PRECLUSION / RES JUDICATA VARIABLES: NATURE OF THE CONTROVERSY

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"Decisions . . . demonstrate that res judicata, as the embodiment of a public policy, must, at times, be weighed against competing interests, and must, on occasion, yield to other policies."

Washington, J.[1]

INTRODUCTION

Res judicata or preclusion, an embodiment of a principle that is well established in the law, is

> a manifestation of the recognition that endless litigation leads to chaos; that certainty in legal relations must be maintained; that after a party has had his day in court, justice, expediency, and the preservation of the public tranquillity requires that the matter be at an end.[2]

The concept of res judicata, which is not at all a simple one, encompasses at least two distinct facets. For the sake of clarity it is desirable to distinguish the foreclosing of further litigation on a cause of action (which may be called claim preclusion) from the preclusion of further litigation of an issue (which may properly be called issue preclusion).

When a question of issue preclusion[3] is injected into a suit, the court must consider a number of relevant factors before it can rule on the matter. The court must consider: (1) the persons involved in the instant suit and in the

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1. Spilker v. Hankin, 188 F.2d 35, 38-39 (D.C. Cir. 1951).

2. Schroeder v. 171.74 Acres of Land, 318 F.2d 311, 314 (8th Cir. 1963). For an excellent defense of the general principle of preclusion (res judicata) see Mr. Justice Traynor's dissent in Greenfield v. Mather, 184 Cal. 462, 194 P.2d 1 (1948). See also Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29 (1964).

3. In this, as in other related articles, the terms being used for clarity, in place of "res judicata"—the generic historical term—are "claim preclusion" and "issue preclusion." Claim preclusion means that further litigation on the claim is prohibited; issue preclusion means that further litigation of the specific issue is barred. Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27 (1964); Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29 (1964); Vestal, *The Constitutional and Preclusion/Res Judicata*, 62 MICH. L. REV. 33 (1963).

Since the terminology was first used in the article in the *Michigan Law Review*, it has been noted by several courts. See Williams v. Murdoch, 330 F.2d 745 (3d Cir. 1964); Engelhardt v. Bell & Howell Co., 327 F.2d 30 (8th Cir. 1964); Amos v. Commissioner of Internal Revenue, 43 T.C. 50, 60-61 (1964) (Mulroney, J., concurring); Clark v. Clark, 389 P.2d 69 (Nev. 1964).

It is interesting to see that the functional terminology—claim and issue preclusion—has been accepted and found useful by a trial court judge. See Estate of Ling, Probate No. 4123, Montgomery County, Iowa, Oct. 1964.

suit in which the issue was first decided;[4] (2) the nature of the adjudicating bodies, the instant one and the earlier one; possibly (3) the egregious nature of the error committed by the first court; and certainly (4) the nature of the controversy, that is, the general sort of litigation pending in the instant case and specifically the nature of the issue on which there is supposedly preclusion. It is the nature of the controversy which is considered in this article.

In any examination of res judicata/preclusion it must be remembered that all of the law in this area is in a state of flux and that the trends and attitudes are more significant than are individual decided cases.[5]

The courts and the authorities have reached something of a consensus on the matter of issue preclusion/collateral estoppel. Usually it is stated that such estoppel or preclusion by judgment exists on those issues which were essential to and actually litigated and determined by a valid and final judgment.[6] This statement is obviously an oversimplification of the law. The matter must be examined in greater detail if any meaningful analysis is to be made. First, it is necessary to consider how the courts should ascertain the issues on which there may be preclusion. Secondly, it is necessary to examine the nature of the specific issue involved, for it is clear that the courts are more ready to re-examine some types of issues than others. Finally, it is appropriate to examine the broad nature of the litigation before the court since courts react differently according to the litigation then pending. When all of these factors are considered, it may be possible to articulate some specific conclusions which will give some guidance to the legal profession.

I. Ascertaining Precluded Issues

One of the first problems faced when there is a claim of issue preclusion is that of determining what issues were faced and necessarily decided by the first court; that is, on what issues there is a possibility of preclusion.

A. *Issues Involved*

In order to ascertain the issues which have been raised in Suit I, a number of different elements may be considered. A jury verdict and judgment may establish certain facts in a relatively simple case. When a trial is to

4. This variable was considered in depth in Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27 (1964).

5. For judicial expression of these flexible attitudes see Zdanok v. Glidden Co., 327 F.2d 944, 953-57 (2d Cir. 1944); Caterpillar Tractor Co. v. International Harvester Co., 120 F.2d 82, 84 (3d Cir. 1941).

6. Restatement, Judgments § 68 (1942).

the court the findings of fact may establish certain issues. In more complicated cases tried to a jury it may be necessary to address interrogatories to the jury or to obtain a special verdict on certain points in controversy. By using these procedures, the issues decided can be determined.

In all cases the pleadings can be referred to and will be helpful in deciding what matters were in issue. Of course, the pleadings are not conclusive because of the possibility of trial by the implied consent of the parties. Under both state[7] and federal[8] practice there is a possibility that issues will be so tried so that the pleadings will not reflect the issues actually before the court.[9]

This means that the court in Suit II may be forced to examine the Suit I trial record itself to see what matters were in issue between the parties and what matters were necessary for the decision. This suggests that the careful counsel will make sure that the court in Suit I spells out just exactly what the court is facing and deciding. Anything less than this can be extremely troublesome in subsequent related litigation.

B. *Preciseness Regarding Issues*

One of the areas which requires greater consideration than afforded to it in the past is comparing the precise nature of the issue decided in Suit I vis-à-vis the issue posed in Suit II. Lack of clear thinking in this area can be the source of great trouble. If preclusion is to be used more effectively in the future it will be necessary to establish certain standards or rules in this uncertain area.

Some examples may help in understanding the problems. If the defendant should move for a directed verdict at the end of the plaintiff's presentation of his evidence, and the court should direct a verdict, this might be based on a failure of the plaintiff to introduce any probative evidence on a material point of the controversy. For example, the plaintiff might have failed to introduce evidence of his own freedom from contributory negligence. Can it be said that this is now conclusively determined between the parties? The ruling by the court is simply that the plaintiff has failed to introduce any probative evidence on the point, not that the plaintiff was guilty of contributory negligence. Would it be fair in subsequent litigation to say that the plaintiff's negligence is conclusively established?

Exactness in the determination of issues may be crucial in the matter of

7. See, *e.g.*, IOWA R. CIV. P. 249.

8. FED. R. CIV. P. 15.

9. This can be rectified by an amendment to conform the pleadings to the issues being tried.

preclusion arising from a criminal prosecution. *Tomlinson v. Lefkowitz*[10] was a suit brought in federal court for refund of certain penalties. The court of appeals held that the issue of the existence of fraudulent intent was foreclosed by the conviction of the taxpayer for felonious evasion of income taxes: "an issue resolved in favor of the United States in a criminal prosecution may not be contested by the same defendants in a civil suit brought by the Government."[11] When the government loses in a criminal prosecution, it does not follow that there is preclusion against the government on the matters in issue in the prosecution. This is true because the burden of proof in the criminal case is greater than in a civil case. Clarity in analyzing issues before the courts in Suit I and Suit II is necessary if the doctrine of preclusion is to be properly applied.

In a typical automobile accident in which there are concurrent tortfeasors and an injured party who sues for injuries received, a judgment in Suit I may establish the negligence, or lack of it, of the defendants vis-à-vis the plaintiff. This does not necessarily decide the matter of negligence between the defendants. After the judgment in Suit I, a second suit may be maintained between the defendants in Suit I. If the court in the first case found that one defendant had been intoxicated and had operated his vehicle on the wrong side of the road, this issue might be established in Suit II. Should the court in Suit I find that a defendant had not kept a proper lookout, this might not necessarily mean that the same defendant had breached his duty to keep a proper lookout as far as the other defendant in Suit I (plaintiff in Suit II) is concerned.[12]

Suppose that in litigation arising out of an automobile accident, the jury finds for the defendant. In a state such as Iowa, where the plaintiff has the burden of proving his own freedom from contributory negligence,[13] the verdict for the defendant may reflect any of a number of different things. The jury may have found that the plaintiff had not established his own freedom from contributory negligence, that the plaintiff had not established the negligence of the defendant, that the plaintiff had not established a causal relationship between the claimed negligence on the part of the defendant and

10. 334 F.2d 262 (5th Cir. 1964).

11. *Id.* at 264.

12. See Radmacher v. Cardinal, 264 Minn. 73, 117 N.W.2d 738 (1962). In this case, Suit I was an action by A against B, with judgment for A; Suit II arising out of the same occurrence was by C against B. After B attempted to implead A, asking for contribution, the court held that the issue of B's right of contribution had not been decided in Suit I.

13. Gregory v. Woodworth, 93 Iowa 246, 61 N.W. 962 (1895); IOWA R. CIV. P. 344(f). *But see* Note, *Judicial Rule Making: Propriety of Iowa Rule 344(f)*, 48 IOWA L. REV. 919 (1963).

the injury of the plaintiff, or that the plaintiff had not established an injury suffered by the plaintiff.

Should the defendant in Suit I then attempt to recover from the plaintiff in a second suit, assuming no compulsory counterclaim provision barring such litigation, it would not be easy to determine what issues had been decided in Suit I. A general verdict cannot be said to establish any one of these issues or all of them. Only if the decisive issues are defined with precision can there be issue preclusion.

Another hypothetical will suggest a second problem which may occur. Suppose, in a jurisdiction that holds that two causes of action arise from an automobile accident—for personal injury and for property damage—plaintiff sues defendant claiming negligence in operating the motor vehicle at an unreasonable rate of speed. Suppose further that the defendant obtains a jury verdict because of plaintiff's failure to prove such negligence on the part of the defendant. Could the plaintiff then sue on his second cause of action claiming negligence on the part of the defendant in operating his vehicle with defective brakes—a matter not considered in the first action? If the defendant claims issue preclusion because of the first judgment, what should the court hold? It can be urged that the issue decided in the first suit was the negligence—or lack of negligence—of the defendant, and that this is now precluded. On the other hand, it may be claimed that the issue on which there is preclusion is whether there was negligence on the part of the defendant in the speed at which he was operating his vehicle; that it has been preclusively decided that his speed was not unreasonable; and that only this narrow facet of negligence has been decided.

