

1950

# Russell W. Young and Saba O. Young v. Elvis Hansen and Bonnie Hansen : Brief of Respondents

Utah Supreme Court

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Rich and Elton; Attorneys for Respondents

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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RUSSELL W. YOUNG and  
SABA O. YOUNG, his wife,  
*Appellants,*

vs.

ELVIS HANSEN and  
BONNIE HANSEN, his wife,  
*Respondents.*

} Case No.  
7426

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## Brief of Respondents

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RICH AND ELTON,  
*Attorneys for Respondents.*

# I N D E X

	Page
STATEMENT OF FACTS .....	1
First Case .....	2
Second Case .....	7
ARGUMENT .....	9
POINT I .....	
CASES <u>Res Judicata Applies in this Action</u> .....	9
Badger v. Badger, 69 Utah 293, 254 Pac. 784 .....	18
Daluiso v. Nicassio, 107 Pac. 2d 460 .....	22
East Mill Creek Water Co. v. Salt Lake City, 108 Utah 315, 159 Pac. 2d 863 .....	19
Logan City v. Utah Power & Light Co., 86 Utah 340, 16 Pac. 2d 1097 .....	16
Logan City v. Utah Power & Light Co., 86 Utah 354, 44 Pac. 2d 698 .....	18
Matthews v. Matthews, 102 Utah 428, 132 Pac. 2d 111.....	14
Poarch et al v. Finkelstein, 99 Pac. 2d 871 .....	23
Smith v. Schuler-Knox Co., 192 Pac. 2d 34 .....	24
Utah Builders Supply Co. v. Gardner, 86 Utah 250, 39 Pac. 2d 327 .....	15
 TEXTS	
30 Am. Juris 920-925, Secs. 178, 179 .....	13
 STATUTES REFERRED TO	
104-6-1, U. C. A. 1943 .....	11
104-7-2, U. C. A. 1943 .....	11
104-7-3, U. C. A. 1943 .....	11
104-9-1, U. C. A. 1943 .....	12
104-9-3, U. C. A. 1943 .....	12
104-14-1, U. C. A. 1943 .....	12
104-14-2, U. C. A. 1943 .....	12
104-14-3, U. C. A. 1943 .....	12
104-14-4, U. C. A. 1943 .....	12

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## Brief of Respondents

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### STATEMENT OF FACTS

This action, being No. 87,190 in the trial court, was commenced by plaintiffs in an attempt to relitigate, by changes in allegations, the issues which had already been presented and determined in case No. 85,678. In other words, instead of appealing from the adverse decree and judgment in the original case, plaintiff attempted to refile the case. Defendants, in their answer, pleaded the findings of fact, conclusions of law and judgment in the former case as res adjudicata of the issues and plaintiffs thereupon interposed a demurrer and motion to strike;

and at the hearing stated to the court that in the event the demurrer was overruled and the motion to strike denied that a judgment of dismissal of the case would be in order as they had no defense to those issues as presented by defendants.

That the two cases were the same is evident from a reading of the pleadings. They both are an attempt on the part of plaintiffs to secure redress for what they regard as a breach of contract on the part of defendants. The contract is the same in each case; they arise out of the same transaction; the alleged breach is the same; and all issues as to rights and liabilities of the parties were either raised in the first case or should or could have been presented in that case. Of course, some of the issues presented in the first case were raised by the answer of defendants, but those issues were nevertheless presented in the first case and determined by the court in the first case.

Let us, therefore, take a look at the issues presented in the two cases.

## FIRST CASE

Plaintiff's alleged legal ownership by defendants of certain real property; that it was capable of being farmed and of having pigs, chickens and rabbits raised thereon; and that defendants had urged plaintiffs to move upon the property with defendants and enter into a partnership with plaintiffs for operation of the farm.

That on or about May 14, 1948 plaintiffs and defendants made an oral contract that plaintiffs should pay defendants \$9000.00 for an undivided one-half interest in the real property and personal property, including livestock thereon; that plaintiffs were to move on the property with defendants and that the \$9000.00 should be paid when plaintiffs sold their home at 3348 South State Street, and if it was not sold by Nov. 15, 1948, that plaintiffs were to pay \$50.00 per month until it was sold, the same to apply on the purchase price; that there was a \$2,000 mortgage on defendants' farm, which defendants were to clear, and upon payment of the \$9,000 that the one-half interest was to be clear.

