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Comment

RES JUDICATA IN CALIFORNIA

All too often an attorney must inform his client that his otherwise well-founded claim has failed in court because of the insuperable barrier of res judicata. The vast practical significance of the doctrine described by these two Latin words would seem to make it mandatory that it should be clearly annunciated and its precepts firmly established. Alas, the opposite is the case. A veritable quagmire has developed around the term res judicata. It has been used, or misused, in a number of ways and has been held to apply in radically differing situations and to have widely varying requirements.¹

In this comment an attempt will be made to discuss the basic concepts of res judicata and to highlight some of the peculiarities which have been

¹ Note the following statement from *Bingham v. Kearney*, 136 Cal. 175, 177, 68 Pac. 597 (1902), "... judgment between the same parties is conclusive not only as to the subject matter in controversy in the action upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated . . ." This statement is susceptible to the erroneous interpretation that an issue, whether or not actually litigated in the first suit, is foreclosed in another action between the same parties, whether the same cause of action or another cause is the basis of the second action. Similarly see, *Southern Pacific Co. v. Edmunds*, 168 Cal. 415, 143 Pac. 597 (1914); *Agnifili v. Laguna*, 204 Cal. 262, 267 Pac. 705 (1928) (loose use of the term "bar").

engrafted upon the doctrine in California. Particular attention will be given to three major problems:

(1) The effect of a prior suit by the plaintiff upon a subsequent suit by him;

(2) The effect of a prior suit upon a defendant therein where he is defending a second suit;

(3) The effect of a prior suit upon a defendant where he is plaintiff in a subsequent suit under general law and under Section 439 of the California Civil Code. The discussion will concern itself primarily with ordinary *res judicata*, which is chiefly a plaintiff's problem. Collateral estoppel, which primarily concerns the defendant either as plaintiff or defendant in subsequent suits, will be discussed only to the extent that language and practical results of the cases are similar to ordinary *res judicata* situations.

The term *res judicata* has been used to describe two essentially different rules which should be distinguished.² First, final determination of any litigation precludes a new suit on the same "cause of action." If the plaintiff won the prior action, all claims which he may subsequently raise "merge" in the judgment obtained, and any further action must be based on that judgment;³ if he lost, he is "barred" from suing anew on the same cause of action.⁴

Secondly, if a suit, though based on a differing cause of action, involves "issues" previously litigated in another suit, *res judicata* will prevent raising such issues again. This aspect of the doctrine is known as "collateral estoppel."

Both aspects of *res judicata*, bar or merger and collateral estoppel, require that the prior suit must have gone to final judgment on the merits⁵ and that both suits involved the same parties or their privies.⁶

Collateral estoppel is more limited in its effect than bar or merger. A requisite to application of collateral estoppel is that the particular issue must have been actually or necessarily litigated. Also, since a different cause of action is involved in the two suits between the plaintiff and defendant

² For several clear statements of the doctrine of *res judicata* by California courts see *Panos v. Great Western Packing Co.*, 21 Cal. 2d 636, 134 P.2d 242 (1943); *Bernhard v. Bank of America*, 19 Cal. 2d 807, 122 P.2d 892 (1942); *Todhunter v. Smith*, 219 Cal. 690, 28 P.2d 916 (1934); *Horton v. Greenough*, 184 Cal. 451, 194 Pac. 34 (1920). These statements accord with the prevailing view on *res judicata*.

³ *California Nat. Supply Co. v. Porter*, 83 Cal. App. 758, 257 Pac. 161 (1927) (also reference to bar); *RESTATEMENT, JUDGMENTS* § 45, comment *a* (1942).

⁴ *Triano v. F. E. Booth Co.*, 120 Cal. App. 345, 8 P.2d 174 (1932). (The child plaintiff was injured by the gears of defendant's machine. The plaintiff lost the first suit which was tried on an attractive nuisance theory; a later suit sought recovery on the ground that the child slipped and fell into the unguarded machine.) Similarly see *RESTATEMENT, JUDGMENTS* § 45, comment *b*.

⁵ The complex problems relating to what constitutes a final judgment on the merits and privity of parties are beyond the scope of this comment.

⁶ The California rule as to identity of parties in the collateral estoppel situation is unusual. It only requires that the party against whom collateral estoppel is raised must have been a party to the prior suit in which the issue was litigated. The party relying on collateral estoppel need not have been a party to the prior action. *Bernhard v. Bank of America*, *supra* note 2.

or their privies, the collateral estoppel effect would not necessarily be determinative of the second action.

