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Robert T. Brousseau

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A READER'S GUIDE TO THE PROPOSED CHANGES IN THE PRECLUSION PROVISIONS OF THE RESTATEMENT OF JUDGMENTS

Robert T. Brousseau*

[T]he first undertaking of the new organization should be to produce a restatement of certain phases of the law that would tell judges and lawyers what the law was. Such a work would dispel uncertainty in the fields of law it dealt with if it had 'an authority greater than that now accorded any legal treatise, an authority more nearly on a par with that accorded the decision of the courts.' A judge, a lawyer, a law teacher could then go to one source, find what the law in point was and with confidence note it to be so.¹

Nearly thirty-five years have passed since the promulgation in 1942 of the American Law Institute's *Restatement of the Law of Judgments*, an altogether remarkable work hammered and forged in the short span of two years. None should feign surprise, however, if the subject's authority suffered with its age, for the active life of a legal text like that of an athlete is necessarily short. Two factors have required a review of the *Restatement* of this subject as it bears upon preclusion by judgment, factors which command mention at least for their obviousness: the widespread adoption of the Federal Rules of Civil Procedure as a model for state systems of civil procedure,² and the frontal attacks on the "rules" of mutuality and privity conducted in the van by the Supreme Court of California³ and belatedly given the dignity of nation-

* B.S.F.S., Georgetown University; J.D., Duke University. Assistant Professor of Law, Mercer University.

1. H. GOODRICH AND P. WOLKIN, *THE STORY OF THE AMERICAN LAW INSTITUTE 1923-1961* 8 (1961).

2. FED. R. CIV. P., 28 U.S.C.A. (Supp. 1975) (historical materials).

3. *Bernhard v. Bank of America*, 19 Cal. 2d 807, 122 P.2d 892 (1942).

wide application by a narrow yet portentous holding of the federal Supreme Court.⁴ What follows is at best a restatement of a restatement, an attempt to compress into a few pages the extraordinary efforts and conscientious research of the American Law Institute, both the product of and the happy answer to a system of law operating in a vast and never simple federal union.

The sequence of discussion is not always that of the Institute, but lends itself to the more narrative tone suitable for periodical literature. Where criticism appears warranted, I have with deference but without hesitation inserted it.

A PRELIMINARY COMMENT WITH A NOTE ON TERMINOLOGY

With respect to nomenclature the American Law Institute has done nothing to dispel the fog which settles in the first year of law school and seems never to ascend for most of us. Both the *First*⁵ and *Second*⁶ Restatements define "res judicata" to include the preclusive effect given a judgment as a merger, a bar, or a collateral or direct estoppel. Engaging in further taxonomy, the drafters of the *Second Restatement* distinguish between "issue preclusion" (collateral and direct estoppels) and "claim preclusion"⁷ (merger and bar), a thoroughly more useful and traditional division and one which corresponds to the more popular understanding of the subject.⁸ But insofar as a term of general application is needed, the appropriation of "res judicata" for the purpose is harmless enough. In the ensuing discussion, I have limited myself to the most traditional form of civil suit in which the question of preclusion is most likely to arise: the in personam action seeking affirmative relief.⁹

FINALITY OF JUDGMENTS

It is hornbook law that a judgment is entitled to res judicata effect only if final, and in this maxim there is no change between the two

4. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

5. RESTATEMENT OF JUDGMENTS, Ch. 3, Introductory Note (1942). The earlier work will hereinafter be cited as FIRST RESTATEMENT.

6. RESTATEMENT (SECOND) OF JUDGMENTS, Ch. 3, Introductory Note (Tent. Draft No. 1, 1973). The first Tentative Draft will hereinafter be cited SECOND RESTATEMENT.

7. See SECOND RESTATEMENT § 41, especially Comment g.

8. "Res judicata" customarily includes only the effects of merger and bar, in opposition to estoppel by judgment, which is seen as a corollary, but distinct, doctrine.

9. For the treatment of actions in rem and quasi in rem as well as those initiated by obtention of jurisdiction over status, see SECOND RESTATEMENT §§ 73-75, and for declaratory judgments, § 76 of the same draft.

Restatements. Nonetheless, one cannot at all infer from the similarity of language that the area of finality has been stagnant these many years. In 1942, the position of the Institute was that “[o]rordinarily the requirement of finality of judgment as a basis for appellate proceedings is the same as that of finality as a basis for the application of the rules of *res judicata*,”¹⁰ a position it now disingenuously asserts “has often been suggested” but which “has probably never been quite true.”¹¹ As to merger and bar, a strict—and coincidentally traditional—view of finality is appropriate, since these claim preclusions operate to “extinguish” a party’s claim. Whatever considerations may favor relaxation of the requirement of finality for purposes of appellate review—mainly preservation of the integrity of the trial process and encouragement of judicial economy—are not easily transported to the extinguishment of a constellation of rights in a party. The drafters of the recent *Restatement* recognize this and caution against a too easy confusion of finality under such appeals statutes as section 1291¹² with finality for claim preclusion.

They suggest, however, that the more flexible concept of finality adopted by the federal courts—that “final” in some instances means “final enough”¹³—may be appropriate for issue preclusion, and the illustrations they supply lend cogent support.¹⁴ It is theoretically a trifle troublesome to discern how one can be collaterally estopped by a judgment—and both *Restatements* are emphatic that the metaphysical underpinning of direct and collateral issue preclusion is an estoppel by *judgment*¹⁵—which has not been, may or may not be, rendered. This theoretical peccadillo may stem from an excestion in both *Restatements* which allows application of full *res judicata* effect to intermediate judgments which do not ultimately settle or terminate the litigation.¹⁶

10. FIRST RESTATEMENT § 41, Comment a.

11. SECOND RESTATEMENT § 41, Comment b.

12. 28 U.S.C. § 1291 (1970), discussed in SECOND RESTATEMENT § 41, Comment b.

13. Most of the cases arise under 28 U.S.C. §§ 1291, 1292, 1257 (1970). Similar problems exist under FED. R. CIV. P. 56(d), the misleadingly called “partial summary judgment” rule. I say misleading, since without a determination of appealability under FED. R. CIV. P. 54(b) there is no judgment (and accordingly) no finality. See text accompanying note 15 *infra* for the theoretical problems attendant upon preclusion without judgment.

14. SECOND RESTATEMENT § 41, Illustrations 1-3.

15. Compare FIRST RESTATEMENT § 45, comment on clause (c) with the parallel comment in the SECOND RESTATEMENT.

16. Compare FIRST RESTATEMENT § 14, Comment c with SECOND RESTATEMENT § 41, Comment e. There is a common emphasis on adjudications in bankruptcy, accounting and receiverships, but the SECOND RESTATEMENT specifically refers to the broadly applicable FED. R. CIV. P. § 54(b).

But in those instances at least one has a judgment. The matter is of measurably greater importance in these days since 1938 and 1966 of liberal claims and party joinder, when protracted litigation of impressive life expectancy may yet involve early adjudication of issues crucial in other contemplated or pending suits. This raises the spectre of inconsistent judgments in numbers greater than before,¹⁷ but blame for that, should blame be due, is laid more properly at the door of the apostles of liberal joinder than at that of those who merely accommodate them.