That in July 1948 plaintiffs paid defendants \$4,000, securing the same by a mortgage on their State Street house, whereupon it was alleged that the oral agreement was modified and that the defendants were to immediately execute the deed for the one-half interest and execute a bill of sale for the one-half interest in the personal property and execute a partnership agreement with plaintiffs. Plaintiffs also alleged that by certain minor purchases they were to have an additional credit of \$60.00 on the purchase price.

It is further alleged that defendants did not give plaintiffs the deed and made excuses for their failure so to do; that plaintiffs moved onto the property and performed their part of the partnership agreement by buying grain, etc., doing work in taking care of the livestock and put in about 400 hours of labor upon the premises.

That defendants agreed that if plaintiff would wait until November 15, 1948 they would then execute deed and bill of sale and have the other agreements drawn up. That on or about February 15, 1949 defendants refused to execute the deeds and partnership agreement and refused to execute any papers carrying out the agreement and demanded that plaintiffs leave the premises.

Plaintiffs alleged that defendants had breached the contract and demanded damages as follows:

- a. For the sum of \$4060.00.
- b. Interest thereon at 6%.
- c. The value of the labor expended by Mr. Young in the sum of \$472.50.
- d. Cost of moving to the premises, \$100.00.
- e. Moneys advanced for a saw, \$53.00.
- f. Further moneys advanced in the sum of \$161.37.
- g. Money advanced for purchase of a trailer, \$16.00.
- h. Money advanced to assist in payment of taxes, \$37.01.
- i. Cash advanced for payment of labor, \$53.50.

Plaintiffs further alleged that they had demanded payment from defendants of said amounts, but defendants had failed and defused to pay.

By defendants' answer they admitted owning the real property; admitted that it was capable of being farmed; admitted that they discussed with plaintiffs the formation of a partnership; admitted making an oral agreement with plaintiffs for the sale to plaintiffs of a one-half interest in the real estate and personal property for \$9,000.00 to be paid on or before November 15, 1948; admitted receipt of the \$4,060 on the purchase price; admitted that the balance was to come from a sale of the State Street home of plaintiffs but that the balance was to be payable in any event on or before November 15, 1948; and alleged that in the meantime it was a part of the agreement that they would operate the farm *as a joint enterprise* and sell and dispose of the products, contributing equally in labor and cost of the operations and dividing equally the net proceeds. Defendants further admitted that the farm had a mortgage on it in the sum of \$1600.00, and that they were to convey the one-half interest free and clear of lien and that they used a portion of the \$4,000 received from plaintiffs to clear the mortgage. Defendants admitted that plaintiffs had gone into possession of an apartment on the premises, and alleged that the parties had operated the farm as a joint enterprise and had sold the livestock and chickens and other salable products and had applied the proceeds to the expenses of operations and had equally divided the balance. Defendants denied that the contract was modified in July 1948, as alleged by plaintiffs, and alleged that it was understood and agreed at that time that the balance of the purchase price was to be paid on or about November 15, 1948. On the other hand defendants alleged



that when November 15, 1948 came the plaintiffs failed and refused to pay the balance of the purchase price and breached the agreement in that regard and then and there notified defendants that they did not intend to pay the balance and did not intend to go ahead with the formation of the partnership and did not intend to engage in the joint operation of the farm, and did not intend to render any further services in the operation of the farm, and did not intend to and would not be responsible for any further debts or obligations which might be incurred for the restocking of the farm with livestock or poultry, and on the contrary demanded that they be reimbursed for their expenditures and that \$4,000 be returned to them.

Defendants denied that they had breached the contract as alleged by plaintiffs and alleged that the contract was breached by plaintiffs and alleged that plaintiffs had breached the contract by failing and refusing to pay the balance on the purchase price and by repudiating the agreement and by refusing to further participate in the operation of the farm. That if plaintiffs were damaged it was due to their own misconduct in breaching the contract and in refusing to go ahead and in demanding a return of their invested funds.

Upon these issues the case was tried. The issues were found in favor of defendants and findings of fact, conclusions of law and judgment were entered, all of which are made a part of the answer of defendants in the second case.

## SECOND CASE

Thereupon the plaintiffs, before and instead of appealing as they have now done in the first case, filed a second case.