California courts use the term *res judicata* in at least three senses: to refer to (1) bar and merger;⁷ (2) collateral estoppel;⁸ and (3) bar, merger, and collateral estoppel.⁹ Further confusion is caused by the indiscriminate use of the term "estoppel" as the equivalent of bar and merger.¹⁰

For purposes of this comment the following terminology will be adhered to:

Res judicata will be used in its broad sense to include merger, bar, and collateral estoppel.¹¹

The term *ordinary res judicata* will be used to refer to the bar and merger aspect of the doctrine.

Collateral estoppel will describe that aspect of *res judicata* giving conclusiveness to issues actually litigated and determined in a prior action when they arise again in a subsequent different action between the same parties or their privies.¹²

Policy Basis of Res Judicata

Res judicata penalizes the client for the mistakes of his attorney. This fact has led one commentator to ask whether the punishment fits the crime.¹³ Application of *res judicata* should be evaluated and discussed with an ever present eye on its policy basis. Policy reasons for ordinary *res judicata* and collateral estoppel are not the same though they overlap.

Justifications advanced for ordinary *res judicata* include the need for an end to litigation,¹⁴ prevention of multifarious law suits,¹⁵ protection of persons from being sued twice in the same cause,¹⁶ and conservation of court time by preventing needless relitigation.¹⁷

⁷ *E.g.*, *Servente v. Murray*, 10 Cal. App. 2d 355, 52 P.2d 270 (1935).

⁸ See the concurring opinion in *Fulton v. Hanlow*, 20 Cal. 450 (1862). (This opinion may be using the term *res judicata* to refer to both ordinary *res judicata* and collateral estoppel.)

⁹ *Panos v. Great Western Packing Co.*, *supra* note 2; *Todhunter v. Smith*, *supra* note 2. See also Cleary, *Res Judicata Reexamined*, 57 YALE L. J. 339 (1948).

¹⁰ *Steiner v. Thomas*, 94 Cal. App. 2d 655, 211 P.2d 321 (1949).

¹¹ *Panos v. Great Western Packing Co.*, *supra* note 2; *Todhunter v. Smith*, *supra* note 2; RESTATEMENT, JUDGMENTS, Introductory Note 157, 160.

¹² *Bernhard v. Bank of America*, *supra* note 2; *Sutphin v. Speik*, 15 Cal. 2d 195, 99 P.2d 652 (1940); RESTATEMENT, JUDGMENTS § 45, comment *c*. Illustrative of this rule is a suit to recover contract installments in which the defense is non-execution. Assuming the plaintiff recovered in the first suit, collateral estoppel would prevent the defendant from again litigating the issue of *execution* in a suit for a subsequent installment. However, the defendant could still utilize another defense such as payment of the subsequent installment. Similarly, the plaintiff would be precluded from raising the issue of execution in a suit based on the same contract initiated by the defendant. This situation could arise where the original defendant sued to recover for the original plaintiff's breach of his promise subsequent to the first suit. This would be possible if the promises in the contract were expressly made independent.

¹³ Cleary, *supra* note 9.

¹⁴ *E.g.*, *Dilliard v. McKnight*, 34 Cal. 2d 209, 209 P.2d 387, 11 A.L.R. 2d 835 (1949).

¹⁵ *Bernhard v. Bank of America*, *supra* note 2.

¹⁶ *Ibid.*

¹⁷ *Wulfjen v. Dolton*, 24 Cal. 2d 891, 151 P.2d 846 (1944); *Bingham v. Kearney*, *supra* note 1. This rationalization of the rule has been subject to especially severe criticism on the ground that it is the function of a court to decide disputes on the merits.

The policy reason for collateral estoppel is to prevent a party who has had one fair trial on an issue from again drawing it into controversy, thereby saving court time and preventing the other party from being unduly vexed.¹⁸ The one policy involved in ordinary res judicata which is not involved in collateral estoppel is the certainty, stability and finality of the first judgment.

A party may waive application of res judicata when it would operate for his benefit.¹⁹ This has been pointed to as being inconsistent with the policies of prevention of litigation and the economizing on court time.²⁰ This waiver rule underscores the fact that the fundamental policy underlying the doctrine is the prevention of vexatious litigation.

The doctrine of ordinary res judicata precludes a second suit on the same cause of action. This result can be expressed in three different ways: (1) that the cause of action was barred by or merged in the first judgment; (2) that the plaintiff cannot split his cause of action; (3) that the matter might have been litigated in the first action.

THE CAUSE OF ACTION

Since ordinary res judicata precludes a new suit upon the same cause of action after final judgment on the merits, it is vital to determine when the same cause of action will be involved.