Modifiable judgments or those granting or denying continuing relief, a not inconsiderable portion of the civil judicial output, are treated only tangentially in the *First Restatement*,¹⁸ but receive comprehensive attention in the *Second*.¹⁹ The 1973 draft, as a general rule, would allow preclusive effect to judgments granting or denying continuing relief so long as the circumstances underlying the judgment remain unchanged. There then being no reason for the first court to modify its judgment, a sort of static finality exists which should trigger preclusion in a second suit. While the 1973 comment addresses its loudest voice to merger and bar, it specifically includes issue preclusion by modifiable judgment, an altogether sensible extension if the other requirements of estoppel are met,²⁰ since it is changed facts which usually open a modifiable judgment.²¹ Once actually determined, the facts and issues ought not be relitigated elsewhere if no changed circumstances move the first court to reexamine them.

A major change effected by the *Second Restatement* if adopted will be the effect of proceedings to set aside or vacate a judgment on that judgment's preclusive force. Both *Restatements* share the view that the mere existence of unelapsed time in which such proceedings might be brought does not prevent the judgment's use preclusively.²² They also concur in the notion that a motion in the trial court, whether for vacation, modification, or new trial, does not impair the binding force of

17. As to inconsistent judgments, see text accompanying note 26 *infra*.

18. See FIRST RESTATEMENT § 41, Comment a. The comment allows an action upon a judgment to recover alimony installment payments which have become due. It is hard to extrapolate any general rule from this, since such a judgment is without question final. The FIRST RESTATEMENT apparently does not consider modifiable judgments final and hence accords them no *res judicata* effect.

19. See SECOND RESTATEMENT § 41, Comment c.

20. See generally SECOND RESTATEMENT § 68.

21. There is authority that changes in the law may also render continuing judgments modifiable. See cases cited in SECOND RESTATEMENT § 41, Reporter's Note to Comment c.

22. Compare FIRST RESTATEMENT § 41, Comment d with SECOND RESTATEMENT § 41, Comment f.

the judgment; the *Second Restatement* is even more emphatic in specifically rejecting statutes or rules of court which make such judgments unenforceable pending determination of the motion in the trial court.²³

Where the two redactions part ways is in the appellate court: what preclusive effect can be given a judgment which has been taken for review to a higher court? The *First Restatement* looked to whether such proceedings under local law operated to vacate the judgment, as was the case with respect to decrees appealed in equity, but not generally with respect to judgments under writ of error. The *Second Restatement* takes the view that taking of an appeal does not affect finality—and hence preclusion—unless the “appeal” is in actuality a trial de novo. Finality is not affected by the character ascribed to review by local law, in all a worthy change made almost irresistible by the procedural merger of law and equity. Res judicata is difficult enough without having its applicability turn on medieval distinctions, largely repudiated.²⁴

In carrying out the newer section 41's suggestion that the concept of finality may be less stringently applied in cases of issue preclusion than in instances of claim preclusion, the *Second Restatement*²⁵ sketches the following tests: (1) the parties were fully heard, (2) the court supported its decision with a reasoned opinion, (3) the decision was subject to appeal or was in fact reviewed on appeal, and (4) the decision was not avowedly tentative. Again we have opened wider the door for inconsistent adjudications since we have broadened the availability of prior decisions as “judgments” upon which to ground subsequent decisions.

INCONSISTENT AND DEPENDENT JUDGMENTS

In the first of the two situations in the caption, no significant change has occurred: the well-settled rule is reaffirmed that “[w]hen in two actions inconsistent final judgments are rendered, it is the later not the earlier judgment that is accorded conclusive effect in a third action under the rules of res judicata.”²⁶ This is the so-called “last-in-time” rule, which presents no difficulties and seems equitable enough in the

23. *Id.*

24. *Id.* It is odd that the Institute here and in the rule accompanying note 23 *supra* counts for naught what must be the clear import of local rules (albeit not their full play) when in more crucial areas it seems needlessly abject before unnecessarily harsh effects created by anomalous interactions of local rules or statutes with the general rules of res judicata. For an example see SECOND RESTATEMENT § 41.3.

25. SECOND RESTATEMENT § 41, Comment g.

26. SECOND RESTATEMENT § 41.2. Compare FIRST RESTATEMENT § 42.

case of a party who fails to assert available preclusion in one action yet demands it in another. The later judgment is valid and subsisting and ought not be overturned merely because it is inconsistent with an earlier one. Elements of unfairness steal in, however, where the diligent suitor in the second action asserts preclusion and it is *erroneously* refused. There seems little for it, indeed, but to apply the general rule that valid judgments should be appealed and not attacked. Problems arise when the successful second suitor, the beneficiary of the court's erroneous denial of preclusion, claims preclusion in a later action. Even if the erroneous denial of preclusion is reversed, according to the *Restatement's* view, the dependent judgment will remain majestically intact.

Let me write out this curious rule, which follows closely the *First Restatement*:

A judgment based on an earlier judgment is not nullified automatically by reason of the setting aside, or reversal on appeal, or other nullification of that earlier judgment; but the later judgment may be set aside, in appropriate proceedings, with provision for any suitable restitution of benefits received under it.²⁷

The section follows, blindly I think, the Supreme Court opinion in *Reed v. Allen*,²⁸ and has long been the subject of thoroughly persuasive criticism by Professor Moore.²⁹ He would simply apply the "last-in-time" rule to the nullifying act of the appellate court—which is, to be sure, a judgment—so that it, and not the erroneous judgment at nisi prius will be given preclusive effect in a later action. That the Institute is uncomfortable with its rule is clear from its official comments and Reporter's Note, which are pointedly apologetic and do not confront the hardest case. The 1973 revisers proclaim that "the problem when met head-on is that of a judgment based and dependent upon an earlier judgment which subsequently is nullified."³⁰ I respectfully dissent: that is the problem met obliquely, for it is easily circumvented by such postjudgment relief as that provided in Federal Rule 60³¹ and under similar state practice. The problem "met head-on" is the nullification on appeal of a dominant judgment when there are no longer any available avenues of postjudgment relief from the earlier dependent

27. SECOND RESTATEMENT § 41.3. The earlier language is in FIRST RESTATEMENT § 44.

28. 286 U.S. 191 (1932).

29. 1B J. MOORE, FEDERAL PRACTICE ¶ 0.416[4] (2d ed. 1974).

30. SECOND RESTATEMENT § 41.3, Comment c.

31. See FED. R. CIV. P. 60, especially 60(b)(5) which specifically allows relief on the basis of a nullified "dominant" judgment.

judgment. Resort to local procedure seems a rather thin solution, when the Institute is unable to assure that postjudgment relief is available from the dependent judgment.³² It seems a more just solution to allow what the reporter hopes is allowed—a guaranteed avenue of redress against the dependent judgment. I should even be willing to permit a new exception to the general rule against collateral attack of a valid judgment in any instance where the complaining party can establish his inability to secure redress in the court which rendered the dependent but now unsupported judgment.³³ The answer accommodates the arguments of Professor Moore (that judgments based not on litigated issues but on precluded issues ought to fall with a dominant judgment which is voided on appeal) with the reluctance of the Institute to disturb the stability of judgments by permitting anything so unregulated as “automatic” nullification. It seems not unfair to assure the litigant a day in court on the matters reopened by the reversal of the dominant judgment.³⁴

CLAIMS AND CAUSES OF ACTIONS

It has long been a cause of embarrassment to teachers of civil procedure that for the first 90 percent of the course they struggle to wean the student from the arbitrary and conceptualistic language of cause of action which permeates the older codes and cases and still muddles thinking under our current claim-oriented procedure, while in the closing days of the course—after judgment is rendered—the cause of action appears as from nowhere to define the operative preclusive effect of the judgment. It is disquieting. The writers of the *Second Restatement* have gone much of the distance to make the subject, if not

32. “Local procedure must be consulted to find the appropriate methods and any relevant periods of limitation; counterparts to the following methods, available in federal court, can probably be found in state practice.” RESTATEMENT SECOND § 41.3, Reporter’s Note, Comment c (emphasis added). The note assumes the federal remedy is always available, when in fact it is limited to “a reasonable time,” but I shall not quibble: Rule 60 preserves “an independent action to relieve a party from judgment” which the reporter correctly suggests might be appropriate in these cases.