The only difference between the second case and the first case is that plaintiffs allege in the second case that a partnership was formed by the agreement in May, 1948. That the real and personal property belonged to the partnership. That plaintiffs paid the sum of \$4,060.00 on the purchase price of a one-half interest in the partnership, the balance to be payable on or about Nov. 15, 1948 from the sale of their State Street home, and if not sold by Nov. 15, 1948 that the balance was to be payable at the rate of \$50.00 per month, and that in the meantime the plaintiff was to receive a deed and bill of sale for the one-half interest, and that defendants refused to make the deed, bill of sale, and prepare and execute the necessary partnership papers. That it is impossible for the parties to settle their differences and the personal property of the partnership has been sold and no accounting had. They pray for a dissolution of the partnership and an accounting had; that the partnership property be sold and that the surplus be divided between the parties.

To this complaint in the second case the defendants interposed the same defenses which were pleaded in the first case and in addition pleaded *res adjudicata*, attaching copies of the pleadings, findings of fact and judgment in the first case to the answer.

When plaintiffs' demurrer to the defense of res adjudicata was overruled and their motion to strike that defense was denied they stated that they could not go to trial and that a judgment of dismissal of the second case was in order and appropriate in view of the decision of the court on the demurrer and motion.

This appeal is from the order of the court in overruling the demurrer of plaintiffs to the plea of res adjudicata and from the order of the court in denying the motion to strike the same, and upon that basis in entering the judgment of dismissal thereon.

Plaintiff's position, as we understand it, is that the trial court erred in overruling the demurrer and in denying the motion to strike. Since the judgment of dismissal was entered at their own suggestion after the court had so ruled, they are not appealing from the action of the trial court in dismissing the case after making the ruling. In other words, they regard the issue of res adjudicata as a complete defense if it is good, and if it is not good it has no place in the answer.

The question, then, is as to whether the first case, on the issues framed by the pleadings and the findings of fact, conclusions of law and judgment on those issues, stands as an adjudication of the rights of the parties, subject only to the right of appeal in the first case.

POINT I  
RES JUDICATA APPLIES IN THIS ACTION.

ARGUMENT

The only difference between the two cases is the change of position taken by plaintiffs. In the first case they alleged the oral contract in May, 1948, said that it was for purchase of a one half interest in the real property and for the formation of a partnership, the terms to be later agreed upon, when the payments were to be made, what was done and to be done by the respective parties; that the defendants breached the contract and that they wanted their money back plus damages for the breach. Defendants pleaded the May, 1948 contract, what was done and to be done by the parties thereunder, the relationship of the parties under the contract, what was done with the jointly owned personal property, who breached the contract and denied any liability to plaintiffs for any breach of the contract and alleged that the plaintiffs were the wrong-doers.

In the second case the plaintiffs allege the same contract, the same payments by themselves, the same breaches by defendants, and the same facts as those alleged in the first case, excepting that in the second case they allege that the contract was not one of purchase and sale of real and personal property with an agreement to make a partnership, as alleged in the first case, but was in fact a partnership agreement.

In both cases the issues were: What was the agreement between the parties; what was their relationship; what became of the property; who breached the agree-

ment; what are the liabilities of the parties by reason thereof?

All of those matters were fully litigated in the first case and all of those issues were presented by the pleadings and determined by the court in the first case.

It will be observed by the court that in the first case plaintiffs alleged when the partnership was to be formed and how the parties were to operate until the plaintiffs paid the \$9,000 in full. Defendants, by their pleadings in the first case, likewise pleaded when the partnership was to be formed, how they were to operate pending payment of the one-half interest, what the relationship of the parties was, what the parties did with the personal property which they jointly owned and disposed of; and where the breach occurred. All of those issues were heard and determined in the first case.

Plaintiffs now contend that they can relitigate those same issues by changing their position in the second case from a contract for purchase and sale of real and personal property, with an agreement to make a partnership in the future, to a position that the partnership was formed in the first instance and with the real and personal property as partnership property.

In other words, plaintiffs contend that they can relitigate an action for breach of contract, involving a construction of the contract, and involving the rights and liabilities of the parties arising out of the contract and the alleged breaches thereof, as often as the parties

change their minds as to what their relationship really was.

Such is not the law in the State of Utah.