It is at this point that the courts must decide how much of an impact should flow from the concept of preclusion. If the pressures are truly great and there is a desire to cut down markedly on litigation in the courts, they might apply the doctrine of preclusion in an expanded manner. This might support a decision that negligence, once decided, encompasses all of the evidentiary possibilities which fall within that ultimate fact. The courts might logically conclude that preclusion is concerned with ultimate fact issues rather than with narrow evidentiary matters. This would seem to be entirely consistent with the present development of the law in this area.

1. *Domestic Relations*

It must be recognized that domestic relations problems do not involve a single event which can be considered apart from a time continuum; rather, the problem exists over a period of time. When a decision has been rendered, for example, that a divorce should not be granted, this does not close the matter for all time. There is no *issue* preclusion on the matter of mis-

conduct except in terms of those issues raised and decided. There is no adjudication concerning matters occurring after the date of the decree; certainly, additional acts of misconduct or subsequent acts of condonation may change the rights of the parties.

A support money award is an example of the sort of decision that does not give rise to issue preclusion on the fundamental rights of the parties. Any support award simply adjudicates on the condition then existing. A change of conditions may warrant a change in the support award, and either party has the right to ask the court for a re-examination of the matter without being barred by the earlier adjudication.[14] This is not a repudiation of the doctrine of preclusion, but rather is a valid distinction drawn through clear analysis of the problem before the court.

2. *Law v. Equity*

If the first action was in equity, the nature of the decision by the court must be examined with care. It may well be that the court has simply decided that, in the exercise of its discretion, it would not give any relief to the plaintiff. This does not become a final and binding decision on any of the facts alleged by the plaintiff. The only preclusive effect is that under the given facts a court of equity, in the exercise of discretion, would not give relief to the plaintiff. This is essentially a problem in identification of issues presented and decided in Suit I.

If Suit I is a proceeding in equity, the court in deciding the case must make certain decisions in terms of certain equitable principles. It must decide whether there is an adequate remedy at law, whether the plaintiff is entitled to equitable relief in the exercise of a certain discretion which the court has, and whether the plaintiff has clean hands. All of these matters pose problems which a court of law would not have to face.

If the equity court finds for the defendant and refuses to give relief to the plaintiff, the court in Suit II is faced with a rather difficult decision, since it must decide whether the decision in the first case was based on one of the applicable equitable principles which might not be controlling in Suit II. The court in Suit II must decide the precise issues adjudicated in the first suit; on only these will there be issue preclusion. If the equity court simply decided that the plaintiff did not have clean hands, this is the issue decided in Suit I and is the only issue on which there is preclusion. Likewise, if the court decided that there was an adequate remedy at law, this is the issue on which there is preclusion. This distinction was noted when

14. Fridman, *Res Judicata in Divorce*, 27 SOL. 107 (1960).

in *Fulton v. Hanlow*,[15] Mr. Justice Norton wrote in his concurring opinion:

> Although the judgment of a court of equity is equally effectual as *res judicata* as that of a court of law, the nature of their different jurisdictions must be considered in order to determine what was the exact matter decided.[16]

Of course a court of equity may make certain findings of fact in which case there may be issue preclusion on such matters. As was noted above, however, it is necessary to examine such equitable decrees with a great deal of care to ascertain exactly the matters decided.

3. *Analysis*

All of these examples indicate the complex nature of the matter under consideration. Stating simply a rather complicated matter, the court in Suit II must examine the specific issues raised and necessarily decided in Suit I. It must separate out those exact issues which served as the basis of the decision in the first suit. Only if there is complete and precise identity between such an issue and an issue in Suit II may there be issue preclusion.[17]

C. *Contested v. Conceded Issues*

One of the problems of issue preclusion is the determination of the issues to which the doctrine will be applied. When issues actually have been contested between the parties, preclusion may apply.[18] However, there has been some uncertainty about its application to issues necessarily adjudged but not actually contested in a suit. The situation wherein there has been no actual litigation of a particular issue but still the rendition of a judgment on the matter can arise in a number of different ways. First, the defendant can default and contest none of the factual allegations. Second, the defendant can contest some but not all of the issues. Third, the defendant can

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15. 20 Cal. 450 (1862).

16. *Id.* at 488.

17. "Traditional" principles which would apparently render inapplicable invocation of collateral estoppel considerations include the rule that the passage of time may evoke change of circumstances which preclude the creation of an estoppel. . . . and the principle that matters adjudged as to one time period are not necessarily an estoppel as to other time periods. International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449, 455 (1st Cir. 1963).

18. Obviously, other variables may be controlling. The nature of the courts involved in the suits may have a controlling effect on the claim of preclusion. An example would be a second suit in a court of special competence. The author plans to develop this concept more extensively in a subsequent article, *Preclusion/Res Judicata Variables: The Adjudicating Body.*

confess judgment. Fourth, the defendant can allow a judgment to be entered by consent.[19]

The classic statement on the matter is found in *Cromwell v. County of Sac.*,[20] where the United States Supreme Court said:

> [W]here the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel [issue preclusion] only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.[21]

This requirement of actual litigation or contest between parties has been reiterated a number of different times.[22] The position of the *Restatement of Judgments* is that "a judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."[23] In the explanation, the text points out that "the defendant is not precluded from interposing a defense to the subsequent action which he might have interposed but did not interpose in the first action."[24]

It must be admitted that there are a number of cases that support the *Restatement's* position.[25] However, there are a number of well-considered

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19. See Annot., 39 A.L.R.2d 1232 (1955); Annot., 2 A.L.R.2d 514 (1948); Annot., 40 A.L.R. 441 (1926); James, *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173 (1959).

20. 94 U.S. 351 (1876).

21. *Id.* at 353.

22. See, *e.g.*, Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944); Larsen v. Northland Transp. Co., 292 U.S. 20 (1934); Russel v. Place, 94 U.S. 606 (1876).

23. RESTATEMENT, JUDGMENTS § 68(2) (1942).

24. RESTATEMENT, JUDGMENTS § 68, comment *d* at 300 (1942). The text continues,

> . . . it would be unfair to him to hold that he is precluded from relying upon facts which might have been but were not determined in the prior action. . . . [T]here is no reason why he should not make the defense when sued upon a different cause of action. He may have various reasons for not interposing the defense in the first action and for permitting the plaintiff to obtain a judgment against him in that action. *Id.* at 300-01.

The *Restatement* suggests as possible reasons for such action the cost involved and that only a small amount was sought to be recovered or the distance to the place of trial where it would be difficult to defend. "It would be most unjust to him to hold that his failure to defend should have the same result as though he had interposed a defense and it was found that the matters alleged in the defense were untrue." *Id.* at 301.

25. See, *e.g.*, Blanchard v. Stribling, 24 So. 2d 713 (Fla. 1946); Gwynn v. Wilhelm, 226 Ore. 606, 360 P.2d 312 (1961); Clark v. Clark, 52 Pa. D. & C. 47 (1944).

cases which adopt the position that preclusion can arise although the issue was not contested in the first suit.[26] A widely articulated rule concerning default judgments is found in *Harvey v. Griffiths*[27] wherein the court stated:

> It is immaterial that the judgment which is assailed was procured by default. The defendants in that action had an opportunity to appear and protect their interest. They deliberately waived the right to their day in court by failing to appear and answer the complaint. A default judgment is an estoppel as to all issues necessarily litigated therein and determined thereby exactly like any other judgment provided the court acquired jurisdiction of the parties and subject matter involved in the suit. . . .[28]

It is entirely possible that various states have so established the law by case decisions on this point that it is not subject to change. Nevertheless, the merits of the competing lines of authority will be considered, bearing in mind the underlying purposes to be served, to arrive at a position which is most fitting in light of these concepts.

First, it should be understood that it is not necessary that either extreme be adopted. It is entirely possible that the courts might establish a more flexible grey area between the black of total preclusion arising from a default judgment and the white of no preclusion from such a judgment.

At least some courts have accepted the idea that res judicata is not an inflexible rule, but rather is one with some play in the joints. The California Supreme Court, when apparently faced with the problem under consideration,[29] noted that a claim of res judicata was being urged based upon a proceeding where "there were no pleadings or evidence on the issue claimed to be adjudicated."[30] The court also noted that inconsistent positions had been taken by both parties and that no innocent parties had been misled. The court concluded, "all those circumstances together with the facts and

26. See, *e.g.*, International Bldg. Co. v. United States, 199 F.2d 12 (8th Cir. 1952) (consent decree); Messerlian v. Goodness, 75 R.I. 203, 65 A.2d 42 (1949) (default judgment); Lawhorn v. Wellford, 179 Tenn. 625, 168 S.W.2d 790 (1943) (default judgment). The plaintiff in Buck v. Mueller, 221 Ore. 271, 351 P.2d 61 (1960), brought an action to recover on a covenant to renew a lease. In finding that the plaintiff was precluded by a prior default judgment in an action for ejectment the court said that:

> . . . since the plaintiff's right to recover on the covenant to renew must rest upon a determination of his right to possession, the fundamental issue has already been adjudicated and constitutes a bar under the doctrine of res judicata, or more accurately, the doctrine of estoppel by judgment. That doctrine, in its applicability to a plaintiff who was a defendant in a former action, makes the judgment in that action conclusive as to all matters which he interposed or could have interposed as a defense. *Id.* at 274, 351 P.2d at 63-64.

27. 133 Cal. App. 17, 23 P.2d 532 (1933).

28. *Id.* at 22-23, 23 P.2d at 534.

29. Greenfield v. Mather, 32 Cal. 2d 23, 194 P.2d 1 (1948).

30. *Id.* at 34, 194 P.2d at 8.

history of the litigation heretofore set forth present a situation where the doctrine of res judicata should not be applied."[31] This case suggests that the second court may have the right, under certain circumstances, to examine the milieu to determine whether the doctrine should be applied. It is not necessary, however, to accept this broad doctrine. It is enough to conclude that in the situation involving an issue not actually litigated in the first suit, that the supposedly precluded party may be able to show that the circumstances surrounding Suit I were such that it would be more desirable and just to allow an examination of the issue in Suit II.