Definitions of a cause of action are multitudinous,²¹ but are based on a few major theories: (1) the primary right theory.²² Under this theory, cause of action is defined as an obligation sought to be enforced; (2) the factual test theory. Adherents of this concept have defined cause of action variously as a) the underlying evidence in a suit;²³ b) all claims arising out of the same transaction or occurrence;²⁴ c) coextensive with the neces-

¹⁸ *Bernhard v. Bank of America*, *supra* note 2 at 811, 122 P.2d at 894.

¹⁹ See the broad dictum (quote from 34 C.J. 829) in *United Bank and Trust Co. v. Hunt*, 1 Cal. 2d 340, 345, 34 P.2d 1001, 1004 (1934).

²⁰ *Von Moshzisker, Res Judicata*, 38 *YALE L.J.* 299, 317 (1929).

²¹ *E.g.*, *Harris, What is a Cause of Action?*, 16 *CALIF. L. REV.* 459 (1928); *McCaskill, The Elusive Cause of Action*, 4 *U. OF CHI. L. REV.* 281 (1937); *Schopflocher, What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?*, 21 *ORE. L. REV.* 319 (1942); *Wheaton, Cause of Action Blended*, 22 *MINN. L. REV.* 498 (1938).

Cases defining cause of action for purposes of determining the propriety of pleading amendments and joinder of causes of action will be used in this discussion of the cause of action, since the courts cite them as precedent when defining cause of action in res judicata situations.

E.g., *Panos v. Great Western Packing Co.*, *supra* note 2, relied on *Frost v. Witter*, 132 Cal. 421, 64 Pac. 705 (1901) (pleading amendment case). It may be observed, however, that cause of action should be more liberally defined in pleading cases than in res judicata situations, since the policy in the former requires only that the opposing party have adequate notice of all issues to be raised and for joinder purposes a broad cause of action tends to facilitate the trial of plaintiff's claims.

²² *E.g.*, *Panos v. Great Western Packing Co.*, *supra* note 2; *Wiley v. McCaffrey*, 103 Cal. App. 2d 621, 230 P.2d 152 (1951); *RESTATEMENT, JUDGMENTS* § 63, comment *d*.

²³ *E.g.*, *Morrison v. Willhoit*, 62 Cal. App. 2d 830, 145 P.2d 707 (1944) (fact language); *Phelan v. Quinn*, 130 Cal. 374, 62 Pac. 623 (1900); *Taylor v. Castle*, 42 Cal. 367 (1871); *RESTATEMENT, JUDGMENTS* § 61, comment *a. Cf.*, *Seney v. Pickwick Stages*, 206 Cal. 389, 274 Pac. 536 (1929).

²⁴ *Morrison v. Willhoit*, *supra* note 23; *Woolverton v. Baker*, 98 Cal. 628, 33 Pac. 731 (1893).

sary allegations of a suit;²⁵ d) constituting as many facts as may be conveniently tried at one hearing;²⁶ (3) the discretion of the court theory. Under this view the identity of a cause of action depends on the court's discretion, keeping in mind the underlying policies of ordinary *res judicata* and considering the peculiarities of the case.²⁷

Another group of cases offers no particular theory but instead considers the identity of a cause of action a question of common sense.²⁸

Primary Right Theory

Under the primary right (defendant's obligation) theory occurrences are viewed entirely from plaintiff's point of view. An action is considered to constitute the right or power to enforce an obligation.²⁹ The violation of each primary right of the plaintiff gives rise to a separate cause of action.

The California Supreme Court early declared its allegiance to the primary right theory³⁰ and apparently still adheres to it.³¹

The primary right approach, however, adds a further definitional problem: What constitutes the "primary right" or "obligation" forming the basis of plaintiff's right?

Tort Cases.—An interesting illustration of the futility of the primary right theory as a tool of legal analysis is furnished by its application to tort cases.

Under the primary right theory a tort gives rise to as many causes of action as there are obligations arising in the defendant. Thus a single tortious act results in separate causes of action for injury to property and to persons.³² Similarly, separate causes of action exist for injuries to a person's real property, personal property, and to his character.³³

On the other hand, only a single cause of action has been held to exist where a defendant at different times trespassed on the same property, physically injured the plaintiff, and converted the plaintiff's property.³⁴ This case may be explained so as to come within the primary right approach by emphasizing that the court relied on the unity of acts as a scheme to

²⁵ *Fay v. Craggs Land Co.*, 62 Cal. App. 2d 445, 145 P.2d 46 (1944); *Henderson v. Miglietta*, 206 Cal. 125, 273 Pac. 581 (1928) (similarity of cross complaint in first suit and complaint in second suit).