When a party to a contract decides that his rights thereunder have been violated and that he is entitled to damages for its breach, and when both parties plead fully with reference to all of the issues thereunder, that ends the matter excepting for a motion for new trial and appeal. You cannot take as many bites of the apple as your change of whim or second guessing or more mature reflection suggests. If such were not the case litigation would never end and rights and liabilities would never come to rest between the parties.

This court has so held in many cases.

We shall not burden the court with all of the decisions of this court on the subject. The doctrine of res adjudicata is, of course, comprehended within the rule against splitting causes of action. Section 104-6-1, Chapter 6, U.C.A. 1943, provides that the pleadings are the formal allegations of the parties of their respective claims and defenses for the judgment of the court.

Sec. 104-7-2 provides what the complaint shall contain, including a statement of the facts constituting the cause of action of plaintiff, and the demand for relief which he claims.

Sec. 104-7-3 provides that a plaintiff may join in the same complaint as many causes of action as he feels that



he has arising out of the same transaction or transactions, legal and equitable, including actions upon contract, express or implied, and including also claims to real and personal property and damages for the withholding thereof. He may plead in the alternative or set up his cause of action in separate counts.

Section 104-9-1 provides what the answer shall contain, including allegations of new matter and counterclaims.

Section 104-9-3 provides that if the defendant fails to set up in his counterclaim in all matters pertaining to the subject matter of the action or arising out of the same transaction that he and his assignees are thereafter barred from asserting the same.

Liberal provisions are made in Chapter 14, Section 104-14-1, 104-14-2, 104-14-3 and 104-14-4 for the amendment of pleadings. A plaintiff may even dismiss his case and start over, if, as here, no counterclaim has been pleaded, at any time before the case is submitted and decided.

All of those provisions are for the purpose of having cases fully presented, fully litigated in one proceeding, and then set at rest, subject only to a motion for new trial, one of the grounds of which is newly discovered evidence, and he may thereafter appeal.

What is the value of all of this if it results in nothing—no adjudication that is binding on the parties—no determination of the issues involved, no finality that can-

not be undone by the simple method of plaintiff changing his position or his view as to his relationship under the contract?

The general rule is well stated in 30 Am. Juris. 920-925, as follows:

### Section 178 (Judgments)

“It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. *In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes and seek different relief.*”

### Section 179.

“The phase of the doctrine of *res judicata* precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which could properly have been determined in the prior action. This rule applies to every question falling within the purview of the original action, in respect to matters of both claim and defense, which could



have been presented by the exercise of due diligence.”

These principles are also recognized and established by decisions of this court.

The most recent case is *Matthews v. Matthews*, 102 Utah 428, 132 Pac. 2d 111. The case involved rights and defenses arising out of purported contracts, relationships, releases and conveyances, all of which had been before the court in a former case. This court sustained the plea of *res adjudicata* in the following language:

“In his brief on appeal, appellant enumerates several contentions, but they are all resolved in the question of *res adjudicata*. A careful examination of the record herein and the decision in the cases of *Klein v. Matthews* and *Matthews et al v. Garcia*, reported jointly in 99 Utah 398, 106 P. 2d 773, discloses that the property described and the subject matter referred to in plaintiff’s complaint in this action is the same property and the same subject matter involved in both of these cases; that the plaintiff Klein in the former action is the same person as the defendant Maud E. Garcia in the case at bar; that the relationship of attorney and client previously existing between plaintiff herein and the defendant Orson Heber Matthews was considered and ruled upon in the above reported case; and that, in view of the judgment of nonsuit against this plaintiff and in favor of the Home Owners’ Loan Corporation, defendant herein, the matters in controversy between Cecil B. Matthews, Orson Heber Matthews and Maud E. Garcia, also known as Maud E. Garcia Klein, attempted to be re-litigated in this action, were definitely decided and set at rest in the former cases.

“ ‘The judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter directly in question in another court.’ 15 R. C. L. 951, Sec. 429.

“ ‘The foundation principle upon which the doctrine of res juriciata rests is that parties ought not to be permitted to litigate the same issue more than once; that, when a right or fact has been judicially tried and determined by a court of competent jurisdiction, or an opportunity for such trial has been given, the judgment of the court, so long as it remains unreversed, should be conclusive upon the parties, and those in privity with them in law or estate. \* \* \* *Public policy and the interest of litigants alike require that there be an end to litigatiton, and the peace and order of society demand that matters distinctly put in issue and determined by a court of competent jurisdiction as to parties and subject matter shall not be retried between the same parties in any subsequent suit in any court.*’ 15 R. C. L. 953, Sec. 430.”

