Michigan Law Review

Volume 55 | Issue 7

1957

Required Joinder of Claims

Dieter L. Hoegen
Jur. D. 1952, Heidelberg

REQUIRED JOINDER OF CLAIMS*

A COMPARATIVE STUDY OF THE AMERICAN AND THE GERMAN LAW

Dieter L. Hoegen†

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,* Cont'd.

IN review we can say that within a comparatively broad field of the American law required joinder of claims is the rule. There are some exceptions. The German law has no rule of compulsory joinder of claims. Here, there are some exceptions, too. In this sense and within a field which is marked out by the American rule and the German exceptions, the relationship of rule and exceptions is reversed in the two systems.

To decide which concept deserves preference may be a task that would defy all efforts. The American rule looks back on a long history and has come to be applied as a matter of course. The "absence"—if I may say so—of such a rule in the German law has had as long a history and is as certainly conceived to be a matter of course. An attempt has been made in this study to throw light on the differences. Doctrines and concepts, to be sure, are to a certain extent only the expressions of legal policy. Considerations as to what is just and fair in the interest of the individual parties go hand in hand with considerations as to what is expedient and practical or otherwise of benefit to the public, the common good. Legal certainty and predictability are desirable in the interest of both.

Within its field of application the American rule has emphasized very strongly the protection of the defendant and a time-saving administration of justice.[140] In the German law, on the other hand, the plaintiff's control over his claims and actions

* Submitted to the Faculty of the University Law School in partial fulfillment of the requirements for the LL.M. degree. [The first instalment was published in the April issue, 55 MICH. L. REV. 799.]—Ed.

† Jur. D. 1952, Heidelberg; LL.M. in Comparative Law, 1957, University of Michigan; Gerichtsassessor am Landgericht, Mannheim.—Ed.

140 There are some who would go still farther and require joinder of all claims which arise from the same transaction or occurrence, or which involve common questions of law or fact. Cf., for example, Blume, "The Scope of a Civil Action," 42 MICH. L. REV. 257 at 283 (1943).

seems to be the favored policy. Either principle certainly has its advantages, and either may cause great hardship. To prevent a multiplicity of suits altogether is no doubt a supportable policy. It may, however, in certain cases be very hard on a plaintiff who has some reasonable ground for splitting his claims. He may, in a case of personal injury, for example, not yet have ascertained the seriousness and all consequences of the injury sustained and, therefore, confine his action for the present to those damages which he definitely knows have accrued. He may in truth seek to avoid needless trouble and unnecessary expense for himself and the defendant. The intent to save expense, time and effort for the benefit of all concerned (the courts included) may quite generally be a reason for a part action. Still, the plaintiff is always precluded under the American rule from maintaining an action for the balance. In this respect the German view certainly has advantages. On the other hand, it allows part actions quite generally irrespective of whether in the individual case the plaintiff does have such reasonable motives. Put in extreme terms, the German law takes the possibility of reasonable motives, the American law the possibility of unreasonable motives, as the bases of their respective rules. There is, to be sure, one other aspect which has to be taken into account and which, by virtue of the collateral estoppel, is peculiar to the American law. There is a certain danger that the plaintiff may trap the defendant. He might bring an action for a very small part of a big claim hoping that the defendant might not defend as vigorously and carefully as he would in the face of a large demand. And the plaintiff might, even upon this small claim asserted, obtain an adjudication of the decisive ground of the whole claim which the defendant could no longer dispute in a subsequent action for the large remainder (collateral estoppel). This danger, however, would almost seem to be outweighed by the risk which is involved for the plaintiff as well. If his speculation would fail and he would lose on the action for the small part after all, because the court—possibly also influenced by the seeming unimportance of the case—found its ground to be bad, then he also would be precluded as to the whole.

The American rule rigorously prevents multiplicity of suits as such, in the interest of the defendant and the courts, and for the purpose of preserving superior jurisdiction. This is a justifiable policy, and in this respect, of course, the German concept is not as effective. But in consideration of its modifications, provided for in special situations, and of the declaratory relief obtainable

by the defendant to prevent substantial hardship and vexation, it results no less in a meritorious administration of justice. The scrupulous restriction by ZPO, §322 (1) of the scope of res judicata has forced the courts and the legal writers to develop an exact concept of "procedural claim," and they have discharged this obligation satisfactorily by arriving at a workable definition. This has contributed substantially to certainty of law and predictability of judicial action, both in the interest of the parties and of the public. And the constant reference to the element of care, or fault, in those exceptional cases of required joinder of claims has maintained a clean distinction between res judicata and special preclusion. So far as legal certainty and predictability are concerned one should think, of course, that the American rule is no less effective. But there remains a little doubt in this respect, especially as long as so many courts continue their adherence to the concept of "splitting a 'single, entire' cause of action or claim." This, as experience has disclosed, makes completely certain only that the plaintiff cannot split such an entire cause of action, but at times leaves uncertainty as to whether the plaintiff is relying upon an "entire" cause of action, or claim.