²⁶ CLARK, CODE PLEADING 137-40 (2d ed. 1947).

²⁷ Cleary, *supra* note 9; Von Moschzisker, *supra* note 20.

²⁸ *Triano v. F. E. Booth Co.*, *supra* note 4; *Owens v. McNally*, 124 Cal. 29, 56 Pac. 615 (1899).

²⁹ *Frost v. Witter*, *supra* note 21 at 426, 64 Pac. at 707. See *Panos v. Great Western Packing Co.*, *supra* note 2.

³⁰ *Hutchinson v. Ainsworth*, 73 Cal. 452, 15 Pac. 82 (1887); *Frost v. Witter*, *supra* note 21 (amendment of pleadings).

³¹ *Wulfjen v. Dolton*, *supra* note 17.

³² *Todhunter v. Smith*, *supra* note 2; *Schermerhorn v. Los Angeles Pac. R.R.*, 18 Cal. App. 454, 123 Pac. 351 (1912).

³³ *Bowman v. Wohlke*, 166 Cal. 121, 135 Pac. 37 (1913) (misjoinder and amendment case); *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56 (1895) (misjoinder).

³⁴ *Tooke v. Allen*, 85 Cal. App. 2d 230, 192 P.2d 804 (1948).

deprive the tenant of enjoyment of the property.³⁵ But such an interpretation departs from the view that the pecuniary right springs from and equals the obligation of the defendant, and serves to emphasize that the problem has merely been shifted from what constitutes a cause of action to what constitutes a primary right.

Likewise, a single cause of action was held to exist where damage was caused by construction of a railroad in front of two separate lots of property in adjoining blocks.³⁶ The court applied a "one tort, one single cause of action rule."³⁷ But since the torts were committed at different times, and two different pieces of property were involved, in truth two torts occurred. The result of this case appears difficult to reconcile with the primary right theory.

Contract Cases.—Even in contract cases the primary right theory is sometimes difficult to apply. For instance, in *Steiner v. Thomas*,³⁸ the plaintiff sought to recover on a breach of contract to will certain property. Plaintiff had lost a prior suit to rescind her own promise of conveyance to the defendant involving the same property and the same agreement. The plaintiff was not permitted to sue, on the ground that the same cause of action was involved in the two suits.³⁹ The court relied on the fact approach in conjunction with the primary right technique in reaching its result.⁴⁰ Only if "primary right" is defined as the right to the property can a glaring inconsistency with the primary right approach here be avoided.⁴¹

It is not clear why both the remedial right to rescind a promise to convey and the right arising from the promise to will property should be unenforceable, unless the basis for the rescission also constituted the breach of the defendant's promise. The plaintiff lost her suit to rescind her promise, and thus her action to enforce the defendant's promise is not inconsistent with her prior suit.

The Factual Test Theory

Another theory, or really a group of theories, utilized by some courts to delineate a cause of action, is the factual test theory. This approach, at least in one of its manifestations, the identity of evidence theory, has been disapproved by the California Supreme Court,⁴² yet it lives on.⁴³

³⁵ Note, 1 *STAN. L. REV.* 156 (1948) views this case as inconsistent with the primary right approach.

³⁶ *Beronio v. Southern Pacific R.R.*, 86 Cal. 415, 24 Pac. 1093 (1890).

³⁷ See also *Herriter v. Porter*, 23 Cal. 385 (1863) (a single or continuous tortious act constituted one cause of action in replevin cases).

³⁸ *Supra* note 10.

³⁹ In foreclosing plaintiff's recovery the court either states and applies the rule of collateral estoppel too broadly, or it delineates a cause of action in a way difficult to reconcile with the primary right approach.

⁴⁰ By analogy to *Panos v. Great Western Packing Co.*, *supra* note 2; where the plaintiff offered different theories to recover for the same damage in two suits.

⁴¹ *Cf. Owens v. McNally*, *supra* note 28 (first suit to enforce executory contract of a decedent to will property, second suit to establish executed gift; different causes of action were held to exist).

⁴² *Seney v. Pickwick Stages*, *supra* note 23. (The court rejected application of res judicata as the "subject matter" was not the same.) See also *Hardenbergh v. Bacon*, 33 Cal. 356 (1867). (That many facts are the same is not necessarily determinative of the identity of two causes.)

⁴³ See cases cited *infra* in notes 24, 44, and 46.

