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Required Joinder of Claims

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REQUIRED JOINDER OF CLAIMS*

A COMPARATIVE STUDY OF THE AMERICAN AND THE GERMAN LAW

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THIS comparative study is confined to the situation of one claimant against one claimee. The principles which will be considered seem to be rather well settled both in the American and the German law. The fact, however, that besides many a common result we shall find fundamental differences in the pertinent basic concepts of the American and German systems makes the discussion worthwhile. It may, at least, promote a reconsideration of the propriety of those concepts.

The American law of joinder of claims in its present stage, like the law of joinder of parties, is the product of a long historical development. The term "product," to be sure, may be somewhat misleading, for it is not just a complete body of rules once drawn and then loosed from its history; that history cannot be forgotten even where the law has been codified. Thence it comes that the subject still has to be examined in four different connections: at common law, in equity, under the codes, and under the federal rules. And not infrequently the more modern law of joinder of claims, despite its effort to favor the viewpoint of procedural convenience, is to some extent burdened by this very history. This is not the case with the German law of joinder of claims. The pertinent basic provision of the code is in favor of free joinder of claims so unmistakably that it hardly ever admits of any doubt which might be predicated on history. So it may be said that the German provision is really a complete "product" in a sense not true of the American law.

Before going into what may be called required joinder of claims it will be helpful to take a brief look at joinder of claims in general, or, more precisely, permissive joinder of claims (one claimant against one claimee), for this is, systematically and as already indicated by the terms, at least one of the major backgrounds against which required joinder must be considered.

What is meant by required joinder of claims is, in the American law, found also and even more frequently under the denomination "splitting a cause of action," or "splitting an 'entire' claim."

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This points to another and even more important background of the doctrine: res judicata. Where problems of this sort arise in the German law they greatly resemble those of the American law; yet they may not be said to have a place in the "foreground" of the whole joinder doctrine. This noteworthy fact is significant enough to indicate that the relationship between rule and exception with respect to required joinder of claims must be much different in American and German law. Indeed, it is. As intimated, however, the problems and considerations to be passed upon when required joinder does apply are much alike. They are essentially threefold: (1) Does required joinder of claims mean that the plaintiff is bound to join the respective claims or else be thrown out of court by a judgment not even going to the merits? (2) Or is the enforcement of the plaintiff's "duty" confined to the operation against him of the doctrine of res judicata in case he does not join? If so, to what extent? If not so, what else enforces the requirement of joinder? (3) What rationale underlies the concept of required joinder of claims?

I

A BRIEF SURVEY OF JOINDER OF CLAIMS (PERMISSIVE JOINDER)

As already stated the American law of permissive joinder must be looked at in four different connections: at common law, in equity, under the codes, and under the federal rules. Inasmuch as the federal rules are the prevailing law for all federal courts there is one uniform law all over the United States in this sense and to this extent. So far as the state courts are concerned, however, the distinctions among common law, equity and the code provisions are important. The German regulations (without reference to their particular contents) are, in a sense, comparable to the federal rules in that the Zivilprozessordnung (ZPO) of 1879, enacted by the former Reichstag, created a uniform civil procedure for all Germany. Although the German courts, here in question, are courts of the Laender (states)[1] they all have to proceed according to the Zivilprozessordnung, regardless of what kind of law the case may involve.[2]

[1] With the exception of the Bundesgerichtshof, the Supreme Court for civil and criminal cases, which is a federal court. Cf. Art. 92 Grundgesetz (Basic Law), present constitution for West Germany (Federal Republic of Germany).

[2] This is due to the fact that civil procedure was, under the constitutions of 1871 and 1919, and still is under the Grundgesetz, a matter of concurrent federal and state legislation. Cf. art. 74(1) Grundgesetz; and once the federal legislature had made use

At Common Law. The old common law for various reasons condemned a multiplicity of issues.[3] As a joinder of claims ordinarily presents at least two issues, it is not surprising that at the outset it was not permitted. The surprising thing is rather that the common law later came to recognize joinder of claims (causes of action) to an extent, namely, that as many claims could be joined as could be comprised in one writ.[4] This meant that the plaintiff could join in one writ as many claims as he had of the same form of action. This change of the old common law was accomplished by the practice of the chancery clerks, who often allowed a claim to be enlarged in point of sums and quantities and thereby gave authority for joining any number of causes of action of the same form. The ancient rule against multiple issues, though not abolished, was no longer interpreted so as to reduce all matters in controversy to only one issue, but to prevent more than one issue being raised with respect to one claim.[5] The only exceptions to the rule that the claims joined must be of the same form of action were the joinder of debt and detinue and of case and trover.

In Equity. While the common law disfavored a multiplicity of issues, it was a multiplicity of *suits* which was condemned in equity. The aim was to settle an entire controversy between the plaintiff and the defendant in one proceeding.[6] There was, it is true, some difference of opinion among the courts as to whether joinder of claims should be permitted with entire freedom, subject only to the discretion of the court, or whether it was necessary that the causes joined be related by a common question of law or fact.[7] Yet, this disagreement seems not to have been as considerable in substance as it may appear to have been. The common principle governing both views was the rule against "multifariousness." That is to say that even those courts which advocated free joinder as a general principle reserved the right of separating unconnected

of its power it thereby excluded the states from doing so. Cf. art. 72 (1), 31 Grundgesetz. The Zivilprozessordnung of 1879 as amended several times since then has been upheld as prevailing federal law of the Federal Republic of Germany by the provision of art. 125 Grundgesetz.

[3] See Blume, "A Rational Theory for Joinder of Causes of Action and Defences, and for the Use of Counterclaims," 26 MICH. L. REV. 1 (1927).

[4] Id. at 4-5.

[5] Id. at 4-7.

[6] Cf. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, 2d ed., 437 (1947).

[7] See Blume, "A Rational Theory for Joinder of Causes of Action and Defences, and for the Use of Counterclaims," 26 MICH. L. REV. 1 at 10-11 (1927); BLUME, AMERICAN CIVIL PROCEDURE 339-340 (1955).

causes where they could not conveniently and properly be litigated together.[8] At any rate the two rules, against a multiplicity of suits and against multifariousness, brought about notable progress in equity as compared to the common law. They made more sense in that they put the main emphasis upon what seems to be the proper criterion in this context, viz., procedural convenience. The rule against multiplicity avoided the narrowness of the common law rule which required the same form of action to be available for all claims joined. The rule condemning multifariousness, on the other hand, guarded against the inappropriate breadth which was also a characteristic feature of the common law rule, in the sense, namely, that it did not place any restriction on the number or nature of the causes which might be joined as long as all came under the same form of action.[9]

Under the Codes. More than half of the states have adopted codes of civil procedure.[10] The first was New York which, with its code of 1848, started the procedural reform movement in America. The New York code abolished the old common law forms of action and established one form of civil action instead. Legal and equitable claims could be joined in one action. But the New York code, while it abolished the old forms of action, did not provide for a free joinder of claims. It set forth seven classes of situations in which joinder might be had.[11] The codifiers still felt that there should be some formal tests for restricting joinder of causes.[12] This reminds one of the common law rule of joinder, despite the abolition of the old forms of action. In 1852 another class of joinder was added by amendment which was much more general in nature and was intended to help accomplish a combination of the common law and equity practices. By this provision joinder was allowed of causes of action "arising out of the same transaction or transactions connected with the same subject of action."[13] Causes of action joined under any of these clauses must affect all the parties to the action, and not require different places

8 See Blume, "A Rational Theory for Joinder of Causes of Action and Defences, and for the Use of Counterclaims," 26 MICH. L. REV. 1 at 10, and n. 28 quoting from Bank v. Starkey, 268 Ill. 22 (1915); BLUME, AMERICAN CIVIL PROCEDURE 340 (1955), quoting from Newland v. Rogers, 3 Barb. Ch. (N. Y.) 432 (1848).

9 Blume, "A Rational Theory for Joinder of Causes of Action and Defences, and for the Use of Counterclaims," 26 MICH. L. REV. 1 at 9 (1927).

10 CLARK, CODE PLEADING, 2d ed., 25 (1947).

11 For example, actions arising out of contract; actions for injury to the person; actions for injury to property, etc. See CLARK, CODE PLEADING, 2d ed., 438, 441, 450 et seq. (1947).

12 Cf. Sunderland, "Joinder of Actions," 18 MICH. L. REV. 571 at 579 (1920).

13 N.Y. Laws (1852) c. 392, §167.

of trial. The other code states have substantially copied the New York provisions. In some states the causes joined must be consistent.[14] Thus, the characteristic features of the codes are the specified classes on one hand, and the general clause on the other. There are two tests: (1) Does the case come within one of the classes? (2) If not, does it come within the general clause?

A satisfactory combination of the common law and equity practices was not really accomplished by the codes. The main reason for this fact seems to be that the large discretion which had been vested in the courts of chancery was taken away and replaced by a general clause whose interpretation caused and still causes great difficulties. The terms "transaction" and—even more—"subject of action" have still not been defined satisfactorily. The courts are far from agreeing on the meaning of the clause[15] and, depending upon its interpretation, it is entirely possible that the maximum scope of an action is narrower under the codes than it was under the equity rules.

New York, the leader in code development, amended its provision on joinder of claims in 1935. Now it practically allows free joinder of claims; and the court may, upon application, order severance or separate trials where it thinks advisable.[16] Some other states have also removed the restrictions on joinder of claims.[17]

Under the Federal Rules. Rule 18 (a) of the Federal Rules of 1938 greatly resembles the New York provision of 1935. It authorizes the plaintiff to join in one action "as many claims either legal or equitable or both as he may have against an opposing party," subject merely to the power of the court to order separate trials "in furtherance of convenience and to avoid prejudice." [Rule 42 (b)]. The federal rules thus favor the modern concepts of free joinder and procedural convenience.[18]

Under the German Law. Prior to the enactment of the Zivilprozessordnung of 1879, the uniform federal code, Germany, too, had what was called "common law procedure," leaving aside the codes of a few states. The common law procedure was a mix-

14 CLARK, CODE PLEADING, 2d ed., 448 et seq. (1947).

15 Blume, "A Rational Theory for Joinder of Causes of Action and Defences, and for the Use of Counterclaims," 26 MICH. L. REV. 1 at 20 (1927); MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 112 (1952).

16 N.Y. Civil Practice Act, §258, as amended by N.Y. Laws (1935) c. 339. See CLARK, CODE PLEADING, 2d ed., 440 (1947).

17 See CLARK, CODE PLEADING, 2d ed., 443 (1947). For a general survey of the joinder rules, see also BROWN, DIGEST OF PROCEDURAL STATUTES AND COURT RULES 100 et seq. (1954)

18 Cf. 3 MOORE, FEDERAL PRACTICE, 2d ed., §18.04 (1) (1955).

ture. It developed from elements of the Romano-canonical procedure carried into Germany by the reception of the Romanic law in the fourteenth and fifteenth centuries, and from surviving elements of the Germanic procedure which antedated the reception.[19] As to joinder of claims the common law procedure was already very modern. A plurality of claims in favor of one plaintiff against the same defendant could be joined in one action provided that all came within the jurisdiction of the court and could be enforced by the same form of procedure.[20]

This principle was taken over almost literally into the Zivilprozessordnung whose present section 260[21] provides:

> "Several claims of the plaintiff against the same defendant, even though they may be based upon different occurrences, may be joined in one action, provided that they all come within the jurisdiction of the trial court and can be enforced by the same form of procedure."

If the jurisdiction of the court is merely dependent upon the amount of a claim, the aggregate of all claims joined is determinative.[22] The last requirement of section 260 refers to some special forms of procedure such as, to pick out three examples, the negotiable instrument procedure,[23] proceedings in matrimonial causes, and proceedings in status causes.[24] These proceedings pursue special purposes and are, therefore, governed by special principles and provisions. For this reason the legislature did not want causes of these kinds to be joined with causes which have to be enforced in the ordinary proceeding.[25] Within the ordinary proceeding, however, free joinder of claims is allowed, subject merely to the jurisdictional restriction referred to. Even wholly unre-

19 See ENGELMANN and others, A HISTORY OF CONTINENTAL CIVIL PROCEDURE, translated and edited by R. W. Millar, p. 507 (1927).