33. This need may well be obviated under other provisions of the *First Restatement*, see, e.g., § 125, but I think not.

34. I enter the following caveat. The *First Restatement* contained language broad enough to include all forms of res judicata under its section 44 dealing with the subsequently reversed dominant judgment. Illustration 1 involves the truest form of merger, an action on a favorable judgment, while Illustration 2 involves a second judgment dependent only in the sense that collateral estoppel supplied the defense which resulted in a favorable judgment for the defendant. The *Second Restatement* omits the illustrations. I do not infer from the omission any restriction in the type of dependent judgment covered by the section.

easy, at least in harmony with modern theories of pleading and procedure.

The difference in approach and necessarily in anticipated results between the two *Restatements* is marked. The 1942 Introductory Note engages our attention with a doubtless empirically verifiable yet wholly misleading generalization: "Ordinarily it is clear whether or not the two actions are based on the same cause of action."³⁵ The later reporter has assumed the more forthright posture, observing that for the purposes of determining claim preclusion, it "becomes necessary to determine what is the scope or extent or dimension of the claim that has been extinguished, or, noted in another way, what is the scope of the matter as to which a second action by the plaintiff against the defendant is precluded." The key, he asserts, is a "transactional"³⁶ analysis.

With the dethronement of the cause of action as the operative determinant of the scope of *res judicata* go all of the structure and a good deal of the substance of the former treatment.³⁷ It is replaced with a lean, tripartite exposition of the general rule,³⁸ some exemplifications thereof³⁹ and exceptions thereto,⁴⁰ interspersed throughout by comments and illustrations in greater number and detail than we shall elsewhere see in these two tentative drafts.

The new rule concerning "splitting" a claim—attempting to use offensively⁴¹ in two actions what should have been used in the first—is a first cousin of Federal Rule 13(a) concerning compulsory counterclaims: "[T]he claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or *any part of the transaction*, or series of connected transactions, *out of which the action arose*."⁴² This "transactional" approach and the corollary abandonment of the cause of action, although needing no apology, is justified as a response to contemporary notions of appropriate trial units. "Transaction," the reporter notes, has always been the outer limit of merger

35. FIRST RESTATEMENT, Ch. 3, Topic 2, Title D, Introductory Note.

36. The quotation marks are his.

37. FIRST RESTATEMENT §§ 61-67.

38. SECOND RESTATEMENT § 61.

39. *Id.* § 61.1.

40. *Id.* § 61.2.

41. See text accompanying note 101 *infra* for the Institute's view of "splitting" a claim defensively.

42. SECOND RESTATEMENT § 61 (emphasis added). Compare FED. R. CIV. P. 13(a):

Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

and bar, for a judgment in the prior action could not preclude a second action on a different transaction. But now, as often happens in law and life, the maximum becomes the minimum. "The law of *res judicata* now reflects the expectation that parties who are given the capacity to present 'their entire controversies' shall in fact do so."⁴³ What the modern systems of procedure exemplified by the Federal Rules permit, the modern law of *res judicata* exemplified by the *Second Restatement* commands. One must be chary, however, of overstating the case, as I think this *Second Restatement* does, of too lightly equating Federal Rules joinder with *Restatement* preclusion. For all its "transaction" or "claim" orientation inherited from Charles Edwin Clark,⁴⁴ the Federal Rules system does not escape the "individual" or "party." The party is the real unit of division, for the Federal Rules contain no effective compulsory party joinder, and cleverly limit compulsory claim joinder to situations where it is unlikely to affect party joinder. True it is that we have indispensable party rules⁴⁵ which make joinder "compulsory," but the penalty for nonjoinder is not extinguishment, but dismissal without prejudice of the plaintiff's claim.⁴⁶ Federal Rule 13(a), the compulsory counterclaim rule which is at once the cornerstone and paradigm of the transactional analysis the *Second Restatement* attempts to borrow, is hardly reconcilable with the grand design of making permissive joinder mandatory through application of *res judicata*.

Thus the transactional universe which supposedly defines the binding effect of the judgment must at once be redefined into transactional subsets: the new *Restatement* admits that if *A* and *B* are injured as passengers in the same automobile, and in the same accident, they possess separate claims,⁴⁷ although both as a matter of pleading and as a matter of logic, their rights to redress arise out of the same transaction. One other point, perhaps a semantic one, suggests that the Federal Rules drafters had not quite the transactional orientation of claim which the 1973 *Restatement* authors ascribe to them. Rule 13 commands filing by a defendant of any "claim" arising "out of the same transaction or

43. SECOND RESTATEMENT § 61, Comment a.

44. See C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 19 (2d ed. 1947). Clark was the reporter and chief draftsman of the Federal Rules of Civil Procedure.

45. FED. R. CIV. P. 19.

46. FED. R. CIV. P. 41(b) specifically states that an involuntary dismissal for failure to join a party under Rule 19 does not act, unless the court otherwise specifies, as an adjudication on the merits. The *Restatement* elsewhere, of course, accommodates this provision by stating that such a dismissal does not bar a second action on the same claim. See SECOND RESTATEMENT § 48.1.

47. See SECOND RESTATEMENT § 61, Comment a.

occurrence."⁴⁸ A "transaction" then necessarily encompasses, in the contemplation of the Rules, several claims even of a single person.

The specific provisions relating to the *scope* of the claim are of less immediate importance than this major change of emphasis in the *theory* of the claim. Most of the comments and illustrations, and even an entire section of considerable detail,⁴⁹ take aim at older formulations of "cause of action" and in the dreams of the reporter lay them forevermore to rest. The plaintiff's claim is extinguished by judgment even though he is prepared in a second action to present different evidence, grounds or theories, or to seek distinct remedies or forms of relief than those sought in the first action. The rule against splitting thus places on the plaintiff the same onus as has long been shouldered by the defendant who must defend on every ground and theory and with whatever evidence: he cannot pick and choose and hope to have another day.⁵⁰ One of the interesting effects of this is to place the responsibility for variances in the pleadings⁵¹ on the plaintiff, where arguably it belongs if it must belong somewhere: the doctrine of variances combines a singular degree of inutility and odiousness, and, within modern systems of procedure permitting liberal amendment,⁵² ought only in the most egregious cases appear.