Several variations of the fact approach are used. Similarity of facts to such an extent that the cause of action is identical could be established on the basis that the evidence supporting a given theory of the plaintiff in the first suit is the same as in the second suit,⁴⁴ that the "transaction" or occurrence out of which the contested liability arose is the same,⁴⁵ or that the injury for which compensation is sought is the same.⁴⁶

While some fact theories lead to a broader cause of action than the primary right theory, others lead to a narrower definition, permitting two or more causes to arise from the same fact situation where only one would result under the primary right theory. Thus evidence in a suit to recover for an injury caused by the defendant negligently dropping a chunk of meat on the plaintiff would not be identical in all respects with the evidence in a subsequent suit to recover for the same injury on the theory that a licensee dropped the meat on the defendant.⁴⁷ In this situation distinct causes of action could possibly be found under the evidence test although only one of these alternatives occurred. Only one cause exists here under the primary right theory.

The "transactional" fact approach is much broader than the primary right approach. Thus, an injury to person and property out of the same accident constitutes two separate causes under primary right rationale,⁴⁸ while under the transactional approach it would constitute but one cause.

The broadest of the fact approaches limits a cause of action only by the number of facts that can be conveniently tried. Justification for the approach is found in the rules of code pleading concerning joinder and misjoinder of causes. A broader cause of action lessens the restriction of those provisions and thus expedites litigation. However, a broad cause of action may lead to the preclusions of *res judicata*, which are far more serious than the inconvenience of too narrow a cause in pleading cases.

Common Sense Approach

Neither the primary right approach nor the various fact approaches furnish a satisfactory solution. The approach of those cases which do not attempt to define a cause of action as an immutable and fixed concept may therefore be the best.⁴⁹ The policies favoring certainty and stability of judgments, economy of court time, and prevention of vexatious litigation must be weighed against the harsh effects of ordinary *res judicata*. If there is no precedent in a particular situation, courts should consciously weigh

⁴⁴ *Parnell v. Hahn*, 61 Cal. 131 (1881); *Taylor v. Castle*, *supra* note 23; *Steiner v. Thomas*, *supra* note 38 (reference to "identity of evidence" as final proof); *Morrison v. Willhoit*, *supra* note 23.

⁴⁵ See cases *supra* note 24.

⁴⁶ *Clark v. Bauer*, 135 Cal. App. 65, 26 P.2d 729 (1933). See also generally, as to fact approach, *Phelan v. Quinn*, *supra* note 23; *Dobbins v. Title Guar. & Trust Co.*, 22 Cal. 2d 64, 136 P.2d 572 (1943).

⁴⁷ These facts are taken from *Panos v. Great Western Packing Co.*, *supra* note 2, at 637, 134 P.2d at 243.

⁴⁸ See cases *supra* notes 30 and 31.

⁴⁹ See cases cited *supra* note 28.

these factors along with the circumstances of the case in determining what constitutes a cause of action.⁵⁰

The California Rule

Recent decisions indicate that California courts favor the primary right theory,⁵¹ though the factual approach is sometimes utilized in a supplementary capacity to determine the extent of a cause of action.

SPLITTING THE CAUSE OF ACTION

What has been said concerning the cause of action is also applicable in determining whether a cause of action has been split.

The rule against splitting a cause of action has been stated to be that "a party may not split up a single cause of action and make it the basis of separate suits."⁵² In effect, this rule is merely another application of *res judicata*. The first judgment acts as a bar or merger, thus prohibiting a second suit on the same cause of action or one of its indivisible parts.

Matters Which Might Have Been Litigated

It is often stated that an adjudication is final and conclusive not only as to matters actually and necessarily determined, but also as to all matters which might have been litigated which are connected with the matter or issues in the first suit.⁵³

"Might have been litigated" is merely an expression of the unrestricted and absolute nature of bar and merger. The inquiry should be still whether the cause of action in the first and second suits is the same.

The rationale of "might have been litigated" has been stated concisely: "Neither party can decline to meet an issue tendered by the other party and then maintain that it has not become *res judicata*. The plaintiff must support all issues necessary to maintain his cause, and the defendant must bring forward all defenses he has to the cause of action asserted in the plaintiff's pleading at the time they are filed."⁵⁴

The meaning of the "might have been litigated" phrase differs sharply, depending on the context in which it is used. In a bar or merger situation, the assertion that matters "might have been litigated" in the first suit merely means that the conclusiveness of the first judgment is unqualified. However, the phrase must not be taken literally to include separate causes of action which the plaintiff had a *discretionary* right to join under Section 427 of the Code of Civil Procedure, since ordinary *res judicata* has no application to such separate causes which were not raised.

The term "might have been litigated" also appears in cases involving

⁵⁰ Von Moschzisker, *supra* note 20, at 314; Cleary, *supra* note 9.

⁵¹ *E.g.*, Wulfjen v. Dolton, *supra* note 17.

