Re Trufort* (1887) 36 Ch. D. 600; *Saleh v Director of the Serious Fraud Office* [2017] EWCA Civ 18 at [48] (“Whatever the appearance of the judgment it will only be regarded as a judgment in rem if it is made by a court with jurisdiction to determine proceedings where the function of those proceedings is to determine rights or status as against the world. Findings which are merely incidental to a determination that the court is required to make in personam are not binding on the world at large”).

[109.](#) Dicey, Morris and Collins at 14R–108—14–117.

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**Section 2. - Alteration or Cancellation of a Written Instrument**

**Material alteration**

**25-020**

If a promisee, without the consent of the promisor, deliberately makes a material alteration in a specialty or other instrument containing words of contract, this will discharge the promisor from all liability thereon, even though the original words of the instrument are still legible. <sup>110</sup> The rationale for the rule is two-fold. First: “no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected” <sup>111</sup> and, second, that the effect of the alteration renders the deed or instrument “no longer the deed or instrument of the party charged”. <sup>112</sup>

**The scope of the rule**

**25-021**

The effect of the rule is therefore to render void the instrument and the obligations to which it would otherwise give rise. Where the instrument which has been altered does not itself contain the obligations of the parties but is to be relied upon by them for the purpose of carrying out the contract, the alteration does not necessarily operate to discharge the parties from their underlying obligations. <sup>113</sup> Whether it does so or not will depend upon the terms of the contract and the facts and circumstances of the case. <sup>114</sup>

**The elements of the rule**

**25-022**

The rule consists of two principal elements. First, the alteration must have been made deliberately. The promisor is therefore not discharged if the alteration is made by accident <sup>115</sup> or by mistake. <sup>116</sup> Not every amendment or note will amount to an “alteration”. <sup>117</sup> Where, for example, the amendment is made in pencil, the court may infer that the amendment is not “an operative and final alteration” <sup>118</sup> but is merely an annotation or a suggestion. <sup>119</sup> Second, the alteration must have been material. The touchstone of materiality has been held to be whether or not:

“... there has been some alteration in the legal effect of the contract or instrument concerned simply in the sense of some alteration in the rights and obligations of the parties.” <sup>120</sup>

In order to show that the alteration is material the:

“... would-be avoider should be able to demonstrate that the alteration is one which, assuming the parties act in accordance with the other terms of the contract, is one which is potentially prejudicial <sup>121</sup> to his legal rights or obligations under the instrument.” <sup>122</sup>

Whether or not the would-be avoider:

“... might or might not have assented to the alteration prior to affixing his signature, had he been requested to do so, is not a matter for investigation by the court when applying the rule.” <sup>123</sup>

### **Material alteration by a stranger**

#### **25-023**

More difficult to justify, however, is the supposed rule that a material alteration made by a stranger while the instrument is in the custody of the promisee discharges the promisor from his obligation. <sup>124</sup> The reason for this is said to be that the alteration of the instrument may raise a doubt as to its identity. <sup>125</sup> If this is so, the reason is both illogical and inadequate. It is illogical, because the same doubt would be raised, whether or not the instrument was in the custody of the promisee, and it is inadequate, because extrinsic evidence would be admissible to prove the true words of the agreement. <sup>126</sup> On the other hand, if the reason for the rule is that an alteration made while the document is in the custody of the promisee raises a suspicion that it was made with his connivance or consent, the situation is already adequately covered, since it is incumbent on the party seeking to enforce an altered instrument to show that the alteration was made in such circumstances as not to invalidate it. <sup>127</sup> The acceptance of the rule would mean that an alteration by an officious burglar would discharge the contract. <sup>128</sup> Such a conclusion has rightly been doubted <sup>129</sup> and it is submitted that the rule should be discarded.

### **Burden of proof**

#### **25-024**

The burden of proving that the promisee has, without the consent of the promisor, deliberately made a material alteration to a written instrument would appear to be on the promisor. <sup>130</sup> But, once it has been proved or it is apparent from the face of the instrument that it has been altered, the burden of proof switches to the promisee to show that the alteration was made in circumstances which were insufficient to discharge the promisee from all liability under the instrument (for example, by proving that the alteration was made before the promisor signed the document). <sup>131</sup> The question whether an alteration is material is a matter of law for the court. <sup>132</sup>