Utah Builders Supply Co. v. Gardner, 86 Utah 250, 39 Pac. 2d 327. The question involved in the case was whether a homestead exemption had to be claimed in the original case where the property was sold or whether it could be claimed in a subsequent case. While this court held that a homestead right could be claimed in either proceeding under our statute it announced the general law as follows:

“It is undoubtedly the general rule, as urged by respondent, that *a valid judgment for plaintiff is conclusive not only as to defenses which are set up and adjudicated, but also as to those which*

*might have been raised*, so that a defendant can neither set up such defense in a second action between the same parties nor in a further proceeding in the same action. *Everill v. Swan*, 20 Utah 56, 57 P. 716; 34 C. J. 856, 859.”

The case of *Logan City v. Utah Power & Light Company* is squarely in point on this subject. In that case Logan City was attempting to avoid the legal effect of a decree construing and interpreting a former adjudication of its water rights in Logan River. There, as here, plaintiff was attempting to contend that there were certain issues which were not litigated and determined in the former case and that they should have the right to present the case upon the changed theory. In both decisions this court held that “the interests of society demand that there shall be a termination to every controversy” and that the plea of *res adjudicata* was properly sustained.

In the first decision, 86 Utah 340, 16 Pac. 2d 1097, the following language is used:

“\* \* \* A leading case supporting such rule is that of *United States v. Throckmorton*, 98 U. S. 61, 65, 25 L. Ed. 93. It is there said that:

“ ‘There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; namely, *interest rei publicae, ut sit finis litium*, and *nemo debet bis vexari pro una et eadem causa*.

“ ‘If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has

been mistaken in the facts, the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So in a suit in chancery on proper showing a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated.

“ ‘But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client’s interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See Wells,

Res Adjudicata, Sect. 499; Pearce v. Olney, 20 Conn. 544; Wierich v. DeZoya, 7 Ill. (2 Gilman) 385; Kent v. Richards, 3 Md. Ch. 392; Smith v. Lowry, 1 Johns. Ch. (N.Y.) 320; DeLouis et al. v. Meek et al., 2 Iowa (G. Green), 55 (50 Am. Dec. 491).’ ”

In the decision after rehearing 86 Utah 354, 44 Pac. 2d. 698, this court announced the law in the following language:

“As to the claimed right of Logan City to litigate in the instant case matters which it could have litigated in case No. 3055, this court and the courts generally are likewise committed to a doctrine contrary to plaintiffs’ contention.

In the case of Peay v. Salt Lake City, 11 Utah, 331, 40 P. 206, 208, this court said: ‘The defendant can only be called upon to answer the material allegations of the complaint, and upon such allegations the issue is formed, and, when judgment is rendered thereon by a court of exclusive jurisdiction, it is conclusive between the parties, upon the same matters, unless set aside by a court of last resort. *And such a judgment is final, not only as to the matter actually determined, but also as to every other matter which might have been litigated by the parties, as part of the subject in controversy, but which was omitted from the case through negligence, or inadvertence, or even accident.*’ ”

The case of Badger v. Badger, 69 Utah 293, 254 Pac. 784, announces the same law with reference to splitting causes of action, in the following language:

“It is a well-settled rule of law, under both common-law and the Code system of pleading, that



a party having one entire demand cannot split the demand up into separate causes of action. 1 Sutherland, Code Prac. and Forms, sec. 218; Cooley v- Calaveras County, 121 Cal. 482, 53 P. 1075; U. S. v. Throckmorton, 98 U. S. 65, 25 L. Ed. 93; 1 C. J. 1006; 1 Van Fleet's Former Adjudications, 204. In fact, as stated in the case of U. S. v. Throckmorton, supra:

“ ‘There are no maxims of the law more firmly established or of more value in the administration of justice than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely: Interest reipublicae, ut sit finis litium, and nemo (debet) bis vexari pro una et eadem causa.’