⁵² *See id.* at 894, 151 P.2d at 848.

⁵³ *E.g.*, United Bank & Trust Co. v. Hunt, *supra* note 19 at 346, 34 P.2d at 1004; Estate of Bell, 153 Cal. 331, 340, 95 Pac. 372, 376 (1908); Bingham v. Kearney, *supra* note 1.

⁵⁴ 2 FREEMAN, JUDGMENTS § 1421 (5th ed. 1925).

collateral estoppel.⁵⁵ There different causes of actions are involved, and the inquiry should be whether the *issue*, common to both the first and second suits, was *actually* litigated. In collateral estoppel the phrase "might have been litigated" means, if anything, only that as to an issue *actually* litigated in the first suit, all matters bearing on that issue are deemed litigated. Factors which might have been litigated in reference to that issue in the first suit cannot be raised in the second suit to impeach the litigated issue.

Exception to the Rule: Unjust Result

Apparently there is a limit to the application of ordinary *res judicata* in California. In *Greenfield v. Mather*⁵⁶ it was held that ordinary *res judicata* would not be applied so as to defeat the ends of justice.

In that case, the husband sued to rescind an assignment given to his wife. Before a final judgment was obtained in that suit the debtor-estate interpleaded the sum due under the contested assignment in a different court. An erroneous judgment was entered in the first suit, which granted the wife only one half of the sum due on the assignment. Conflicting appellate decisions contributed to this error; there were five appeals to the California Supreme Court in this litigation. However, the erroneous judgment in the first suit was not appealed and became final.⁵⁷ The trial court held that the judgment in the first suit was decisive of the interpleader action. This determination was reversed by the supreme court.

This decision is difficult to reconcile with the basis of ordinary *res judicata* and its corollaries. Application of the doctrine of *res judicata* is not even defeated by mistake, ignorance of existing facts or evidence which would support a different result,⁵⁸ or the fact that the judgment was erroneous and should not have been rendered.⁵⁹ To hold that the conclusive effect of a judgment is nullified by mistake or error is a clear violation of the fundamental policy and purpose of *res judicata*.⁶⁰ What stability and certainty resides in a judgment which may be overturned by another proceeding if an appellate court deems the first decision "unjust"?

If the *Greenfield* case be narrowly construed as applying only to rare cases, such as where conflicting appellate decisions contributed to the erroneous judgment, no substantial weakening of the rule of ordinary *res judicata* has occurred. A possible broad interpretation of the decision, however, may give cause for concern. It has been suggested that in case of hardship the court should allow reopening of the earlier judgment, instead of making an exception to *res judicata*.⁶¹

⁵⁵ "A prior judgment is *res judicata* on matters which could have been raised on matters litigated or litigable." *Sutphin v. Speik*, *supra* note 12 at 202, 99 P.2d at 655. See also *Bingham v. Kearney*, *supra* note 1.

⁵⁶ 32 Cal. 2d 23, 194 P.2d 1 (1948).

⁵⁷ *Id.* at 33, 194 P.2d at 7.

⁵⁸ 2 FREEMAN, JUDGMENTS § 553.

⁵⁹ *Estate of Keet*, 15 Cal. 2d 328, 100 P.2d 1045 (1940); *Kupfer v. Brawner*, 19 Cal. 2d 562, 122 P.2d 268 (1942); *Smith v. Woods*, 164 Cal. 291, 128 P.2d 748 (1912); *Lamb v. Wahlenmaier*, 144 Cal. 91, 77 Pac. 765 (1904).

⁶⁰ 2 FREEMAN, JUDGMENTS § 553.

⁶¹ Comment, 65 HARV. L. REV. 818 (1952).

APPLICATION OF RES JUDICATA TO DEFENSES

The discussion up to this point has been centered around the situation where the plaintiff in a prior suit is plaintiff in a subsequent suit, and the pervasive problem of identical causes of action.

The discussion to follow will concern itself with three different party arrangements: (1) the original plaintiff as defendant in a subsequent suit; (2) the original defendant as a defendant in a subsequent suit, and (3) the original defendant as a plaintiff in the subsequent suit.

The Original Plaintiff as Defendant

A party cannot rely on a defense which was utilized as the basis of a cause of action in a prior suit by him against the other party if he lost the prior suit.⁶² Thus, where the original plaintiff sued to recover for fraud and misrepresentation arising from the sale of certain property and lost, he was precluded from relying on fraud and misrepresentation as a set off in an action by the original defendant to foreclose a trust deed securing a note which was given in the land transaction involved in the prior suit.⁶³

The Original Defendant as Defendant

The most difficult question in connection with defenses is the effect of failure actually to raise a defense when the defense is subsequently raised in a different action brought by the original plaintiff.