20 Id. at 548.

21 Originally ZPO, §232.

22 See ZPO, §5.

23 ZPO, §592 et seq. If plaintiff chooses this procedure he has to prove all facts which constitute his claim, by documents. If he can do so he gets a preliminary judgment regardless of defendant's defenses which the latter cannot prove by documents, as well. It is intended to be a very expeditious procedure. In the preliminary judgment (which is executable and appealable) the judge reserves to the defendant the right to prove his defenses not provable by documents in an ordinary proceeding immediately following.

24 ZPO, §606 et seq. and §640 et seq., respectively. Because of the public interest involved in such cases the proceedings are preponderantly governed by the principle of judicial investigation rather than that of party-presentation.

25 For similar reasons there are also a few other dispersed provisions prohibiting joinder which, however, may be left aside here.

lated claims may be joined.[26] It thus appears that the German law of joinder of claims, with respect to the ordinary proceedings at least, is very much the same as the law under the federal rules, the New York code as amended in 1935, and in those other states which have removed the old restrictions.

Two procedural problems closely connected with the joinder doctrine are consolidation and severance.

Consolidation and severance are important complements to the law of joinder. This is true although they were not always so regarded and some codes and statutes still keep them separated from the joinder provisions.

According to modern conceptions the purpose of the court's power to consolidate several actions is to realize in its sound discretion the desirability of a single proceeding where the actions could have been "consolidated" by the plaintiff, i.e., where he could have joined the claims pending in several actions, and, moreover, to accord some margin of discretion to the court even beyond the scope of joinder granted to the plaintiff. Thus, by making the question one of trial rather than of pleading consolidation effectuates the joinder rules without making them compulsory, and, at the same time, completes them by imparting an additional flexibility.

Modern severance serves a corresponding purpose. It affords the possibility of separate trials or proceedings where several claims could be and were pleaded in one action but, by virtue of the particular circumstances of the case, cannot conveniently be tried together, and therefore should not be tried together. The states most modern in view of what has been said above are California and New York. They allow consolidation whenever it can be done without prejudice to a substantial right, even where the actions are pending in different courts.[27] The statutes of most of the other states restrict consolidation to cases where the second claims are pending in the same court and the plaintiff could have joined them originally and make consolidation dependent upon application.[28] The federal rules[29] and the rules of some states allow consolidation where there is a common question of law or fact.[30]

[26] As a matter of pleading, at least. As to the court's power to sever claims joined, see below.

[27] See CLARK, CODE PLEADING, 2d ed., 491, and note 195 (1947).

[28] Id. at 491, note 193.

[29] Rule 42 (a).

[30] See CLARK, CODE PLEADING, 2d ed., 491, 492 (1947).

The consolidation provision (§147) of the German Zivilprozessordnung stands somewhat in between. Consolidation is allowed whenever several actions between the same or different parties are pending in the same court which could have been joined in one action or are legally related.[31] Thus, on one hand, the provision does not restrict consolidation to cases where it has been applied for and the plaintiff or plaintiffs could have joined the actions to be consolidated; on the other hand, however, it does not permit consolidation of actions pending in different courts.

As to severance the provisions of most code states and of the federal rules on one side and of the Zivilprozessordnung on the other side are very much alike. Most codes provide for severance where it can be done without prejudice to a substantial right of the parties.[32] Federal rule 42 (b) allows separate trials "in furtherance of convenience and to avoid prejudice." The German provision, ZPO, section 145 (1), confines itself to the simple statement that the court may order severance of several claims joined in one action. The court exercises its discretion according to procedural convenience and the rights of the parties.[33] The Zivilprozessordnung (§ 150) also expressly provides that the court in its discretion may vacate a prior order of consolidation or severance.

Looking back from this modern state of development to the history of the American common law and equity it is interesting to observe that at common law already, as arbitrary as it may have been in its joinder rule, consolidation was allowed whenever the plaintiff could have joined the respective causes of action in one suit; whereas in equity, where the joinder rules were much broader, there seems to have been some conflict as to whether such power was vested in the court.[34] Severance, on the other hand, was not developed in common law, but was employed in equity under the rule against multifariousness.[35]

31 For a similar provision of Arkansas, cf. CLARK, CODE PLEADING, 2d ed., 491 (1947).

32 Id at 492. For the New York provision see note 16 above and the text theretofore.

33 Only in case of misjoinder the severance is mandatory. In the German code both the terms of consolidation and severance are employed in the meaning of true consolidation and severance. Consolidation and severance for trial are not admissible. Cf. STEIN-JONAS-SCHOENKE, KOMMENTAR ZUR ZIVILPROZESSORDNUNG, 17th ed., §145 V, §147 III (1953).

34 See CLARK, CODE PLEADING, 2d ed., 490, note 191 (1947).

35 See note 8 above and text theretofore.

II

REQUIRED JOINDER OF CLAIMS

A. *Required Joinder of Claims, Commonly Termed in American Law the Rule Against Splitting an Entire Cause of Action, or Claim*

1. *Comparative Illustration.* Let us start the discussion by introducing a few basic cases to illustrate—roughly at first—the situation in the American law and the German law. One American case is enough for the present purposes; three German cases will sketch the prevailing German solutions.

In *Buchanan v. General Motors Corp.*[36] the plaintiff entered into an agreement with the defendant according to which the plaintiff licensed the defendant to make and sell ice trays for mechanical refrigerators under certain Letters Patent owned by the plaintiff. In consideration thereof the defendant was to pay royalties to the plaintiff. Under this agreement the defendant made and sold two kinds of ice trays, "single trays" and "double trays," i.e., trays with one grid each and trays with two grids each. The plaintiff brought two successive suits against the defendant. The first suit concerned the single trays. The defendant had paid royalties for part of them only, contending that the other part of the single trays made and sold by it were of a different type which did not come within the terms of the above-mentioned agreement. The plaintiff sued for the royalties allegedly due on this part of the trays. His action was dismissed and became res judicata.

Subsequently the plaintiff brought a second suit concerning the double trays. He alleged that they consisted of two devices on which two unit royalties should have been paid in accordance with said agreement but that the defendant had paid a single royalty only. The difference he claimed. Upon the defendant's objection the court dismissed the second suit on the ground that it was barred by the judgment rendered in the former action. The court pointed out that the plaintiff should have included this claim in the prior action because it was based on a breach of the

[36] (S.D. N.Y. 1946) 64 F. Supp. 16. As previously intimated, required joinder of claims has been a familiar feature of the common law, equity, code and federal practices, even though under the old common law it may not have been applied quite as extensively as under modern practice. See CLARK, CODE PLEADING, 2d ed., 473 et seq. (1947). It does not make much difference, therefore, when and by what court the case we have picked out has been decided.

same contract and because the breach, as the plaintiff had learned before the trial of the first action, had occurred prior to the commencement of the first suit.

In the first of the illustrative German cases[37] the plaintiff entered into a contract with the defendant under which the plaintiff was obligated to remove a certain considerable quantity of earth and to procure and keep ready the necessary tools. The defendant, in consideration thereof, was to pay a certain money compensation to the plaintiff. The plaintiff procured the tools, had them brought to the place where the work was to be performed, and removed about half of the quantity of earth fixed in the contract. The defendant, then, intentionally prevented the plaintiff from doing the remaining work and fully performing the contract. As a consequence the tools were scattered about without being used for some considerable time. They thereby became almost worthless to the plaintiff. The plaintiff brought two actions for damages against the defendant.

The first action was for damages sustained by the depreciation of the equipment as a consequence of defendant's breach of the contract. The plaintiff claimed some 12,000 marks. The court granted him some 6,000 marks and denied the rest.

In a subsequent second action the plaintiff claimed compensation for the damages sustained by defendant's breach of the contract, except those recovered in the former proceeding. The plaintiff demanded payment of the profits he had lost by having been prevented from fully performing the contract, i.e., the difference between the contractually agreed price for the services and his net cost in case of performance.

The defendant relied upon res judicata of the former judgment. The Reichsgericht, however, held that a different claim within the meaning of ZPO, section 322 (1)[38] was presented in the second suit which was not barred by the former judgment. The partial denial of the plaintiff's claim in the first judgment related only to that particular claim for depreciation of the tools, but did not preclude the present claim for loss of profits.

Thus, although the two claims arose out of breach of the same contract and both had occurred prior to the commencement of

37 JURISTISCHE WOCHENSCHRIFT (hereinafter J.W.) 1896, p. 691, ¶18. The case is typical still today. It was decided in the Reichsgericht, the German supreme court for civil and criminal cases prior to 1945. If not otherwise noted all German cases in the following text, taken from any report or periodical, were decided in the Reichsgericht.

38 This provision will extensively be discussed later.

the first suit, the court allowed two successive actions to enforce them. The difference from the American case is obvious. There, the second action was held barred by the prior adjudication in spite of the fact that the two claims were predicated upon two distinct breaches of the contract whereas in the German case two actions were held admissible although the common basis for both of them was but one breach of the same contract. If the German case had to be adjudicated in America there would, accordingly, even be an argument a fortiori to decide it the same way as the American case reported, and the same would be true as to the American case under the German jurisdiction. This makes the difference especially clear! There are, however, some situations in which the German law departs from the ruling of the case just considered. The following two cases will serve as illustrations.[39]

The defendant by certain conduct has violated plaintiff's patent *A* and patent *B*. In a first action the plaintiff sues him for damages suffered by the infringement of patent *A*. After the adjudication of this case the plaintiff brings a second damage action for the interference with his patent *B*. No matter whether the plaintiff won or lost on his first action (patent *A*) his second action (patent *B*) is barred by the former judgment. This is the rule set forth in section 54 of the German Patentgesetz of May 5, 1936.[40]

The defendant owes the plaintiff 500 marks. The plaintiff sues the defendant for 10 marks as part of the 500. There is evidence to the effect that the plaintiff has planned to bring fifty different law suits against the defendant each for 10 marks.[41]

Plaintiff's action for the 10 marks has to be dismissed without prejudice. A plaintiff is not permitted to split a claim into multiple claims where it is apparent that the only purpose of the split is to produce injury to the defendant. Such an action is not even admitted to be considered on its merits.

The cases considered indicate and roughly mark out the range of the following discussion. What we can state at this point is this: when the American law talks in terms of required joinder of claims it does not mean to say that the plaintiff is *bound* to join the respective claims in one action or else be thrown out of court —that he cannot get a judgment on the merits as to part of them.

39 They are not decided cases but hypothetical ones according to the prevailing law.

40 This provision and similar ones contained in some other statutes, will later be considered more closely.

41 For a similar case see HELLWIG, SYSTEM DES DEUTSCHEN ZIVILPROZESSRECHTS, Part 1, p. 462 (1912).

Such a rule applies within the field of joinder of parties when necessary or indispensable parties, respectively, are not joined as plaintiffs or defendants, as the case may be, but not to a pure joinder of claims, i.e., to the cases of "splitting a cause of action." Otherwise the first action in cases like the ice-tray case could not even have been maintained and adjudicated on the merits. Rather, the requirement of joinder of claims, whenever it applies, is enforced by indirection, namely by barring a second action for the other claims after judgment in the first action has been had. Accordingly, the objection to splitting is one to be made in the second action.

Insofar as the German law has condemned splitting at all, as indicated by the second and third German cases above, there may be observed this distinction: the second case (patent case) in effect goes along the same line as the American law; the desired joinder of claims is enforced—and thus made required—by the same indirection, the same legal device of clothing a judgment in the first action with a bar effect. The ruling of the third case, on the other hand, implies an application of the concept of required joinder of claims in its literal sense: the plaintiff *must* join, or he loses for not having properly commenced his action which, therefore, cannot be considered on its merits.[42] A similar situation is presented where the plaintiff, for the purpose of circumventing the superior court's jurisdiction, splits his claim among several contemporaneous suits each of which separately fits into the inferior court's jurisdiction. This, too, will be discussed later.

