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upon their merits in the absence of prejudice, interposition of the answers should have been permitted.[142]

Perhaps treatment of defaults as admissions of the complaints is a proper solution to the problem of dilatory calendar practice. Nevertheless, such sanction has not been authorized by the Legislature. The appellate division's decision in *Ballard* is both consistent with the relevant statutes and just in the circumstances of the case, especially in light of plaintiff's culpability in filing a false note of issue and in not applying for judgment upon the default. Nevertheless, an attorney should seek entry of judgment within one year of default as directed by CPLR 3215(c), to avoid the sundry problems inherent in failure to comply.

Res Judicata: Doctrine applicable only to those issues actually raised in prior taxpayer suit.

Under the doctrine of res judicata, when a cause of action has been adjudicated on the merits, the parties to the action and their privies are bound by the judgment, in which the cause of action merges, and may not relitigate the same cause of action between themselves.[143] The general rule is that

> [a] judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first . . . .[144]

The doctrine of res judicata applies to class actions.[145] The United States Supreme Court held that "[w]here the parties interested in the suit are numerous," convenience requires that "the decree bind[s] all of them the same as if all were before the court."[146] A judgment rendered in a taxpayer suit has been held in New York to bar a subsequent suit by different taxpayers.[147] Is the scope of the doctrine as

142 *Id.* at 76, 319 N.Y.S.2d at 196.

143 *See* RESTATEMENT OF JUDGMENTS § 68, comment *a* at 294 (1942).

144 Schuylkill Fuel Corp. v. B&C Nieberg Realty Corp., 250 N.Y. 304, 306-07, 165 N.E. 456, 457-58 (1929). *See* Pagano v. Arnstein, 292 N.Y. 326, 331, 55 N.E.2d 181, 183 (1944); 5 WK&M ¶ 5011.17. *See, e.g.*, Hochster v. City Bank Farmers Trust Co., 260 App. Div. 712, 719, 24 N.Y.S.2d 110, 117 (1st Dep't 1940), *aff'd without opinion*, 288 N.Y. 588, 42 N.E. 2d 600 (1942).

145 *See In re* Sullivan's Will, 123 N.Y.S.2d 159, 160 (Sur. Ct. Kings County 1953); 5 WK&M ¶ 5011.35.

146 Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1857).

147 Campbell v. Nassau County, 274 App. Div. 929, 83 N.Y.S.2d 511 (2d Dep't 1948); *see* Ashton v. City of Rochester, 133 N.Y. 187, 192-94 (1892); People's Gas & Elec. Co. v.

applicable to subsequent taxpayer suits by different taxpayers inclusive of all issues which could have been raised in prior suits, or merely those questions actually litigated previously?

The Court of Appeals resolved this matter in *Murphy v. Erie County*,[148] one of several taxpayers' actions unsuccessfully challenging various transactions concerning construction and management of a stadium by Erie County. A prior taxpayer suit, which merely raised a threshold question regarding the absence of competitive bidding, had been dismissed on the merits.[149] Defendants in *Murphy* argued that the prior action was a complete defense to this action under the doctrine of res judicata. The Court weighed the desirability of an end to taxpayer suits concerning a particular matter against their usefulness as a check on abuse of official power and held that said doctrine bars only litigation of those issues which were litigated in prior taxpayer suits.[150]

The doctrine of res judicata should not prevent courts from passing upon the merits of contentions not presented in a previous taxpayer suit. Otherwise, an initial ineffectual challenge will bar forever from judicial consideration valid challenges to unlawful actions. For, "[t]he effect of the judgment is not at all dependent upon the correctness of the verdict or finding upon which it was rendered."[151] In light of the potential danger inherent in barring subsequent taxpayer actions, the doctrine of res judicata should be applied only when the arguments of the subsequent plaintiffs have been presented adequately and considered on the merits.[152]

ARTICLE 40 — TRIAL GENERALLY

CPLR 4011: Interposition of interlocutory judgment is discretionary with the court.

Separate trials on the issues of liability and of damages are proper under CPLR 603.[153] Under CPLR 4011, a court is empowered to "regulate the conduct of the trial in order to achieve a speedy and

City of Oswego, 207 App. Div. 134, 141, 202 N.Y.S. 243, 247 (4th Dep't 1923), *aff'd*, 238 N.Y. 606, 144 N.E. 911 (1924).

148 28 N.Y.2d 80, 268 N.E.2d 771, 320 N.Y.S.2d 29 (1971), *aff'g* 34 App. Div. 2d 295, 310 N.Y.S.2d 459 (4th Dep't 1970), *aff'g* 60 Misc. 2d 954, 304 N.Y.S.2d 242 (Sup. Ct. Erie County 1969).

149 Hurd v. Erie County, 34 App. Div. 2d 289, 310 N.Y.S.2d 953 (4th Dep't 1970).

150 28 N.Y.2d at 85-86, 268 N.E.2d at 773, 320 N.Y.S.2d at 32.

151 Wilson's Executor v. Deen, 121 U.S. 525, 534 (1887).

152 *See* 5 WK&M ¶ 5011.35; *Developments in the Law — Res Judicata*, 65 HARV. L. REV. 818, 858-59 (1952).

153 *See* Berman v. J.J. Enterprises, Inc., 13 App. Div. 2d 199, 214 N.Y.S.2d 945 (1st Dep't 1961).