This requirement that the plaintiff assert his right to relief on the transaction completely and immediately will have some immediate repercussion for the practitioner. Until now, I do not think the doctrine of pendent jurisdiction, most definitely articulated in *United Mine Workers v. Gibbs*⁵³—that in some instances a federal court may adjudicate a "pendent" state claim over which it would otherwise have no jurisdiction, if the state claim arose out of the same nucleus of operative fact⁵⁴—much concerned the federal court practitioner, for it seemed to

48. See note 42 *supra*. The same formula appears in Federal Rule 13(g) concerning cross-claims and in Rule 14(a) concerning third-party practice. Here, of course, the joinder is permissive and the "transaction" serves its ancient function as a maximal perimeter.

49. SECOND RESTATEMENT § 61.1.

50. *Id.* See SECOND RESTATEMENT § 47(b) for the proposition that a defendant may not interpose as a defense to an action on the judgment a defense he might have raised in the prior action. In a subsequent action not on the judgment, a defense can be precluded by collateral estoppel; see text accompanying notes 106-53 *infra*.

51. In capsule form, a variance occurs when proof is introduced as to issues not joined in the pleadings. Under a strict application of the rule, a dismissal for failure of proof may result since plaintiff cannot prove his case as pleaded.

52. See, e.g., FED. R. CIV. P. 15(a) and especially 15(b) which directly confronts, and effectively neutralizes, the problem of variances.

53. 383 U.S. 715 (1966).

54. As the Reporter's Note indicates, *Gibbs* used a transactional analysis from

be but a lever to pry open a few inches more the doors to the federal chambers. Under the *Second Restatement's* view, the state and federal court theories or grounds comprise but a single claim. If there is a jurisdictional obstacle⁵⁵ to asserting both theories in the same state or federal court, then of course the excluded theory may be pursued in the appropriate forum. If, however, a federal court might entertain the state ground or theory in the exercise of its pendent jurisdiction, the state claim is merged in the judgment whether asserted or not since it is part of the claim with no jurisdictional obstacles to its determination. Deductive reasoning supports the conclusion (as well as the converse where a state court has concurrent jurisdiction to determine federal claims)⁵⁶ but defeats it as well, depending on which of two propositions is the premise: first, the justification for the determination by the federal judiciary of a question which, standing by itself, would be beyond the court's constitutional grant of authority is that there is but a single "case" (read: transaction) before the court which could be entertained on the basis of the dominant federal question, in *Gibbs* an alleged violation of the Taft-Hartley Act.⁵⁷ Secondly, however, it has long been the rule that a plaintiff may not intentionally split a cause of action by unnecessarily bringing a portion in a court of limited jurisdiction.⁵⁸ Hence, at least one problem exists with calling rights created by federal law and rights existing by virtue of state law but a single claim. I do not think the Institute sufficiently explains its position on the point, especially in light of the goals of res judicata and most especially of bar.⁵⁹ Why on earth should a defendant have to litigate this matter twice? If a state claim is adjudicable in federal court under the doctrine of pendent jurisdiction, but the plaintiff chooses to bring it in state court, a not unlikely desire, a judgment will not under the *Second Restatement's* view extinguish the federal ground since there is a "juris-

which the *Second Restatement* borrows heavily. See SECOND RESTATEMENT § 61.1, Reporter's Note. In fact, in the same place, in Comment c, discussing the thoroughly factual character of claim, the Reporter virtually restates the famous formulation from *Gibbs*. See 383 U.S. at 725 (1966).

55. See SECOND RESTATEMENT § 61.1, Comment e.

56. See SECOND RESTATEMENT § 61.1, Illustration 11.

57. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The Taft-Hartley Act provision involved was section 303, 29 U.S.C. § 187 (1964).

58. Compare FIRST RESTATEMENT § 62, Comment j with SECOND RESTATEMENT § 61, Comment g.

59. See SECOND RESTATEMENT § 48, Comment a:

The rule that a defendant's judgment acts as a bar to a second action on the same claim is based largely on the ground that fairness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy come to an end.

dictional obstacle" to the state court's determination of the federal claim. This permits a plaintiff to play with federalism a game both versions of the *Restatement* forbid him otherwise to play: deliberately splitting his claim by initially suing in a court which has jurisdiction over only a part of the claim when a court exists which is competent to hear the whole. On the facts of *Gibbs* itself the discrepancy would not arise, since the federal ground of relief, a damage action under section 303 of the Taft-Hartley Act, is within the concurrent jurisdiction of state and federal courts.⁶⁰ That the problem could arise, however, is not unlikely. A deterrent to abuse, always an inferior nostrum to removing the possibility of abuse, is the threat of issue preclusion,⁶¹ which, we shall see, is free of many of the impedimenta of claim preclusion.

There are other changes wrought by the 1973 version of perhaps lesser importance. The curious former section 65,⁶² whose import I think never could be ascertained from its language, goes for the most part out the window, since the *Second Restatement's* undergirding supposition is a Federal Rule system of procedure which abolishes forms of actions,⁶³ fuses law and equity,⁶⁴ and permits alternative and even inconsistent allegations.⁶⁵

Former section 65(2) was reluctantly dismissed, however, for it permitted a second action for restitutionary relief where a plaintiff erroneously pleaded the existence and breach of a contract but could not at trial prove it because of an interposed but disfavored defense such as the statute of limitations or the statute of frauds.⁶⁶ The exception was never quite logical since the two counts, that is, on the breach and for restitution, might have been pleaded in the alternative and a judgment would have precluded further assertion of either.⁶⁷ The *Second Re-*

60. 29 U.S.C. § 187(b) (1970).

61. This is suggested as the proper course in the Reporter's Note to SECOND RESTATEMENT § 61.2, Comment c(1).

62. FIRST RESTATEMENT § 65 states in full:

(1) Where a judgment on the merits is rendered in favor of the defendant in an action to enforce one of two or more alternative remedies, the plaintiff cannot thereafter maintain an action to enforce another of the remedies.

(2) Where a judgment is rendered in favor of the defendant because the plaintiff seeks a form of remedy which is not available to him, the plaintiff is not precluded from subsequently maintaining an action in which he seeks an available remedy.

63. FED. R. CIV. P. 2.

64. FED. R. CIV. P. 1 & 2.

65. FED. R. CIV. P. 8(e)(2).

66. See FIRST RESTATEMENT § 65, Comment j and Illustrations thereto.

67. FIRST RESTATEMENT § 65, Comment d. The reason is that there would have been a judgment on the merits rather than a determination of nonavailability of relief. Remember that damages for breach and restitution, while *alternative*, are not *inconsistent*. All of this assumes a system permitting pleading in the alternative.

statement, while sympathetic to the suitor who has partially performed under a contract the breach of which he cannot legally establish, expects him to plead breach and restitution in the same action or suffer extinguishment of the unsought remedy. It suggests the plaintiff, if surprised by a failure of proof, amend under Rule 15⁶⁸ or a state analogue, or at worst, pray the court to enter judgment against him without prejudice to seeking restitutionary relief.⁶⁹

Other changes which merely follow the trend already apparent of conforming the concept of claim to the permissibility of transactional pleading, are quickly summarized. Contrary to prior doctrine,⁷⁰ mutually exclusive remedies are merged in a favorable judgment⁷¹ as are any cumulative remedies to which plaintiff was entitled but which he did not seek.⁷²

The last of the three sections on the scope of the claim spells out seven exceptions to the general rule against splitting,⁷³ most of which are neither new nor shocking and some of which are simply counterparts to situations implicitly exempted in the two sections which developed the general rule. Only three warrant any extended discussion. Section 61.2(d) permits a split where “[t]he judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim” This is a restatement of the celebrated holding of the New York Court of Appeals in *White v. Adler*⁷⁴ where a public official charged with enforcing a regulatory scheme inadvertently split a claim to the huge benefit of one bank shareholder. The doctrines of merger and bar are, to be sure, for the benefit of defendants, but their wooden application to the facts of every case is indeed unwarranted.