B. *Required Joinder of Claims: Counterclaim and Defense*

1. *Compulsory Counterclaim.* In the codes of a number of the American states provision has been made for compulsory counterclaim.[141] This, too, in a sense, means to require a joinder of claims. According to the nature of the thing the requirement is, of course, not addressed to the plaintiff, but to the defendant. He is to "join" his counterclaim with the claim set forth in the complaint so as to have it litigated together with the latter in one proceeding. As in the case of required joinder of claims on the plaintiff's side, the range of the compulsory counterclaim requirement is limited to the same transaction or occurrence. The defendant has to set up a counterclaim upon such a cause or causes as arise out of the transaction or occurrence set forth in the complaint as the foundation of plaintiff's claim, or else he is precluded from afterward maintaining a separate action against the plaintiff thereon. To the same effect is rule 13 (a) of the federal rules:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occur-

141 Cf. hereto CLARK, CODE PLEADING, 2d ed., 646-648 (1947).

> rence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

Some states have adopted similar provisions. Although rule 13 (a) does not explicitly state a subsequent preclusion in case the defendant omits to set up such a counterclaim it is settled beyond issue that the res judicata effect of the former judgment bars a later action on the counterclaim.[142] And the plaintiff can plead the pendency of the action if the defendant, after the commencement of the action and before final judgment therein, sets up his claim in a separate proceeding.

The compulsory counterclaim statutes, in a way, supplement the doctrine against "splitting." Both taken together reveal a policy of procedurally exhausting one transaction between the same parties in one litigation. The majority of the states, however, do not have the compulsory counterclaim but leave to the defendant the choice between filing a counterclaim and bringing an independent action.

This also is the law under the German Zivilprozessordnung. With one exception, to be mentioned in a moment, there is no provision forcing the defendant to set up a counterclaim, no matter whether it arises from the same transaction as the plaintiff's claim does, or from a different one. There is, to be sure, one difference. Under the American law, even in the absence of a compulsory counterclaim statute, the adjudication upon the plaintiff's claim may be of some effect in the later action on the counterclaim by virtue of collateral estoppel. Although two different claims are involved in the two proceedings the adjudication upon the plaintiff's claim is res judicata as to all issues of law or fact common to both proceedings. This certainly is of particular practical importance in those very cases where claim and counterclaim arise out of the same transaction or occurrence and therefore are likely to depend upon common questions of law or fact, or both. As mentioned previously, the res judicata effect under the German law does not reach what are often called the elements of a judgment, i.e., the intermediate conclusions on the logical way toward reaching the final conclusion. It is only the latter

142 Cf. id., p. 648.

that becomes res judicata,[143] that is, whether or not the plaintiff's assertion of a right or claim is justified — in other words, whether or not the asserted right or claim exists. So the former adjudication upon plaintiff's claim theoretically has no influence on the later counterclaim proceeding as long as that counterclaim does not contradict the final conclusion itself reached in the former.

There is only one case in which the German law has provided for a compulsory counterclaim in the meaning of this context. It is connected with one of the exceptional cases of required joinder of claims on the plaintiff's side. We have seen previously[144] that ZPO, §616, first sentence, requires the plaintiff to join in one proceeding all claims for divorce and cancellation of marriage he may have against the defendant, and precludes the defeated plaintiff from afterward maintaining an action on any divorce or cancellation claim which he could have included in his original action. Section 616, second sentence, provides that after the dismissal (on the merits) of a divorce or cancellation action, "The same obtains . . . as against the defendant with respect to facts upon which he could base a counterclaim." The defendant is thus compelled to counterclaim for all divorce and cancellation claims which he may have against the plaintiff, or else is subject to the same preclusion as the plaintiff. And he must do this within the pending action; otherwise the plaintiff can avail himself of the plea of pendency. This again is an emanation of the policy that a multiplicity of marriage-destroying suits shall be avoided.

