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RES JUDICATA REEXAMINED

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> "If plaintiff, through negligence in not properly presenting her claim in the first instance, has lost her right to recover money which she allegedly advanced in reliance upon fraudulent representations of said individual defendants, it is a hardship but one from which the courts cannot relieve if the general and well-established rule against the splitting of a single cause of action is to be allowed for the benefit of all."*

SUCH quotations as this, where the operation was a success but the patient died, arouse the suspicion in connection with the rule of res judicata that the courts protest too much. The reasoning is more than vaguely reminiscent of a common-law judge ruling against some deserving party who had followed a course designed to threaten the symmetry of common-law pleading. When courts pretty consistently feel called upon to apologize to a litigant while administering the kiss of death to his cause, perhaps some basic reconsideration of the reasons is overdue.

The landmarks are familiar.[1] Defendant may continue to sleep in plaintiff's bed, though not under plaintiff's bed-quilts.[2] Defendant may continue to occupy plaintiff's real estate even though plaintiff has a judgment awarding him possession.[3] The insurance company need not pay the widow all it owes her.[4] Small wonder that apologies are in order.

Traditionally the res judicata problem has been solved by definition. Once a cause of action[5] was defined, then anything that could be squeezed within the confines of the particular definition inevitably acquired certain characteristics and was attended with certain conse-

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* Wulfjen v. Dolton, 24 Cal.2d 891, 896, 151 P.2d 846, 849 (1944).

1. Citations throughout are for the most part merely illustrative. No attempt has been made to count cases. For the sake of brevity, the problem is approached from the plaintiff's point of view. Similar considerations, however, will prevail as to defendants.

2. Farrington v. Payne, 15 Johns. 432 (N.Y. 1818).

3. Hahl v. Sugo, 169 N.Y. 109, 62 N.E. 135 (1901).

4. Jacobson v. Mutual Ben. Health & Accident Ass'n, 11 N.W.2d 442 (N.D. 1943).

5. Whenever the term "cause of action" is used in this paper, the reader should assume that it is in quotation marks.

quences, as day follows night. The effort to evolve a satisfactory definition of a cause of action has produced some of the finest examples of the possibilities for philosophical development in the field of procedure. The scholarly products of those who have already plowed the ground leave little for the latecomer to do, unless perchance he may be able to raise a different crop out of the same soil.

Professor McCaskill and Judge Clark are the leading exponents of the two rival schools of thought, and their views are familiar to all students of the subject. Adopting the old common-law remedies as a measuring stick, Professor McCaskill defines a cause of action as

> "that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded." [6]

Judge Clark, on the contrary, says a cause of action is

> "such an aggregate of operative facts as will give rise to at least one right of action, but it is not limited to a single right (if it is ever possible to isolate one such right from others). The extent of the cause is to be determined pragmatically by the court . . . but the controlling factor will be the matter of trial convenience. . . ." [7]

Essentially the difference has centered around the size of a cause of action. Professor McCaskill favors a small-sized cause of action because, for one reason, it restricts the operation of the doctrine of res judicata. Any desired increase in the scope and content of a law suit may be obtained through more flexible rules for joining parties and causes of action, rather than by increasing the size of the cause of action itself. Judge Clark favors a big cause of action because that increases the scope and content of a law suit, and he is willing to allow lawyers and litigants to learn the resulting harsher rules of res judicata by trial and error in the hard school of experience.[8] This lets more angels sit on the head of the pin at one time. The strange thing is that

6. McCaskill, *Actions and Causes of Action*, 34 YALE L. J. 614, 638 (1925).

7. CLARK, CODE PLEADING 137 (2d ed. 1947). Other articles in the field are Harris, *What is a Cause of Action?*, 16 CALIF. L. REV. 459 (1928); Gavit, *The Code Cause of Action: Joinder and Counterclaims*, 30 COL. L. REV. 802 (1930); Arnold, *The Code "Cause of Action" Clarified by the United States Supreme Court*, 19 A.B.A.J. 215 (1933); Wheaton, *The Code "Cause of Action": Its Definition*, 22 CORN. L. Q. 1 (1936); 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). It is mainly a question of choosing up sides.