### **Immaterial alteration**

#### **25-025**

An instrument is not discharged by an immaterial alteration, that is to say, one which does not alter the legal effect of the instrument or impose a greater liability on the promisor. <sup>133</sup> Cases in which the alteration has been held to be immaterial have been held to fall into two groups: (i) where it either was or could have been said that the alterations either rendered express, or had no effect upon (in the sense of adding nothing to), what the law would otherwise provide or imply <sup>134</sup>; and (ii) where the alteration corrects a mere “misdescription” which can be cured by parol evidence that a person or entity referred to has in fact been misdescribed and that the alteration merely corrects the error in description in accordance with the original intention. <sup>135</sup> Thus the addition, without the assent of the

maker, of the words “on demand” to a promissory note did not vitiate the instrument, since the alteration only expressed the legal effect of the note as originally drawn.<sup>136</sup> The alteration in a charterparty of the time of sailing has been held to be material as it altered its legal effect.<sup>137</sup>

## Negotiable instruments

### 25-026

By s.64(1) of the Bills of Exchange Act 1882, where a bill or acceptance is materially altered<sup>138</sup> without the assent of all parties liable on the bill, the bill is avoided, except as against a party who himself made, authorised or assented to the alteration, and subsequent indorsers<sup>139</sup>; provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.<sup>140</sup>

## Bank of England notes

### 25-027

In the case of notes issued by the Bank of England, even an alteration which does not affect the contract may be sufficient to avoid the instrument. Thus where such notes had been fraudulently altered by erasing the numbers on them and substituting others with the object of preventing the notes from being traced, the Court of Appeal held that although the alteration did not vary the contract, it was material in the sense of altering the notes in an essential part and that the notes were therefore void.<sup>141</sup>

## Cancellation

### 25-028

In early law, the accidental destruction or cancellation of a deed or of its seal prevented it being sued upon.<sup>142</sup> Now only the intentional cancellation by the promisee of a bond<sup>143</sup> or bill or promissory note<sup>144</sup> is sufficient.

## Loss

### 25-029

The loss of a deed or written instrument does not destroy the obligation, but only affects the question of proving the instrument.<sup>145</sup> By s.69 of the Bills of Exchange Act 1882 the holder has the right to a duplicate of a lost bill.<sup>146</sup>

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<sup>110.</sup> *Pigot's Case* (1614) 11 Co. Rep. 26b (deed); *Master v Miller* (1791) 4 Term Rep. 320; *Croockewit v Fletcher* (1857) 1 H. & N. 893; *Sellin v Price* (1867) L.R. 2 Ex. 189, and cases cited in n.135, below cf. *Hamelin v Bruck* (1846) 9 Q.B. 306; *Pattinson v Luckley* (1875) L.R. 10 Ex. 330. See generally Norton on Deeds, 2nd edn, p.34; Holmes (1897) 10 Harvard L.R. 457, 473; Williston (1904) 18 Harvard L.R. 105, 165 and for criticism of the rule see Rogers, *The End of Negotiable Instruments: Bringing Payment Systems Out of the Past* (2012), pp.102–110. For the effect of alteration on joint obligations, see above, para.17-022; for negotiable instruments, see below para.25-026 and Vol.II, para.34-140.

<sup>111.</sup> *Master v Miller* (1791) 4 Term Rep. 320, 329; *Co-operative Bank Plc v Tipper* [1996] 4 All E.R. 366, 369–370, where the severity of the rule is noted by Roger Cooke J.