This preclusion provided for in ZPO, §616, as the instrument of enforcing the compulsion to counterclaim is certainly not to be conceived as a genuine res judicata effect. Res judicata as laid down in ZPO, §322 (1), could not reach a counterclaim which had not even been set up in a prayer for relief. It is, therefore, just another case of special preclusion. With respect to the American law one can say that the common doctrine of required joinder of claims in the meaning of the rule against splitting an entire cause of action, which is generally explained on the basis of res judicata, would not make a counterclaim compulsory in the absence of a statute, not even where it arose out of the same transaction as plaintiff's claim. This is shown by the

143 Except where such an intermediate issue itself could be and was made the subject of a declaratory (counter-) action and corresponding declaratory relief was granted. See pp. 829-830 supra.

144 See p. 832 supra.

very existence of the statutes. Whether, then, those statutes should be regarded as establishing a preclusion of a special kind, or as extending the scope of res judicata, is a matter of taste. The latter seems to be the prevailing notion.

2. *Required Joinder of Claims in the Counterclaim.* So far the discussion has had to do with the question of whether the defendant is compelled to file a counterclaim or be precluded from afterward suing in a separate action. A question to be distinguished therefrom is whether required joinder of claims applies to the counterclaim in case the defendant does bring one, leaving aside the compulsory counterclaim provisions.

The answer is that in both laws it quite generally does apply to the same extent that it applies to the action of the plaintiff. Under the American law, that is to say, the defendant, who files a counterclaim, must join under pain of subsequent preclusion all claims against the plaintiff that have themselves arisen out of the same contract transaction or tort occasion and prior to the commencement of the counterclaim. Under the German law the counterclaiming defendant is as little required to join claims as the plaintiff is in his action. On the other hand, the previously discussed exceptions[145] to that rule also obtain in regard to counterclaims, i.e., the counterclaiming defendant in those cases is subject to the requirement of joinder exactly as much as he would be as a plaintiff in an original action.

3. *Defense in the Nature of a Counterclaim.* There are situations where the same facts constitute a defense to the plaintiff's claim and also a basis for a counterclaim. In such cases the defendant may often have some reasonable ground to proceed like this: he may first use those facts as a defense against plaintiff's action in an attempt to defeat it; and he may thereafter base a claim upon the same facts in a separate action brought against the former plaintiff.

There is, however, a split among the American states as to whether the defendant may do this.[146] The authorities in those jurisdictions which deny the defendant's right to proceed in this way expressly refer to the doctrine against splitting an entire claim. It is generally held that in the absence of a compulsory counterclaim statute the defendant need not set up those facts in plaintiff's

[145] Ibid.

[146] See CLARK, CODE PLEADING, 2d ed., 653 (1947).

action either as a counterclaim or as a defense in order to preserve his claim. If the defendant has failed to plead altogether so that a default judgment is given against him, or has at least not defended on those particular facts, he is not precluded from afterward predicating a claim upon them.[147] The difference of opinion arises where the defendant did rely on said facts as a defense to plaintiff's action and subsequently seeks to use them as the ground for a separate action against the plaintiff.

A typical case is that of *Leslie v. Mollica,*[148] decided in the Supreme Court of Michigan. The plaintiff was a patient of the defendant physician. The action was for damages allegedly sustained as a result of malpractice on the part of the defendant. In a prior action the defendant had sought to recover from the plaintiff for medical services rendered and the plaintiff had successfully defended that action on the ground that the defendant was negligent and his services were of no value. The Supreme Court of Michigan, deciding against the plaintiff, made express reference to the rule against splitting a cause of action[149] and pointed out that the plaintiff's "action" for malpractice was indivisible and that the plaintiff could not split it by first employing it as a defense against defendant's former action for services and later as foundation for a separate malpractice suit.

This view is well supported by other authorities in the country.[150] It thus appears that the jurisdictions taking this view apply the doctrine against splitting an entire cause of action, or claim, also to defenses based upon facts which at the same time represent the foundation for a counterclaim. They in effect not only require the defendant to the original suit to join in his counterclaim all claims against the plaintiff arising out of the respective transaction or occasion but also to bring a counterclaim rather than confining himself to defense. The first requirement is nothing special in view of the rule of required joinder of claims, it being applicable to counterclaims as such, anyway. The second requirement, however, virtually usurps at least part of the function of the compulsory counterclaim statutes, or, put another way, equates defense with counterclaim in regard to its procedural effect. It is significant

147 See JUDGMENTS RESTATEMENT 231 (1942). See also annotation entitled "Judgment in Action for Services of Physician or Surgeon as Bar to Action against Him for Malpractice," 49 A.L.R. 551 (1927).

148 236 Mich. 610, 211 N.W. 267 (1926).

149 Id. at 615.

150 Cf. A.L.R. annotation cited in note 147 supra.

that the Supreme Court of Michigan did not rely upon, or even mention, any such compulsory counterclaim statute.