8. Judge Clark, dissenting in Riordan v. Ferguson, 147 F.2d 983, 988 (C.C.A. 2d 1945), says, "The small chance nowadays that an action may ultimately go wrong for mere procedural defects should induce greater confidence in the judgment ultimately rendered." The enormous volume of res judicata cases reported shows the statement to be overly optimistic.

the literature has centered so largel yon the definition and not upon the effect. Deciding cases by definition is easy and therefore a method which courts are prone to follow, but the easy way is not necessarily the best way.

Judges, scholars and statute-writers use the phrase "cause of action" in a variety of situations. Statutes commonly provide that the venue of a case may be where the cause of action or some part thereof arose.[9] Codes and practice acts require that causes of action be stated separately.[10] An amendment to a complaint tendered after the running of the statute of limitations raises the question whether it is being attempted to introduce a new cause of action which has been barred by the statute of limitations.[11] The statute of limitations itself raises the question when did the cause of action accrue, as that was the time when the statute commenced to run. Provisions on joining causes of action range from those allowing limited joinder only of causes of action falling within the same certain classification,[12] to unlimited joinder if the parties otherwise are properly before the court.[13] A complaint usually is required to state a cause of action.[14] The rule of res judicata, herein discussed, forbids the relitigation of a cause of action once litigated and even of matters not litigated at all if they are part of a cause of action which once was litigated in part.

A "liberal" attitude on amendments, after the running of the statute of limitations, *i.e.* liberal in the sense of stretching procedural concepts so as to allow an apparently deserving plaintiff to recover, leads to the definition of a cause of action in terms of bigness, thus permitting the conclusion that the matter included in the amendment was really a part of the original cause of action and therefore no new cause of action is being introduced.[15] The same definition applied in a res judicata situation lets the plaintiff recover his bedding in one action but not his bed in another action, because he has split his cause of action, which included the conversion of both bed and bedding, for both of which he could have recovered in one action since both were converted by the same wrongful act of defendant.[16] Can a definition of a cause of action be phrased so as to be all things to all men, producing a happy result in

9. N.Y. CIV. PRAC. ACT § 184.

10. N.C. GEN. STAT. § 1-123 (Michie, 1943).

11. *Compare* Box v. Chicago, R.I. & P. Ry. Co., 107 Iowa 660, 78 N.W. 694 (1899), *with* Chobanian v. Washburn Wire Co., 33 R.I. 289, 80 Atl. 394 (1911).

12. See note 10 *supra.*

13. ILL. CIV. PRAC. ACT § 44.

14. N. Y. CIV. PRAC. ACT § 255.

15. In Illinois it was found necessary entirely to abandon the term "cause of action" in dealing with amendments after the running of the statute of limitations and instead to use "transaction or occurrence" in order to achieve liberality as to such amendments. ILL. CIV. PRAC. ACT, § 46(2); ILL. CIV. PRAC. ACT ANNO. 112 (McCaskill, 1933).

16. Farrington v. Payne, 15 Johns. 432 (N.Y. 1818).

every situation where the concept of a cause of action may appear? Or ought we be prepared to abandon the idea that procedural problems lend themselves to solution by definition? Classification may be necessary if a body of knowledge is to be put to work, but legal hardening of the arteries results when classification becomes an end in itself and original objectives are lost from view.

THE RULE OF RES JUDICATA

Res judicata is an ancient rule, originally traveling as "estoppel" until the current phrase was adopted from the civil law and put into common use.[17] A typical statement of the rule is:

> " . . . if the first suit was between the same parties and involved the same cause of action, the judgment in the former suit is conclusive, not only as to all questions actually decided but as to all questions which might properly have been litigated and determined in that action." [18]

The rule, then, falls into two divisions: (a) what was in fact determined in the former action, and (b) what might have been determined in the former action.