- [112.](#) *Raiffeisen Zentralbank Österreich AG v Crossseas Shipping Ltd* [2000] 1 W.L.R. 1135, 1143.
- [113.](#) *Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd* [2010] EWCA Civ 1335, [2011] Q.B. 943.
- [114.](#) [2010] EWCA Civ 1335, [2011] Q.B. 943 at [34].
- [115.](#) *Hong Kong and Shanghai Bank v Lo Lee Shi* [1928] A.C. 181; *Pickenham Romford Ltd (In Administration) v Deville* [2013] EWHC 2330 (Ch), [2014] 1 B.C.L.C. 380 at [24].
- [116.](#) *Henfree v Bromley* (1805) 6 East 309; *Wilkinson v Johnson* (1824) 3 B. & C. 428.
- [117.](#) It may be necessary in certain cases to distinguish between an “alteration” to a document and an “appendage” to the contract. Thus the addition of an incorrect date after the document has been signed may amount to an “appendage” rather than an alteration: *Moussavi-Azad v Sky Properties Ltd* [2003] EWHC 2669 (QB), [2003] All E.R. (D) 38 (Dec) at [49]. This may be thought to introduce an unnecessary element of sophistry into the rule and that the better view is that such an addition is an “alteration” and the vital question then becomes whether that alteration is “material”.
- [118.](#) *Co-operative Bank Plc v Tipper* [1996] 4 All E.R. 366, 372.
- [119.](#) [1996] 4 All E.R. 366.
- [120.](#) *Raiffeisen Zentralbank Österreich AG v Crossseas Shipping Ltd* [2000] 1 W.L.R. 1135, 1146.
- [121.](#) It is not necessary to show that prejudice has in fact occurred. The rule is a salutary one which is aimed at the prevention of fraud and so it suffices to establish that the prejudice is potential: *Raiffeisen Zentralbank Österreich AG v Crossseas Shipping Ltd* [2000] 1 W.L.R. 1135, 1148. However, there must be evidence from which a court can infer a potential prejudice: *Governor and Co of the Bank of Scotland v Henry Butcher & Co* [2003] EWCA Civ 67, [2003] 1 B.C.L.C. 575 at [73]–[74].
- [122.](#) *Raiffeisen Zentralbank Österreich AG v Crossseas Shipping Ltd* [2000] 1 W.L.R. 1135, 1148. The position may be otherwise where a bank note or negotiable instrument has been altered after its execution without the approval of the parties.
- [123.](#) *Raiffeisen Zentralbank Österreich AG v Crossseas Shipping Ltd* [2000] 1 W.L.R. 1135, 1150.
- [124.](#) *Pigot’s Case* (1614) 11 Co. Rep. 26b; *Davidson v Cooper* (1844) 13 M. & W. 343; *Croockwit v Fletcher* (1857) 1 H. & N. 893, 912
- [125.](#) *Sanderson v Symonds* (1819) 1 B. & B. 426, 430.
- [126.](#) See above, paras 13-108 et seq.
- [127.](#) *Johnson v Duke of Marlborough* (1818) 2 Stark. 313; *Bishop v Chambre* (1827) Moo. & M. 116.
- [128.](#) Williams, *Joint Obligations*, para.67.
- [129.](#) *Lowe v Fox* (1887) 12 App. Cas. 206, 217. Although the rule is “at the very least questionable”, it may be premature to assume that it no longer represents the law: *Pickenham Romford Ltd (in administration) v Deville* [2013] EWHC 2330 (Ch), [2014] 1 B.C.L.C. 380 at [24].
- [130.](#) There does not appear to be any authority in English law for this proposition but it flows from the general principle that he who alleges must prove. See generally on alterations Phipson on Evidence, 18th edn (2013), paras 40–45—40–49.
- [131.](#) *Johnson v Duke of Marlborough* (1818) 2 Stark. 313, 317; *Bishop v Chambre* (1827) M. & M. 116; *Henman v Dickinson* (1828) 5 Bing. 183; *Knight v Clements* (1838) 8 A. & E. 215, 220;