The remaining two exceptions departing from prior law are shortly disposed of: one simply allows a split in a claim in “extraordinary

68. FED. R. CIV. P. 15. The Reporter notes a denial of leave to amend would be reviewable on appeal.

69. SECOND RESTATEMENT § 61.1, Comment h.

70. FIRST RESTATEMENT § 65, Comment k.

71. SECOND RESTATEMENT § 61.1, Comment k. Mutually exclusive remedies are not always barred by an unfavorable judgment. See the special circumstances suggested in the same Comment.

72. This is not a change in the spirit of the law. Compare SECOND RESTATEMENT § 61.1, Comment j with FIRST RESTATEMENT § 64, Comment f, where the remedies *could not* procedurally be cumulated.

73. SECOND RESTATEMENT § 61.2.

74. 289 N.Y. 34, 43 N.E.2d 798 (1952).

situations where merger or bar is inappropriate,"⁷⁵ a telling confirmation of Judge Clark's famous statement: "The defense of *res judicata* is universally respected, but actually not very well liked."⁷⁶ And finally, the 1973 draft takes some of the sting out of the often treacherous choice a plaintiff who suffers a nuisance must make, allowing him either to split his claim into successive actions if the nuisance is even arguably temporary, or to sue for total damages. In case he opts for the latter course yet fails to prove a "permanent nuisance," he is simply relegated to successive actions rather than barred.⁷⁷

MERGER AND BAR

Proposed changes in the law of merger need not long detain us, as the drafters, besides conforming the language to the *Second Restatement's* claim emphasis, have done little save extend the general rule of merger to all "valid and final personal judgments" rather than merely those for the recovery of money.⁷⁸

The general rule of bar—that a valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim⁷⁹—has been the subject of extensive revisions, almost all occasioned by elimination of the earlier formulation that the judgment for defendant must have been "on the merits."⁸⁰ This prescription has been abandoned in light of the trend to regard ever more judgments as bars: the fundamental bases for the rule of bar are fairness to the defendant and sound judicial administration, considerations which may frequently conjoin in the absence of any adjudication, or even litigation, on the merits.⁸¹

75. SECOND RESTATEMENT § 61.2(f) & Comment d.

76. *Riordan v. Ferguson*, 147 F.2d 983, 988 (2d Cir. 1945) (dissenting opinion).

77. SECOND RESTATEMENT § 61.2(e) & Comment h. For the earlier view see FIRST RESTATEMENT § 62, Comment g.

78. The *First Restatement* apparently indulged fears that sister state actions for recovery other than the payment of money were not entitled to full faith and credit under the Constitution, and felt compelled by a desire for symmetry to deny preclusion by merger to the judgment altogether. The entire text of the *Second Restatement* evinces a hope that comity will persuade the sister court to honor the earlier judgment by according it preclusive effect even if the Constitution would not mandate its enforcement. See SECOND RESTATEMENT § 47, especially Comment b, and the Reporter's Note thereon. Contrast FIRST RESTATEMENT § 46 and Comment a and § 47, Comment h. New section 47 also includes a clarifying addendum to its subsection (b) which states that "[i]n an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action." SECOND RESTATEMENT § 47(b). This simply makes explicit what was implied in Comment a to former section 47.

79. SECOND RESTATEMENT § 48.

80. FIRST RESTATEMENT § 48.

81. SECOND RESTATEMENT § 48, Comment a.

The change which will have the most noticeable effect is the extension of the general rule of bar to a judgment in favor of defendant on demurrer or on motion to dismiss for failure to state a claim. The 1942 *Restatement* bars further action only if the judgment was rendered because of an entire failure to state a cause of action.⁸² The change in position is warranted by the ease of amendment under modern systems of procedure, exemplified by Federal Rule 15: the plaintiff, faced with the possibility of dismissal for failure to state a claim, can amend. If the judge denies leave to amend, certainly not the routine, his denial is reviewable upon appeal. The reversal of the old rule against preclusion in cases of so-called technical demurrers is also justified by rules of court or statutes, archetypally Federal Rule 41, adopted in most American jurisdictions, which make all but a few dismissals presumptively with prejudice, that is, bars.⁸³ There is, to be sure, a prayer implicit in the recommendation of the passage of this section: that liberal and enlightened views of amendment and pleading-over prevail in the courts of the land.

Federal Rule 41 has further influenced the Institute toward erecting as bars judgments not on the merits: the newer *Restatement* will bar further action where judgment has gone against plaintiff for failure to prosecute, to obey an order of court, or to appear.⁸⁴ The *First Restatement* did not treat the question specifically, but it is pellucidly obvious that the original drafters thought such a dismissal not "on the merits." Fairness to the defendant and sound judicial economy virtually compel the newer view or else we let the languid plaintiff profit by his indifference, or worse, his misdeeds. Lest one overstate the case, there are constraints, perhaps even constitutional ones,⁸⁵ on the exercise of this power, the most effective of which is judicial reluctance to prejudice litigable issues because of tactical shenanigans.

The regency of Federal Rule 41 falls short of completeness: a judgment for defendant because of the running of the statute of limitations⁸⁶ does not bar an action in another state where the statute has not

82. Compare SECOND RESTATEMENT § 48, Comment d with FIRST RESTATEMENT § 50, Comments a, b, & c ("entire failure to state a cause of action").

83. FED. R. CIV. P. 41(b) states in pertinent part: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

84. SECOND RESTATEMENT § 48, Comment e.

85. See *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909); *Hovey v. Elliott*, 167 U.S. 409 (1897).

86. Actually the language of the Comment is considerably broader, but the major

run, a position carried over from the *First Restatement*.⁸⁷ The Reporter, I think, is caught in a dilemma: the same reasons which dictate expansion of the general rule of bar to nonmonetary judgments should control here.⁸⁸ That a sister state need not always give effect to the statute of limitation of another state *as a matter of constitutional law*⁸⁹—and this seems to be the justification for this exception to the general rule of bar—does not suggest that it ought not give preclusive effect as a matter of comity under the law of judgments to a judgment against a plaintiff who in the first instance brought the untimely action in the first state. The dilemma appears to be that there is virtually no authority for the contrary position, and while the Institute has never been slavish in its head count of jurisdictions and is quick to discern a “trend” when logic and policy support a respectable minority view, it is awkward and even intellectually dishonest to “restate” a position which goes unendorsed by the courts. The Reporter notes that

[i]t is not clear how far the principle underlying the effect of dismissals based on the statute of limitations does or should extend. Should it extend, for example, to a dismissal based on the statute of frauds if the second jurisdiction has a different statute that would lead to a different result? Neither authority nor policy lends firm support to nonpreclusion in such a case. Indeed, nonpreclusion seems questionable even with respect to the statute of limitations. Such statutes may be much more closely related to the validity of the claim itself than to the competence or appropriateness of the particular court. . . . See also the statement in *Bertha Bldg. Corp. v. National Theaters Corp.*, 248 F.2d 833, 840 (2d Cir. 1957), to the effect that the prevailing rule on the statute of limitations is inconsistent with Federal Rule of Civil Procedure 41(b).⁹⁰

The exceptions recommended to the general rule of bar are in general familiar.⁹¹ A judgment based on a dilatory plea is no bar,⁹² a position elsewhere made explicit in Federal Rule of Civil Procedure 41(b). And, unless local court rules otherwise mandate, the plaintiff

application is to different statutes of limitations. SECOND RESTATEMENT § 48, Comment f.