The *Judgments Restatement*[151] takes the view of the other jurisdictions when it says that the defendant in such a case is not precluded from maintaining a subsequent action against the plaintiff upon the facts which had constituted the defense. "In such a case he is not improperly splitting his cause of action."[152] Indeed, this notion is very persuasive. Analyzing the rationale which supports the doctrine of required joinder of claims one is inclined to believe that in order for the harsh preclusion to come into effect the person to whom it is applied should have manifested and set in motion some active initiative aiming at a multiplicity of suits. This is not the case when the defendant, drawn into litigation by the plaintiff, confines himself to defense. On the contrary, he thereby seems to refrain from taking such active initiative. He does not really make an attempt to bring a multiplicity of suits. Indeed, he does not even sue. It seems to the writer that the applicability of the rule of required joinder of claims, or against splitting an entire claim, as you please, presupposes that a claim has been asserted by suit, be it by way of complaint or counterclaim. Pendency of one of the claims (or one part of a claim) should be a prerequisite for the requirement of joining the others under the pain of subsequent preclusion. The view taken in the *Judgments Restatement* is, therefore, probably the sounder one.

It is quite clear that under the German law the patient would win in a case like the one above if in fact the doctor had been negligent and the patient had sustained damages thereby. As we know there is no rule of required joinder of claims, save some exceptions discussed. Even if the patient had actually counterclaimed or made use of a set-off in the amount of the doctor's action he would, as clearly opposed to the American law, not have been precluded from later suing for the balance. As to a counterclaim this result would follow from ZPO, §322 (1) because res judicata in no way reaches the balance of a claim or counterclaim which was not included in the prayer for relief. In regard to a set-off the defendant's claim would—according to the express provision of ZPO, §322 (2)—be spent and subject to res judicata preclusion only insofar as it was employed to defeat plaintiff's claim. All the more could the patient win if he had confined himself to a pure defense

[151] P. 154, also illustrations 9-12, particularly 11, at pp. 234, 235 (1942).
[152] Id. at 234.

in the first proceeding. The patient would not, to be sure, owe his success in his later action against the doctor to the fact that the court in the former proceeding had found the doctor negligent. There being no collateral estoppel as to litigated issues of law or fact in the German law[153] this would not be res judicata, neither for nor against either one of the parties. On the other hand, under the view taken by the *Judgments Restatement* and those American jurisdictions which are opposed to the *Leslie* view, the patient in his later action against the doctor may rely on the court's finding in the prior litigation that the doctor was negligent.[154] It is interesting to observe that in the *Leslie* case both parties did in fact invoke res judicata, the doctor pleading the rule against splitting and the patient collateral estoppel!

Even where the German law in those cases of exception considered previously does require a joinder of claims it presupposes for the operation of the enforcing preclusion that part of the claims were actually made the subject of an action or counterclaim. When such a claim was employed as a defense only—where this is conceivable at all according to the nature of those exceptions—there would be no bar to subsequent suit on the rest of the claims in a separate action. Only in the case of ZPO, §616, concerning the matrimonial causes, is the defendant actually compelled to file a counterclaim whenever he does have one. But this is the only compulsory counterclaim the German law has recognized. Within its narrowly limited area of required joinder of claims it thus goes along with the view expressed for the American law in the *Judgments Restatement.*

If the defendant does not succeed on his defense in the first action, then it follows in all American jurisdictions that he cannot later come out with a counterclaim based upon the same facts. So, for example, the patient could not bring an action against the physician for malpractice after he had without success defended the latter's suit for services on this ground, and judgment had been given against him. This result, however, is reached without a questionable appeal to the doctrine of required joinder of claims. It is rather a necessary consequence of collateral estoppel. Once

153 Something like this, namely res judicata of the "elements of a judgment," i.e., the intermediate conclusions on the logical way toward reaching the final result, was once strongly advocated for the German law, too, especially by Savigny in his famous SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS, vol. 6, §§291-293, 298 (1847). This, however, was prior to the enactment of the Zivilprozessordnung. Cf. thereto HELLWIG, SYSTEM DES DEUTSCHEN ZIVILPROZESSRECHTS, Part 1, §231, p. 791 (1912).