- Cariss v Tatterswell* (1841) 2 M. & G. 890; *Clifford v Parker* (1841) 2 M. & G. 909, 911. See also Halsbury's Laws of England, 4th edn (2006 reissue), Vol.12(1), para.1056 and the notes to *Master v Miller* 1 Smith L.C., 13th edn, pp.807, 818. A different rule would appear to apply to deeds because, in the case of a deed, there is a presumption that the alteration was made before the deed was delivered, so that the promisor bears the burden of proving that the alteration was made after the deed was delivered: *Doe d. Tatum v Catmore* (1851) 16 Q.B. 745, 747; Halsbury's Laws of England at Vol.13, para.81.
132. *Vance v Lowther* (1876) 1 Ex. D. 176, 178. The burden of proof would appear to be on the promisee to show that the alterations did not alter the liabilities of the parties on the instrument: *Koch v Dicks* [1933] 1 K.B. 307, 321.
133. *Pigot's Case* (1614) 11 Co. Rep. 26b, as qualified in *Aldous v Cornwell* (1868) L.R. 3 Q.B. 573; *Bishop of Crediton v Bishop of Exeter* [1905] 2 Ch. 455; *Moussavi-Azad v Sky Properties Ltd* [2003] EWHC 2669 (QB), [2003] All E.R. (D) 38 (Dec) at [48]–[51] and *National Westminster Bank Plc v Alfano* [2012] EWHC 1020 (QB), [2012] All E.R. (D) 94 (Apr).
134. See, e.g. *Aldous v Cornwell* (1868) L.R. 3 Q.B. 573; *Bishop of Crediton v Bishop of Exeter* [1905] 2 Ch. 455; *Caldwell v Parker* (1869) 3 I.R. Eq. 519.
135. See, e.g. *Re Howgate and Osborn's Contract* [1902] 1 Ch. 451; *Lombard Finance Ltd v Brookplain Ltd* [1991] 1 W.L.R. 271, 274.
136. *Aldous v Cornwell* (1868) L.R. 3 Q.B. 573. See also *Waugh v Bussell* (1814) 5 Taunt. 707; *Sanderson v Symonds* (1819) 1 B. & B. 426; *Wood v Slack* (1868) L.R. 3 Q.B. 379; *Decroix v Meyer* (1890) 25 Q.B.D. 343; *Re Howgate and Osborne's Contract* [1902] 1 Ch. 451; *Bishop of Crediton v Bishop of Exeter* [1905] 2 Ch. 455.
137. *Croockewit v Fletcher* (1857) 1 H. & N. 893. See also *Davidson v Cooper* (1844) 13 M. & W. 343; *Re United Kingdom Shipowning Co Ltd* (1865) 2 De G.J. & Sm. 456; *Sellin v Price* (1867) L.R. 2 Ex. 189; *Suffell v Bank of England* (1881–82) L.R. 9 Q.B.D. 555; *Slingsby v District Bank* [1932] 1 K.B. 544; *Koch v Dicks* [1933] 1 K.B. 307.
138. A material alteration is partly defined by s.64(2). See generally Chalmers and Guest on Bills of Exchange and Cheques, 17th edn (2009), para.8–081; Byles on Bills of Exchange and Cheques, 29th edn (2013), paras 20–10–20–12; and Vol.II, paras 34–140–34–141.
139. *Master v Miller* (1791) 4 Term Rep. 320; *Burchfield v Moore* (1854) 23 L.J.Q.B. 261; *Woollatt v Stanley* (1928) 138 L.T. 620.
140. *Scholfield v Londesborough* [1896] A.C. 514; *Imperial Bank of Canada v Bank of Hamilton* [1903] A.C. 49; *London Joint Stock Bank v Macmillan* [1918] A.C. 777.
141. *Suffell v Bank of England* (1882) 9 Q.B.D. 555; *Slingsby v Westminster Bank* [1931] 1 K.B. 173; *Slingsby v District Bank* [1932] 1 K.B. 544; *Arab Bank v Ross* [1952] 2 Q.B. 216. cf. *Leeds Bank v Walker* (1883) 11 Q.B.D. 84; *Hongkong and Shanghai Bank v Lo Lee Shi* [1928] A.C. 181.
142. Shep.Touch. 69; *Nichols v Haywood* (1545) Dyer 59a (seal eaten by mice).
143. *Bamberger v Commercial Credit Co* (1855) 15 C.B. 676, 693; *Perrott v Perrott* (1811) 14 East 423; *Carew v White* (1829) 2 Moo. & P. 558.
144. Bills of Exchange Act 1882 s.63. See Vol.II, para.34-139.
145. *Read v Price* [1909] 2 K.B. 724, 737.
146. See also s.70 of the 1882 Act and Vol.II, paras 34-145, 34-146.



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**Death**

**25-030**

A personal contract is discharged by the death of either party. [147](#)

**Bankruptcy**

**25-031**

Proceedings in bankruptcy may act as a discharge of rights and liabilities under a contract. [148](#)

**Winding up**

**25-032**

The winding up of a company may result in a stay of proceedings in contract against the company and the discharge of the contract. [149](#)

**Set-off and counterclaim**

**25-033**

Where an action is brought for damages for breach of contract, the defendant may claim a set-off or counterclaim in the same action, and judgment may be given for the balance in favour of the claimant or the defendant. [150](#) This judgment operates to discharge the obligations involved in the claim and set-off or counterclaim. The position is otherwise where the defendant claims a set-off but does not make a counterclaim. In such a case the defendant can later issue fresh proceedings against the claimant even though the claimant has accepted a payment into court made by the defendant in settlement of the claimant's claim against the defendant and the allegations made by the defendant are essentially the same as those pleaded in his defence to the claimant's action. [151](#)

**Limitation**

**25-034**

A right of action arising out of a breach of contract may be barred or extinguished by the operation of the Limitation Act 1980 or other limitation enactment. [152](#)

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- [147.](#) See above, paras 20-006, 23-037; Vol.II, para.40-176.
- [148.](#) See above, paras 20-032—20-035, 20-037, 20-046—20-048.
- [149.](#) See above, paras 10-047—10-051.
- [150.](#) CPR Pt 20 r.20.2 and CPR Pt 16 r 16.6.
- [151.](#) *Hoppe v Titman* [1996] 1 W.L.R. 841. The Court of Appeal reached this conclusion with some reluctance but, on the facts, there was no suggestion from the plaintiffs, when the payment in was made, that it was intended to take into account and satisfy their own cause of action for breach of contract.
- [152.](#) See below, Ch.28.

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