2. *Scope of the Rule of Required Joinder of Claims in American Law.* The cases treated under this topic[43] are of two kinds: (1) where the plaintiff really has but one claim[44] in the meaning of the substantive law, and (2) where he has or may fairly be said to have more than one claim according to the substantive law.

One might at first assume that only the cases of the second kind could furnish proper material in the context of required joinder of claims. This seems to be a postulate of linguistic logic. This conclusion, however, would disregard the historical development and would, therefore, be false in substance, at least. "Re-

42 The judgment is without prejudice. To what extent the plaintiff should have joined the other "claims" of his "entire" 500-mark claim will be discussed below in the proper context.

43 The discussion is, as already indicated at the beginning of the introduction, confined to the situation of "one claimant against one claimee."

44 Take, for example, a situation like that of the last of the three German cases above, where the plaintiff has but one single claim for 500 marks, maybe for selling a used motorcycle.

quired joinder of claims" is a modern term. The rule has come down through Anglo-American legal history as one against splitting a claim (an "entire" claim), a cause of action (an "entire" cause of action), and most courts and probably the majority of the text writers still talk in these terms. This makes it quite clear that the cases of but one claim were the original cases, and that, historically, the inclusion of cases of the second kind, with more than one claim, need to be justified. It has been by virtue of a definite tendency to widen the limits of the terms "single, entire claim" and "single, entire cause of action," that this inclusion has occurred.[45] Especially in consideration of this fact the term "required joinder of claims" is probably more appropriate. It should help avoid what is sometimes considered doing violence to the terms "claim" and "cause of action" (what is an "entire" claim or an "entire" cause of action really?) and is likely at the same time to encourage progress by stressing the viewpoint of procedural convenience. On the other hand, it can just as well be applied in regard to the "true" cases of but one claim. One single substantive-law claim may constitute a plurality of "procedural claims," of good minimum causes of action in the meaning of the law of procedure, when split among several law suits. And these claims, in turn, you may—as a matter of linguistic as well as legal logic—fairly require to be joined. This shows that "required joinder of claims" is a procedurally colored term.

Treating both kinds of cases under that topic not only is in accord with history and logic, but also should bring about some further distinction in thinking between substantive law and law of procedure. These statements are not intended to mean that an attempt will be made in this study to base the doctrine against splitting on a new foundation and to trace the possible dogmatic and practical consequences of such an undertaking. That is not the object of this comparative study. The foregoing statements are intended only as a terminological explanation of "required joinder of claims" as used in this study. This term has been given preference over the orthodox term of "splitting a cause of action," not in order to develop new theories different from what is generally held to be the law under the latter but for another reason.

The definition of the terms "cause of action" or "entire cause of action" or "entire claim" has bothered the courts and writers. There has been strong disagreement as to their meaning, and a

[45] Cf. CLARK, CODE PLEADING, 2d ed., 474 (1947).

great number of law review articles have been written on the subject.[46] Judge Clark, considering the various definitions of cause of action, lays stress on three general views.[47] There is one treating cause of action as identical with "right of action," a right against the courts to prosecute an action with effect. Under the second view it is argued that cause of action refers to a group of facts, but is limited and restricted by the resulting legal right which is to be enforced. The third general view is similar to the second inasmuch as it also considers cause of action as referring to a group of facts, but it is different from the second view with respect to the limitation of that group. The particular reference to the resulting legal right or rights has been rejected. The group of facts is said to be limited to a single occurrence or affair, as seen through the eyes of a lay onlooker. The cause of action would be "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)."[48] This study will not make an attempt to reconcile these different views or even to decide which one of them deserves preference—a task which a great number of most capable American lawyers (including judges) have not yet been able to accomplish. And in actuality, despite the strong disagreement which has raged as to the meaning of cause of action or "entire" cause of action, a great majority of courts and a great many of the other authorities largely agree in point of results so far as the cases within the doctrine against splitting a cause of action are concerned—somewhat surprising as this may be. Accordingly, the struggle about the cause of action does not in fact hinder a general "restatement" of the largely prevailing law on this subject. As, however, this might be thought inconsistent, it may be better to talk in terms of required joinder of claims. The term "claim" in this connection is intended to mean a procedural minimum unit of judicial action.[49] As opposed to the maximum unit considered above, the minimum unit

46 See, among others, Wilson, "Writs vs. Rights: An Unended Contest," 18 MICH. L. REV. 255 (1920); Gavit, "The Joinder of Actions in Indiana," 7 IND. L.J. 470 (1932); McCaskill, "The Struggle for Simplicity in Pleading," ILL. B.A. REP. 164 (1933); Gavit, "A 'Pragmatic Definition' of the 'Cause of Action'?" 82 UNIV. PA. L. REV. 129 (1933); Arnold "The Code 'Cause of Action' Clarified by U.S. Supreme Court," 19 A.B.A.J. 215 (1933); Clark, "The Cause of Action," 82 UNIV. PA. L. REV. 354 (1934); Gavit, "The Cause of Action—A Reply," 82 UNIV. PA. L. REV. 695 (1934).

47 CLARK, CODE PLEADING, 2d ed., 129 (1947).

48 This is Judge Clark's own view. Id. at 137.

49 As federal rule 8 (a) may be said to employ the term, without attempting to determine a maximum unit.

has not been the object of such heated debate. The extent of the requirement to join such procedural minimum units will be described on the basis of the generally prevailing authorities.

The *Restatement of the Law of Judgments* presents the following rule:

> "Where a judgment is rendered, whether in favor of the plaintiff or of the defendant, which precludes the plaintiff from thereafter maintaining an action upon the original cause of action, he cannot maintain an action upon any part of the original cause of action, although that part of the cause of action was not litigated in the original action. . . ."[50]

This obviously means to state the rule in terms of splitting a single cause of action.[51] Without particular regard to terminology, what is the substance of the doctrine?

(a) *Within the field of contracts.* In *Buchanan v. General Motors Corp.*[52] the court based its holding in the second action on the settled rule "that all breaches of a contract prior to the commencement of a suit for such breaches are considered as a single cause of action, and if a party brings a suit for a part only of an entire indivisible demand and such action is disposed of on the merits, it may not subsequently sue for recovery on the demands omitted. . . ."

The surprising thing about this rule is this: Concededly, each one of the several breaches upon its respective occurrence

[50] JUDGMENTS RESTATEMENT 242-243 (1942).

[51] Even on the ground of the orthodox terminology, it may be doubted whether this is the most fortunate wording. What is meant by "original cause of action?" Is it the "entire" cause of action? If so, the statement seems to treat as a prerequisite of the rule (". . . which precludes . . .") what in reality is its context: it is the rule itself that the plaintiff after a judgment on the merits is precluded from maintaining an action upon the entire cause of action. In other words, the result to be proved seems to have been made a condition of that result, the result itself an element of its proof. Or does "original cause of action" mean the matter (really) in controversy, the subject matter of the original action? If so, then, its second usage in the passage quoted would not accomplish what it is supposed to: for the plaintiff is not only precluded from maintaining a subsequent action upon the subject matter of the original suit (this alone would be nothing special in the law of res judicata), but from bringing a further action upon the "entire" cause of action. This is, of course, meant to be indicated by the passage following "although," but not as clear as it may seem to be. Assumed as it is, that "original cause of action" means matter in controversy, subject matter of the original action, it is hard to conceive how any part of that very matter should not have been litigated after all. It seems to be a matter of course, even more than that, a logical necessity that it was, and, hence, is embraced by the res judicata effect anyway.

This ambiguity, however, can easily be removed by substituting "which goes to the merits of the plaintiff's case" for the "which" clause as it stands, or the phrase "any part of the entire cause of action" for "any part of the original cause of action." This would be a remedy in the sense of the old terminology, at least.

[52] (S.D. N.Y. 1946) 64 F. Supp. 16 at 18.

constitutes a distinct cause of action, a distinct claim. The plaintiff might bring a separate suit for each one of them as long as the next breach had not yet occurred. Still, as soon as multiple breaches of a contract have accumulated without having been sued upon separately, they suddenly become one single (entire!) cause of action, and the formerly separate causes of action take on the character of "parts" of this single, entire cause of action. The latter, then, is deemed indivisible, so that all "parts" must be united in one action in order to be preserved.

The same rule applies, for example, in the case of a promissory note payable in installments. Each installment when it falls due constitutes a distinct cause of action which might be sued upon as such. But all installments which have fallen due prior to the commencement of an action form one single claim, one entire cause of action, which is regarded as indivisible. If the plaintiff fails to join all those installments in one suit he is precluded from subsequently maintaining an action upon the ones not joined.[53] The same is true as to various items of a running account. All items due and unpaid at the commencement of an action must be joined in that action, although, again, each one of them when it first accrues constitutes a distinct claim.

If we consider the several breaches of contract as each giving rise, as they "originally" do, to a (distinct) cause of action or claim in the meaning of at least a minimum unit of judicial action and relief, we can state the rule like this: The plaintiff is required to join in one action all claims he may have against the defendant for breaches of a single contract which occurred prior to the commencement of the action; a judgment on the merits as to any of such breaches precludes him from subsequently suing for the other breaches not so joined. On the other hand, as follows from the rule as well, the plaintiff is not precluded from bringing a subsequent action for breaches of the contract that have occurred after the commencement of a suit for previous breaches. As to such subsequent breaches the rule starts working anew, but separately from the action and the judgment which have covered the previous breaches.

Furthermore, the so-called divisible contract does not come under the rule. This is the case when the parties, explicitly or implicitly, agree that a single contract shall have separable parts or that portions of the total obligation assumed shall be inde-

[53] See also Taylor v. Irwin W. Masters, Inc., (D.C. N.J. 1947) 74 F. Supp. 572 at 573 with respect to commissions falling due in installments.

pendent of each other.[54] If, for example, in a contract for the payment of money the obligation is represented by a series of promissory notes the holder may bring as many actions as there are promissory notes. A judgment on one of them would not preclude him from maintaining a subsequent suit on any one of the others. The several notes are looked at as each constituting a claim permanently separate. Accordingly, there is no "entire" cause of action in the terminology of the doctrine against splitting, or, put another way, each note obligation is an entire cause of action in itself. Their joinder in one action is not required. It is merely permissive under the contract clause and the same-transaction clause of the codes.[55]

What has been said about a single divisible contract is ordinarily also true in regard to several contracts. It would, however, be misleading, to use an argument a fortiori. As a rule, it is true, it may be said that several contracts do not constitute one entire claim, but as many claims as there are contracts. So the rule of required joinder of claims operates on the claims arising under each contract, but not on all the claims arising out of said contracts collectively. Yet, this latter view may prevail where the contracts are closely intertwined,[56] as in the case of a running account made up of items which do not arise under a single agreement.[57]

It thus appears, on the one hand, that the rule of required joinder of claims may not apply although there is but one (divisible) contract, and, on the other hand, that it may apply to a plurality of contracts, i.e., contracts intertwined or, in this sense, a "contract transaction." Whenever the rule does operate in a subsequent action it does so regardless of whether the plaintiff won or lost in his first suit.

(b) *In the field of torts.* Suppose the defendant negligently caused an explosion thereby damaging plaintiff's houses *A* and *B*. Plaintiff brings an action for damages to his house *A*. The action is disposed of on the merits by a final judgment. He cannot thereafter sue for the damage caused to his house *B*. This is so although two distinct property rights have been invaded and the plaintiff may, therefore, be said to have two claims, two "minimum" causes of action. The decisive fact is that the two

54 See JUDGMENTS RESTATEMENT 253 (1942).
55 See p. 802 supra.
56 See CLARK, CODE PLEADING, 2d ed., 480 (1947).
57 Id. at 484, 485.

property rights have been invaded, and, accordingly, the two claims have been brought about by the same wrongful act. In such a case the plaintiff is required to join all claims for damages he has against the defendant by reason of this wrongful act. If the explosion had caused damage to the plaintiff's house *A* and to his person, the same rule would apply in most jurisdictions.[58] It does not matter that one claim is for injury to property, the other for injury to the person.