It might be possible to conclude that preclusion should arise from a determined issue if there is reason to believe that the failure to litigate in fact was a recognition of the validity of the opposing claim. This could be determined by: (1) the importance of the matter to the conceding party; (2) the cost of litigation; or (3) the ease with which a defense could be made on the conceded point.[32] It would also seem desirable to consider the factual closeness of the two cases[33] and the relative amounts involved in the two suits[34] to see if it would be reasonable to hold the party precluded by the judgment in the first suit. These factors go to the opportunity and incentive to litigate the matter fully, and the question whether it is reasonable in Suit II to hold the party precluded. If there has been a failure to defend on the point, is it not reasonable initially to assume that the party admits the truthfulness of the matter urged? At least, should he not have the burden of explaining his failure to defend in the earlier suit or his desire now to litigate the matter? If this thesis is accepted, it would mean that a default judgment or a failure to defend on a particular matter would establish such issues and there would be preclusion on such matters *unless* the precluded party is able to explain his failure to defend in the earlier suit or is able to convince the court that he should be allowed to contest the issue in the instant suit. The court should be able to allow litigation of the contested point if satisfied that the earlier failure to litigate should not bind the

31. *Id.* at 35, 194 P.2d at 8.

32. The Supreme Court recognized these factors in Cromwell v. County of Sac., 94 U.S. 351, 356 (1876), by stating that:

> various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation and his own situation at the time.

33. If the second suit is factually identical, a court may well find the defense barred under a compulsory counterclaim provision like that of IOWA R. CIV. P. 29.

34. See Jordahl v. Berry, 72 Minn. 119, 75 N.W. 10 (1898); Gwynn v. Wilhelm, 226 Ore. 606, 360 P.2d 312 (1961).

supposedly precluded party, or that justice would be best served by allowing litigation.

After all, unnecessary relitigation of matters is the thing to be avoided. In the situation under consideration, there has been no litigation at all since the matter was conceded in Suit I. It is true that the courts would save time if there were total preclusion, but since it is generally held that a litigant is entitled to his day in court on any matter in controversy, he should lose this only if his action in the first suit can be considered a waiver of his right to contest the matter. This should be true only if the facts would suggest that he has, in truth, made such a choice.

Lynch v. Lynch[35] is an outstanding case on the matter of preclusion arising from a default judgment. Suit I was brought by landlord against a tenant and a default judgment was entered in favor of the plaintiff; Suit II was an action for declaratory relief brought by the same landlord against the same tenant. Again the defendant defaulted and judgment was entered for the plaintiff. Suit III was then brought by the tenant against the landlord, raising the question of the right to possession of the property involved. The court held that the issue was vital in the earlier suits and could not be re-examined in Suit III. The court did not clearly point out its reasons for reaching this particular result. First, it noted that "collateral estoppel is usually not available in default cases." Then it stated:

> If the common issue to this cause of action and . . . [one of the earlier actions] was the right to possession of the land on and after March 1, 1958, and we think it was, there can be little doubt that the former judgment, even though by default, is conclusive, and, as such, estops plaintiff-appellant in this action.[36]

The court held that any available defense should have been asserted in the earlier action and then referred to the compulsory counterclaim provision of the Iowa Rules,[37] suggesting that this might be applicable in the instant case. The language and the holding, however, are both consistent with the idea that a default judgment may be the basis for issue preclusion.

A typical situation in which the question of preclusion by a defaulted—not litigated—determination is that in which a doctor sues for an unpaid bill, and a default judgment is rendered for the plaintiff. The patient then brings an action for malpractice in connection with the treatment received but not paid for. Absent a compulsory counterclaim provision that might force the litigation of both claims together, the preclusive effect of the first

35. 250 Iowa 407, 94 N.W.2d 105 (1959), noted in 36 DET. L.J. 616 (1959).
36. *Id.* at 413, 94 N.W.2d at 109.
37. IOWA R. CIV. P. 29.

on the second becomes extremely important. The Oregon Supreme Court recently held that there was no preclusion arising from the first default judgment under these peculiar circumstances.[38] "The doctrine of *res judicata*, including collateral estoppel, as to matters essential to the judgment, applies to judgment by default."[39] The court considered the New York rule that a judgment for the doctor, even by default, estops the patient from bringing an action for malpractice, but decided to follow the lines of authorities which have refused to accept the New York position. The reasons apparently were: (1) the default was possibly a "snap judgment"; (2) the doctor's suit was brought in a justice court which did not lend itself to a full litigation of the controversy; and (3) the gross difference in the amounts involved. The court then concluded that "the question of malpractice was not litigated and determined by the default judgment in the justice's court,"[40] indicating a reluctance to find issue preclusion in the default judgment.

It is submitted that under the analysis suggested above, the same result would obtain. Accepting the general idea of preclusion from a default judgment, the court in Suit II may consider whether the supposedly precluded party, in view of the surrounding circumstances, intended the default (failure to litigate) to be an admission. It cannot reasonably be said that the plaintiff in the malpractice case intended to admit, in the action brought for payment, the propriety of the treatment given. Perhaps this was the hope of the doctor, but it was not the intent of the patient.

It might be desirable for the courts to apply generally the concept of preclusion to all issues about which a court must reach a conclusion if the plaintiff is going to recover. These would include fact issues that have been conceded by the defendant by default, failure to deny, confession, or judgment by consent. However, it should be possible for a court in Suit II to conclude that a non-litigated issue is still open to litigation if the defendant's action in Suit I was not in the nature of deliberate admission. This would require proof of the matter on the part of the supposedly precluded party and would require a consideration of the factual situation obtaining in Suit I. As suggested above, the court might consider the closeness of the cases, the relative amounts sought, the difficulty of proof, the cost of litigation, and other relevant factors.[41]

The interest of justice would seem to be best served by a compromise such as this.

38. Gwynn v. Wilhelm, 226 Ore. 606, 360 P.2d 312 (1961).
39. *Id.* at 609, 360 P.2d at 313.
40. *Id.* at 615, 360 P.2d at 316.
41. See notes 24-26 *supra*, and accompanying text.

D. *Necessarily Decided*

To decide whether there is issue preclusion, it is important to ascertain whether the issue was necessarily decided in reaching a decision in Suit I.

If the court in Suit I made a finding which was not necessary for the adjudication, it has no preclusive effect.[42] This rule is logical: because the issue was not essential to the decision, the court would have no incentive to consider it with great care. Contrariwise, if the issue *is* essential the court supposedly has the incentive to consider the matter carefully and there should therefore be preclusion on the issue.

Courts have had difficulty deciding whether the adjudication of an issue was necessary for the decision of the case. In a typical negligence case where both negligence on the part of the defendant and plaintiff's freedom from contributory negligence are crucial issues, if an Iowa jury should specifically find that the defendant was not negligent and that the plaintiff was guilty of negligence, an interesting question arises. It was necessary to decide only one of those matters; either was sufficient to undergird a judgment for the defendant. Could it be said that a decision on the first issue was necessary, but that one on the second was superfluous? In this situation one might justifiably say that these are simply alternative grounds for the decision handed down and that both should be preclusive.[43]

The obvious case for the application of this principle is that in which the court finds for one party in the controversy, but makes a finding of fact against the winning party. The latter finding is dictum, and since it is not part of the court's reasoning by which it reached its decision, may not reflect the consideration which should be a concomitant of a judgment, and certainly has no preclusive effect.[44]

Another relevant consideration is that the party vitally interested in the finding of fact may not be able to have the matter reviewed in an appellate court. In the last hypothetical, the winning party in all probability could

42. Thal v. Krawitz, 365 Pa. 110, 73 A.2d 376 (1950), is a case in which the court held that a finding made in the first suit was not necessary for the decision of that case and so the matter was not collateral estoppel in the second suit. It must be remembered, however, that:

> In order to determine whether the particular finding was essential to the holding in the former action, it is necessary to examine the legal principles by which the referee was guided, and which he considered controlling upon him. John A. Hadden, Trustee for Mfrs. Trading Corp., Bankrupt v. United States, 123 Ct. Cl. 246, 257 (1952).
>
> It is the law as found and applied by the court in the former action which determines which facts were essential to its holding. The fact that a later court gives effect thereto by operation of *res judicata* is no expression of agreement or disagreement with the former determination of applicable law. *Id.* at 257 n.6.

43. RESTATEMENT, JUDGMENTS § 49, comment *c* (1942).

44. See, *e.g.*, Cambria v. Jeffery, 307 Mass. 49, 29 N.E.2d 555 (1940).

not obtain judicial review of the adverse finding by the court since he is not prejudiced by the finding; judgment has been in his favor.[45] This would seem to be another reason for the general rule that preclusion flows only from those fact issues necessarily decided in reaching a judgment.

II. Nature of Issue Involved

The nature of the issue involved will be an important factor in determining the preclusive effect to be given to the judgment in the first suit. The courts will react quite differently according to the nature of the issue upon which supposedly there is preclusion. Preclusion on an issue of jurisdiction raises a number of considerations not present in a preclusion of facts in a contract case, and preclusion of issues of law are quite different from issues of fact in a tort case.

The important categories which deserve special considerations seem to be: (1) fact issues as opposed to issues of law; (2) related and remote consequences; and (3) matters of jurisdictional facts.

A. *Issues of Fact v. Issues of Law*

Normally when one thinks of issue preclusion it is in terms of fact issues which have been decided. Occasionally, however, a law issue will be decided in a suit, and in a subsequent action it will be claimed that the law issue is not subject to relitigation but that preclusive effect should be given to the first judgment. This is quite apart from the doctrine of stare decisis which would suggest that an earlier decision would be persuasive on the court.