154 Cf. JUDGMENTS RESTATEMENT 234 under *d* (1942).

the court in the physician's action for services has found on the issue of malpractice that the physician was not negligent, this is binding on the parties in all future litigations concerning whatever causes of action. Under the German law, on the other hand, the patient would not be estopped from collaterally attacking the court's finding on the issue of malpractice. He would, however, be precluded from—and only from—disputing the doctor's claim for services[155] because the adjudication upon this claim has become res judicata [ZPO, §322 (1)]. Accordingly, he could not include this claim as an item in his computation of damages. But he could demand damages in excess of the doctor's claim. It may be doubtful as a practical matter whether the court in the second proceeding would take a position different from that of the court in the first proceeding. This does not raise a question of res judicata, however.

C. *Several Claims (Legal Theories) for One Relief*

When talking about required joinder of claims one usually means what has been the subject of the preceding discussions in Part A and Part B. It is the problem of whether the parties are required to join in one action several claims each of which seeks a separate and additional relief, be it one of the same or one of a different kind.

A problem somewhat related thereto, but occurring within narrower units, arises where the plaintiff, according to the substantive law, may have several claims for one relief which may exist either concurrently or alternatively.[156] For example, a personal injury may create two concurrent claims for one relief (compensation for the damages sustained), viz., a claim for breach of a certain contract and a tort claim; the rendering of services or the furnishing of goods may bring about (alternatively) a claim for compensation either under a contract or under the theory of quantum meruit and unjust enrichment. If the plaintiff has recovered on the basis of one claim it is clear that he cannot recover once more on the ground of one of the others because in this very type of case he is entitled to but one satisfaction. A problem is presented only if he has failed to recover upon one legal theory (claim) and afterwards in a new action seeks to obtain the denied relief upon one of the other legal theories (claims). May he do so, or is he precluded

155 I.e., the court's final conclusion! See above.

156 The term "claim" thus has different meanings in the two contexts.

therefrom by the former adjudication? This problem lies, so to speak, on the periphery of the concept of required joinder of claims. In consideration of this fact we will neither entirely overlook it nor deal with it very extensively here. Instead we will try to draw a comparative outline.[157]

Let us take these two cases:

(1) A passenger on a streetcar is injured as a result of the alleged negligence of the motorman. The passenger sues the streetcar company on the theory of breach of contract.

(2) An attorney has rendered services to *X* upon the latter's request. *X* does not pay compensation. The attorney seeks to recover compensation on the theory of breach of contract.

Suppose that in both cases the court dismisses the action on the ground that there was no valid contract. May the plaintiff thereafter bring a second action, in the first case on the theory of tort and in the second case on the theory of quantum meruit or unjust enrichment? Under the German law he may not, whereas under the American law this cannot be said quite so generally.

1. *Concurrent Claims (First Case).* In the first case, if there were a valid contract, the two claims (contract and tort) could exist side by side, concurrently. This distinguishes it from the second case where only one claim or the other can theoretically be recognized.

In cases like our streetcar case it may be said with some caution that prevalent American principles seem to disfavor a second action on the theory of tort. It is generally said that a party cannot

157 In the American law the problem of "several claims for one relief" is, in turn, related to what is called the doctrine of "election of remedies," but it is distinguishable. "The rule of election of remedies is that the choice of one of inconsistent remedies bars recourse to the others." See CLARK, CODE PLEADING, 2d ed., 493 (1947). It thus has nothing to do with the situation where there may be several concurrent and consistent claims for one relief. And it presupposes that a person does have more than one (inconsistent) remedy to elect from. There is no factual uncertainty in this respect. This, for example, is the case where a person was induced to enter into a contract with another person by the fraud of the latter, who, then, does not perform his part of the contract. Here, the defrauded party, according to the substantive law, has a choice between affirmance of the contract (and demanding damages for breach of contract) and disaffirmance of same (and suing for fraud). This distinguishes the case of election of remedies from the case of several alternative claims for relief where the plaintiff does not have a real choice among two or more actually available remedies, but where there is a factual uncertainty as to which one of several mutually exclusive claims is available to him. The rule of election of remedies could not require the plaintiff to join the several remedies in the alternative, but on the contrary, compels him as a matter of substantive law to make up his mind as to which one he wants to elect and prosecute. Thus, it virtually has nothing to do with required joinder of claims and hence will be omitted from our discussions.

circumvent the preclusive effect of a judgment by instituting a new suit on the same cause of action in a different "form of action."[158] This is prevented by res judicata which a party cannot escape by merely presenting his case in a different manner.[159] In principle this general proposition existed at common law. This may seem somewhat surprising and rather strict in view of the fact that the plaintiff neither could join different forms of action in one writ nor amend his complaint in the course of the proceeding and switch to a different form of action. And what the plaintiff could not do the court could and would not do on its own initiative either. This has been alleviated under modern procedure inasmuch, at least, as amendments, including those "from law to law," are now largely and freely admitted in the broad discretion of the trial court.[160] Even under modern code pleading, however, the court would not automatically take into consideration a claim, in the meaning of a legal theory, that the plaintiff had not himself introduced and relied upon. This is so even where the old "forms of action" have been abolished.