In *Szostak v. Chevrolet Motor Co.*[59] the Supreme Court of Michigan also held the rule applicable in a case where the tortious act was continuous. The plaintiffs alleged that drop hammers in the defendant's forge plant caused their buildings *A* and *B* to vibrate and damaged them, and that noxious fumes were emitted from the plant to their discomfort. On these allegations they commenced two actions for damages, one involving building *A* (action *A*), the other one building *B* (action *B*). Action *A* was finally adjudicated on the merits before action *B* had proceeded to judgment. The court then dismissed action *B*. Talking in terms of splitting a single cause of action it pointed out that ". . . the tort, although continuous, was single in its declared injurious effect. Plaintiffs do not charge that it may be divided as to time or otherwise so that a distinct and separate part of it may be traced to a specific injury to one building without a corresponding effect on the other. The tort is declared upon as a unit and the damage it caused was a unit. Consequently the two suits constituted a splitting of the cause of action. . . ."[60] So the plaintiffs were in effect required to join in the first action their damage claim relating to building *B* with the one for building *A*.

There is still another important aspect to the rule in the context of continuous torts against realty. It is the possible distinction between past and future damages, meaning damages prior to the commencement of an action and subsequent thereto. The prevailing rule is that in the case of a continuous tort against realty the plaintiff is compelled to join his claims for past and

58 See Blume, "Required Joinder of Claims," 45 MICH. L. REV. 797 at 798 (1947); and, for example, Fields v. Philadelphia Rapid Transit Co., 273 Pa. 282, 117 A. 59 (1922), and Larzo v. Swift & Co., 129 W.Va. 436, 40 S.E. (2d) 811 (1946), where the courts, talking in terms of splitting, said the cause of action was the wrongful act as opposed to the resulting damages. In New York, for example, the plaintiff could sue for the damages on his house and bring a separate action for his personal injury. The same view prevails in England. See CLARK, CODE PLEADING, 2d ed., 488, 489 (1947).

59 279 Mich. 603, 273 N.W. 284 (1937).

60 Id. at 607.

future damages only if the defendant would have to commit a fresh wrong to undo the effect of the tort or where the injuries are legally permitted by the state.[61] In the absence of these conditions the plaintiff may bring two actions for past and future damages, respectively.

As a further exemplification of the rule of compulsory joinder, invasions of rights in rapid succession must be mentioned.[62] The defendant trespasses on plaintiff's land on successive days. In another case[63] the plaintiff is injured while alighting from a streetcar because the motorman negligently starts the car that very moment; immediately thereafter the plaintiff falls into a trench negligently left by the defendant streetcar company beside the road, and sustains a further injury.

In either case the plaintiff must join in one action his claims for all injuries caused prior to the commencement of the action, or else loses the claims not so joined when judgment is rendered on the merits. Again, it is immaterial that each one of the several invasions upon its respective occurrence gave rise to a distinct claim and (theoretically at least) could have been sued upon separately.

Summarizing, we can say that all claims for injuries caused prior to the commencement of an action in the course of the same tort occasion[64] are required to be joined.

From what has been said so far it is evident that the plaintiff cannot split one single substantive claim. And this, of course, applies in like manner to both contract and tort cases. So, for example, in the ice-tray case, above, it would have been prejudicial for the plaintiff to claim in his first action only part of the royalties relative to the single ice trays. The judgment then would have deprived him not only of his contended claim for royalties on the double trays but also of the rest of the claim for the single trays. The same thing would have happened to the plaintiffs in the forge plant case had they claimed in action *A* part only of the damages on building *A*, etc. The plaintiff is not permitted to bring a part action first and, after judgment thereupon, to recover further or increased damages caused prior to the com-

61 See CLARK, CODE PLEADING, 2d ed., 487 (1947) who sets forth two examples: A structure on the plaintiff's land, necessitating a fresh entry by the defendant to remove it (first alternative); a railroad right of way (second alternative).

62 See Blume, "Required Joinder of Claims," 45 MICH. L. REV. 797 at 800 (1947).

63 JUDGMENTS RESTATEMENT 249 (1942).

64 In the meaning illustrated, or "series of occasions," if you please.

mencement of the first action.[65] This clearly manifests what the plaintiff is virtually required to join, i.e., all minimum units of claims for relief arising prior to the commencement of an action from the same contract transaction[66] or tort occasion, irrespective of how many claims he may be regarded to have according to the substantive law.[67]

There are some exceptions to the rule of required joinder of claims. It does not apply (1) where the plaintiff in the procedure adopted can prosecute part of his claims only and this procedure is essential to the preservation of his rights.[68] This is mainly the case where cumulative remedies arise out of the same contract transaction or tort occasion, i.e., where the plaintiff is entitled to more than one kind of relief, and the relief sought in one action could not be had in the other action. This

65 Cf. JUDGMENTS RESTATEMENT 246 (1942).

66 The transaction idea in the context of compulsory joinder of claims appeared as early as 1858 in the case of Secor v. Sturgis, 16 N.Y. 548; Strong, J., stated the following on p. 554: "The rule does not prevent, nor is there any principal which precludes, the prosecution of several actions upon several causes of action. . . ." All demands, *of whatever nature,* arising out of *separate and distinct transactions,* may be sued upon separately. . . ." (Emphasis mine.) The transaction test is applied not only to contract actions, but also to tort actions. But it is probably a mere matter of terminological taste whether to talk about a tort transaction or a tort occasion (or series of occasions).

One other thing, to be sure, is noteworthy in connection with the transaction test. The codes in their usual general clause on permissive joinder provide that several causes of action may be joined "where they all arise out of the same transaction. . . ." If all demands, arising out of the same contract or tort transaction, must be joined, and if in terms of the doctrine against splitting these all constitute one cause of action, there seems to be no conceivable possibility that more than one cause of action could arise out of the same transaction and that there remains any substance for the code clause at all. Put another way, does it not seem that all joinder of claims based upon the same transaction is compulsory instead of permissive, as the code clause indicates? But this is not true in this generality, at least. In the case of divisible contracts, for example, joinder of claims is not required. According to the splitting doctrine there are several causes of action; and still, in the meaning of the code clause, one does probably have to say that they all arise out of the same transaction, although they do not in the meaning of the doctrine of required joinder. Hence, the joinder would be permissive, but not required. Furthermore, the code clause retains its importance in such proceedings as involve a plurality of parties on either side. And besides, it has often been said that the term cause of action may have different meanings in different contexts of the law. This cannot further be traced here, of course. But it seems safe to say that by virtue of the compulsory joinder doctrine the same-transaction clause of the codes for permissive joinder appears not to have as broad a substance as one might think prima facie. And this is more true the more one might be inclined to apply the compulsory joinder rule even in cases of several causes and be disinclined to adhere strictly to the traditional "single-entire-clause" idea. Cf. also Schopflocher, "What Is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?" 21 ORE. L. REV. 319 at 324 (1942).

67 There are some courts and writers who advocate an even broader application of the rule. See, for example, Schopflocher, "What Is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata," 21 ORE. L. REV. 319 (1942); Blume, "The Scope of a Civil Action," 42 MICH. L. REV. 257 (1943). But this is not the prevailing opinion, not yet, at least. Cf. CLARK, CODE PLEADING, 2d ed., 144 (1947).

68 Cf. JUDGMENTS RESTATEMENT 243, 255-257 (1942).

is largely a matter of the respective state procedures. If, for example, in a case of conversion the plaintiff has an equitable remedy (specific restitution) as to one part of the items taken and a legal remedy (claim for value) as to the remainder, he may prosecute two actions in states which do not have the union of law and equity. The heterogeneity of the claimed reliefs would not in itself be sufficient, however, to justify an exception to the requirement of joinder. And, on the other hand, the exception may sometimes apply even to homogenous claims (such as money claims), as if, for example, the splitting is justified by limitations of territorial jurisdiction.[69]

Furthermore, the rule does not apply (2) where fraud or misrepresentation on the part of the defendant caused the plaintiff to omit some of his claims in the original action;[70] (3) where the defendant fails to raise an objection in a subsequent action (consent). It is not a further exception to the rule, but rather a presupposition of its applicability, that the parties to the subsequent action are the same as in the original action,[71] or privies of the latter.

The exceptions mentioned are conspicuously suggestive of at least one of the main ideas upon which the rule of required joinder of claims is based. It is the primary aim to protect the defendant against a multiplicity of suits. Such a multiplicity of suits is considered to be a vexation for the defendant. Consequently, it is tolerated only where absolutely necessary for the preservation of the plaintiff's rights (exception 1), or where the defendant has forfeited his protection by his own conduct (exceptions 2 and 3).

At the same time the rule is designed to prevent "the wasting of the time of the courts"[72] and the additional expenditure of money at the expense of the taxpayer. In this sense it is intended to serve the interest of the public. One of the original reasons for the rule was, and continues to be, the protection of the superior courts' jurisdiction.[73] In view of the exceptions (2) and (3), however, the protection of the defendant seems to be the strongest of the underlying ideas.

69 Cf. id. at 255, 270. See also 23 CYC. 383 (1906).

70 JUDGMENTS RESTATEMENT 243, 255-257 (1942). Quite a number of jurisdictions also recognize faultless ignorance or mistake on the part of the plaintiff as an exception, even in the absence of fraud or misrepresentation on the side of the defendant. See annotations, 2 A.L.R. 534 (1919); 142 A.L.R. 905 (1943).

71 See CLARK, CODE PLEADING, 2d ed., 472, 479 (1947). Cf. also JUDGMENTS RESTATEMENT 244, 245 (1942).

72 CLARK, CODE PLEADING, 2d ed., 473 (1947).

73 This will be considered somewhat more closely below at p. 840 et seq.

According to the prevailing notion the enforcement of the joinder requirement and the rule against splitting is confided to the doctrine of res judicata. The preclusion of the plaintiff from maintaining subsequent actions on the claims omitted in the original action is thought of as a genuine effect of res judicata. It is a natural counterpart of this conception that the rule of required joinder of claims results in a plea of pendency in contemporaneous actions whenever it would lead to a plea of res judicata in consecutive actions. That is to say, if a plaintiff splits his claims arising out of the same contract transaction or tort occasion among several contemporaneous suits, pendency may be pleaded in all but one—the first—of them,[74] just as res judicata might be in case that one had proceeded to final judgment before the others. To this extent the joinder is required in a more literal sense of the word.

The underlying rationale and the particular conception of res judicata just sketched are the keys to the comprehension of the basic differences between the American and the German law which are now to be discussed.

3. *Comparative View.* In the German law, too, res judicata serves a preclusive function. On the one hand it binds all courts to the conclusion reached in the prior judgment, within the limits of identity of claims and parties. On the other, it precludes the parties from contradicting this conclusion in a subsequent action.[75] But this preclusion, too, is scrupulously restricted to the same "claim" in the meaning of ZPO, section 322 (1) which provides: (1) Judgments are capable of becoming res judicata only insofar as the claim set forth in the complaint or in the counterclaim, has been adjudicated upon. With some exceptions, almost exclusively statutory in nature, required joinder of claims in the meaning of the American law is not known in the German law. This statement needs closer consideration, to be sure. We have seen that in terms of the doctrine against splitting an entire claim, or cause of action, it is but one "single" claim in the American law, too, that is embraced by res judicata. What, after all, is the difference then? It is hidden in the concepts of "claim" and res judicata. "Claim" as used in ZPO, section 322 (1) and in the German writing on civil procedure is something basically

74 See, in place of the many other authorities, CLARK, CODE PLEADING, 2d ed., 472 (1947).

75 See, for example, HELLWIG, SYSTEM DES DEUTSCHEN ZIVILPROZESSRECHTS, Part 1, pp. 777 (1912).

different from the "single, entire claim, or cause of action" in the meaning of American civil procedure.

