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Mortgages--Receivers--Negligence (Alta Holding Co., Inc. v. Ninson Realty Corp., et al., 241 App. Div. 166 (1st Dept. 1934))

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MORTGAGES—RECEIVERS—NEGLIGENCE.—Petitioners are tenants suing for personal injuries and loss of services, occasioned by the fall of a ceiling. The receiver is sought to be charged with negligence for failing to repair said ceiling after notice of its defective condition. Petitioners were granted an *ex parte* order to sue the receiver, who now seeks an order vacating the *ex parte* order and setting aside all proceedings commenced thereunder. *Held,* granted. Receiver *pendente lite* to collect rents and profits is not chargeable with acts of passive negligence in not keeping the premises in repair. *Alta Holding Co., Inc.* v. *Ninson Realty Corp., et al.,* 241 App. Div. 166, 271 N. Y. Supp. 556 (1st Dept. 1934).

A receiver is a ministerial officer of the court [1] and the scope of his duty is purely administrative.[2] His authority is limited by the terms of the decree and persons dealing with him are bound at their peril to take notice of the limitations of his power.[3]

The policy of the First Department in denying a right of action against a receiver for passive negligence was founded in *Fischer* v. *Glaser.*[4] Such policy has been consistently followed by courts within the jurisdiction of the First Department.[5] Such holding, however, flies in the face of contrary decisions of the courts of the Second Department jurisdiction, wherein leave has been granted to sue a receiver of rents in a foreclosure action, making no distinction between affirmative and passive negligence.[6]

In view of the trend of modern conditions affecting this type of receivership,[7] the policy enunciated by the courts of the Second De-

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[1] Booth v. Clark, 17 How. 322, 58 U. S. 322 (1854); Jones v. Perkins, 115 Kan. 759, 225 Pac. 97 (1924); Vila v. Grand Island Elec. Light Co., 68 Neb. 222, 94 N. W. 136 (1903).

[2] Lyman v. Central Vermont Ry. Co., 59 Vt. 167, 10 Atl. 346 (1887).

[3] Interior Securities Co. v. Campbell, 55 Mont. 459, 178 Pac. 582 (1919).

[4] Fischer v. Glaser *et al.,* 168 App. Div. 326, 153 N. Y. Supp. 1008 (1st Dept. 1915). Such decision is also the basis of similar holdings of textbook writers. 1 WILTSIE, MORTGAGE FORECLOSURE (4th ed. 1927) §619; 3 JONES, MORTGAGES (8th ed. 1928) §1951. The Fischer case, *supra,* proceeds on the theory that authority of the receiver was limited to collecting the rents, issues and profits and without authority of the court to do so, he could not make repairs. In the instant case the order appointing the receiver authorized him *to keep said premises in repair and insured* but petitioner (tenant) did not allege such authority.

[5] Women's Hospital of State of New York v. Loubern Realty Corp., 240 App. Div. 949, 267 N. Y. Supp. 996 (1st Dept. 1933); N. Y. Life Ins. Co. v. Hazlitt Realty Corp., 241 App. Div. 169, 271 N. Y. Supp. 560 (1st Dept. 1934); Equitable Life Assurance Society v. Munson Realty Corp., 151 Misc. 195, 270 N. Y. Supp. 32 (1934); Matter of Garvin, N. Y. L. J., March 5, 1934, at 1069; Irving Savings Bank v. Sorro Construction Corp., N. Y. L. J., March 13, 1934, at 1211.

[6] Krohn v. Silverman, 240 App. Div. 911, 267 N. Y. Supp. 1017 (2d Dept. 1933); City Real Estate Co. v. Realty Const. Corp., 240 App. Div. 1000, 268 N. Y. Supp. 953 (2d Dept. 1933); Cusimano v. Strong, 241 App. Div. 766, 270 N. Y. Supp. 542 (2d Dept. 1934); Gabriele v. Kent Realty Co. Inc., 150 Misc. 415, 270 N. Y. Supp. 33 (1934).

[7] Dissenting opinion of O'Malley, J., N. Y. Life Ins. Co. v. Hazlitt Realty Corp., *supra* note 5, wherein he states, 241 App. Div. at 170, 271 N. Y. Supp.

partment seems more forceful and may well find approval in the Court of Appeals, which in a recent decision,[8] evidences a recognition of the validity of the tenant's rights.

A. R. L.

RES ADJUDICATA—PRIVITY OF PARTIES—IDENTITY OF CAUSE OF ACTION.—Plaintiff alleges that he suffered damages as a result of a collision between an automobile operated by him and one operated and controlled by the defendant who, at the time of the accident, was an employee acting in the course of his employer's business and with his consent. In a prior action by the same plaintiff against the employer, a jury rendered a verdict for the latter. On appeal from an order of the Supreme Court granting the defendant's motion to dismiss the complaint, pursuant to rule 107, Rules of Civil Practice, *held,* where a suit against the master, based on the negligence of the servant, was finally determined adversely to the plaintiff such adjudication is a bar to a similar suit against the servant. *Wolf* v. *Kenyon,* 242 App. Div. 116, 273 N. Y. Supp. 170 (3d Dept. 1934).

Under the doctrine of *res adjudicata,* an existing final judgment rendered upon the merits by a court of competent jurisdiction is conclusive of the rights of the parties, or their privies. in all other actions upon the issues adjudicated in the first suit.[1] The general rule is that an estoppel of judgment must be mutual.[2] When dealing with estoppel of judgment, privity denotes a mutual or successive

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at 561, "The court, moreover, may well take judicial notice that receiverships of this nature now continue for a longer period than was formerly the custom. Conditions are unfavorable for an advantageous sale. It is generally to the interest, not only of the owner of the equity but also of the mortgagee and others concerned to delay a sale and to endeavor otherwise to work a solution. Disinclination to resort to a sale is further increased by recent legislation respecting the entry of judgment for a deficiency. (Chapter 794, Laws of 1933 [EX. SESS.]; §§1083a and 1083b, CIVIL PRACTICE ACT.)"

[8] Prudence Co. v. 160 West Seventy-third Street Corp., 260 N. Y. 205, 211, 183 N. E. 365, 366 (1932). Lehman, J., writing the opinion, states: "* * * Though during the pendency of the action, a court of equity has power to issue interlocutory orders for the protection of an asserted lien, such orders must be auxiliary to the right to foreclose the lien and *cannot deprive any party of a title or a right which though subordinate to the lien of the mortgage survive and are valid* until the lien is foreclosed by a sale under a judgment of foreclosure." (Italics author's.)

[1] Fish v. Vanderlip, 218 N. Y. 29, 112 N. E. 425 (1916); see People *ex rel.* Norwich Pharmacal Co. v. Porter *et al.,* 132 Misc. 609, 610, 230 N. Y. Supp. 364, 365 (1928).

[2] Booth v. Powers, 56 N. Y. 22 (1874); St. John's v. Fowler, 229 N. Y. 270, 128 N. E. 199 (1920); see Kohly v. Fernandez, 133 App. Div. 723, 727, 118 N. Y. Supp. 163, 166 (1st Dept. 1909).