“ ‘To this well-established general rule, however, there are exceptions. If a person by accident, excusable neglect, or mistake, or by fraud on the part of his adversary and without any fault of the pleader, splits a single cause of action, an adjudication in respect to one will not bar a suit upon the other. 1 Van Fleet's Former Adjudications, 206; 1 C. J. 1009, and cases there cited. If, however, the pleader is in possession of the means of ascertaining the full extent of his claim, and his failure to do so is due to his own fault or neglect, it would seem that upon both principle and authority the general rule against splitting applies. Macon, etc., R. R. Co. v. Gerrard, 54 Ga. 327.’”

Plaintiffs in this case did not attempt to bring themselves within any exceptions to the general law. They simply decided to relitigate the case on a different theory.

The most recent case on the subject is East Mill Creek Water Co. v. Salt Lake City, 108 Utah 315, 159

Pac. 2d 863. This case is cited by appellant as authority for the idea that *res adjudicata* applies only to issues actually presented and tried. Apparently the case was not carefully read or understood by appellants. It is authority for no such thing. In fact it sustains the principles which defendants contend to be the law. That there are factual conditions to which the law does not apply is granted, but the case at bar is not such a case. The Salt Lake City case was such a case. In that case there had been an adjudication between the parties as to the rights of the water users under an exchange agreement. The prior adjudication had only to do with an interpretation of the rights during the period prior to the installation of individual meters. It was an action for declaratory judgment. Thereafter the meters were installed and a further dispute arose as to the interpretation of the contract as applied to that situation. The city contended that the former declaratory judgment on one phase of the case was a bar to any further declaratory judgment relating to the exchange rights. This court very properly held that the one declaratory judgment was not conclusive of an issue or controversy which was not in existence and which could not have been presented. In doing so this court used the language quoted by counsel for plaintiffs, which, if lifted from the context of the case, might tend to mislead; but when read as applied to that particular case involving a declaration of rights as applied to a *particular dispute* is easily understood. In that case the general law was again announced by this court in most understandable language as follows:

“This contention overlooks the fact that there are two kinds of cases where the doctrine of *res judicata* is applied: *In the one the former action is an absolute bar to the maintenance of the second; it usually bars the successful party as well as the loser; it must be between the same parties or their privies; it applies not only to points and issues which are actually raised and decided therein but also to such as could have been therein adjudicated, but it only applies where the claim, demand or cause of action is the same in both cases. The courts hold that the parties should litigate their entire claim, demand and cause of action, and every part, issue and ground thereof, and if one of the parties fails to raise any point or issue or to litigate any part of his claim, demand or cause of action and the matter goes to final judgment, such party may not again litigate that claim, demand or cause of action or any issue, point or part thereof which he could have but failed to litigate in the former action.* On the other hand where the claim, demand, or cause of action is different in the two cases then the former is *res judicata* of the latter only to the extent that the former actually raised and decided the same points and issues which are raised in the latter. *Harding Company v. Harding*, 352 Ill. 417, 186 N. E. 152, 88 A.L.R. 563, and note thereto; *Outram v. Morewood*, 3 East 346, 102 Eng. Reprint 630; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195, 30 Am. Jur. 923; ‘Judgments’, section 179 and 180; 38 Yale Law Journal (1928-29) 299, at 311 ‘*Res Judicata*’ by Robert von Moschzisker. This distinction has been followed by this court although not expressly pointed out. *Everill v. Swan*, 20 Utah 56, 57 P. 716; *Glen Allen Mining Co. v. Park Galena Mining Co.*, 77 Utah 362, 296 P. 231; *Leone v. Zuniga*, 84 Utah 417, 34 P. 2d 699; *Logan City v. Utah Power & Light Co.*, 86 Utah



340, 16 P. 2d 1097, on rehearing, 86 Utah 354, 44 P. 2d 698; State v. Erwin, 101 Utah 365, at page 422, 120 P. 2d 285, at page 315.”

If the law of this State were as contended for by plaintiff every plaintiff or defendant in any case involving property or personal injuries could relitigate his case by simply adding a new theory or changing his position regardless of the legal ethics involved. It would open the door to confusion and chicanery.