The German law has come strictly to distinguish between claim in the meaning of the substantive law and claim in the meaning of the law of procedure, or—as is an equally common way of putting it—between substantive claim and "procedural claim" *(Prozessualer Anspruch)*. Section 322 (1) is one of many provisions of the Zivilprozessordnung in which the term claim *(Anspruch)* is used in the second, i.e., procedural sense. The procedural claim, is plaintiff's *assertion* of a substantive right or claim, and it is (has to be) individualized[76] (1) by the prayer for relief and, if necessary, (2) by the facts, the historical event or occurrence upon which the plaintiff relies as the factual basis of his assertion.[77] Categories of the substantive law do not contribute to the individualization of the procedural claim. This is now the generally prevailing view both in the decisions and among legal writers. The Zivilprozessordnung itself is silent as to the exact meaning of "claim." But in section 253, subsection 2, paragraph 2, it provides that the complaint must contain "a particular prayer for relief" and a statement "of the ground of the claim asserted" (the cause of claim, or action).[78] This has been construed as indicating by what the subject matter of the action and, in turn, the object of res judicata, is individualized, and hence, what it is. This construction has resulted in what has been described above as the now prevailing conception of (procedural) "claim" in the meaning of the law of procedure in general and of the law of res judicata [ZPO section 322 (1)] in particular. Being an assertion of a substantive claim or right, the procedural claim exists irrespective of whether the asserted right or claim has actually accrued or not.

The most important point for the present discussion is the fact that the prayer for relief has an essential function in individualizing the procedural claim and thereby, according to ZPO, section 322 (1), in determining the scope of res judicata. The object of the action and of the res judicata effect of the final judgment is only as broad as what the plaintiff by his particular prayer for relief offers for judicial determination. According to

[76] For the purpose of distinguishing it from all other possible assertions of a right or claim which this plaintiff may make against this defendant.

[77] Cf., for example, ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS, 5th ed., 378, particularly 384, 385, with ample citations (1951).

[78] Id. at 386.

the American doctrine against splitting a claim or cause of action, as described above, it is the "entire" claim, or cause of action, which is embraced by res judicata. Stating it in terms of required joinder of claims, it is all minimum units of claims, identical or different in kind, that the plaintiff may have against the defendant out of the same contract transaction or tort occasion. To this extent the plaintiff's prayer for relief has no determinative function.[79] Under ZPO, section 308 (1), a German ". . . court is not authorized to award to a party anything that has not been prayed for," and this has been construed to mean also that the court cannot *ab*judicate what the plaintiff has not prayed to have adjudged.[80] In the cases of required joinder of claims the American courts, to be sure, do not adjudge nor abjudicate beyond the prayer either. But it is the res judicata effect of the judgment itself which is conceived to bring about a tacit abjudication of the claims not joined. Under the essence of ZPO, section 308 (1) in conjunction with section 322 (1), and in the absence of another statutory provision to the contrary, not even this is conceivable within the German law. What the court by virtue of the law is prohibited to declare in the judgment, the latter may not effect "on its own hook," so to speak. Even if the court would explicitly go beyond the prayer—be it by way of adjudging or by way of abjudicating anything that the plaintiff had not prayed for to be adjudged—such a violation of section 308 (1) would not only be reversible error, but also would exempt the judgment from the operation of res judicata to that extent.[81] This judgment would not be "capable of becoming res judicata" because it would not adjudicate upon "the claim set forth in the complaint," but upon a different procedural claim or claims. From what has been said as to the two factors individualizing the particular procedural claim, it follows that the identity of such a claim ceases as soon as the prayer for relief (with respect to quantity or kind) or the essential core of facts is shifted. Only the former is material in the present connection. Neither the court nor the judgment itself may expressly or tacitly shift the plaintiff's prayer for relief. The German law of res judicata does not sanction this. It matters not that the plaintiff does have

79 Cf. 23 CYC. 383 (1906); 50 C.J.S., Judgments §648, at p. 89 (1947).

80 Cf. ROSENBERG, note 77 supra, p. 588; HELLWIG, note 75 supra, Part 1, p. 411.

81 Cf. ROSENBERG, note 77 supra, §150 I 3 a, p. 689; STEIN-JONAS-SCHOENKE, KOMMENTAR ZUR ZIVILPROZESSORDNUNG, 17th ed., §322 V 2c (1953) and the cases cited in either work.

more claims against the defendant than the one or the ones which he has included in his prayer, and that they all did arise from the same contract transaction or tort occasion. As a general rule he alone is the master of his action. It is he who, by his prayer, determines the scope of judicial adjudication.

The law of res judicata yields to this principle and does not require a joinder of claims, neither of additional claims of the same kind nor of claims of a different kind. This is, as intimated previously, one of the main fundamental differences in the conceptions of German and American law. The prevailing American doctrine relating to splitting and to compulsory joinder does not hesitate to conceive the subsequent preclusion as a genuine res judicata effect.[82] According to German conceptions it is hard to conceive that the operation of res judicata may go beyond the object of the action, the subject matter in controversy. It might be argued, of course, that this inhibition could be remedied by the assumption that res judicata determines the object of the action, and not vice versa. This, however, seems not only to be somewhat arbitrary but also rather unrealistic. Taking the American rule of required joinder of claims, it is difficult to assume that all the claims which the plaintiff omitted to join and which, therefore, are covered by the preclusive res judicata effect of the judgment, should have been part of the object of action, of the subject matter in controversy. Should this be true merely because of the scope of the res judicata effect, although the court never passed upon those claims and was not even asked by the plaintiff to do so? Hardly. Nor can this conceptual difficulty be removed by speaking of "one single, entire claim." Thereby it could only be shifted from one relating to a plurality of things to one relating to multiple parts of one thing. The arguments would be the same. If within the scope of compulsory joinder one attributes the preclusion to res judicata, as the prevailing American notion does, it is, therefore, better to admit squarely that to this extent res judicata embraces more than was actually the subject matter of the action. Considering the German reluctance to follow this conception as a dogmatic possibility, the argument could be made that the same results can be reached by con-

[82] Cf., for example, Blume, "The Scope of a Civil Action," 42 MICH. L. REV. 257 at 282 (1943); Blume, "Required Joinder of Claims," 45 MICH. L. REV. 797 at 798 (1947); CLARK, CODE PLEADING, 2d ed., 473 (1947). In the JUDGMENTS RESTATEMENT, too, the section dealing with splitting a cause of action has been made a part of the law of res judicata. Cf. p. 242 et seq. (1942).

ceiving the preclusion[83] as a sort of penalty, a special effect, not of, but in consequence of res judicata. This is, of course, a permissible argument. But the German law has not adopted it except in a few situations,[84] and it thinks of them as exceptions. And it is not only the fact that the res judicata effect does have to overstep the limits of the object of action which makes the German law shrink from a broader application of the compulsory joinder idea as realized in the American law. This reluctance is as much caused by the fact that the preclusion necessarily results in detriment to the plaintiff, no matter whether he has won or lost his original (part) action. The American rule of required joinder of claims is not realized by way of collateral estoppel, but by means of merger and bar.[85] The employment of collateral estoppel would have the effect that issues of law or fact which were litigated and adjudicated upon in the original action could not be relitigated in a subsequent action on another claim. The decision on them would be conclusive. Due to the fact that at least in the majority of the pertinent cases the consecutive actions are based upon common main issues of law or fact, this would in many cases mean that the plaintiff wins on a subsequent action because he won on the original one, or that he loses on the former because he lost on the latter. At any rate, different outcomes in the consecutive actions would have to be based upon reasons which are independent of the issues conclusively decided upon in the original judgment. The plaintiff could never lose on a subsequent action merely because he did not make its object a part of the original action. But this is, indeed, the result of the American rule of required joinder of claims. If the plaintiff's first action for part of his claims has been successful, then all claims against the defendant arising from the same contract transaction or tort occasion merge in the judgment. What the judgment awards is all the plaintiff can ever receive. He is barred from maintaining an action for the rest of his claims; there are not even any left after the merger. In case the plaintiff has lost on his first action for part of his claims, then all claims (arising from, etc.) are barred.

The German law does not even recognize a collateral effect of res judicata in the pertinent cases although it does recognize it as such. If, for example, the plaintiff in an action for declaratory

[83] So far as it goes beyond the subject matter of the action.

[84] See discussion below at p. 832 et seq.

[85] Cf. Blume, "Required Joinder of Claims," 45 MICH. L. REV. 797 at 802 (1947).

judgment asks the court to declare that he is the owner of certain premises, and the plaintiff recovers a judgment to that effect, the defendant can no longer dispute plaintiff's ownership in a subsequent action for recovery of possession based upon said ownership. Although a different procedural claim is presented in the second action (a different relief is sought) res judicata of the first judgment operates collaterally insofar as the incidental question of ownership is concerned which has been the direct subject matter of the first action and judgment. But the collateral effect of res judicata does not go beyond the original procedural claim; especially does it not cover issues of fact or law preceding the adjudication, or logical consequences following therefrom. If, for example, the plaintiff had only sued for recovery of possession, though basing his claim on the ground of his being the owner, the judgment granting the relief would not be res judicata on the question of ownership, because this was not asked for in the prayer and, hence, not "the claim set forth in the complaint." There would be no collateral effect of res judicata on this issue in a subsequent action on whatever claim. The same is true as to the cases in our context. A judgment on part of one or more claims has no collateral effect on the rest.[86] The existence or nonexistence of a part of the entire claim is not thought of as involving the question of existence or nonexistence of the asserted remainder. This is so even in the case where, for example, all claims, if any, arose out of the same contract and the court dismissed the part action on the ground that the contract was void. As a matter of fact it may be difficult for the plaintiff to succeed in a later action for the rest of his claims; as a matter of law, however, he is not prohibited from doing so. The decision on the validity or invalidity of the contract—as all incidental findings of the court—has no part in the res judicata effect because it was not asked for in the prayer for relief. Only the final conclusion of the court directly bearing on the procedural claim itself, as individualized by the prayer and the facts relied upon, enjoys res judicata effect.[87]

If we can thus see the German law rejecting a collateral effect of res judicata in our pertinent cases, it is only natural that, as a rule, it also declines to require joinder of claims by applying a gen-

[86] Cf., for example, ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS, 5th ed., §150 I 3 a, p. 689 (1951).

[87] Cf. id., §150 I 1, p. 688, II, 1, p. 691; STEIN-JONAS-SCHOENKE, KOMMENTAR ZUR ZIVILPROZESSORDNUNG, 17th ed., §322 V (1953).

eral preclusion equivalent to merger and bar—weapons even sharper than collateral estoppel! It is perfectly clear, therefore, that all the cases which have been stated above as illustrations of the compulsory joinder rule would be decided the other way under the German law.

Let us recall the principal German case discussed above[88] where the plaintiff brought two successive actions for breaches of the same contract; first, an action for damages sustained by the depreciation of his equipment, and secondly an action for damages suffered by loss of profits because the defendant had intentionally prevented the plaintiff from completely performing the contract. From the prayer for relief in conjunction with the facts relied upon in the two complaints it appeared that the plaintiff was asserting a different right in each action, in other words, that his assertion of a right, i.e., his procedural claim in his second action was different from the one in his first action. Hence, the first adjudication exerted no res judicata effect on the subject matter of the second action. On his first action for damages to the equipment, to be sure, the plaintiff had lost partially. But this prevented him only from subsequently claiming the damages rejected with respect to the equipment. This claim and only this one was spent and res judicata. The claim for loss of profits was one different from that, and its adjudication also was in no way dependent upon the decision on the former claim, so that neither a direct nor a collateral effect of res judicata, within the meaning of the German law, could come into question.

In *1 RGZ 349 (1880),* the Reichsgericht held permissible a suit for interest after an action for the principal had been adjudicated previously. In *Warn. 1929, p. 208, No. 115,* the plaintiff in a prior action brought on section 288 (1) of Bürgerliches Gesetzbuch (BGB), the German civil code, had recovered interest for the defendant's default in performing a certain obligation, and thereafter in a second suit claimed further default damages (loss of profits) according to BGB, section 288 (2), which was granted. The fact that the second action referred to a different provision of the civil code was not in itself decisive; but it was the fact that the plaintiff prayed for a different relief. In *123 RGZ 44 (1928)* the plaintiff in his first action, in which he recovered indemnity for the expropriation of certain premises, had made a mistake in computing the amount of damages; he was allowed

[88] Note 37 supra.

to claim the increased damages in a second action. In all of these cases the claims raised in the second suit had accrued prior to the commencement of the first action! Under the American rule of required joinder of claims the plaintiff would have been precluded by res judicata from maintaining a second action in each case.