In view of the fact that the plaintiff would be precluded from subsequently maintaining an action for a particular relief on substantially the same facts, but under a different legal point of view, we can thus say that he is required to join in one action all those possibly concurrent legal points of view, theories or claims, which may support him in obtaining his relief. Here the American law is pretty much in conformity with the German law. Legal theories and substantive claims contribute as little to the determination of the scope of res judicata as they do to the individualization of the "procedural claim." The scope of res judicata is determined solely by the adjudication upon the procedural claim as individualized by the prayer for relief and the essential core of facts relied upon in the complaint. In the streetcar case both elements would be identical in the first and the second action. The plaintiff asks for a certain amount of money and supports his prayer by alleging the same essential fact situation, i.e., the streetcar accident. That his first action is for breach of contract, his second one for tort, is immaterial.[161] He may join all possibly concurrent theories with-

158 See 23 CYC. 1167 (1906); 50 C.J.S., Judgments §653 (1947).

159 See 30 AM. JUR., Judgments §175 (1940).

160 Cf. CLARK, CODE PLEADING, 2d ed., 715 (1947).

161 Cf. 66 RGZ 12 (1906); 86 RGZ 377 at 379 (1915); 129 RGZ 55 at 60 (1930); 130 RGZ 162 at 168 (1930); furthermore ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS, 5th ed., §88 II 1 b, c, 3 c, pp. 381-388 (1951).

out encountering a justified objection by the defendant. And in view of the subsequently resulting preclusion he must join them. To put it this way is, to be sure, a little misleading with respect to the German law because even if the plaintiff does not do so the court is under a duty to consider the procedural claim under any legal viewpoint conceivable that may justify it. In the German law of civil procedure the principle of party-presentation applies only to the allegation of facts, but never to the application of the law (*iura novit curia*).

There has, on the other hand, been a certain movement in the German procedural science, called the old theory of individualization, which advocated a determination of the procedural claim strictly according to the substantive law relations. When several claims for a certain relief are not established by exactly the same elements, they are said to constitute different procedural claims for the purposes of res judicata.[162] This notion, when strictly followed, would lead to the admissibility of the subsequent tort action in the streetcar case and all similar cases. But the courts have rarely applied it and most of the writers have refused approval also.

There seem to be quite a number of American courts, however, which have been inclined to allow the second suit in situations like the streetcar case although they probably represent the minority. Citing case material, the *Cyclopedia of Law and Procedure*[163] states: "Where a plaintiff is defeated in an action upon a certain theory of his legal rights or as to the legal effects of a given transaction or state of facts through failure to substantiate his view of the case, this will not preclude him from renewing the litigation, *without any change in the facts,* but basing his claim on a new and more correct theory." The holdings of the cases cited thereto are various in nature and not all of them directly support the statement. Those of them that assume a different cause of action is stated when a different substantive claim and legal theory are presented, and for that reason deny a bar effect to the former adjudication, are at least outwardly consistent with the general principle of res judicata. Some others clearly presuppose a change in the facts alleged, after all.[164] And the *Cyclopedia* itself—in at least apparent contradiction

[162] Cf. ROSENBERG, note 161 supra, §88 III 1, who himself does not share this view, however.

[163] 23 CYC. 1159 (1906). Emphasis added. See also 50 C.J.S., Judgments §649 (1947), where the same statement is made.

[164] See Hubbell v. United States, 171 U.S. 203 (1898), cited in 23 CYC. 1159, n. 21 (1906).

to the prior statement—states a little later that in order for the second action to be allowed there must be some essential difference in the two actions: "If the gist of both actions is the same, and the evidence sufficient to sustain the one would also authorize a recovery in the other, the former judgment will operate as a bar, notwithstanding nominal variances or verbal alterations of plaintiff's claims."[165] Where the essential fact situation relied upon has substantially been changed, the German law, too, would permit a second action under a different legal theory because this would bring about a different procedural claim in the meaning of the res judicata doctrine. For example, a plaintiff, defeated in a purchase price action based on the contract of sale, may subsequently sue on a promissory note issued by the defendant on the purchase price.[166] In a somewhat similar American case[167] it has been held that "An action on the case for a deceit in falsely representing that a farm contained a certain number of acres, is not a bar to an action of assumpsit upon a guaranty that the farm contained that number of acres." But the fact remains that substantial identity of the fact situations and causes of action does not appear to be universally and necessarily the criterion in all American courts, but that sometimes the mere change in legal theory virtually makes the second suit admissible.[168] After all that has been said, this, to be sure, is not the majority view. The latter, as the German law does, seems to require the plaintiff to join in one action all legal theories in support of a relief sought to be obtained on the ground of one essential fact situation.