Defenses not previously raised.—Where matter constituting a defense in one suit is not raised (actually litigated) in the prior suit, California courts prevent the defendant from raising it in a second suit, the result obtained being similar to ordinary res judicata. The “might have been litigated” phrase seemingly has been used by California courts as a working rule in these cases.⁶⁴

Thus a defendant was not allowed to use the defenses of fraud and frustration, among others, in a suit for subsequently accrued payments, where he had failed to raise these defenses in the first suit.⁶⁵ Likewise, where the plaintiff recovered prior installments under an oil lease, the defendant was precluded from utilizing the defense that the well was a “whipstock” well in a suit for subsequent royalties.⁶⁶

On the other hand, a different rule is applied where the original suit resulted in a default judgment. Thus, it was held in *English v. English*⁶⁷ that collateral estoppel did not prevent a husband from maintaining an action to rescind a separation agreement on the ground of fraud and duress. The wife had previously obtained a default judgment for installments due under the contract. This case announced the rule that a defense, such as

⁶² Hamilton v. Carpenter, 15 Cal. 2d 130, 98 P.2d 1027, cert. denied, 311 U.S. 656 (1940).

⁶³ *Ibid.*

⁶⁴ Sutphin v. Speik, *supra* note 12.

⁶⁵ Denio v. City of Huntington Beach, 74 Cal. App. 2d 424, 168 P.2d 785, cert. denied, 329 U.S. 773 (1946), *prior case*, 22 Cal. 2d 580, 140 P.2d 392 (1943).

⁶⁶ Sutphin v. Speik, *supra* note 12.

⁶⁷ 9 Cal. 2d 358, 70 P.2d 625 (1937).

fraud, which was not actually litigated in a prior suit could be raised in a later suit by either party on a different cause of action. The fact that the original defendant was the plaintiff in the subsequent suit was considered irrelevant by the court. The language of the case suggests that where judgment in the previous case was obtained by default, collateral estoppel will not apply against either party, regardless of role as plaintiff or defendant in the subsequent action.

Is there reason to distinguish between a case where a default judgment is obtained and where a particular defense is not litigated?⁶⁸ In a default case the defendant has never really been in court and the issue could not have been litigated. The code section⁶⁹ which provides for the setting aside of default judgments is indicative of the disfavor with which such judgments are regarded.

Nevertheless, a default judgment is considered a judgment on the merits. Furthermore, has the issue been actually and necessarily⁷⁰ litigated in the prior action in either situation? The Restatement asserts that it would be unfair to hold that the defendant is precluded from relying upon facts constituting a defense which might have been but was not relied upon in the prior action.⁷¹

The explanation for the difference between the Restatement and the California approach⁷² lies in the designation or characterization of "issues". Under the California technique the "issue" involved in a suit for an installment on a contract becomes the "validity" of the contract free from all possible defenses. Under the Restatement approach the "issue" in the first suit would be "execution" of the contract and in the second suit "fraud".

The basic policy considerations of *res judicata* do not demand the result found in the California cases. The stability and certainty of the first judgment is not in jeopardy, indeed the plaintiff has received a windfall by defendant's failure to interpose the defense. The policy against relitigation of a cause of action is not involved, since the first cause of action is finally and forever concluded.⁷³

⁶⁸ *Sutphin v. Speik*, *supra* note 12.

⁶⁹ CAL. CODE CIV. PROC. § 473.

⁷⁰ CAL. CODE CIV. PROC. § 1911, uses "actually and necessarily" litigated. The usual statement includes only the word "actually".

⁷¹ RESTATEMENT, JUDGMENTS § 68, comment *d*. Under this view, if in a suit on an installment of interest on a promissory note the defendant denies execution but loses, he may, nevertheless, interpose the defense of fraud in a suit by the plaintiff for another installment. RESTATEMENT, JUDGMENTS § 68, comment *a*, Illustration 2.

⁷² In explaining the California rule, strong reliance may be placed upon the word "necessarily" as used in the phrase "actually and necessarily decided". This phrase applies to collateral estoppel but should really mean that any defense raised was necessarily decided by the judgment whether or not a specific finding exists.

⁷³ The situation where the plaintiff sues only on part of a cause of action and tries to sue on the remainder later, splitting his cause of action, is to be distinguished from the "splitting of defenses". In the collateral estoppel situation where a defense was not actually raised a *different cause of action* would necessarily be involved and there would be no relitigation. A true analogy to splitting a cause would be utilization of part of a defense in a former action and then subsequent reliance upon another part of the same defense. There is no splitting of a defense where it is not raised at all.