The first part of the rule, involving the ascertainment of what was in fact determined in the former action, presents no great difficulty, either practical or theoretical. Courts embark daily upon such inquiries when the question is one of what is usually called estoppel by verdict, or to use a newer phraseology, "collateral estoppel by judgment," [19] under the related rule that when a matter, usually of fact but sometimes of law, is once decided between the parties to an action then that determination is binding in a subsequent suit where that particular matter is again in issue between the same parties, even though the cause of action is not the same. Here we find the courts limiting the rule most scrupulously to what was in fact litigated and decided in the former proceeding, and for that purpose referring to pleadings, testimony, jury instructions, findings, verdicts and any other pertinent source of information sensibly helpful to the inquiry.[20] Unless it does affirmatively appear that the matter was actually raised and passed upon, then it may be litigated in the case now on trial.[21] The inquiry is factual and

17. BLACK, LAW OF JUDGMENTS 760–1 (2d ed. 1902). See generally Von Moschzisker, *Res Judicata*, 38 YALE L. J. 299 (1929).

18. City of Elmhurst v. Kegerries, 392 Ill. 195, 203, 64 N.E.2d 450, 453 (1946).

19. Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942).

20. Wolfson v. Northern States Management Co., 22 N.W.2d 545 (Minn. 1946).

21. *E.g.*, Ohio Life Insurance Co. v. Board of Education, 387 Ill. 159, 55 N.E.2d 163 (1944), where plaintiff in a former action had obtained judgment in the federal district court for interest due on bonds. Subsequently plaintiff sued in the state court for the principal of the bonds and was met with the defense of invalidity of the statute purporting to validate the bond issue. The court pointed out that while the complaint in the first case

common-sense. The might-have-beens are left strictly out of the picture.

When we come to the second part of the rule, dealing with what might have been litigated in the former action, however, we leave the workaday world and enter into a wondrous realm of words, where results are obtained not by grubbing out facts but by the application of incantations which change pumpkins into coaches and one man's property into another's. The incantations are the various definitions of what constitutes a cause of action. If the cause of action in the second action was a part of the cause of action in the first action, plaintiff cannot recover. He has had his day in court, even though the subject matter of the second proceeding was not even mentioned in the first one.

The problem essentially is one of splitting up the underlying situation which gives rise to litigation, and using the pieces to build more than one lawsuit. The splitting may be as to the theory of recovery; it may be along arithmetical lines; or it may involve the relief given.

Splitting as to theory of recovery occurs when plaintiff in his first action adopts one rule of substantive law, supported by an appropriate selection of the facts comprising the underlying situation out of which the litigation arose, while in his second action he changes his rule of substantive law or his selection of appropriate facts, or both, although the underlying situation remains the same. For example: In a personal injury case, plaintiff sues first for one kind of negligence, and in his second action on a theory of willful wanton misconduct, or for a different kind of negligence, the same accident being involved in each case.[22]

What may be called "arithmetical" splitting occurs when plaintiff, more or less arbitrarily according to the circumstances, selects certain elements of damages for his first action and others for his second action, all having some basic connection. Examples are: More than one action based upon separate breaches of the same contract.[23] More than one action based on the conversion or destruction of various items of property by one wrongful act.[24] Plaintiff sues only for the face amount of a life insurance policy and in a second action seeks to recover an additional amount for the annual increase in benefits stipulated in the policy.[25] Plaintiff brings one action to recover for personal injuries and

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relied upon the validating statute, no question was actually raised as to its validity and judgment was entered upon the assumption that the statute was valid. Estoppel was held not to apply.