165 23 CYC. 1161 (1906); and p. 1168 to note 60. See also 50 C.J.S., Judgments §649, at pp. 90 and 91 (1947).

166 Cf. ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS, 5th ed., §88 II 3 c, p. 389 (1951).

167 Schriver v. Eckenrode, 87 Pa. St. 213 (1878), still cited in 50 C.J.S., Judgments §654, at p. 100, n. 1, by reference to 34 C.J. 816, n. 77 (1924).

168 Cf., for example, Gayer v. Parker, 24 Neb. 643, 39 N.W. 845 (1888). In that case the court does not talk about identity of cause of action. Citing Johnson v. White, 13 S.&M. 584, it states: ". . . where the statute required an action of replevin to be brought in one year after the taking [of certain chattels], a plaintiff defeated in such action, because not brought within the requisite time, may still maintain trover for the conversion of the property. The evidence required in both cases not being exactly the same, —as in trover it is unnecessary to prove that the taking was within one year"! It is not the probably different prayers for relief that this reasoning is based upon (because this is no test of identity of claims in the American law, cf. 50 C.J.S., Judgments §648, p. 89), but it is virtually the fact that the first suit was for replevin, the second one for trover. Thus, it also has been held that a second action is admissible if brought under a different statute, or if based upon federal law after the first action had been predicated on state law. See 50 C.J.S., Judgments §649, to notes 55 and 56 (1947).

2. *Alternative Claims (Second Case).* In the second case the attorney can claim his fee either upon the theory of contract or the theory of quantum meruit (or unjust enrichment); he cannot have both claims concurrently. Whether he has one or the other does not depend upon which one he elects, but upon whether or not a valid contract was made with the defendant.

The German courts would hold against the attorney in the second case. Again, res judicata would bar him. He asks for the same relief in his second suit as he did in his first one;[169] and he asserts the same essential fact situation in both, i.e., the actual relation between the parties and the rendering of services. Hence, the procedural claims are identical and the former adjudication is res judicata in the second proceeding. According to what has been said previously, it would be a mistake for a German court to dismiss the attorney's action on the mere ground that there was no valid contract. Insofar as the services were actually and properly rendered by the attorney, the court would have to hold the defendant liable for unjust enrichment, even if the attorney had not himself relied upon such a claim, and grant relief for the reasonable value of the services. Thus, the Reichsgericht, within the limits of the prayer for relief, sustained an action on the ground of unjust enrichment although it was brought for damages on the theory of breach of contract.[170] The contract was found invalid. In another case the action for repayment of a certain amount of money was based on the theory of loan. The court of appeals dismissed because the payment of the money had not constituted a loan. On appeal the Reichsgericht reversed and advised the court of appeals to consider the action under the viewpoint of partnership.[171] This is constant practice.[172] The consequence is that if the plaintiff has failed to introduce, or the court to take into consideration on its own motion, one of such alternative claims, a second action based upon that claim is barred by res judicata whenever the same prayer for relief is made and substantially the same fact situation alleged. It is the same principle as applies to concurrent theories. It may be said—that the plaintiff must join

169 Only if he would be claiming more than in the prior action there might under the German law of res judicata be a problem of whether the former judgment is a bar as to the excess. For a similar problem see 12 RAG 461 (1930).

170 105 RGZ 349 (1921).

171 98 RGZ 22 (1919).

172 For further cases see ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS, 5th ed., §88 II 1 c (1951).

alternative claims for the same relief in the alternative as he must join concurrent claims in the conjunctive.