The policy statements found in the cases, that multifarious litigation is eliminated by preventing a party who has had one fair trial on an issue from drawing it again into the controversy,⁷⁴ sound ironic in reference to some of the defense cases.⁷⁵ The only policy that could possibly justify this result is economy of court time. When weighed against the inequitable result to the defendant, it does not strike a balance.⁷⁶

Defenses actually previously raised.—Matter which was actually raised as a defense in a prior suit where the judgment was against the defendant cannot be used again as a defense to a subsequent suit by original plaintiff on a different cause of action, because of collateral estoppel.⁷⁷

The Original Defendant as Plaintiff

Counterclaims, Cross Complaints and Section 439.—If a cause of action is made the basis of a cross complaint or counterclaim by the defendant, that same cause of action cannot be relied on by him as the basis for a subsequent suit.⁷⁸ This is merely another application of ordinary *res judicata*. It leads back to the question of what constitutes a cause of action.

The doctrine of *res judicata* is extended by Section 439 of the Code of Civil Procedure, which requires certain matters, even though constituting separate causes of action, to be placed in issue by the defendant on penalty of losing the right to sue on such causes.^{78a} All claims arising from the same transaction which can be set up as a counterclaim must be raised or be forever lost.

It has been held that Section 439 does not apply where the court lacked jurisdiction to entertain the counterclaim.⁷⁹ Similarly, the defendant should be permitted to split his claim if the court's jurisdiction is limited, using part as a counterclaim and part as the basis for a separate cause of action.⁸⁰ However, Code of Civil Procedure Section 396 possibly changes the above results. This section permits transfer from an inferior court to a superior court where a counterclaim or cross complaint is filed which is beyond the jurisdictional amount of the inferior court. This Section, read with Section 439, would *seem to compel* the filing of any counterclaim arising out of the same transaction regardless of the amount, under penalty of forfeiture of such claim. A possible alternative for the defendant would be to sue in the superior court on his claim and enjoin the inferior court action.⁸¹

⁷⁴ See *United Bank and Trust Co. v. Hunt*, *supra* note 19 at 345, 34 P.2d at 1004.

⁷⁵ *E.g.*, see cases cited *supra* notes 65 and 66.

⁷⁶ See *Cleary*, *supra* note 9.

⁷⁷ *Bingham v. Kearney*, *supra* note 1. (Defendant asked for rescission in prior suit.) RESTATEMENT, JUDGMENTS § 58, comment c.

⁷⁸ *Rodehaver v. Mankel*, 16 Cal. App. 2d 597, 61 P.2d 61 (1936); *Henderson v. Mighetta*, *supra* note 25 (answer in the nature of a cross complaint).

^{78a} The doctrine of collateral estoppel may effectively prevent recovery where a particular matter is made the basis of a separate cause of action, even though the matter may not come within § 439. *Sawyer v. Sterling Realty Co.*, 41 Cal. App. 2d 715, 107 P.2d 449 (1940).

⁷⁹ *Todhunter v. Smith*, *supra* note 2.

⁸⁰ RESTATEMENT, JUDGMENTS § 57, comment a.

⁸¹ *Stratton v. Superior Court*, 2 Cal. 2d 693, 43 P.2d 539 (1935).

Where a defense actually raised leads to a judgment for the defendant, the rule against splitting a cause of action has no application and thus does not preclude a separate action by the original defendant based on the matter constituting the defense,⁸² but Section 439 will cover most such situations and require a counterclaim under penalty of forfeiture of the right to litigate the matter.

Defenses not previously raised.—According to the Restatement, a matter which would have constituted a defense, other than as a counterclaim arising from the same transaction, to a prior action by plaintiff could be made the foundation of a separate suit by the defendant, since his claim is a different cause of action from the plaintiff's and is not merged in the judgment.⁸³ Although there is no merger or bar, a "collateral estoppel rule" of the breadth of California's would often operate to deny recovery even in this situation.⁸⁴ In California a result consonant with the view of the Restatement of Judgments⁸⁵ probably occurs only if the defendant defaults.⁸⁶

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⁸² RESTATEMENT, JUDGMENTS § 58, comment *d*.

⁸³ RESTATEMENT, JUDGMENTS § 58, comment *b*.

⁸⁴ *E.g.*, *Andrews v. Reidy*, 7 Cal. 2d 366, 60 P.2d 832 (1936).

⁸⁵ See text, *supra* at note 64.

⁸⁶ *English v. English*, *supra* note 67.

* LL.B., June 1952.