22. Cotter v. Boston and Northern Street Ry., 190 Mass. 302, 76 N.E. 910 (1906).
23. Pakas v. Hollingshead, 184 N.Y. 211, 77 N.E. 40 (1906).
24. Farrington v. Payne, 15 Johns 432 (N.Y. 1818).
25. Jacobson v. Mutual Ben. Health & Accident Ass'n, 11 N.W.2d 442 (N.D. 1943).

another to recover for property damage arising out of the same negligent act of defendant.[26]

Splitting of relief occurs when plaintiff fails to ask for or obtain in his first action all the relief to which he might have been entitled, and brings another action for additional relief. Examples are: In an action for the possession of real property plaintiff obtains a judgment for possession, but fails to obtain a decree requiring defendant to remove an obstruction of such nature that the sheriff cannot be compelled to remove it. In a subsequent proceeding plaintiff seeks a decree compelling defendant to remove the obstruction.[27] Plaintiff forecloses a mortgage but fails to obtain a deficiency decree which he might have had. Later he brings an action for a money judgment for the deficiency.[28]

In each instance the plaintiff is met with the defense of res judicata.

The grounds commonly advanced to justify the rule of res judicata are: 1. The danger of double recovery; 2. The desirability of stable judicial determinations; 3. Relieving a defendant of the expense and vexation of repeated litigation; 4. Economy of court time. A fair appraisal of the validity of solving res judicata problems in terms of causes of action involves considering each of these four grounds in relation to splitting theory, splitting arithmetically and splitting relief.

Danger of Double Recovery

The danger of double recovery obviously exists only in the event the plaintiff has recovered in his first action. If he was successful, then a careful examination of what elements of damages or injury were considered and passed upon should furnish an ample safeguard against further recovery based upon the same elements in the later action. The inquiry is no more difficult than in the case of estoppel by verdict or "collateral estoppel by judgment."

An illustration at common law is the case of a trespass with an aggravation where plaintiff might have an action of trespass for the trespass itself and an action on the case for the matters constituting the aggravation, or at his option might bring an action of trespass and include the additional matter as an aggravation of the trespass.[29] If, after bringing trespass, he later sued in case, an examination in some detail of the proceedings in the first case would readily reveal whether the circumstances attending the trespass had been placed before the jury and therefore presumably did or did not enter into the verdict.[30]

26. King v. Chicago, M. & St. P. Ry. Co., 80 Minn. 83, 82 N.W. 1113 (1900). *Cf.* Vasu v. Kohlers, Inc., 145 Ohio St. 321, 61 N.E.2d 707 (1945).

27. Hahl v. Sugo, 169 N.Y. 109, 62 N.E. 135 (1901).

28. Kearny County Bank v. Nunn, 156 Kan. 563, 134 P.2d 635 (1943).

29. McCaskill, *The Elusive Cause of Action*, 4 U. of Chi. L. Rev. 281, 294 (1937).

30. Savage v. French, 13 Ill. App. 17 (1883). At common law merely shifting as to the form of the action did not avoid the operation of res judicata, when plaintiff had al-

A recent example of such an inquiry appears in *Smith v. Lykes Bros.-Ripley S.S. Co.*, [31] where an injured seaman based his first action upon negligence under the Merchant Marine Act of 1920 and his second action upon the general maritime law for failure to provide maintenance and cure. The court held that the first action was not res judicata of the second but that plaintiff was not entitled to recover twice for the same elements of damage. "The issue is whether or not the items of damage here involved were actually litigated and determined in the former case. . . . What items of damage were really submitted to the jury may be proven aliunde by evidence not contradictory of the record." [32]

A similar question was presented in *Ash v. Mortensen.*[33] Plaintiff first recovered judgment for personal injuries in a negligence action against an automobile driver. This judgment was satisfied, and plaintiff later brought a malpractice action against the physician who attended her. The court ruled that, while plaintiff upon proof of due care in selecting a physician might have recovered her entire damages from the original defendant, she would not be obliged to do so. Here again the inquiry was what plaintiff actually placed before the jury as damages in the original action, rather than what she might have employed as a basis of recovery.