We have seen that in the case of concurrent claims for one relief not all American courts would exclude a second action on one of them omitted in the first action. The same is true as to alternative claims. In a case like the above it has been held that the attorney, after having been defeated on the ground that there was no valid contract made with the defendant, could recover compensation for his services in a second action based upon the theory of quantum meruit, i.e., claim the reasonable value of the services rendered.[173] And there are other cases also holding that a plaintiff who had first sued on the theory of an express contract, but lost because the contract was invalid or not proved, could renew litigation on the theory of implied contract or quantum meruit.[174] These situations of alternative claims for a certain relief are, in the American law, too, essentially governed by the same principles of res judicata as the cases of concurrent claims and as quoted above from the *Cyclopedia* and *Corpus Juris*. Cases of each kind are dealt with therein side by side. What has been said above with reference to our first case therefor largely obtains here as well. Thus, the proposition that the plaintiff cannot escape the res judicata effect by merely adopting a different "form of action," but that there must be some substantial difference in the two actions, is applicable to both situations. But some courts simply do not strictly adhere to it; they stress the fact, rather, that the plaintiff in his second action is suing on a different legal theory.[175] It is, however, quite in accord with the general principle to hold that an adjudication against the plaintiff on an action brought upon the theory of implied contract is a bar to a later action on the theory of an express contract[176] if there is no substantial change in the facts relied upon. By this reasoning the same ruling would have to apply in the reverse situation, thus taking care of our attorney case. Along the same line is the holding that a party suing for a certain amount of money on the theory of partnership and defeated on the ground that the facts did not show a partnership cannot bring a second suit on the theory of quantum meruit.[177] This, again, is largely

173 Cf. Thayer v. Harbican, 70 Wash. 278, 126 P. 625 (1912), and 34 C.J., Judgments §1227, to note 28, also referred to in 50 C.J.S., Judgments §649, n. 63 (1947).

174 See C.J.S., Judgments §649, n. 63 (1947).

175 See note 163 supra.

176 See 50 C.J.S., Judgments §649, to note 67 (1947).

177 Golden v. Mascari, 63 Ohio App. 139, 25 N.E. (2d) 462 (1939).

in conformity with the German view and in effect requires joinder of alternative claims for one relief.

It may, perhaps, be suspected that the "leniency" of some American courts relative to the second suit rests, in part at least, upon a misunderstanding of the proposition that a judgment against the plaintiff on the ground that he has misconceived his remedy is not a bar to a later suit in which he seeks the proper remedy.[178] Such a judgment is not on the merits.[179] This proposition, however, presupposes a situation different from the one we have been dealing with here. In our situations the plaintiff failed in the first action because he could not prove an element of a remedy which would have been a proper remedy in case of factual proof! He did not from the outset rely upon a wrong remedy. There was no misconception of remedy, but failure of proof. Accordingly, the judgment in the first action did go to the merits of the case. Hence, the proposition of misconception of remedies is inapplicable.

If, in the streetcar case, the first action had been dismissed on the ground that there was no proof of injury, and in the attorney case for the reason that the plaintiff did not prove the rendering of services, there is general agreement that a second suit on a different legal theory could not be brought.[180] The adjudication upon these issues would, under the American law, certainly be binding with regard to any legal theory because they are the crucial points of the claims as such. The German law, as we have seen, does not recognize such an estoppel; but in the cases under consideration it is not even necessary in order to preclude the second action.

Looking back to the American rule of required joinder of claims as applied to several claims for several reliefs arising out of one contract transaction or tort occasion, it is somewhat surprising to find that the American courts seem not to be quite as unanimous in principle so far as requiring the joinder of several (concurrent or alternative) claims or legal theories for one relief is concerned. This is surprising because this joinder lies on a lower level, so to speak, than the other one. To require it, if the fact situation relied upon is substantially the same, would seem to be a lesser "venture" than the so-called rule against splitting an entire claim, and

178 Cf. 23 CYC. 1148 (1906); 50 C.J.S., Judgments §653, to note 95 (1947). Even §65, comment *g* et seq., of the JUDGMENTS RESTATEMENT (p. 276 et seq.) seems not entirely above suspicion.

179 50 C.J.S., Judgments §653 (1947).

180 Cf. 50 C.J.S., Judgments §649, to note 65 (1947), and Randall v. Carpenter, 25 R.I. 641, 57 A. 865 (1904).

the rationale of preventing a multiplicity of suits tends to require one kind of joinder as well as the other. Indeed, it would strike one as somewhat curious that a plaintiff, in a situation like the streetcar or the attorney case, who in the first action sued for part of the whole amount only and recovered it, might eventually be worse off than a plaintiff who sued for the whole amount and lost entirely because he could not sustain his legal theory. The former plaintiff would certainly be barred by the doctrine of required joinder of claims from maintaining a suit for the balance. Should the latter plaintiff, then, although completely defeated in his first action as to the full amount, really be given the chance of eventually recovering that very amount under a different legal viewpoint, but on substantially the same facts?

The German law, on the other hand, does not, as a rule, require a joinder of "procedural claims" (claims for several reliefs), but the courts are unanimous in holding that within the limits of one procedural claim all legal theories for the same relief are precluded by an adjudication upon that claim, and in effect, then, must be joined in the one action.