The problem of collateral estoppel/preclusion as to questions of law can be meaningful only in the situation where the applicable law is uncertain or in a state of flux. When the law is clearly established and unchanged, the doctrine of stare decisis would control; the same legal principles would be applied. If the law has been changed by a clear ruling of a court having the authority to settle the law, then there is no preclusion. A litigant has no vested right in a decision which has been overturned by a court. This problem faced the court in *Christian v. Jemison*,[46] where certain plaintiffs brought a class suit in the federal court to have a certain municipal ordinance of Baton Rouge, Louisiana, declared unconstitutional. It was claimed that the suit was barred by res judicata because of an earlier suit brought by one of the instant plaintiffs and others in a state court to enjoin the enforcement of the same ordinance. The state court had not reached the constitu-

45. If the finding is incorporated in the decision of the case, then perhaps the matter might be appealable by the winning party. Restatement, Judgments § 69 (1942).

46. 303 F.2d 52 (5th Cir. 1962).

tional issue but had found against the plaintiffs in the earlier suit. No appeal had been taken from the judgment.

The federal district court found for the plaintiff and against the res judicata argument. On appeal the court of appeals affirmed, stating:

> The defendants' res judicata argument might be attacked on several bases. But the reason that demonstrates its inapplicability most clearly to us is the momentous change that has occurred in the field of constitutional law since the adjudication of the first suit. The Supreme Court has many times declared "the general rule that res judicata is no defense where between the time of the first judgement and the second there has been an intervening decision or a change in the law creating an altered situation." . . .[47]

The court considered the repudiation of the "separate but equal" doctrine and the decisions rejecting segregation of local transportation facilities in cases subsequent to the class suit which supposedly precluded the plaintiffs in the instant suit.

> The wisdom of the rule which exempts such cases from the doctrine of res judicata is clearly revealed in this instance. It would be a senseless absurdity to sanction in Baton Rouge segregated seating under a law patently unconstitutional while everywhere else in the country segregated seating is prohibited. The Constitution is not geared to patchwork geography. It tolerates no independent enclaves.[48]

Thus was an overriding constitutional right recognized in spite of a decision which was apparently res judicata on the matter.

When the law on the point is not well established, the deciding court must face the question of the preclusive effect to be given the earlier decision. It is at this point that the courts must either accept or reject the concept of preclusion. The *Restatement of Judgments* articulates a rule:

> Where a question of law essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is not conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction; and in any event it is not conclusive if injustice would result.[49]

This suggests a very limited application of the doctrine of preclusion to law questions.

In fact there have not been many instances in which there has been a claim of res judicata as to a matter of law. The problem of recurring similar factual situations, with possibly different applicable law, has been found most frequently in the area of tax litigation.

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47. *Id.* at 54-55. (Footnote omitted.)
48. *Id.* at 55.
49. RESTATEMENT, JUDGMENTS § 70 (1942).

In the definitive case of *Commissioner v. Sunnen*,[50] the Supreme Court stated:

> A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But . . . a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. . . . Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repititious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.[51]

As suggested by the *Sunnen* case, it would seem completely reasonable to say that if there has been a change in the law, either state or federal, this might require a re-examination of the earlier tax decision. In other words, issue preclusion on the matter of law would not apply if there has been a change in the law. The Court suggested that "an interposed alteration in the pertinent statutory provisions or Treasury regulations can make the use of that rule [collateral estoppel] unwarranted."[52] The Court concluded that there had been a "sufficient change in the legal climate" so that the doctrine of collateral estoppel should not be applied regarding the assignment of a contract.[53] Implicit is the idea that fairness to the individual and to others in the general class requires equality of treatment; one individual should not be prejudiced or advantaged by an incorrect ruling.

Another example of tax litigation and possible preclusion on a legal issue is *Y.M.C.A. v. Sestric*[54] in which the court assumed the identity of the facts in a prior suit and the instant case and still held that res judicata would not apply concerning a tax exemption, stating:

> To hold this case res judicata would result in applying forever one rule of law between two parties (YMCA and the City of St. Louis) and another rule of law among all other parties in similar or the same factual situation. The injustice of any such application or res judicata or collateral estoppel is at once apparent. Since the adjudications on the second and third YMCA cases, judicial decision has created a new situ-

50. 333 U.S. 591 (1948).

51. *Id.* at 599.

52. *Id.* at 601.

53. *Id.* at 606. *But see* Hercules Powder Co. v. United States, 337 F.2d 643 (Ct. Cl. 1964).

54. 362 Mo. 551, 242 S.W.2d 497 (1951) (en banc).

> ation and respondent should not be precluded from having accorded it the same treatment as to taxation as is accorded any other charitable corporation in like circumstances.
>
> . . . .
>
> [T]he doctrines are not applied at all when obvious injustice would result. . . .[55]

The court recognized that the erroneous first construction of the constitutional provision should not be binding on the party to the first adjudication.

Although in some cases it may be held that there is preclusion as to legal points involved because of earlier decisions involving the precluded litigant, the authorities examined suggest that this is not likely to happen with any frequency. The courts generally will be rather reluctant to apply a rule of law simply because it was applied in any earlier case. If the cases are closely related factually and in point of time, the courts might apply the decision made earlier and hold that there is preclusion on the matter of law. Generally, however, it would seem that there is complete freedom to examine any point of law regardless of an earlier decision.

The explanation underlying the distinction between issues of fact and issues of law is not clear.[56] It may be that the courts regard matters of law as within the special competency of the courts:[57] perhaps issues of fact are always subject to doubt, although it may be felt that matters of law can be decided with precision. Finally, militating in favor of a re-examination is the rendering of decisions on the merits rather than on the basis of preclusion barring a consideration of the merits.[58]

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55. *Id.* at 567, 242 S.W.2d at 507-08.

56. For a discussion of the complexities surrounding the "issues of law" question see RESTATEMENT, JUDGMENTS § 70 (1942).

57. It should be mentioned that any adjudication of a point of constitutional law has no preclusive effect. As the Supreme Court has recently indicated, it is the Court's "considered practice not to apply stare decisis as rigidly in constitutional as in nonconstitutional cases," Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962), and the same principle would apply in the case of preclusion. Because of the fundamental nature of the matter involved, and because of the difficulty in getting any constitutional rule changed, the courts should be willing to reconsider such matters. Certainly, constitutional rights should not be lost because of an earlier decision which applied a different interpretation of constitutional law; that would nullify the very rights the constitution is supposed to give. The doctrine of preclusion, as an extension of its underlying rationale, requires no such conclusion.

58. Courts have always been desirous of getting to the merits of a controversy rather than deciding it on the basis of some technical, mechanical rule. See N.A.A.C.P. v. Alabama, 377 U.S. 288 (1964); Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477 (1959).

B. *Related and Remote Consequences*

In any given law suit a great number of facts may be in dispute. In the view of the litigants in that suit, the controversy is cast in terms of the facts in controversy and the legal liability possibly involved. It is probably true that the parties do not consider the possible ramifications of every fact involved. With this thought in mind, the court have been rather reluctant to extend the idea of issue preclusion to every fact involved, but rather have attempted to limit it in some way.[59]

In the landmark case of *The Evergreens v. Nunan,*[60] Judge Learned Hand attempted to delimit the impact of issue preclusion by talking in terms of mediate and ultimate facts. The court, in considering which issue should be precluded by facts found in the first suit, indicated that *any* type of fact found in Suit I might preclude further litigation on the matter. It seemed to be interested in whether the fact was really disputed in the first suit and whether the losing party would have put out his best effort. The court concluded that if the final outcome hinged on the issue, that would be enough. But the court then examined the second suit to determine whether the supposedly precluded fact would be mediate or ultimate in *that* suit. The court stated:

> [W]e are to decide what are the purposes in the second suit for which anything decided in the first suit—whether "ultimate facts", or "mediate data" therein—are conclusively established. Do the "ultimate" facts, or the "mediate data" decided in the first suit conclusively establish in the second, anything but facts "ultimate" in that suit? Do they also establish "mediate data" in that suit: i.e. premises from which to deduce the existence of any of the facts "ultimate" in that suit?[61]

The court patently was unhappy with the possible ramifications of issue preclusion, but seemed to think that the only available limitation was in terms of the use to which the preclusive matter would be put in the second suit. If only mediate data in the second, then there would be no preclusion; if ultimate in the second, then there would be preclusion. The court recognized that there is little rhyme or reason in this conclusion, but decided that it does have the merit of limiting impact of the first suit. The court concluded: "we do not hesitate to hold that . . . no fact decided in the first whether 'ultimate' or a 'mediate datum,' conclusively establishes any 'medi-

59. The *Restatement of Judgments* provides that: The rules stated in this Section are applicable to the determination of facts in issue, but not to the determination of merely evidentiary facts, even though the determination of the facts in issue is dependent upon the determination of the evidentiary facts. RESTATEMENT, JUDGMENTS § 68, comment *p* (1942).

60. 141 F.2d 927 (2d Cir. 1944).

61. *Id.* at 929.

ate datum' in the second, or anything except a fact 'ultimate' in that suit."[62]

It seemed to be the feeling of the court that it was a permissible and highly desirable limitation on the preclusion effect given to the first judgment. The court, noting the impossibility of anticipating the effect in the future of facts decided, stated: "logical relevance is of infinite possibility; there is no conceivable limit which can be put to it. Defeat in one suit might entail results beyond all calculation by either party . . . ."[63] This seems to be the primary consideration undergirding the court's decision. It is noteworthy that the court acknowledged a "dearth of authority"[64] in the area.

It is rather surprising that this outstanding court would accept the supposed dichotomy between "mediate" and "ultimate" facts and announce a rule not clearly established by precedent, since it was not rationally suited to the ends which the court clearly felt were desirable. The decision is also subject to criticism because of the complexity of the rule suggested. This is clearly shown by the confusion found in decisions supposedly following *The Evergreens*. The Iowa Supreme Court, for example, in *State v. Thompson*[65] stated:

> These claims did not present or raise any ultimate facts to be decided by the jury in that [first] case but were merely evidentiary facts from which the ultimate fact *might* be determined. The law is well-settled that the theory of res judicata is confined to ultimate facts and does not extend to evidentiary ones.[66]

The statement, of course, is not consistent with *The Evergreens*.