Whether plaintiff's splitting has been of theory, or arithmetical, or of relief seems to be unimportant in connection with double recovery. The essential inquiry is whether he has already had redress for a particular element of damages or injury. Any doubt should be resolved against plaintiff, as he could have avoided the raising of the question by including the debated matter in his first action.

Desirability of Stable Decisions

Effective operation of courts in the social and economic scheme requires that their decisions have the respect of and be observed by the parties, the general public and the courts themselves. According insufficient weight to prior decisions encourages disrespect and disregard of courts and their decisions and invites litigation. However, giving a prior decision effect beyond its actual scope is just as undesirable as according to it an insufficient effect.

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ready recovered for the same elements of damages. *Compare* Gilchrist v. Bale, 8 W. & S. 355 (Pa. 1839), where plaintiff's former recovery in trespass for criminal conversation with his wife was held to bar a later action on the case for enticing her away, *with* Schriver v. Eckenrode, 87 Pa. St. 213 (1878), holding that a prior unsuccessful action for deceit did not bar a subsequent recovery for breach of warranty that a tract of land contained a specified acreage.

31. 105 F.2d 604 (C.C.A. 5th 1939).

32. *Id.* at 606.

33. 24 Cal.2d 654, 150 P.2d 876 (1944).

Pronouncements that courts will not pass upon particular matters because of a highly conceptual view of what might have been decided in a prior action serve neither to enhance the stature of courts nor to add strength to the foundations upon which they rest. Too frequently the solution of res judicata problems is reminiscent of the old vaudeville skit in which two men owned a cow. One killed his half and the other half died.

The stability of decisions is not affected when plaintiff splits his cause of action arithmetically, or splits his relief. The prior decision remains in full force and is not questioned. Plaintiff merely wants something additional. A split of theory, on the other hand, presents a very real problem. Policy would seem to indicate that when a plaintiff has once attempted to obtain his entire relief, based upon his entire damages, then the matter should be laid at rest. He should be denied a second attempt at substantially the same objective under a different guise. In deciding such cases, the concept of a cause of action possesses real utility if applied with realization of what actually is at issue and with due regard for the other factors herein discussed.

Freedom from Vexatious Litigation

The elimination of vexatious litigation sounds like a worthy purpose. But what is meant by vexatious litigation? Presumably all lawsuits vex the defendant by causing him anxiety and expense, even if he wins. Since our object clearly is not the elimination of all lawsuits, then it must be the elimination of those which are vexatious for some particular reason or reasons. Under the res judicata decisions, cases involving the danger of double recovery or really threatening the stability of judicial decisions, already discussed, might be classed as vexatious. However, the term seems primarily to be directed against a plaintiff who tries to make two actions do the work of one, by splitting his cause of action arithmetically or by splitting his relief.

Here it is important to distinguish compulsory joinder from permissive joinder of the subject matter of litigation. A literal reading of the rule that res judicata applies not only to what was litigated but to what might have been litigated, as well, would mean that all procedurally joinable matters between the parties at the time of the former action would now be res judicata, regardless of how unrelated such matters might be in fact. Courts have not gone to that length. They have said that what might have been litigated in the first action is res judicata only to the extent that it constituted a part of the cause of action involved in the first action. If the causes of action are different, it is immaterial then that plaintiff might have joined them under rules governing permissive joinder.[34] Now the purpose of liberality in joinder rules

34. Boddiker v. McPartlin, 379 Ill. 567, 41 N.E.2d 756 (1942).

is the same as the anti-vexatious-litigation purpose of the rule of res judicata, *i.e.* to encourage litigants to reduce the numerical volume of lawsuits by bringing more disputed matters into the same action. Yet when plaintiff seeks to make two lawsuits do the work of one, the rule of res judicata applies too harsh a penalty (complete loss of plaintiff's right of recovery), and permissive joinder too slight a penalty (some added inconvenience and expense to plaintiff, which he incurs voluntarily). And so we find a deserving plaintiff denied recovery of very apparent damages for breach of contract because the contract was "entire", and in a former action he had not included damages for anticipatory breach,[35] thus "splitting his cause of action," while in another case plaintiff is permitted to bring as many actions as he holds bonds and coupons of the same identical issue,[36] because each bond and coupon "constitutes a separate cause of action."