The American rule does not allow subsequent recovery of increased damages if they were caused prior to the commencement of the original suit. The fact that the plaintiff was unable to prove the full amount of the damages suffered makes no difference.[89] He may, to be sure, avail himself of the possibility of moving for a new trial on the ground of inadequacy of damages or of newly discovered evidence.[90] These proceedings, however, subject to a broad discretion of the trial court, do not open independent new actions in spite of the res judicata effect of the former adjudication, but are proceedings in the original action in order to remove that otherwise operating res judicata effect. They do not constitute a genuine exception to the rule of compulsory joinder of claims. The German law of res judicata precludes the plaintiff from subsequently claiming increased damages or the like only under special circumstances. *Warn. 1925, p. 186, No. 138,* for example, presented the following situation: The plaintiff had lent to the defendant several Persian rugs. While in the defendant's possession said rugs were stolen by a third person. In his action for damages the plaintiff prayed for such a sum "as according to the court's discretion[91] is necessary to replace the rugs, said sum being calculated tentatively to amount to 250 Goldmark." The plaintiff was awarded 250 Goldmark. In a subsequent second action the plaintiff contended that the rugs had been worth 3,000 Goldmark, and he claimed additional 2,750 Goldmark accordingly. The Reichsgericht dismissed on the ground of ZPO, section 322 (1). It pointed out that if the plaintiff submits the amount of the damages to the court's discretion, suggesting a certain amount himself, and the court, then, in exercising its discretion follows the plaintiff's suggestion and awards the sum suggested as full damages, the plaintiff's claim is completely adjudicated. The plaintiff cannot thereafter claim increased damages. This reasoning is perfectly in accord with the

89 Cf. JUDGMENTS RESTATEMENT 246 (1942).

90 Ibid.

91 Such a prayer is admissible in certain types of damage cases according to the special provision of ZPO, §287.

rule of section 322 (1). In a case like this the plaintiff himself by his prayer for relief submits his total claim for damages to judicial discretion and adjudication. Thence it necessarily follows that in a subsequent action for "increased damages" the plaintiff cannot escape asserting a claim which already had been (part of) the subject matter of the previous action and adjudication. And this very identity brings res judicata into effect. Furthermore, and of course, the plaintiff is precluded from afterward claiming an additional amount insofar as such an amount was prayed for and explicitly rejected in the original action.[92] Another device to reach a partial preclusion under the German law is the assumption of a waiver on the part of the plaintiff. But such an assumption is not justified by the mere fact that the plaintiff in his original action did not make a reservation of further claims. The law of procedure does not require him to do so.[93] There must be some additional conduct showing that the plaintiff meant to waive further claims, and that the defendant agreed to that.[94] For waiver is thought of as a contract governed by the rules of substantive law. The plaintiff in such cases is precluded, not by virtue of the res judicata effect of the former judgment, but because his additional claim or claims have been extinguished according to the substantive law.[95]

A corresponding difference between the American and the German law exists with respect to the plea of pendency. The American law has its rule of required joinder of claims. It results in a plea of res judicata when consecutive actions are brought, in a plea of pendency when the actions are pending contemporaneously. The German law, as we have seen, in its general rule does not require a joinder of claims, no matter whether they all arose out of the same contract transaction or tort occasion, respectively, and prior to the commencement of the particular suit. Res judicata cannot be pleaded in a later action. Accordingly, the defendant cannot avail himself of the plea of pendency in contemporaneous action, provided only that the plaintiff in each one of them states a claim sufficiently individualized as to be distinguished from the other ones.

92 Cf. JW 1896, p. 691, No. 18 (note 88 supra and text theretofore) as to the one part of the claim for the equipment damages; furthermore, 73 RGZ 213 at 219 (1910).

93 See Warn. 1929, p. 208, No. 115.

94 Cf. ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS, 5th ed., §150 I 3 a, p. 690 (1951); STEIN-JONAS-SCHOENKE, KOMMENTAR ZUR ZIVILPROZESSRECHTS, 17th ed., §322 V 2 d (1952).

95 Ibid.

Two entirely different policies are, thus, conspicuous within the two legal systems in regard to a plurality of claims arising out of the same contract transaction or tort occasion. The German law does not, as the American law does, presume a multiplicity of suits to be harassing to the defendants and time-wasting to the courts. Within the limits of some exceptions[96] the plaintiff is at liberty to bring as many actions as he sees fit. He is, as it has been put previously, the master of his claims and is not required to join same. What has been said, comparatively, so far is more or less an elaboration of the dogmatic differences operative against the background of different policies. Two points are worth mentioning now which should be likely to cast at least some light on those policy differences themselves. One of them goes to the position of the defendant, the other one concerns the courts.

A considerable part of what has made the American law regard a multiplicity of suits as a vexation of the defendant may, under German conceptions, be thought of as being remedied by the legal possibility that the defendant may ask for a negative declaratory judgment.[97] He may, in a counterclaim to the plaintiff's part action or in a separate suit, assert that out of the particular transaction, occasion or event relied upon in plaintiff's action, the plaintiff has no other claim or claims against him, and he may pray for a corresponding declaratory judgment. This remedy is available for the defendant in those frequent cases where the plaintiff pretends to have a further claim or claims and the defendant believes them unjustified. The res judicata effect of such a declaratory judgment in defendant's (the defendant to the original action) favor would protect him against later suits insofar as the court has declared that the plaintiff has no further claim or claims out of said transaction, etc. The effect is the same as if an action or actions of the plaintiff based upon such claims had been dismissed.

In cases where the defendant believes that the contract, upon which the plaintiff has based his claim in litigation and further pretended claims, is invalid, he may bring what is called a negative *Inzidentfeststellungsklage,* i.e., literally translated, a negative incidental declaratory action. This he can do in the form of a counterclaim within the pending action.[98] He also can do it in a

[96] See discussion below at p. 832 et seq.
[97] Provided for by ZPO, §256.
[98] So provided for by ZPO, §280.

separate action.[99] Again, a judgment granting him the relief sought would protect him against all claims predicated on said contract. The propriety of defendant's assertion that the contract is invalid would be res judicata in the original and any collateral proceeding for prosecution of such claims.[100]

It does not appear that in the American law the possibility for the defendant to obtain negative declaratory relief has had any influence on the policy considerations relating to the problem of required joinder of claims. Even though not known under the old common law, declaratory relief was to some extent recognized in the old courts of chancery and is now, also in negative form, authorized by statutes in force throughout the United States.[101] It might be argued that the rule against splitting claims became well settled under the common law long before (negative) declaratory relief had come to be recognized. On one hand, however, the rule against splitting was not applied as broadly under the common law as it has been later, and on the other hand it seems probable that the striving for protection of the superior courts' jurisdiction and the effort to cut down the engrossment of the courts would have turned the scale in favor of the rule anyway.

So far as the defendant is concerned, the American rule, as it stands, protects him against a multiplicity of suits not only in those cases which under the German law are believed sufficiently remedied by the possibility of obtaining negative declaratory relief, and at least part of which could be taken care of by a collateral estoppel under the American law, but it protects the defendant even in those cases where he himself does not think that the claims are unjustified and would not consider obtaining negative declaratory relief in order to have the plaintiff precluded from afterwards maintaining an action or actions on further claims. In other words, not only a multiplicity of unjustified suits, but also a plurality of (substantively) justified suits is thought of as a vexation of the defendant. The German law has not taken

99 According to ZPO, §256.

100 ZPO, §322 (1). This kind of action is the very instrument (and the only one) by which a party can have the res judicata effect extended to legal relations on which the final conclusion on the matter directly in controversy is dependent, namely, by making said relations themselves the direct subject, i.e., "claim" in the meaning of §322 (1), of an action or counterclaim.

101 Cf. BLUME, AMERICAN CIVIL PROCEDURE 30 (1955); JUDGMENTS RESTATEMENT 342 et seq. (1942).

this view as a general rule. The defendant may try to protect himself by bringing a negative declaratory action against the pretense of further claims where he sees fit to do so.[102] As long as the plaintiff does not pretend such claims, or if they are justified, the defendant is not regarded as needing and deserving protection of the kind the American rule affords him. Against a multiplicity of well-founded suits, in particular, the defendant may protect himself by payment. Some exceptions are to be discussed below, but they will show, either, that the term "vexation" has a much more restrictive meaning in the German law of procedure, or, that the underlying rationale has nothing to do with the defendant at all.

Another point, which probably has had some bearing upon the different policies, is the fact that the German courts do not sit with a jury in civil actions. To save the time of the courts and to avoid additional expenditures at the expense of the taxpayer has been one of the major reasons for the American rule of required joinder of claims. The necessity of impaneling separate juries in case of multiple suits is very likely one of the gravest points in the scope of the considerations of this sort. It is of course true that the same rule applies in such proceedings at law as are carried on without a jury and likewise in proceedings in equity where the court always sits alone. But this does not refute what has been said about the influence of the jury trial. In other areas of the American law, too, comparable situations can be found. It is generally agreed, for example, that a great many of the rules of evidence are to be ascribed to the fact that the evidence is put before the jury, i.e., the twelve laymen in the box. And yet, the same rules generally apply in proceedings without jury. In contemplation of law the jury trial is (still) considered to be the normal kind of trial.

That the German courts do not have to bother with impaneling juries is another possible explanation for the general tolerance of the German law of a multiplicity of suits even where all the claims arose from the same contract transaction or tort occasion and could have been joined in the original action.

As already suggested, there are some exceptions in the German law to the general rule that a joinder of claims is not required.

[102] If it turns out to be successful the opponent has to pay both parties' expenses of the litigation, ZPO, §91.

One group of exceptions is based on express statutory provisions. Section 54 of the German Patentgesetz has previously been mentioned. The plaintiff, who has brought an action against the defendant for violation of a patent, cannot institute another action against this defendant for violation of another patent on the basis of the same wrongful act or one identical in kind,[103] except where the plaintiff in the exercise of due care could not join the claim for the other patent in his original action. Whether the plaintiff won or lost on his first action makes no difference.

Another case of this kind, and the most famous one, is regulated by ZPO, section 616, first sentence. The provision concerns matrimonial causes and reads as follows: "The plaintiff, whose action for divorce or action for cancellation of marriage[104] was dismissed,[105] cannot later on base his right, to ask for divorce or cancellation, on such facts as he alleged in the former litigation, or as he could allege in the former litigation or by way of joining the actions." The plaintiff is thus required to join all claims for divorce and cancellation in one proceeding,[106] except where, even in the exercise of due care, he cannot do so.

Another provision of this type, drafted after the model of ZPO, section 616 is section 17 of the German Mieterschutzgesetz.[107] The landlord is required to join in one action all claims against the tenant for termination of the lease. If an action has been dismissed on the merits the landlord cannot subsequently maintain

103 Under the American law the same result could be reached by the assumption of one tort occasion so far as the same wrongful act is concerned, and possibly by the assumption of one series of occasions as regards wrongful acts identical in kind.

104 While the action for divorce is brought on the ground of violations of marriage duties or other conduct or facts having occurred after the contraction of marriage, the action for cancellation is based upon facts or conditions that occurred prior thereto or were operative, respectively, during the very act of contraction, such as relevant error, deceit, coercion and the like. The judgment granting cancellation has no retroactive effect. The action for cancellation is to be distinguished from the action for annulment whose bases are fatal defects in the contraction of marriage (incompetency, lack of form, etc.) or certain cogent impediments (bigamy, close relationship, etc.). The judgment in this case is retroactive.

105 On the merits.

106 Under the American law this would be different. Although the plaintiff may be precluded from suing a second time for a particular relief on a ground other than the one alleged in the first action and already existing at that time, this generally does not apply to status proceedings. Thus, plaintiff may bring another divorce action on a different ground even though it existed and was known to him at the time of the first action. See JUDGMENTS RESTATEMENT 337 (1942).