The court itself in *The Evergreens* indicated that it was not happy with the rule that it announced.

> Were the law to be recast, it would . . . be a pertinent inquiry whether the conclusiveness, even as to facts "ultimate" in the second suit, of facts decided in the first, might not properly be limited to future controversies which could be thought reasonably in prospect when the first suit was tried.[67]

Against such background it seems apparent that the law is going to grow and become a more sophisticated response to the need in the area. The shift from the formal rule of *The Evergreens* to a more rational and apt approach to the matter is found in *Hyman v. Regenstein*.[68]

Collateral estoppel carries a built-in danger that it may be applied

62. *Id.* at 930-31.
63. *Id.* at 929.
64. *Id.* at 930.
65. 241 Iowa 16, 39 N.W.2d 637 (1949).
66. *Id.* at 22, 39 N.W.2d at 641.
67. 141 F.2d 927, 929 (2d Cir. 1944).
68. 258 F.2d 502 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959).

> loosely to subsequent litigation having such a tenuous connection with the original controversy that application of the doctrine would work an injustice. . . . Judge Hand in The Evergreens v. Nunan, limits the doctrine to "ultimate facts" as opposed to "mediate data". Ultimate facts are "those facts, upon whose combined occurrence the law raises the duty, or the right, in question". We would state the limitation, and apply it to this case: collateral estoppel by judgment is applicable only when it is evident from the pleadings and record that determination of the fact in question was necessary to the final judgment and it was foreseeable that the fact would be of importance in possible future litigation.[69]

This last statement would seem to suggest an important change in the applicable law, a change entirely consistent with the law as developed in other areas.

There are a number of different approaches which might be used in limiting the preclusive effect of the first judgment. Courts might talk in terms of: (1) whether it is essentially the same cause of action; (2) whether the second cause of action was in existence at the time of the first judgment; (3) whether there is more than a single issue in common; (4) whether the matter was central or peripheral; or (5) whether the issue involved a claim or a defense. Each of these concepts might be used to limit the preclusive effect, but these all seem to be as formal or ritualistic as the rule in *The Evergreens*. The foreseeability or predictability test would seem to be more consistent with a logical development of the law.

A reasonable test would seem to be that of the foreseeability or predictability regarding the adjudication. Would it have been the reasonable expectation of the persons concerned that the decision in Suit I would have repercussions as far as Suit II? Was it foreseeable that Suit II would turn on the same issues litigated in Suit I? These questions would seem to be the relevant ones in deciding how far to extend the concept of preclusion. These would seem to reflect the reasonable expectation of those involved.[70]

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69. *Id.* at 510-11. (Footnote omitted.)

70. This reasonable expectations test would seem to be one which can be justified in terms of precedents in law. In the first place, the law may be reluctant to carry any principle to a remote, although logical extreme. In tort law, for example, one of the areas of concern is the extraordinary result flowing from a wrongful act. There is a reluctance to hold the wrongdoer liable in the aberrational case even though an innocent party is injured. Chapter 16 of *Restatement of Torts* is, in large measure, an attempt to limit the liability flowing from the wrong. In the case of preclusion, where no innocent party is involved, the courts seem to be more willing to adopt some limitation. In fact, courts have articulated tests which delimit the preclusive effect to be given an adjudication.

In The Evergreens v. Nunan, 141 F.2d 927, 929 (2d Cir. 1944), Judge Learned Hand indicated that he felt that preclusive effect should be given in those controversies "reasonably in prospect when the first suit was tried." He indicated, however, that in his view, this was not the law.

C. *Jurisdictional Matters*

Much confusion exists about the preclusive effect to be given to findings concerning an issue of jurisdiction.[71] In some cases it has been stated that

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Professor James, in writing on consent judgments as collateral estoppel, comes close to the reasonable expectation test when he contends that "a consent judgment should not be given any effect as collateral estoppel expect in the rare case where it may fairly be said that the parties intended this effect." James, *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173, 175 (1959).

Professor James after considering the matter at length stated:

> Where the agreement upon which a consent judgment is based is fairly to be construed as providing that the parties should be bound collaterally upon a certain point, that agreement will and should generally be given effect. An intention to be bound in this way should not however be found unless the language or admissible evidence affirmatively points to it, and such an intention should not be inferred from the circumstance, taken alone, that the agreement or judgment contains a stipulation or recital of the fact's existence.
>
> Where the parties to a consent judgment have not agreed to be thus bound, the rules pertaining to the effect of judgments do not require that they should be, and the relevant considerations of policy and expediency require that they should not be. *Id.* at 193.

The Supreme Court of Iowa referred to a situation involving conflicting cases:

> Jurisdiction of this court to determine the status and the rights and privileges of the parties had been properly obtained and was never lost. The existing action and its issues then appealed to us were well known to the litigants and to the probate court. That the adjudication might be set aside by our decision in conflict with it must have been clear to the court and the administrator. *In re* Estate of Hartstack, 250 Iowa 510, 518, 94 N.W.2d 744, 749 (1959).

The continuum of the law is reflected in a number of different facets—law of the case, stare decisis, preclusion, estoppel, and waiver. All to some extent are grounded on the reasonable expectations of individuals. The Supreme Court has noted this grounding generally, referring to "the practical consideration underlying the doctrine of stare decisis —protection of generated expectations . . . ." Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962).

This same limitation of a ruling's effect to that reasonably expected by the litigants is found in Gadsen v. Fripp, 330 F.2d 545 (4th Cir. 1964) where the court of appeals considered the intent of a party in his presentation in determining whether the trial court was authorized to dispose of the entire case on its merits. The court, also considering the question of whether a plaintiff could take payment of judgment and still appeal, stated:

> When a payment of a judgment is made and accepted under such circumstances as to indicate an intention to finally compromise and settle a disputed claim, an appeal may be foreclosed, but, under such circumstances, it is the mutual manifestation of an intention to bring the litigation to a definite conclusion upon a basis acceptable to all parties which bars a subsequent appeal, not the bare fact of payment of the judgment. *Id.* at 548.

All of these cases suggest that the Court of Appeals for the Fifth Circuit was close to the truth when it indicated that it would approve a limitation that "collateral estoppel by judgment is applicable only when it is evident from the pleadings and record that determination of the fact in question was necessary to the final judgment and it was foreseeable that the fact would be of importance in possible future litigation." Hyman v. Regenstein, 258 F.2d 502, 511 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959). See also Yates v. United States, 354 U.S. 298, 335-38 (1957) wherein the Court seemed to be troubled by the long period of time intervening between the two suits and the remoteness of the earlier adjudication.

71. "Indications that this development [concerning jurisdiction and collateral attack] has passed from the tranquillity of infancy to a rowdy adolescence. . . ." Boskey &

such adjudications should be given preclusive effect[72] although other courts have indicated that collateral attacks on such findings will be permitted even where there has been actual litigation of the matter.[73]

Clarity will be served if the general area of jurisdiction is divided into specific areas and situations.[74] In the first place, jurisdiction of the person must be distinguished from jurisdiction of the subject matter, because the treatment afforded those two matters differs considerably.[75] Within each category it is necessary to consider the specific situation in which the problem is posed.

1. *Jurisdiction of the Person*

In Suit I wherein there may be some question about the jurisdiction over the person of the defendant, generally speaking the matter must be raised as provided in the procedural rules or the matter is waived. For example, Iowa requires a special appearance before any motion or pleading; if it is not so raised, the defendant waives the objection.[76] Under the federal rules, it must be raised in the motion made before answer or in the answer or it is

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Braucher, *Jurisdiction and Collateral Attack: October Term, 1939*, 40 COLUM. L. REV. 1006 (1940).

> Jurisdiction is the power to hear and determine a controversy and to render judgment in accord with law. . . . [T]his power includes the power to decide wrongly as well as rightly, to render an erroneous judgment as well as a correct one. Yet jurisdiction is not thereby lost. Stated succinctly, the power to decide includes the power to err. State v. Jameson, 123 N.W.2d 654, 656 (S.D. 1963).

72. See, *e.g.*, Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); Stoll v. Gottlieb, 305 U.S. 165 (1938); Davis v. Davis, 305 U.S. 32 (1938).

73. See, *e.g.*, Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336 (1850); Williamson v. Berry, 49 U.S. (8 How.) 495 (1850); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839).

74. "[T]he generalization that judgments without jurisdiction are void has been displayed by analytical dissection of jurisdiction doctrines in each specific situation presented." Boskey & Braucher, *supra* note 71, at 1029.

The decisions in Union Joint Stock Land Bank v. Byerly, 310 U.S. 1 (1940); Kalb v. Feverstein, 308 U.S. 433 (1940); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940) "serve notice that every attempt at collateral attack will be required to show cause." Boskey & Braucher, *supra* note 71, at 1030.

75. See Duke v. Durfee, 308 F.2d 209 (8th Cir. 1962), *rev'd*, 375 U.S. 106 (1963):

> To begin with, matters of personal jurisdiction and those of subject-matter jurisdiction have not received identical treatment. Thus, as to the former, where a defendant appears in the first action and litigates the question of the court's jurisdiction over his person, the ensuing judgment is held to be res judicata and not subject to collateral attack in another forum. . . .
>
> On the other hand, the answer, under the decided cases, to the parallel problem of conclusiveness of a prior determination of subject-matter jurisdiction, as distinguished from jurisdiction over the person, is not nearly so clear. The Supreme Court at different times has stated that the res judicata principle is both (a) applicable to determinations of subject-matter jurisdiction and (b) does not preclude a collateral inquiry into a court's assumption of subject-matter jurisdiction. The Court's holdings disclose the same apparent inconsistency and are further clouded by generalizations going both ways. As a result the formulation of a governing rule is difficult. *Id.* at 212-13.

76. IOWA R. CIV. P. 66, 104.

waived.[77] Jurisdiction of the person is not a fundamental problem which can be raised at any time; it does not go to the basic power of the court.[78] This is a truism which should be remembered.