87. FIRST RESTATEMENT § 49, Comment a.

88. See note 78 *supra* and accompanying text.

89. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 95, Comment c (limitations) and § 110 (public policy), cited in SECOND RESTATEMENT § 48, Comment f.

90. SECOND RESTATEMENT § 48, Reporter's Note.

91. The exceptions are now collected in SECOND RESTATEMENT § 48.1, largely derived from former sections 49, 53 & 54.

92. SECOND RESTATEMENT § 48.1(1)(a), fully in accord with the less specific former section 49 and its Comment a.

may elect a voluntary nonsuit without prejudice or the court may permit one.⁹³ Federal Rule 41(a) and similar state pronouncements control in terms the preclusive effects of certain types of judgments (such as successive voluntary nonsuits)⁹⁴ and are accommodated by the 1973 draft.⁹⁵

A final exception to the application of bar, while not new, contains some new blood. It remains the Institute's view that dismissal of a plaintiff's claim for prematurity or for failure to satisfy a precondition to suit does not bar a later action when the claim has matured or the precondition has been executed.⁹⁶ The new element is simply an exception to an exception allowing the earlier judgment to bar a later suit, basically where the precondition was easily met yet inexcusably omitted and fairness to the defendant, after all the *raison d'être* of the rule of bar, demands preclusion.⁹⁷

COUNTERCLAIMS

There is some reluctance to expatiate on the interplay of counterclaims, defenses, and preclusions. First, statutes and rules of court control such a great percentage of the cases that it is a rare lawyer who will have to consult the new *Restatement*. It is not the assertion of a counterclaim and concomitant judgment thereon, either favorable or not, which presents problems, for with an ever less important exception, both *Restatements* agree that the general rules of merger and bar apply.⁹⁸

The difficulty is with the failure of a defendant to interpose a counterclaim when he is permitted to do so. Both the 1942 and 1973 drafts provide that absent a compulsory counterclaim rule or statute,⁹⁹ a defendant has the right to opt between interposing a counterclaim or bringing his own, separate action against the plaintiff.¹⁰⁰ Further,

93. SECOND RESTATEMENT § 48.1(1)(b).

94. *E.g.*, FED. R. CIV. P. 41(a).

95. SECOND RESTATEMENT § 48.1(1)(c), Comment j, § 48.1(1)(b), Comment f.

96. Compare FIRST RESTATEMENT § 54 ("condition precedent") with SECOND RESTATEMENT § 48.1(2).

97. SECOND RESTATEMENT § 48.1(2), Comment n, Illustration 9.

98. Compare FIRST RESTATEMENT § 56 with SECOND RESTATEMENT § 56. The exception, inability of the court to grant the counterclaimant the full recovery to which he is entitled, is the subject of new section 56(2) and is carried over from the more specialized former sections 57 and 60.

99. The compulsory counterclaim exception to the general rule of nonpreclusion is explicitly set out in new section 56.1(2)(a), receiving analogous, albeit tangential, treatment in former section 58, Comment f.

100. Compare FIRST RESTATEMENT § 58, Comment a with SECOND RESTATEMENT § 56.1(1).

refusal to defend on grounds which might be asserted as a counterclaim has generally no effect on the defendant's claim. But may a defendant use as a defense to the plaintiff's action facts which *could* form the basis of a counterclaim and yet later bring an action on the same facts *qua* claim? This is the famous problem of the shield and the sword:¹⁰¹ may a party use the same congeries of fact first defensively and then in a later action offensively? Both *Restatements* say he may, so long as the first use is purely defensive.¹⁰²

The innovation in the later *Restatement* is this: it has carved out a category of counterclaims which, even if not asserted, must be precluded in order to insure the integrity of the earlier judgment.¹⁰³ The Reporter has for want of an available term called these "common-law compulsory counterclaims,"¹⁰⁴ hastening to add that while in most cases they will be "statutory counterclaims" as well, the intended scope of the concept is much more restricted. It is not sufficient that the counterclaim arise out of the same transaction or occurrence, the normal trigger of a statutory compulsory counterclaim, it must actually claim relief which would in effect be an attack on the first judgment:

The counterclaim must be such that its successful prosecution in a subsequent action would nullify the [first] judgment, for example, by allowing the defendant to enjoin enforcement of the judgment, or to recover on a restitution theory the amount paid pursuant to the judgment . . . or by depriving the plaintiff in the first action of property rights vested in him under the first judgment¹⁰⁵

In any event, if an issue which might have constituted a counterclaim is actually litigated, reassertion in a subsequent action may be foreclosed not by these rules of merger and bar, but by collateral estoppel, or issue preclusion.¹⁰⁶

ISSUE PRECLUSION

Admirably, the revisers have sifted and sorted the five earlier

101. See *Mitchell v. Federal Intermediate Credit Bank*, 165 S.C. 457, 164 S.E. 136 (1932). "He cannot use the same defence, first as a shield, and then as a sword." *Id.* at —, 164 S.E. at 140, quoting *Shaw, C.J.*, in *O'Connor v. Varney*, 76 Mass. (10 Gray) 231 (1857).

102. Compare FIRST RESTATEMENT § 58, Comment d and Illustration 11 thereto with SECOND RESTATEMENT § 56.1, Comment d.

103. SECOND RESTATEMENT § 56.1(b), Comment f.

104. SECOND RESTATEMENT, Reporter's Note.

105. SECOND RESTATEMENT § 56.1(2)(b), Comment f.

106. As to issue preclusion of defenses and counterclaims see SECOND RESTATEMENT § 56.1, Comment c, FIRST RESTATEMENT § 58, Comment c, and text accompanying notes 107-53 *infra*.

sections¹⁰⁷ dealing with issue preclusion—direct and collateral estoppel—and left us with two new sections, a short general rule and a considerably longer body of exceptions.¹⁰⁸ The new rule is not markedly different from the old:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.¹⁰⁹

Two modifications are, however, immediately apparent in the black letter text: first, the general rule is expressly made applicable to issues “of law,” and second, direct as well as collateral estoppel is brought within the ambit of the general statement.¹¹⁰ In spirit the title on issue preclusion is much altered, and one must consult the exceptions and comments to discover the manifold differences.