The suggestion has been made that parties should be compelled to join all joinable matters, regardless of whether they are part of the same "cause of action," and that failure to do so be punished with sentence of death by res judicata as to any omitted matter.[37] A step in that direction appears in the compulsory counterclaim provision of the federal rules.[38] Applied generally, however, the penalty is a severe one for mere procedural failure. Too much virtue is often ascribed to extremely liberal joinder provisions, as joinder of wholly unrelated matters usually effects no saving except of paper and filing fees and results as a practical matter in breaking the case back down into some sort of units for purposes of trial.

Assuming that sound policy encourages joinder of related matters, a litigant who has split his cause of action arithmetically or as to relief should be penalized to the extent that the splitting has resulted in added expense to the opposing party. The same principle, however, should apply in the case of the plaintiff who brings separate actions upon related causes of actions which can more economically be tried in one proceeding, *e.g.*, cases where consolidation may be had under present rules if the actions are pending at the same time in the same court. Recoverable expenses should include court costs, counsel fees and other expenses, such as expert witnesses, to the extent that such expenses are increased by the use of more than one action. Thus the desired objective of gathering all related matters into one action may be achieved by the assessment of costs, more effectively than under optional joinder rules and less harshly than under res judicata.[39]

35. Pakas v. Hollingshead, 184 N.Y. 211, 77 N.E. 40 (1906).

36. Nesbit v. Riverside District, 144 U.S. 610 (1892); Gaddis v. Williams, 193 Pac. 483 (Okla. 1921).

37. Wheaton, *Causes of Action Blended*, 22 MINN. L. REV. 498 (1938).

38. FED. R. CIV. P. 13(a).

39. See the interesting discussion in Vasu v. Kohlers, Inc., 145 Ohio St. 321, 61

Contrary to the English practice, tradition in this country has almost uniformly been opposed to the assessment of counsel fees against an opposing party. No matter how unfounded an alleged cause of action may be, no matter how ironclad the defense, usually the sole penalty for frivolous litigation is payment of court costs.[40] The prevalence of contingent fees even relieves the unsuccessful plaintiff of the necessity of paying his own attorney fees. We find, however, an increasing tendency in the contrary direction, with rules for the assessment of attorney fees and other expenses as costs for unreasonably increasing the expense of some particular aspect of the litigation.[41] An extension into the fields now occupied by the rule against splitting causes of action and by permissive joinder could produce very salutary results.

Economy of Court Time

The final justification of the usual rule of res judicata, the saving in court time, is peculiarly unconvincing. Courts exist for the purpose of trying lawsuits. If the courts are too busy to decide cases fairly and on the merits, something is wrong. Decision solely in terms of the convenience of the court approaches the theory that the individual exists for the state. Maintenance of the judicial system is a very minor portion of the cost of government.[42] If the judges are too few to be able to decide cases fairly and on the merits, the public probably can afford to have more judges. The fact that a party may waive the defense of res judicata,[43] as seems to be the general rule, indicates that saving the

N.E.2d 707 (1945), an automobile case involving personal injury and property damage with insurance as to the latter, and note the situation arising when different insurers insure against different items of liability arising from the same injury, as in Brinkman v. Oil Transfer Corp., 185 Misc. 257, 56 N.Y.S.2d 773 (Sup. Ct. 1945). The difficulties of apportioning recovery in such cases if the cause of action is held to be an indivisible unit is illustrated by Hayward v. State Farm Mut. Auto. Ins. Co., 212 Minn. 500, 4 N.W.2d 316 (1942).