2. *Jurisdiction of the Subject Matter*

Quite apart from the idea of jurisdiction over the person of the defendant is the concept of subject-matter jurisdiction.[79] This deals with the power of the court to adjudicate over either (1) a general type of litigation, or (2) a specific controversy of the general type. For example, federal courts are courts of limited subject-matter jurisdiction. The general type of litigation which they can hear include diversity cases,[80] special federal question cases,[81] and general federal question cases.[82] Moving from the general to the specific, a federal court can hear a specific suit if the litigants are of diverse citizenship and more than the jurisdictional amount is involved. Or a federal court can hear a case if the required federal question is involved and there is the required jurisdictional amount.

The same distinction can be drawn in connection with state courts. General subject-matter jurisdiction involves the general grant of power to the courts and the limitations which are general in scope. State courts generally

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77. FED. R. CIV. P. 12.

78. The United States Supreme Court, speaking on the point of preclusion and jurisdiction over the person of the defendant, stated that a judgment is entitled to full faith and credit and that issues tried once shall be considered "forever settled as between the parties." Durfee v. Duke, 375 U.S. 106, 111 (1963).

> And the principle that there shall be but one adjudication of an issue between the same parties covers the issue of jurisdiction over a defendant's person, provided the court first deciding that issue . . . did not make so gross a mistake as to be impossible "in a rational administration of justice." . . . From our statement of the case we think it too clear for discussion that the Vermont court made no outrageous mistake in applying its own law. This being so, its judgment is *res judicata* under established principles of federal law. Wayside Transp. Co. v. Marcell's Motor Express, Inc., 284 F.2d 868, 871 (1st Cir. 1960).

79. For a case distinguishing between jurisdiction of the subject matter and the "power to grant the relief demanded," see American Dredging Co. v. Local 25, Marine Div., Int'l Union of Operating Eng'rs, 224 F. Supp. 985 (E.D. Pa. 1963).

80. 28 U.S.C. § 1332 (1958). It is interesting to note that cases are being tried in surprisingly large numbers in the federal courts where the diversity jurisdiction is supposedly being invoked when there is in fact no diversity. It has been reported by the Administrative Office of the United States Courts that there were 36 such cases in 1960, 22 in 1961, and 32 in 1962. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 126 (Tent. Draft No. 1, 1963).

81. 28 U.S.C. § 1333 (1958).

82. 28 U.S.C. § 1331 (1958).

have no jurisdiction over admiralty or bankruptcy.[83] Moreover, with some frequency legislation is passed that restricts the jurisdiction of state courts. Some state courts have only limited jurisdiction in terms of either monetary amount or type of subject to be considered.[84] Moving again from the general to the specific, specific subject-matter problems can arise in a state, such as whether certain land is within the state[85] in a suit to quiet title. Whether certain parties are residents of the state for divorce purposes is another example of specific subject-matter problems.[86] These latter problems go not to general subject-matter jurisdiction but to the specific facts which bring a case within the area of competency of the court.

The problem of lack of jurisdiction of the subject matter, in the federal courts, can be raised at any time by the suggestion of a party, sua sponte by the court, or even by a third person not a party to the suit.[87] Although there is some authority to the contrary,[88] most federal courts hold that

> the duty devolves upon the court "at any time" the jurisdictional question is presented to proceed no further until that question is determined. It can not be conferred by agreement, consent or collusion of the parties, whether contained in their pleadings or otherwise, and a party can not be precluded from raising the question by any form of laches, waiver or estoppel. . . .[89]

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83. "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty . . . ." 28 U.S.C. § 1333 (1958). "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy." 28 U.S.C. § 1334 (1958).

84. See Crider v. Zurich Ins. Co., 224 F. Supp. 87 (N.D. Ala. 1963) (no jurisdiction in state court under Workman's Compensation Act); Stucker v. County of Muscatine, 249 Iowa 485, 87 N.W.2d 452 (1958) (no jurisdiction of subject matter where defendant immune from tort action). In Travelers Ins. Co. v. Sneddon, 249 Iowa 393, 86 N.W.2d 870 (1957), the court said:

> The question presented by this appeal is the jurisdiction of the district court to hear a controversy pending before the Iowa Industrial Commissioner as to whether the insurance carrier had effectively canceled its policy issued to an employer before his workman was injured. The district court held industrial commissioner had exclusive jurisdiction over the controversy and the court was not at liberty to interfere therewith. We affirm the decision. *Id.* at 394, 86 N.W.2d at 871.

85. See *e.g.*, Durfee v. Duke, 375 U.S. 106 (1963).

86. See *e.g.*, Julson v. Julson, 122 N.W.2d 329 (Iowa 1963).

87. Subject-matter jurisdiction is so crucial that any party can suggest while the case pends that the court does not have jurisdiction of the subject matter and the court will consider the matter. The court, *sua sponte*, may raise the question of lack of jurisdiction of the subject matter. This is true even after the case has been litigated on the merits. A third person, not a party to the action, may be successful in questioning the jurisdiction of the subject matter. MOORE & VESTAL, MOORE'S MANUAL § 5.01 (1962). (Footnotes omitted.)

88. In Di Frischia v. New York Cent. R.R., 279 F.2d 141 (3d Cir. 1960), the court found that defendant abused his discretion by asking for a dismissal on grounds of no jurisdiction over the subject matter two years after defendant had stipulated jurisdiction and after the statute of limitations had run on plaintiff's cause of action.

89. Page v. Wright, 116 F.2d 449, 453 (7th Cir. 1940).

The classic case is that in which the defendant removed the case to the federal court because of the claimed diversity between the parties. In the trial on the merits the defendant lost. He then claimed lack of diversity and that the court had no jurisdiction. The Supreme Court held that because of the fundamental nature of the jurisdiction of the federal courts, the matter could be so raised and that there was no estoppel.[90] So long as the case is pending, the question of subject-matter jurisdiction can be raised. This would seem to include both general subject-matter jurisdiction and such jurisdiction in a specific case.

In state courts, the question of subject-matter jurisdiction is not treated in the same way. In some states there are provisions concerning the way in which subject-matter jurisdiction must be raised[91] and if it is not so raised, then the matter is waived and presumably the court could continue to adjudicate in the matter.[92] Whether this would be true in the case of some egregious error might be questioned. Should, for example, a justice of the peace attempt to adjudicate in a divorce case, it is probable that this would be subject to attack at any time during the proceeding.

3. *Preclusion and Jurisdiction of the Person*

When Suit II pends and the allegedly precluded party raises some questions about the jurisdiction of the Suit I court over his person, it is necessary to examine carefully the litigation in the first suit.

If the defendant in the first suit did not raise the question of jurisdiction over his person but did litigate the controversy on the merits, there was a waiver of the jurisdictional question—preclusion by deliberate choice of the jurisdiction of the person question in Suit I. Although the matter was not contested, the earlier decision was based upon a necessary finding that the court did have jurisdiction over the person of the defendant. The failure to contest can be properly interpreted as an admission in this situation so that there is preclusion.

If the defendant raised the issue in Suit I and lost on it, there is issue preclusion, because the matter was raised, litigated, and decided. Under the normal concepts of preclusion, the defendant in Suit I would not be able to raise the matter a second time. Since the matter is not fundamental in character, it would seem to be entirely reasonable to say that one trial of the matter is sufficient.

If the defendant did not appear in Suit I and the judgment went against

90. American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951).
91. *E.g.*, IOWA R. CIV. P. 104.
92. Oakes v. Oakes, 255 Iowa 1315, 125 N.W.2d 835 (1964).

him by default, the matter of jurisdiction over the person of the defendant *can* be litigated in Suit II. In the discussion concerning issue preclusion and non-contested matters,[93] it was indicated that although preclusion can arise from a default judgment, this rule is subject to exceptions.[94] An example of this is the situation where the defaulting party can show that the default was in no wise an admission of the supposedly contested facts. In the case of the default judgment where there is a question about the jurisdiction in Suit I over the person of the defendant, it can be urged that there was no admission of jurisdiction intended. The courts have, apparently in every instance, allowed litigation of such jurisdictional question, when it has been raised in Suit II. There is no issue preclusion by judgment on the matter. This means that the defendant in the second suit—who was the defendant also in the first suit—will be able to raise the question of the jurisdiction of the court over his person in Suit I. This may require a trial of factual issues in Suit II.[95]

4. *Preclusion and Jurisdiction of the Subject Matter*

Frequently in Suit II a question about the jurisdiction over the subject matter of the court in Suit I may arise in a suit on the judgment handed down.[96] Another example would be the case in which a party claims preclusion on a fact issue because of a judgment rendered and the resisting party claims that there is no preclusion because the first judgment was void because of lack of jurisdiction over the subject matter. This would raise the problem of the effect of the first judgment on the jurisdictional issue.

When an adjudication has been handed down in a court and a claim of preclusion is made in a subsequent suit, it is necessary to determine the law that will control. If the two Suits have been brought in the courts of a single state, that state law will control. If the two Suits have been brought in the courts of different states, then the full faith and credit provision of the federal constitution comes into play. This requires that the second court give the same effect to the judgment that the courts of the first state would

93. See notes 18-41 *supra* and accompanying text.

94. See notes 35-41 *supra* and accompanying text.

95. In the case of a suit originally based upon a so-called "single act" statute, this might mean an examination of the act supposedly done by the defendant. This might become almost a complete trial of the merits of the controversy.

96. It is no longer true that questions concerning preclusion on jurisdictional matters will arise in suits on judgments in the federal courts, because that court system now has a provision concerning registration of judgments. Plaintiffs can reach property outside the state in which the court is sitting under 28 U.S.C. § 1963 (1958). The judgment can be registered in any other federal court and it will have the effect of a judgment rendered in that court. Note, *Registration of Federal Judgments*, 42 IOWA L. REV. 285 (1957).

have given to it.[97] Although there are variations when the federal court system is involved,[98] these two situations would seem to cover the most common situation.[99]

Absent a controlling statute, reference must be made to the general principles which have grown up in the area.