For lack of a better starting place, let us take up the question: as to what sort of question should relitigation be precluded? One must look in several places for the answer. Is the matter in the second action sufficiently related to the matter in the first action that in fairness to the nonmoving party it can be said to have been already determined? In a sense, the Institute sidesteps the question, taking a pragmatic rather than a conceptualistic approach, and suggesting guidelines to help the courts in what it proposes should be a case-by-case determination.¹¹¹ A total identity is by no means expected. The commentary of the *Second Restatement* does not deal with the “separable facts doctrine” developed in tax litigation—that total identity of issues is required¹¹²—and the thrust of the section and the Reporter’s Note is clearly contrary to the doctrine. Once a substantial identity of issue is shown, the burden

107. FIRST RESTATEMENT §§ 68-72.

108. SECOND RESTATEMENT §§ 68 (general rule), 68.1 (exceptions).

109. SECOND RESTATEMENT § 68.

110. As a practical matter principles of issue preclusion can usually be applied without discrimination between direct and collateral estoppel, except as to issues of law, where a direct estoppel may be fairer, and hence more frequent, than a collateral estoppel. See SECOND RESTATEMENT § 68, Comment b, § 68.1(b)(i), and text accompanying notes 128-30 *infra*.

111. SECOND RESTATEMENT § 68, Comment c. The suggested considerations are:

Is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first? Does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding? Could pretrial preparation and discovery relating to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second? How closely related are the claims involved in the two proceedings?

112. See *Commissioner v. Sunnen*, 333 U.S. 591 (1948).

should be upon the losing party in the first action to prove such changed circumstances as to warrant nonpreclusion.¹¹⁸

Having determined that there exists a substantial identity of issues unfortunately leaves only one hurdle behind us. The *First Restatement* denied preclusion of "merely evidentiary facts"¹¹⁴ and in a rare substantive amendment in 1948, extended this exemption to "merely evidentiary or mediate facts,"¹¹⁵ accepting Learned Hand's formula that preclusion should only be given to "facts in issue" or ultimate data.¹¹⁶ The current *Restatement* rejects both views in favor of a test which reduces to recognition and foreseeability. Did the parties and the adjudicator in the first action recognize the issue as an important one worth full investigation and litigation, and was it foreseeable that the issue might arise again in subsequent litigation?¹¹⁷

It must be clear by now that what is to be precluded is inexorably tied to what was "actually litigated," an emphatic pleonasm which the reporter notes but leaves untouched¹¹⁸ in order to stress the importance of assuring the existence of prior litigation before precluding disputation of an issue.¹¹⁹ The discussion of the requirement tracks closely the earlier text,¹²⁰ but emphasizes that "litigation" does not always mean "trial" and that determination on the pleadings or summary judgments can meet the requirement in appropriate instances. Both *Restatements* permit preclusion of issues determined in equity in later actions at law,¹²¹ the latter redaction specifically rejecting as a general principle of estoppel an opinion of a United States court of appeals which denied preclusion when the effect was to eliminate a jury determination of the issue.¹²²

113. SECOND RESTATEMENT § 68, Comment c, Reporter's Note. Contrast the burden which is placed upon the party attempting to establish "actual litigation." *Id.*, Comment f.

114. FIRST RESTATEMENT § 68, Comment p.

115. RESTATEMENT OF JUDGMENTS § 68, Comment p. (Supp. 1948).

116. *Evergreens v. Nunan*, 141 F.2d 927 (2d Cir. 1944). The case, I think, contains the seeds of its own demise, for Hand's conceptualistic divisions are all geared to a single practical consideration: foreseeability of prospective collateral preclusion. He remarks, wistfully *obiter*:

Were the law to be recast, it would . . . be a pertinent inquiry whether the conclusiveness . . . of facts decided in the first [suit], might not properly be limited to future controversies which could be thought reasonably in prospect when the first suit was tried. That is of course not the law as it stands

Id. at 929.

117. SECOND RESTATEMENT §§ 68, Comment i, 68.1(e)(ii).

118. See SECOND RESTATEMENT § 68, Comment e, Reporter's Note.

119. *Id.*, Comment d.

120. Compare FIRST RESTATEMENT § 68, Comments c-j.

121. Compare FIRST RESTATEMENT § 68, Comment j, Illustration 4 with SECOND RESTATEMENT § 68, Comment d.

122. *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970).

The requirement of "essentiality"—that determination of the issue must have been essential to the prior judgment—has experienced at least one transformation¹²³ of substance: nisi prius determinations in the alternative either of which standing alone would have supported the result and justified an estoppel, are now both considered "inessential," a reversal of the previous view that both could be considered essential and precluded.¹²⁴ The change in position must be justified on policy rather than on logic, since it is hard to say neither was necessary to the judgment. The grounds given in support of the new rule is that the right to appeal the determination may be ephemeral, the losing party fearing that one of the grounds might never be reached in the reviewing court. Another reason for finding nonpreclusion in such cases is unstated by the *Second Restatement*. In support of the older view, the current comment states that "a party who would otherwise urge several matters in support of a particular result may be deterred from doing so if a judgment resting on alternative determinations does not effectively preclude relitigation of particular issues."¹²⁵ It occurs to me the converse is as true: if one routinely precludes alternative issues when it is not known which is at bottom the one which supports the judgment, a party may be chary of putting any even arguably unnecessary eggs in the trial basket. The new rule effectively protects litigants, gives them freedom to put forward whichever issues they choose, and allows relitigation only when the adjudicator, maybe out of doubt or fear of reversal, makes alternative determinations. The policies which support issue preclusion give no support to denial of relitigation in such an instance.¹²⁶

Even when all the normal prerequisites to issue preclusion are present, there may be reasons for permitting relitigation. The *Second Restatement* suggests, in a single section, five such circumstances.¹²⁷ There is much new matter, but little room for catchy titles or simplistic descriptions: the 1973 drafters, like those before them, realize that there are numerous instances in which collateral and direct estoppels overstep their worth.

123. That evidentiary and mediate data are now considered "essential" and their relitigation precluded has already been noted. See text accompanying notes 114-17 *supra*.

124. Compare SECOND RESTATEMENT § 68, Comment i with FIRST RESTATEMENT § 68, Comment n and Illustrations 7 & 8. Note that the 1942 illustrations both deal with *alternative defenses*, where the problem is most likely to arise.

125. SECOND RESTATEMENT § 68, Comment i.

126. Contrast the rule on appeal, where the reviewing court affirms on alternative grounds, in which case both *Restatements* agree there should be dual preclusion. See FIRST RESTATEMENT § 69(1), Comments a & b; SECOND RESTATEMENT § 68, Comment o.

127. SECOND RESTATEMENT § 68.1, replacing former sections 69-72.

As to issues of law¹²⁸ both *Restatements* evidence a preference for the more flexible rules of stare decisis over the more Procrustean tenets of res judicata. A rule of law declared in a proceeding between suitors ought not bind them on all claims forever. Hence estoppel is denied where

[t]he issue is one of law and (i) the two actions involve claims that are substantially unrelated, or (ii) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws¹²⁹

I suggest the key to the application of the section is much the same as the considerations involved under section 56.1 concerning when an omitted counterclaim may be asserted in an independent action: preclude relitigation if the new action is fundamentally an attack on the former judgment.¹³⁰

Two more broadly drafted versions of an earlier exception have been retained, with some anticipated differences in result:

- (c) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
- (d) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action¹³¹

The newer version would deny preclusion even in the courts of the same state, where procedural or jurisdictional differences together with a dose of common sense warrant relitigation. The illustration of a denial of collateral estoppel on issues decided by an informal small claims court well underscores the necessity of such a rule.¹³² As to judgments incidentally determining title to land in a sister state, the *Second Restatement* modifies the *First* and, following the Institute's *Restatement (Second) of Conflicts*,¹³³ would estop further litigation. With respect to state and federal courts, there is scant change largely because the subject