Attention should be directed to the declaratory judgment acts, which permit and even encourage plaintiffs to split their relief. For example, the Illinois act provides, "Where further relief based upon a declaration of right shall become necessary or proper after such declaration has been made, application may be made . . . to show cause why such further relief should not be granted forthwith. . . ." Ill. Civ. Prac. Act § 57½(3).

40. Ritter v. Ritter, 381 Ill. 549, 46 N.E.2d 41 (1943) (refusing recovery for attorney fees incurred).

41. Under Fed. R. Civ. P. 37, refusal to answer an interrogatory without substantial justification may be penalized by assessment of expenses, including attorney fees, against the offending party. See also Fed. R. Civ. P. 56(g) involving affidavits in bad faith in summary judgment proceedings; Ill. Civ. Prac. Act § 41 involving allegations and denials made without reasonable cause and not in good faith and found to be untrue; and Illinois Rule 18 dealing with unreasonable refusals to make admissions.

42. Editorial, *"Cost of Our Federal Courts,"* 33 A.B.A.J. 802 (1947), places the cost of the entire federal judicial organization at $20 million.

43. Clark, *op. cit. supra* note 7, at 479. Note, 23 Calif. L. Rev. 205 (1935). See Von Moschzisker, *supra* note 17.

judge's time is more afterthought than reason. Judge Sibley's comment, dissenting in *United States v. C.C. Clark, Inc.*,[44] although directed primarily against the government, would seem equally applicable to the courts:

> "It is more for the public good that the United States Government in its own courts should deal honorably with its taxpayers than that a few hours of court time should be saved." [45]

CONCLUSION

The courts themselves have not been happy over results often apparently required by res judicata. Even Judge Clark is forced to admit:

> "The defense of res judicata is universally respected, but actually not very well liked." [46]

So we find the courts drifting off into somewhat vague dissertations upon the election of remedies,[47] though the problem actually is one of res judicata. Or we find them making ill-defined exceptions in cases where some items comprising the cause of action have been omitted from the earlier action through ignorance, mistake or fraud.[48] Or, in line with the general principle that the government, unlike a private litigant, should not be prejudiced by the lack of skill of its own attorneys, the courts may refuse to apply the rule against splitting causes of action in litigation brought by the state, or "involving the public interest." [49] Most of these cases seem to arrive at a desirable result, but the effort has been inartistic, to say the least. It is believed that the suggestions contained herein would make these cases somewhat more cohesive and would furnish them a more convincing rationale by bringing them within a general workable rule rather than leaving them as exceptions to a rule which at its best is not very satisfactory.

Many, if not most, res judicata cases are the result of a procedural error on the part of counsel. Each case should be decided with reference to the basic objects of the rule rather than by highly conceptual theories of what is a cause of action. If the subject matter of the second action is so inextricably involved with that of the first case that it must

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44. 159 F.2d 489 (C.C.A. 5th 1947).
45. *Id.* at 492.
46. See note 8 *supra*.
47. Norwood v. McDonald, 142 Ohio St. 299, 52 N.E.2d 67 (1943).
48. See Note, 142 A.L.R. 905 (1943).
49. United States v. Pan-American Petroleum Co., 55 F.2d 753 (C.C.A. 9th 1932) (suit to cancel fraudulent oil leases made under Secretary Fall); White v. Adler, 289 N.Y. 34, 43 N.E.2d 798 (1942) (suit to recover bank stockholder's liability); State v. Superior Court, 145 Wash. 576, 261 Pac. 110 (1927) (eminent domain case in which the court points out that in any event the entire expense of the proceeding is borne by petitioner).

have entered into the composition of the first judgment then further consideration should be barred by res judicata. If the matter might more economically and conveniently have been litigated in the first action but in fact was not, then costs and expenses should be assessed against the offending party. This would seem to let the punishment fit the crime.