When the litigant in the second suit wishes to challenge the jurisdiction of the subject matter in the first suit, a number of interesting problems arise. Three possibilities exist in relation to the first suit which may be relevant in deciding the outcome of the second:

1. the defendant might have defaulted in the first suit by not even appearing;
2. the defendant might have appeared in the action and defended but not raised the question of subject-matter jurisdiction; or
3. the defendant might have raised the question of lack of subject-matter jurisdiction in the first suit and have lost after a trial of this specific issue.

Consider a suit brought in which the subject-matter jurisdiction of the court in Suit I is being challenged. An example is the case in which it is claimed that the first court was operating flagrantly beyond its authority; this would be the situation should a justice of the peace purport to grant a divorce. In such a case, should the defendant default by not appearing in Suit I, he might wish in Suit II to challenge the jurisdiction of the court over the subject matter in Suit I and so undercut the preclusive effect of that judgment. Because the defendant did not appear in Suit I, it can hardly be claimed that there is any preclusion against him. As is the case when the question is that of jurisdiction of the person,[100] the defendant who defaults in Suit I should be able to raise the jurisdictional matter in Suit II. There is no issue preclusion through judgment since the default can hardly be considered an admission of jurisdiction.[101]

97. The concept of full faith and credit is subject to certain limitations including those based upon the policy of the forum state or inhering in the first judgment. For a discussion of these factors, see Vestal, *The Constitution and Preclusion/Res Judicata*, 62 MICH. L. REV. 33, 43 (1963).

98. *Id.* at 35-38.

99. There are two other situations that might pose some problems if the two courts are in different jurisdictions. One is where the first court is federal and the second is a state court; the other, where the first is a state court and the second a federal. For the governing considerations in these cases, see *id.* at 34-38. It would seem that the general principles of preclusion would control in these situations as in those discussed in the text.

100. See note 95 *supra* and accompanying text.

101. As indicated in the discussion of "Contested v. Conceded Issues" (notes 18-41 *supra*), it would be logical to hold a matter precluded unless there was a clear indication

Should the defendant appear and not raise the subject-matter jurisdictional question, it might be argued that he has waived it so far as Suit I is concerned. In Suit II preclusive effect should be given to the judgment in Suit I since the failure to contest can be reasonably viewed as an admission of the court's jurisdiction.[102]

Of course, if the defendent appears, litigates the subject-matter jurisdictional problem in Suit I and loses, then it can be asserted that there is issue preclusion on the matter.

In summary, if the judgment in Suit I is obtained by default there is no preclusion regarding jurisdiction of the subject matter. If the defendant appears and fails to litigate the matter, or if the defendant appears and loses on the matter, then there would appear to be preclusion.

It is necessary, however, to inject the consideration of the fundamental nature of subject-matter jurisdiction into the discussion. A question of *generic* subject-matter jurisdiction is of fundamental importance not just to the litigants but to the state and society in general. It can be urged rather persuasively that because the acts establishing the courts have granted them certain powers, the parties to a suit should not be able, to expand the powers beyond those enumerated.

On the other hand, the state is not vitally interested in the problem of *specific* subject-matter jurisdiction, since the general area is within the competency of the court. It is interested in only the specific case which is possibly improperly before the court; to say that the litigants are the only persons really concerned seems completely reasonable. From this, it would seem to follow that no exceptions should be made to the normal rules of preclusion. However, commentators have stated that the state is interested in

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that no concession was intended in a failure to contest an issue. Applying this principle to the instant problem, it would be logical to say that one refusing to participate has challenged the jurisdiction of the court, and a failure to participate does not admit the jurisdiction of the court. A failure to participate, however, would apparently admit the issues beyond jurisdiction which are necessary for the decision, if the defendant could raise both the jurisdictional matter and the merits at the same time.

102. Note, *Judgment on Merits as Res Judicata of Jurisdiction over Subject Matter*, 49 YALE L.J. 959 (1940). In Stoll v. Gottlieb, 305 U.S. 165 (1938), the court said:

> We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. *Id.* at 172. (Footnote omitted.)

The Supreme Court reiterated this doctrine in Williams v. North Carolina, 325 U.S. 226 (1954):

> It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. *Id.* at 230.

the misuse of its courts in such a situation and that a court may, sua sponte, consider the matter even though the litigants have not raised the matter.[103]

Following this reasoning, a court in Suit II might allow a litigant to raise the question of jurisdiction of the subject matter—specific or generic—even though the matter was litigated or the defendant appeared in Suit I.[104] This would seem to depend on the fundamental nature of the jurisdictional objection. If the jurisdictional issue is basic, perhaps the courts might reexamine the matter. This is to say that all subject-matter objections will not be treated the same. Under some conditions there will be no issue preclusion by judgment even though the matter has been litigated in Suit I. This is the exceptional suitation, however, and normally if the subject-matter jurisdiction has been litigated in Suit I or the defendant has appeared,[105] there will be preclusion.

Most recently, the United States Supreme Court faced the question of preclusion on specific subject-matter jurisdiction. Viewing the matter through the filter of full faith and credit, the Court stated in *Durfee v. Duke*[106] that the

> general rule is . . . [that a judgment is entitled to full faith and credit when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment] when the claim is made that the original forum

103. MOORE & VESTAL, MOORE'S MANUAL § 5.01 (1962).

104. Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 29 (1917):

> A court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over that defendant. But it must be taken to be established that a court cannot conclude all persons interested by its mere assertion of its own power, Thompson v. Whitman, 18 Wall. 457, even where its power depends upon a fact and it finds the fact. Tilt v. Kelsey, 207 U.S. 43, 51. A divorce might be held void for want of jurisdiction although the libellee had appeared in the cause. Andrews v. Andrews, 188 U.S. 14, 16, 17, 38.

105. The American Law Institute recognizes that there is no absolute rule in the area of subject-matter jurisdiction and preclusion. In RESTATEMENT, JUDGMENTS § 10 (1942), it is stated,

> [1] Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction.
>
> [2] Among the factors appropriate to be considered in determining that collateral attack should be permitted are that—
>
> (a) the lack of jurisdiction over the subject matter was clear;
>
> (b) the determination as to jurisdiction depended upon a question of law rather than of fact;
>
> (c) the court was one of limited and not general jurisdiction;
>
> (d) the question of jurisdiction was not actually litigated;
>
> (e) the policy against the court's acting beyond its jurisdiction is strong.
>
> These are simply factors which presumably are to be considered by the second court in determining whether or not preclusive effect should be given to the first court's decision concerning its jurisdiction over the subject matter.

106. 375 U.S. 106 (1963).

> did not have jurisdiction over the subject matter. . . . In each . . . [of four cases] this Court held that since the question of subject-matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in a subsequent action between the parties.[107]

It must be noted that the Court acknowledged the existence of possible exceptions to the doctrine of finality of jurisdictional determinations. But these are extremely rare; the ordinary rule is that the doctrine of preclusion applies to decisions concerning subject-matter jurisdiction.[108]

5. *Analysis*

It can be stated that jurisdiction of the person, generic subject matter, and specific subject matter must be considered separately.

In each case it is necessary to consider also whether the matter was (1) not litigated although the supposedly precluded party was present in Suit I; (2) completely litigated in Suit I; or (3) not litigated because the supposedly precluded party defaulted in Suit I. In each situation the interest of the state in the jurisdiction of the court must be considered.

An analysis in these terms offers a much more meaningful approach to the matter of preclusion and jurisdiction than does any single sentence generalization.

III. Nature of the Litigation

Although this principle has not been thoroughly validated, it seems reasonable to conclude that the courts will react somewhat differently according to the general nature of the litigation involved. Preclusion is a doctrine being applied in actual cases, and the application will reflect to some extent at least, the nature of the controversy involved.[109]

The classic example is civil rights. It is entirely possible and right that courts have a higher regard for certain values than others. They generally

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107. *Id.* at 112.

108. *Ibid.*

109. "We have not found any overriding equities or considerations of public policy here which would be served by relitigating determinative issues of fact or law which were finally determined in the Illinois action." Seven-Up Co. v. Bubble-Up Corp., 50 C.C.P.A. (Patents) 1012, 1018, 312 F.2d 472, 477 (1963). This certainly suggests that equities or considerations of public policy might justify relitigation under some circumstances.

In Spilker v. Hankin, 188 F.2d 35 (D.C. Cir. 1951), the court of appeals for the District of Columbia held that res judicata (issue preclusion) would not control in a suit brought by an attorney on certain promissory notes apparently given in payment of the attorney's fee. The court stated:

> [W]hen under such circumstances the attorney twice brings the matter into court, the requirements of justice are better served by permitting reexamination of the merits than by treating the prior suit as foreclosing the matter. We think that the client should be permitted to make any legal or equitable defense to the remaining notes which appeals to the conscience of the court. *Id.* at 39.

feel that society demands greater consideration for the civil and political rights of individuals than for property rights.[110] This being true, courts are more willing to reconsider fact issues that have supposedly been decided if the personal rights of individuals are involved.

This problem faced the court in *Sweeney v. City of Louisville*[111] wherein certain Negroes instituted a class action to get equal use of certain facilities owned by the city. The defendants "contend that . . . not only the plaintiff Sweeney, but all members of the class—that is Negro citizens and taxpayers of Louisville—are precluded by the judgment in the State Court proceedings and that the defendants' plea of res judicata is dispositive of this action."[112] The court rejected the claim of preclusion because of the earlier action in the state court and placed great reliance on *Trailmobile Co. v. Whirls*,[113] where it was stated: "the interpretation by the state court of the rights of a citizen under a federal statute is not binding upon the federal court."[114] The instant court, relying on the *Trailmobile* case, denied the res judicata plea. This again suggests the importance attaching to the matter of civil rights and the reluctance of the courts to see litigants precluded on such matters.

This same reluctance is found in the case of habeas corpus. After conviction the imprisoned individual may attempt to upset the result of the criminal prosecution by bringing an habeas corpus proceeding. It is a familiar principle, the United States Supreme Court has stated that "res judicata is inapplicable in habeas corpus proceedings."[115] If the petitioner is denied the writ, he can bring a second and a third and a fourth, ad infinitum, so long as he has the time, and this is one thing he has. The first judgment is not preclusive on those things which could have been urged or on the validity

110. See, *e.g.*, Thomas v. Collins, 323 U.S. 516, 529-30 (1944).

111. 102 F. Supp. 525 (W.D. Ky. 1951), *rev'd on other grounds sub. nom.* Muir v. Louisville Park Theatrical Ass'n, 331 U.S. 971 (1954).