107 The statute is a result of the shortage of living quarters after the two world wars and is designed to protect the tenants. As a rule, the landlord cannot terminate the lease whenever he sees fit, but he has to bring an action for judicial termination on the basis of certain grounds recognized by the statute (such as non-payment of the rent, other violations of duties by the tenant, urgent own needs of the landlord and the like).

another action for termination on the ground of such facts as he alleged or could have alleged in the original action.[108]

So far as these provisions require a joinder of different claims it is not conceived to be enforced by res judicata. This constitutes at least a theoretical difference from the prevailing American conception. In the patent case the allegation of a different patent leads to a different procedural claim in the meaning of the law of res judicata because the identity of the patent is an essential element in individualizing the procedural claim for its infringement. Res judicata being confined to the same claim under the German law, it would, accordingly, not bar a later action for the same wrongful act on the ground of a different patent. And it also would not bar an action for an act "identical in kind," as the statute does, because here again, a new procedural claim is presented. Likewise, in the case of ZPO, section 616 concerning the matrimonial causes, res judicata alone would not bring about the effect desired. If the plaintiff's action for divorce was dismissed res judicata would, at any rate, not preclude the plaintiff from afterward maintaining an action for cancellation of marriage, because he would be praying for a different relief and relying upon facts necessarily different from the ones alleged in the divorce action. The same would be true in the reverse case where the action dismissed was for cancellation and the later action seeks a divorce. Claims for cancellation are not the subject matter of a divorce action, and vice versa.[109] What could be accomplished by res judicata at the most would, therefore, be a preclusion of further divorce claims after the dismissal of a divorce action, and of further claims for cancellation after an action for cancellation had been dismissed. And if you take the view that also in proceedings like these, whose objective is the change of a legal state by constitutive judicial act (judgment), the subject matter, i.e., the procedural claim, is not the assertion of a right to the change absolutely, but as individualized by particular facts,[110] then, res judicata can accomplish even less: it would not

[108] The American law does not have a statute like this. But there is a similar proposition. Successive actions on different grounds to cancel a contract or deed are not permitted if the grounds alleged in a later action could have been presented in the original action. See JUDGMENTS RESTATEMENT 261 (1942).

[109] View of the great majority, including the Supreme Court. Cf. ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS, 5th ed., §161, III 4, p. 742 (1951).

[110] This, indeed, has been the notion generally prevailing at least outside the range of ZPO, §616 with respect to other, like proceedings. Cf. 3 HELLWIG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS 27 (1903).

even preclude an unsuccessful divorce plaintiff from later raising further claims for divorce on the ground of different cores of facts.[111] And it would be the same after a dismissed cancellation action with respect to subsequent claims for cancellation. This very view is important in connection with section 17 Mieterschutzgesetz above. If in the landlord's action for judicial termination of the lease the assertion of his right to the termination as such is the subject matter, then there is but one procedural claim, irrespective of different cores of facts possibly relied upon, and res judicata can easily take care of this case even under the German law. A problem of required joinder of claims does not come up. As pointed out in note 110, however, this is not the prevailing view, and the statute itself not only by the mere taking up of an express and otherwise superfluous provision, but also by additional language indicates that it is not based on this view either. In other words, reliance upon different fact situations as bases for the asserted right of termination leads to different procedural claims not covered by res judicata.

There is one other situation where the German law requires such a joinder of claims. This, too, is a case of an action for judicial change of a legal condition. If a judgment debtor after the adjudication acquires a defense (called in German law "an exception") against the judgment creditor's claim—by payment, release, allowance of time to pay, and the like—but has nevertheless to face the impending execution by the creditor (who may contest the payment, etc.), he may as a plaintiff bring an action against the creditor to have the execution of the judgment enjoined and declared inadmissible. The legal condition to be changed by a constitutive judgment is the executability of the former judgment. Section 767 (3) ZPO compels the plaintiff (debtor) to join in his suit all exceptions (defenses) that he may have against the judgment debt and that he can join in the exercise of due care. Again, according to what has been said above, the subject matter of such an action is not merely one procedural claim for declaring the execution inadmissible as such, but as many procedural claims as the plaintiff alleges exceptions. If, therefore, the plaintiff contrary to section 767 (3) ZPO should fail to join some available claim (exception), and lose on the one he asserted, res judicata as laid

111 In our context only such facts are of any interest, of course, as accrued prior to the original adjudication. To rely upon subsequently accruing facts is not prohibited by any preclusion.

down in section 322 (1) would not bar a later action on the omitted claim (exception).

From all that has been said it is quite clear that in the cases where the German law does require a joinder of claims and enforces it by way of subsequent preclusion, the enforcement, so far as different procedural claims are concerned, does not depend on res judicata, as is generally assumed for the American law. It is rather effected by a special, statutorily provided preclusion which goes beyond the object of the action and of res judicata. A similar distinction between res judicata preclusion and a special preclusion as penalty has sometimes been intimated in the American literature on compulsory joinder. Schopflocher, for example, has advocated such a distinction.[112] He has favored a narrow concept of "cause of action" for the purpose of res judicata, pretty much following the substantive law. A special preclusion as penalty should apply with respect to causes of action arising from the same transaction, but not joined. In other words, the requirement to join several causes of action (claims) would not be enforced by res judicata, the latter being confined to the "same" cause of action as restrictively described by Schopflocher.[113] He has pointed to the difference that should be observed with respect to the two kinds of preclusion. Res judicata should work automatically irrespective of whether the plaintiff was at fault or not; the special preclusion, on the other hand, should be a penalty against the plaintiff for having neglected procedural duties. This idea bears much resemblance to the German conception. The res judicata effect of ZPO section 322 (1), confined, as it is, to the particular claim in litigation, is entirely independent of any fault on the part of the plaintiff; yet, the statutory provisions discussed, which require a joinder of claims, all make explicit or implicit reference to "due care"! Considering the exceptions to the American rule of required joinder of claims, it, indeed, becomes obvious that elements of fault on the part of the plaintiff are involved in the rule although it is conceived to be enforced by res judicata. The defendant's consent to the splitting—to take that up first—as a recognized exception may not clearly support this statement because in most jurisdictions, as opposed to the German law, res judicata, to be effective, must always be

112 "What Is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?" 21 ORE. L. REV. 319 at 363, 364 (1942).

113 It will be noted, of course, that the restriction itself is different in nature from the one used with respect to the German "procedural claim."

pleaded by the defendant anyway. That the defendant is empowered to consent to the non-observance of res judicata by omitting the plea is, accordingly, a general feature of the American law of res judicata and not one peculiar to the field of compulsory joinder. The exception involving the plaintiff who, in the original action, sought a remedy applicable only to part of his entire claim, however, more clearly reveals the element of fault. This is even more true of the third exception which allows the plaintiff to bring a later action on an omitted claim if the defendant had concealed same from the plaintiff. Even under the American doctrine of res judicata fraud or misrepresentation on the part of a party generally does not prevent res judicata from coming into effect.[114] The element of fault enters the context of required joinder of claims not only through these exceptions, but oftentimes also in the judicial process of determining what is an "entire" cause of action or claim[115] although one would think that it is even less a legitimate criterion here than it is for determining the scope of res judicata. It is certainly this flavor of repeated dogmatic inconsistency which makes Schopflocher so strongly advocate a distinction between res judicata preclusion and a special penalty preclusion. In this respect, at least, he might be quite satisfied with the German law.

The cases discussed, in which the German law—as exceptions—requires a joinder of claims, are not based upon a common rationale. The only thing one can say is that they represent situations in which the legislature has recognized an exigency urgent enough to justify the requirement of joinder by providing an extraordinary preclusion beyond the limits of the procedural claim asserted and of res judicata.

Experience had shown that especially in the course of patent controversies it frequently happened that economically less powerful defendants had to face a multiplicity of suits, consecutively instituted by economically more powerful plaintiffs on the ground of the same, allegedly wrongful, act or acts. Section 54 of the German Patentgesetz was designed to remedy these situations, i.e., to prevent imposition upon the defendant of unnecessarily

114 An attack on the means by which the judgment was obtained may only be made in a special equitable proceeding instituted for that very purpose, and there are strict requirements of relief. Cf. JUDGMENTS RESTATEMENT 256, 610 et seq. (1942).

115 Cf. Schopflocher, note 112 supra, at p. 364. He speaks of "the necessity for the courts to strain and distort the concept of cause of action according to what in a given case is thought to be the desirable result."

high expense of litigation, or the use by a more powerful plaintiff of the risk of such expense to make the less powerful defendant compliant.[116] Under these circumstances and within this limited field a multiplicity of suits has been recognized as constituting a vexation of the defendant that is so unfair and has occurred frequently enough as to call for the legislature to step in.

In the three other cases of compulsory joinder it is not the protection of the defendant which is the primary objective of the special preclusion. It is rather some particularly strong public interest involved that at times has made it desirable to cut down litigation as far as possible under a fair consideration. Thus, the harsh preclusion provided for by ZPO, section 616 in order to effect a joinder of all available divorce and cancellation claims, finds its rationale in a general favor matrimonii, a favor of marriage which has been amply voiced in other provisions of the German law as well. One of its procedurally most important emanations is the abhorrence of a multiplicity of marriage-destroying suits.[117] Quite a similar rationale underlies section 17 Mieterschutzgesetz. The leases that come under the statute and, accordingly, are not subject to free termination on the side of the landlord, actually bring about some sort of long term relation, naturally depending upon reasonable cooperation from both sides. It is for this reason that the statute in the special interest of the public wants a judicial termination proceeding to be a concentration of all complaints which the landlord has against the tenant and which may be a basis for the judicial termination of the lease. Once the case has been tried and termination refused there shall be a "state of peace"[118] between the parties; only with such claims as arise subsequently is the plaintiff allowed to come into court again. Likewise, the legislature has deemed it most undesirable that the executability of a judgment should be questioned again and again. Here, too, a public interest is involved, aside from the creditor's interest. The result has been the provision of ZPO, section 767 (3), requiring a joinder of claims. In none of the provisions, however, has the interest intended to be protected by the requirement of joinder been regarded as higher than

116 Cf. BENKARD, KOMMENTAR ZUM PATENTGESETZ, 4th ed., §54, 1, p. 511 (1954); KLAUER-MOEHRING, KOMMENTAR ZUM PATENTGESETZ, 2d ed., §54, 1, p. 504 (1940).

117 See Bötticher, "Zur Lehre vom Streitgegenstand in Eheprozess," in FESTGABE FUER LEO ROSENBERG 85 (1949).

118 See Roquette, "Rechtskraft und Ausschlusswirkung klagabweisender Urteile in Mietaufhebungsprozess," DR 1942, 874 at 875.

the ability of the plaintiff to comply with it. Exercise of due care exculpates him. This he may show in various ways. Proof to the effect that he did not and ought not to have had knowledge of a particular claim is probably the most important. There may, however, be some other reasonable considerations which justify the omission of a claim or claims even if the plaintiff does know of them. In view of the serious legislative intent expressed in said provisions, there has to be, of course, a strict measure for what is a reasonable consideration.

Just as in the American law of compulsory joinder of claims, pendency may be pleaded in the above German cases when the plaintiff splits the claims required to be joined among several contemporaneous actions. In the German law, too, the requirement of joinder not only means that the plaintiff is precluded from maintaining successive actions, but also that he cannot bring several contemporaneous suits.[119] This is as important a means of enforcing the joinder as the subsequently resulting preclusion. The scopes of res judicata and pendency are thus not quite identical in the German law. Pendency can be pleaded to the same extent that a subsequent preclusion would have, be it res judicata preclusion or special statutory preclusion or both.

As intimated previously, the availability of the pendency plea makes the joinder required in a more literal sense of the word. The plaintiff, true, is not compelled to make more than one minimum claim the subject matter of litigation so as to obtain judicial action on the merits; if, however, he does so he has to do it in one proceeding, he must join, as a matter of proper commencement of action. There are two other exceptions to the German rule that a joinder of claims is not required. They are not based on express statutory provisions requiring joinder, and involve no question of preclusion but one purely of proper commencement of action.