128. SECOND RESTATEMENT § 68.1(b), drawn from former section 70.

129. SECOND RESTATEMENT § 68.1(b).

130. See text accompanying notes 103-05 *supra*.

131. SECOND RESTATEMENT §§ 68.1(c) & (d). See SECOND RESTATEMENT, Comments d, e, & f. Contrast FIRST RESTATEMENT § 71.

132. SECOND RESTATEMENT § 68.1(c), Comment d, Illustration 7.

133. RESTATEMENT (SECOND) OF CONFLICTS § 95 (1971).

comes laden with constitutional precepts of preclusion. Often, the supremacy clause will mandate preclusion in one direction and the doctrine of exclusive jurisdiction will prevent it in the other. The touchstone is obviously federal legislative intent.¹³⁴

The later text also permits relitigation where differences in the burden of persuasion make preclusion in the second action inequitable, a sound exemption apparently overlooked in the 1942 version.¹³⁵ Finally, there exists the residuary escape clause which to the surprise of some is not to be found in the *First Restatement*.¹³⁶ This is, I suggest, explicable by the first volume's embracement of Learned Hand's approach to mediate and ultimate data. In fact, secreted in this final subsection of exceptions is the entire soul of the new estoppel provisions: "[I]t was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action"¹³⁷

ISSUE PRECLUSION INVOKED BY NONPARTIES

The *First Restatement* adhered to the principle of mutuality of estoppel, that in order to invoke a judgment as an estoppel a party must have been subject, had it been unfavorable, to the same judgment as an estoppel: "[A] person who is not a party or privy to a party to an action . . . is not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action."¹³⁸ The first part of the statement is doubtless indisputable as a matter of constitutional law, for current notions of due process require that a person must have an opportunity to be heard before he can be bound by a judgment, unless he is represented by a party or has interests derivative from a party.¹³⁹ The latter suggestion of the cited section comes devoid of constitutional implications—a person who has had notice and opportunity to be heard on an issue can scarcely assert a denial of due process merely because he is precluded from doing it again. If this notion prevailed, all of the law of *res judicata* should crumble at our feet. In the very year of its promulgation by the Institute, the doctrine of mutuality came under

134. Compare SECOND RESTATEMENT § 68.1(c), Comment e with FIRST RESTATEMENT § 71, Comment e. The supremacy clause is found at U.S. CONST. art. VI, § 2.

135. SECOND RESTATEMENT § 68.1(d), Comment f.

136. *Id.* § 68.1(e).

137. *Id.* § 68.1(e)(ii).

138. FIRST RESTATEMENT § 93.

139. See *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971).

attack from the Supreme Court of California in the celebrated case of *Bernhard v. Bank of America*.¹⁴⁰ It was a mortal blow. The Supreme Court of the United States has overruled the requirement of mutuality of estoppel in patent infringement cases,¹⁴¹ and while the doctrine still gasps here and there, the *Second Restatement* has pronounced it dead.¹⁴² It places in its stead the general rule that a party who would have been precluded under sections 68 and 68.1 (collateral and direct estoppel) from relitigating an issue with a party opponent will likewise be precluded from doing so with another person (often somewhat confusingly called a nonparty), "unless [the party] lacked full and fair opportunity to litigate the issue in the first action or unless other circumstances justify affording him an opportunity to relitigate the issue."¹⁴³

The general proposition is then hedged, as we have seen elsewhere in the *Second Restatement*, with a series not of conceptualistic restraints but of pragmatic safeguards. All of the exceptions to the general rule of collateral estoppel among parties form a first line of defense for the party, assuring him a right to relitigate against the stranger any issue he might still dispute with his first opponent.¹⁴⁴ The second line of defense is found in seven safeguards, or if you will, exceptions. It may be that we shall have to await a third *Restatement* before we can better describe these safeguards, but for the present the following summary may do service.

Where the substantive law and its scheme of remedies evinces an intent that relitigation be available, naturally the law of judgments should be no barrier.¹⁴⁵ Moreover, where the second forum offers significantly different procedural opportunities for determination of the issue with some reasonable likelihood that the differences might alter the result, then fairness and the *Second Restatement* allow reassertion.¹⁴⁶

140. 19 Cal. 2d 807, 122 P.2d 892 (1942).

141. See, e.g., *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

142. See RESTATEMENT (SECOND) OF JUDGMENTS § 88, Comment b & Reporter's Note (Tent. Draft No. 2, 1975).

143. *Id.* § 88 (emphasis added).

144. See RESTATEMENT (SECOND) OF JUDGMENTS § 88 & Comment b (Tent. Draft No. 2, 1975), both of which incorporate expressly SECOND RESTATEMENT § 68.1.

145. RESTATEMENT (SECOND) OF JUDGMENTS § 88(1), Comment c (Tent. Draft No. 2, 1975).

146. *Id.* § 88(2), Comment d. This is the case of *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970). As between the same parties, one will recall, the *Restatement* would preclude relitigation. Where a nonparty asserts estoppel, however, the *Restatement* would allow, but does not require, relitigation.

This is, after all, but a corollary to the similar exception for same-party estoppel.¹⁴⁷ Perhaps the most interesting exception is that which permits relitigation where the party seeking the benefit of the estoppel offensively—that is, trying to use it to gain affirmative relief—appears to have manipulated joinder so as to have the benefit of a favorable judgment without the risk of an adverse one.¹⁴⁸ Herein, however, arises the “anomaly” of the mass tort which so worried Brainerd Currie but to which he later resigned himself,¹⁴⁹ the *Second Restatement* permits a co-claimant to “sit this one out,” and await in hope a judgment in favor of one of his fellows.¹⁵⁰ Many have objected to this “anomaly” as being unfair to the defendant, an objection I consign as did Bentham to the mentality of the gaming table. I rather feel some regret for those first few plaintiffs who recovered naught and whose claims are now forfeited by bar. Perhaps, though, their “remedy” is to sue as representatives of a class under Federal Rule 23 or a state cognate.

Three remaining exceptions to nonparty estoppel are the children of suspicion: one ought not preclude litigation over an issue which has been inconsistently adjudicated before.¹⁵¹ Neither Reporter’s Note nor the Comment reflects the possibility that this exception might be used to defeat “offensive” use of a finding in the mass tort situation. The remaining codifications of suspicion¹⁵² allow relitigation where cause exists to believe that the first judgment may have resulted in part from the relationship of the parties (such as relative financial position), from a compromise verdict, or where circumstances simply make relitigation more appropriate than preclusion.

Perhaps the final, concluding sentence of the Reporter’s Note to this section states a principle as valuable for all *res judicata* as it is for nonparty estoppel: “The ultimate question is whether there is good reason, all things considered, to allow the party to relitigate the issue.”¹⁵³

147. See note 132 *supra* and accompanying text.

148. RESTATEMENT (SECOND) OF JUDGMENTS § 88(3), Comment e.

149. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965).

150. RESTATEMENT (SECOND) OF JUDGMENTS § 88(3), Reporter’s Note (Tent. Draft No. 2, 1975).

151. *Id.* § 88(4).

152. *Id.* §§ 88(5) & 88(7).

153. *Id.* § 88, Reporter’s Note.