112. *Id.* at 530.

113. 154 F.2d 866 (6th Cir. 1946), *rev'd*, 331 U.S. 40 (1947).

114. *Id.* at 871. Although the *Trailmobile* decision was reversed on appeal, the Supreme Court was careful to indicate that it was not expressing any opinion on the matter of the class suit and res judicata. 331 U.S. at 48.

115. Fay v. Noia, 372 U.S. 391, 423 (1963). *But see*, Lockhart v. Smith, 241 Iowa 970, 43 N.W.2d 541 (1950). In the latter case, a habeas corpus proceeding, the jurisdiction of the court in criminal proceedings was questioned because of a claimed lack of jurisdiction of the subject matter. The court held that the judgment of the court in Suit I as to jurisdiction was not subject to collateral attack. The rationale of this decision was stated elsewhere: "It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity." Smith v. United States, 339 F.2d 519, 526 (8th Cir. 1964), quoting Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

of the entire criminal proceeding.[116] At some point the courts may not allow relitigation of an issue which has been clearly adjudicated in an earlier proceeding.[117] Certainly, however, an examination of the cases suggests that the courts are interested primarily in the rights of the individuals and are not too concerned with the principle of preclusion. If there is any question it is resolved in favor of the person seeking the writ.

This concept would seem to carry over into all litigation concerning constitutional rights. These matters are so fundamental that a court may be very reluctant to hold that a litigant can be deprived of such rights by a prior adjudication of a controlling fact issue. The interest of the public and litigants will not justify a policy that would deprive an individual of such rights without a trial—full and complete—on the matter.[118]

The concept of preclusion allows one litigant to claim an advantage over another because of an earlier suit. When this concerns only the property rights of persons, it may be asserted that any mistakes which might have been made in Suit I cannot be too important. When there is involved fundamental rights of the party, it can be asserted that the interests protected by the concept of preclusion are outweighed by the interests of the individual and of society, which call out for a trial of the entire matter.

Domestic relations is another area where the courts have indicated an overriding concern in protecting the interests of society. In litigation involving divorce, separate maintenance, separation, and related matters, the courts have continually held that the state has a vital stake that is not subject to the control of the individuals concerned.[119]

The nature of the interest of society has been reflected in a divorce case in which there was a motion for a summary judgment based upon a claim of res judicata. In denying the summary judgment the court stated:

116. See Carter, *Pre-Trial Suggestions for Section 2255 Cases*, 32 F.R.D. 391, 394 (1963). See generally Fay v. Noia, *supra* note 115, at 391-97.

117. See Lipscomb v. United States, 298 F.2d 9 (8th Cir.), *cert. denied*, 369 U.S. 853 (1962); Turner v. United States, 206 F. Supp. 261 (W.D. Mo. 1962), *appeal dismissed*, 325 F.2d 988 (8th Cir. 1964).

118. "At least in the constitutional area, the considerations of finality that stand behind the res judicata doctrine must be balanced against and oftimes give way to government's need to regulate abuses that change with the passage of time." Gold v. DiCarlo, 235 F. Supp. 817, 820 (S.D.N.Y. 1964).

This reluctance to see a party deprived of his constitutional rights by anything short of a trial on the merits has been reflected in state decisions. An example is Martin v. Ben Davis Conservancy Dist., 238 Ind. 502, 153 N.E.2d 125 (1958), where the court stated: "The principle that a citizen may lose his constitutional rights by inaction should be sparingly applied, yet public policy demands that somewhere and at some time there must be an end to litigation and that which has been adjudicated is final and ends the matter." *Id.* at 506, 153 N.E.2d at 128-29.

119. See Fridman, *Res Judicata in Divorce*, 27 SOL. 107 (1960).

> It is the policy of this jurisdiction that no divorce should be granted except on the basis of a hearing in open court at which evidence is adduced. The purpose of that policy is to prevent collusion in divorce cases. It has been figuratively said, time and time again, that the public is a third party in every divorce case and has an interest in the preservation of the marriage bond, and that, therefore, no divorce should be granted until after the court hears evidence.
>
> This policy is in part embodied in the . . . [statute] which prohibits the granting of a decree for divorce on default, without proof; and further which provides that any admission contained in a defendant's answer may not be taken as proof of the facts admitted thereby. It is further illustrated in the statutory provision . . . which requires this Court to appoint an attorney for the defendant in every uncontested divorce case, whose duty it is to defend the action actively.
>
> It necessarily follows, therefore, that no divorce should be granted by a judgment on the pleadings or by summary judgment.[120]

The court also stated that it did not feel that res judicata claimed as basis for judgment had been established in the earlier case.

When an issue, decided in an earlier case, is offered as res judicata in a subsequent action for divorce, the treatment may depend on whether it is offered to support the claim for divorce or oppose it. If the decided issue supports the defense of the party resisting the attempt to get the divorce, the court might well recognize the preclusive effect of the earlier adjudication. On the other hand, if the precluded issue supports the granting of the divorce, there would seem to be some freedom on the part of the court to re-examine the matter. One English authority has stated:

> where a matrimonial cause of some kind has been litigated once before between parties, in such a way as to bring before the first tribunal certain matters for decision, the second court before which the parties litigate subsequently, if the previously discussed matter arises for decision, has the duty (as well as the right—perhaps the more modern term 'power' is more appropriate) to inquiry fully into the matter if it is not satisfied that there has already been a full and proper inquiry. . . . The court can decide to re-open the matter: in which event there is no longer any estoppel on the parties.[121]

It is suggested that the parties are bound by the estoppel, but that the court is not: that the court has the power to re-examine the matter if it feels that this is desirable.

It would seem reasonable to conclude that courts may determine that there

120. Rea v. Rea, 124 F. Supp. 922, 923 (D.D.C. 1954).

121. Fridman, *supra* note 119, at 107. The author suggests that there are four categories where the matter will not be res judicata: (1) when matters have been only impliedly decided; (2) if there is fresh evidence on the matter; (3) if allegations could have been but were not made in the first suit and now a party wishes to make such allegations; and (4) when the proceedings provide for different remedies. *Id.* at 109.

is an overriding consideration in the interest of society in the matter of divorce, and that litigants should not be able, through the use of the doctrine of preclusion, to avoid a full and complete trial of the matter. This would mean simply that a court may elect to force an individual to prove a matter on which there would seem to be preclusion because of an earlier decision. In view of the importance of the matter of marital relationships, this would not seem to be unreasonable.[122]

Equitable proceedings are a third type of litigation in which the general nature of the controversy may have a significant impact upon the application of the doctrine of preclusion.

A court of equity has a greater flexibility in the relief given than does a court of law in a comparable situation. The doctrine of preclusion is not applied as rigidly if the second proceeding is in equity: "the court, and a court of equity in particular, ought not to be too astute in applying rules which would turn a suitor out of court without a hearing on the merits."[123]

If the first suit is one at law and the second is a proceeding in equity, then all of the issues decided by the law court are established by preclusion in the second suit. But it must be remembered that the court of equity has a certain amount of discretion which it can exercise in deciding cases. Too, it must bring to bear on the litigation certain principles such as unclean hands which are irrelevant to the law court. The law court is not at all interested in the meritorious nature of the plaintiff's claim; the equity side of the court, on the other hand, is extremely interested in this matter.

This all suggests that it is not a simple matter to move from law to equity so far as issue preclusion is concerned. This requires a very careful analysis of the total controversy to see the impact in Suit II of the decision in Suit I.

These examples suggest that preclusion is not a doctrine being applied in a vacuum. Rather it is being applied to real controversies, and that in some of these controversies there are external forces that are significant. In civil rights and constitutional cases, the interest of society is obvious, and this must be considered along with the general principles of preclusion. The same is true in the case of domestic relations cases where the state is considered to be a third party vitally interested in the matter. In the case of equitable actions, a different framework is introduced, and the court must react within that framework, rather than the more confining one of the action at law. All of these examples simply suggest that a new dimension is introduced that must be considered along with the usual concepts of preclusion.

122. See Fridman, *supra* note 119.

123. Clark v. Clark, 52 Pa. D. & C. 47, 50 (1944).

Conclusion

An examination of the present state of the law in this area suggests that broad generalizations may be meaningless or, even worse, misleading. The present cases suggest that a definite trend is extant toward a more sophisticated analysis of the matter of preclusion.

One of the lessons which must be learned is that great exactness must be used in determining the issues decided in Suit I and to be decided in Suit II. The issues must be the same. If the issues are significantly different, then the concept of preclusion will not apply. Thus far, the courts have had little experience in the ascertainment of issues for the purpose of preclusion; until this time, there has been a broadsword approach to the problem. In the years ahead, it will be necessary to use more finesse in the area.

In deciding what preclusion flows from a case it is necessary to consider not just what issues were litigated and decided but rather what the probable intent of the supposedly precluded party was at the time of the first adjudication. Did he intend to recognize the validity of the position of his adversary in the action taken in the first suit. If he so intended, it would seem to be reasonable to say that he is precluded in Suit II although the matter was not contested in the first action.

An examination of the trend suggests that it is necessary to consider the specific issue involved. It is quite obvious that not all issues will be treated the same way. As suggested above, generalizations are meaningless; specific categories must be examined to determine the treatment which will be afforded.

Another relevant variable is the nature of the total litigation involved in Suit II. If the fundamental rights of a litigant are at stake, the court will be very reluctant to adjudicate the case on the basis of a prior determination made. The courts generally will wish to examine such matters and not render decisions on the basis of facts found by preclusion.

In summary, the nature of the controversy is an important variable but it must be considered along with others, such as parties and the courts involved, in determining the preclusive effect of the first judgment. It must always be remembered that preclusion/res judicata is a growing, living, vital thing. We have, at best, reached a way station in the search for a valid restatement of the law. Much ground is left to be covered before the end of the trail will be in sight.