There are some other cases from this court which we refrain from citing because they add nothing to what has been so recently reiterated by this court. There are, however, some decisions from other jurisdictions which apply to factual conditions similar to the case at bar. We cite them as added authority. *Daluiso v. Nicassio*, (Cal.) 107 Pac. 2d 460:

Action filed in 1935 alleging that plaintiff and defendant orally agreed to go into partnership in building and operation of a winery and asked for “an adjudication of the existence of the said co-partnership and of the respective rights” of the parties for a dissolution and accounting, and other and further relief. Defendant denied all claims and set up an affirmative defense showing a written agreement constituting full satisfaction of all claims against him. The court found that the allegations of the affirmative defense were true. In 1936 plaintiff filed another action whereby he sought to recover \$8000.00 for services and material furnished during the course of said alleged co-partnership, on the basis that he had mistakenly believed that he was a partner of the

defendant. Other causes of action sought recovery on quantum meruit and accounts stated. The meaning and effect of the aforesaid written agreement was attempted to be put into issue. The court said:

“Moreover, the meaning and affect of that agreement has been adjudicated in another action where the same result was reached. In *Price v. Sixth Dist. Agricultural Ass’n*, 201 Cal 502, 258 P. 387, 390, the court quotes with approval from *Freeman on Judgments* as follows: ‘If the existence, validity or construction of a contract, lease, conveyance or other obligation has been adjudicated in one action it is *res judicata* when it comes again in issue in another action between the same parties, though the immediate subject-matter of the two actions be different.’ The court then said: In other words, when an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard, but also as to matters that could have been heard in support of or in opposition thereto.’ ”

*Poarch et al v. Finkelstein*, (Okla.) 99 Pac. 2d 871:

Where, in an injunction suit, the ownership of the personal property is made an issue under the pleadings, and that issue along with the question of right to injunctive relief is litigated on the trial, and it is finally decided that the writ was wrongfully issued, it is not error in an action between the same parties on the injunction bond to exclude testimony of the defendants therein relative to the ownership of the property in issue in the injunction case.

“ ‘When a fact has been determined in the course of a judicial proceeding, and a final judgment has been rendered in accordance therewith,

it cannot be again litigated between the same parties without virtually impeaching the correctness of the former decision, which, from motives of public policy, the law does not permit to be done. The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis on which it stands, upon the obvious principle that, where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion. *Johnson v. Gillett*, 66 Okl. 308, 168 P. 1031; *Adams v. State ex rel. Mothersead, Bank Com'r*, 133 Okl. 194, 271 P. 946.' "

*Smith v. Schuler-Knox Co.*, (Cal.) 192 Pac. 2d 34:

Plaintiffs realty was purchased at an execution sale in satisfaction of a judgment and judgment rendered against plaintiffs in purchasers quiet title suit; plaintiff's right of redemption and to any moneys previously expended for improvements while plaintiffs retained possession were interests in the realty which should have been alleged and proved, and failure to do so constituted a waiver of the issues and judgment was *res judicata* as to such issues.

"It has been repeatedly determined that *res judicata* applies not only to the issues which were actually pleaded and determined by the former judgment, but also to all issues which could have been properly tendered and determined thereby. (*Slater v. Shell Oil Co.*, 58 Cal. App. 2d 864, 868, 137 P. 2d 713; *De Hart v. Allen*, 26 Cal. 2d 829, 161 P. 2d 453; *Krier v. Krier*, 28 Cal. 2d 841, 172 P. 2d 681; *Brunswig Drug Co. v. Springer*, 66 Cal. App. 2d 444, 450, 130 P. 2d 758.)

What we have stated also disposes of the citations contained in plaintiffs brief.

As to the citation from 30 Am. Juris. 946 with reference to misconception of remedy, we simply say that plaintiffs did not misconceive any remedy. They wanted their money back because they did not want to go ahead with the deal and they brought an action for breach of contract, which they could not prove. They made certain allegations with reference to the contract, what it was, and what the relationship of the parties was, and particularly alleged the partnership matter. Defendant did likewise, and thereafter the partnership matter was tried and adjudicated; and then they tried to bring the second case upon a completely different allegation as to the effect of the same contract and the same transaction. That hasn't anything to do with a misconception of remedy and a reading of the cases in the foot note discloses no such authority for the proposition plaintiffs attempted in this case.

We respectfully submit that the plea of res adjudicata was properly interposed and the trial court was correct in its ruling overruling the demurrer and in denying the motion to strike. If plaintiffs ever had any remedy it was by motion for new trial and appeal in the original case. It certainly was not by refiling.

Respectfully submitted,

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