One of the two situations has already been sketched.[120] The defendant owes the plaintiff 500 marks. The plaintiff sues the defendant for 10 marks as part of the 500. There is evidence to the effect that the plaintiff has planned to bring fifty successive law suits against the defendant each for 10 marks. This the German law would not allow. Such a procedure on the part of the

119 Cf. BENKARD, note 116 supra, §54, 6, p. 514, as to §54 Patentgesetz (not undebated); ROSENBERG, note 109 supra, §161, III 4, p. 741, and 104 RGZ 155 (1921), as to ZPO, §616; 55 RGZ 101 (1903) as to ZPO, §767 (3). The same reasoning applies as to §17 Mieterschutzgesetz.

120 P. 807 et seq.

plaintiff can only have the purpose of producing injury to the defendant. There are several ways of excluding such conduct. One may draw a procedural analogy to BGB, section 226 which prohibits the creditor from exercising a right for the sole purpose of causing injury to the debtor.[121] Or one may say that the plaintiff has no conceivable legitimate interest in obtaining relief in such a way.[122] Such an interest is a prerequisite for any judicial relief. Finally, such a procedure would be against the principle of good faith which not only governs the substantive law, but the law of procedure as well. Malevolent conduct of a case, and delay in particular, the law of procedure does not tolerate.[123] In such a flagrant case of malevolent splitting, the German law would be prepared to presume an unbearable vexation of the defendant, the courts and the public. But still, in the absence of an explicit statutory command, it would shrink from precluding the plaintiff's claim for the remainder, i.e., the 490 marks, because this would clearly overstep the limits of res judicata.[124] As opposed to the American law, neither res judicata nor any other concept of preclusion is called upon for the solution of this problem. Rather, the plaintiff's action would be dismissed without prejudice. The court would under such circumstances decline to pass upon its merits inasmuch as the plaintiff has not properly commenced his action. This in effect forces the plaintiff to join his claims at least to such an extent as to make the imputation of malice disappear from the mind of the court. We know that as a general rule he does not have to join all of them. How much is necessary to remove the imputation of malice and vexation is wholly dependent upon the circumstances of the individual case. None of the writers cited in notes 121 to 123 report any decision dealing with such a case. On the whole, the case seems to be of little practical importance.

This certainly is different as to the second case pertinent to this context. It involves a splitting of claims among several suits for the purpose of circumventing the jurisdiction of the superior courts. The problem arises both in the German and the American law. In fact, as stated previously, the protection of the superior courts' jurisdiction has been one of the original reasons for the

121 Cf. HELLWIG, SYSTEM DES DEUTSCHEN ZIVILPROZESSRECHTS, Part 1, p. 462 (1912).

122 Cf. BAUMBACH-LAUTERBACH, 22d ed., KOMMENTAR ZUR ZIVILPROZESSORDNUNG, p. 247 under E (1954).

123 Cf. ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS, 5th ed., §61 VII, p. 266 (1951).

124 Cf. ZPO, §322 (1).

Anglo-American doctrine of required joinder of claims, and still is an important feature of the rule.[125]

Under the present German law[126] the Amtsgerichte (small claims courts) have jurisdiction over ordinary claims up to the amount of 1,000 marks. Claims exceeding this amount come under the jurisdiction of the Landgerichte (courts of general jurisdiction). Let us suppose that the plaintiff has a claim against the defendant amounting to 2,100 marks and splits same among five suits contemporaneously instituted in the inferior Amtsgericht.[127] Let us further assume that the five part claims are individualized. This being so, the defendant, under the German law, cannot successfully plead pendency[128] in any of the actions because, from a consideration of the prayers for relief in conjunction with the facts relied upon, it follows that the subject matter of each action is a different procedural claim, in the meaning of the term as described previously. But the Landgericht Berlin in its appellate decision cited in note 127 relied upon another ground to hold such a splitting inadmissible. It concluded that this constituted an unfair attempt to circumvent the superior jurisdiction of the Landgericht to the defendant's detriment, and that the plaintiff himself had no legitimate interest in doing so which might outweigh the defendant's interest in having the case tried in the superior court. The court also expressly referred to the principle of good faith, to be complied with under the law of procedure too. This reasoning is closely connected with the German sequence of courts. Actions instituted in the Amtsgericht end (on appeal) at the Landgericht. Furthermore, in the Amtsgericht the case is tried by a single judge whereas the Landgericht sits with three judges irrespective of whether it is acting in the first or appellate instance. And in cases instituted in the Landgericht the parties under some circumstances may have three instances: Landgericht, Oberlandesgericht (Court of Appeals), Bundesgerichtshof (Supreme Court).[129] The Landgericht Berlin, in its decision referred to, recognized a possible interest of the plaintiff in bringing one part action in the inferior court because he may do this in order to

125 Cf. Blume, "Required Joinder of Claims," 45 MICH. L. REV. 797 at 801-802 (1947).

126 Section 23 (1) and §71, subsec. 1 of Gerichtsverfassungsgesetz.

127 These were the facts underlying the decision of the Landgericht (District Court) of Berlin in JW 1931, p. 1766, which the case had reached on appeal. An additional fact was, to be sure, that the part claims were not sufficiently individualized. This also raised a problem of pendency which, however, we leave aside here. That the jurisdictional limit for the Amtsgerichte was 800 marks at that time is immaterial.

128 The defendant actually had objected to the splitting on this ground.

129 Formerly Reichsgericht.

save expenses in case he wins and the defendant thereafter pays the whole debt voluntarily.[130] In the principal case, however, the court affirmed the judgment of the Amtsgericht dismissing all five actions for lack of jurisdiction. This is now universally held to be the correct view in a case of this kind.[131] The effect of this view is directly to require the plaintiff to join his part claims in one action and to remove it to the superior court, in order to escape the dismissals. It must be noted, of course, that it is not meant to require a plaintiff always to join all parts of his claim which falls under the superior jurisdiction. But whenever he does bring several part actions, which in their aggregate exceed the limit of the inferior jurisdiction, he must join and remove them to the superior court, or else they will be dismissed. He may, according to the general German rule, institute one part action in the inferior court or in the superior court depending on where the part fits as a matter of jurisdiction.

A very similar American case is that of *Kruce v. Lakeside Biscuit Co.*[132] The plaintiff brought eleven suits for money claims in the court of the justice of the peace. All claims asserted arose out of the same contract and within a certain period of time. Each claim severally fell under the J.P. court's jurisdiction; their total amount, however, was in excess thereof. The defendant objected on the ground of the rule against splitting and challenged the jurisdiction of the court. His objection was overruled by the justice of the peace and, on certiorari, by the circuit court. Upon writ of error the Supreme Court of Michigan reversed. It applied the doctrine against splitting an entire cause of action and held that the plaintiff was required to join all claims in one suit. Another case pertinent to this context is *Sutcliffe Storage & Warehouse Co. v. United States.*[133] The plaintiff brought four money actions against the United States in the United States district court. The claims were for the reasonable value of the use of certain premises over an alleged period of time. The plaintiff had leased other premises to the United States Navy, but contended that the premises here in question had been used by the

130 The ground rather than the amount of the claim may virtually be in issue.

131 Cf., for example, ROSENBERG, note 123 supra, §31 II, 1, p. 121; Goldschmidt, "Kann durch Zerlegung eines zur landgerichtlichen Zuständigkeit gehörigen Anspruchs in mehrere, gleichzeitig erhobene Teilklagen die amtsgerichtliche Zuständigkeit begründet werden?" in JW 1931, p. 1753; BAUMBACH-LAUTERBACH, note 122, supra, p. 20 under 3; Landgericht Trier, JW 1926, p. 884, No. 22; Landgericht Köln, JW 1932 p. 2923, No. 6; Landgericht Hamburg, JW 1936, p. 960, No. 62.

132 198 Mich. 736, 165 N.W. 609 (1917).

133 (1st Cir. 1947) 162 F. (2d) 849.

latter without being covered by said contract. Each of the claims severally was under 10,000 dollars; in their aggregate they exceeded that amount. The defendant United States objected to the splitting and relied upon the Tucker Act which provides that claims against the United States in excess of 10,000 dollars cannot be brought in the United States district court, but must be instituted in the Court of Claims in Washington.[134] On appeal the Court of Appeals for the First Circuit sustained the defense, as had the district court. It based its reasoning on the principle that all claims arising from continuous trespass are required to be joined also in a case against the government. Accordingly, they were held to constitute one entire claim in the meaning of the doctrine against splitting and of the Tucker Act. The court pointed out that the plaintiff must make his choice whether he wishes to waive the amount exceeding 10,000 dollars, and remain in the district court, or to join all claims in one action and go to the Court of Claims.

These two American cases make it obvious that the rule of required joinder of claims is also designed to protect the superior courts' jurisdiction. When the plaintiff must join his eleven or four claims, respectively, he cannot remain in the court of the justice of the peace or the United States district court. He has to remove to the circuit court in the first case, to the Court of Claims in the second, or else his action will be dismissed for want of jurisdiction. In the *Sutcliffe* case the court made express reference to the jurisdictional feature involved: "The congressional policy is that all large claims must be presented in the one court in Washington."

It thus appears that both laws largely concur in the case of contemporaneously commenced part actions for the purpose of circumventing the superior jurisdiction. They both prohibit such a splitting and directly require a joinder of actions and their removal to the superior court. But there is a considerable difference as to successive part actions. Suppose the plaintiff sues for a part of his total claim in the inferior court and some time after final judgment on the merits sues for another part or the entire remainder. Under the American law of compulsory joinder his action must fail;[135] under the German law it does not. According to the former the plaintiff, true, can go into the inferior court as long as he keeps the amount within the limits of its

[134] 28 U.S.C. (1952) §1346.

[135] Provided, of course, that the previously discussed exceptions do not apply.

jurisdiction. But he has to pay dearly for doing so. In this situation the rule of compulsory joinder protects the jurisdiction of the superior court by indirection in that it will strike with its sharp weapon of subsequent preclusion. The plaintiff will fail at the broad bar of res judicata.[136] The German law of res judicata cannot accomplish this, as we have seen, because the prayer for relief, individualizing the procedural claim, marks out its limits definitely. And here the German law has not taken the other conceivable step, i.e., to establish a procedural bar by way of special preclusion. Here again, the idea of the negative declaratory action and relief plays an important role. When the plaintiff brings consecutive (individualized) part actions in a case where the total claim would come under the jurisdiction of the superior court, the defendant, who has an interest in doing so, may file a counterclaim praying for a judicial declaration that the whole claim does not exist.[137] Thereby the whole claim becomes pending, and the defendant can ask the inferior court for removal of the entire case to the superior court.[138] In the case of contemporaneous (individualized) part actions which, added together, amount to the total claim, the defendant cannot avail himself of this possibility because his counterclaim for negative declaratory relief would be successfully objected to by a plea of pendency, the subject matter of the declaratory counterclaim being included in the actions for coercive relief. Accordingly, the defendant would, in this situation and only in this, stand defenseless before the plaintiff's unconscionable resort to the inferior jurisdiction.[139] If the defendant in the case of one part action does not make use of the negative declaratory counteraction the law does not step in on its own initiative by way of subsequent preclusion. The superior court's jurisdiction not being an exclusive one the defendant will be protected only if he insists on same. One thus has the impression that the German law, when it prohibits splitting of a total claim among several contemporaneous actions, does so primarily for the sake of the defendant's statutory right to invoke the superior jurisdiction. On the other hand, one may be inclined to think that the Anglo-American rule of required joinder of

136 Cf. JUDGMENTS RESTATEMENT 253, 254 (1942).

137 It is the prevailing view that he can do this although part of the disputed claim has been pending already. Cf. BAUMBACH-LAUTERBACH, note 122 supra, §280 2 D, p. 496, STEIN-JONAS-SCHOENKE, KOMMENTAR ZUR ZIVILPROZESSRECHTS, 17th ed., §280 II 2; Goldschmidt, note 131 supra, at p. 1754; all writers have cited ample cases.

138 ZPO, §506.

139 Cf. Goldschmidt, note 131 supra.

claims, so far as its jurisdictional features are concerned, protects the superior courts' jurisdiction for it own sake. This, to be sure, is hard to decide because the jurisdictional features seem to be almost inextricably interwoven with the other rationales of the rule, i.e., protection of the defendant against a multiplicity of suits as such and saving the time of the courts in general.

[To be concluded.]