

# Restatement (2d) of Judgments

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## Chapter 3. Former Adjudication: the Effects of a Judicial Judgment

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## Topic 1. General Rules Applicable to Judgments

### §13 Requirement of Finality

The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), “final judgment” includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.

#### **Comment:**

a. Rationale. The rules of res judicata state when a judgment in one action is to be carried over to a second action and given a conclusive effect there, whether by way of bar, merger, or issue preclusion. This Section makes the general common-sense point that such conclusive carry-over effect should not be accorded a judgment which is considered merely tentative in the very action in which it was rendered. On the contrary, the judgment must ordinarily be a firm and stable one, the “last word” of the rendering court—a “final” judgment.

b. Comparison with finality for purposes of appellate review. The question whether a judgment is “final” also arises in the context of statutes providing for appellate review of “final decisions” (as in 28 U.S.C. §1291, “Final decisions of district courts”), or “final judgments or decrees” (as in 28 U.S.C. §1257, “State courts; appeal, certiorari”). It has often been suggested that finality for appellate review is the same as finality for purposes of res judicata, but that has probably never been quite true, and it is surely not true at present when considerable liberties are being taken with finality in the context of appeal in order to take care of various exigent situations in which prompt review by the higher courts is thought necessary. The fact that a trial court order may be reviewable by interlocutory appeal, for example under 28 U.S.C. §1292(b), does not necessarily mean that the matter resolved in the order should be treated as final for purposes of res judicata. A general working description of finality in the field of former adjudication will, however, resemble the older, traditional, strict formulation of the concept of finality for appellate review. Thus when res judicata is in question a judgment will ordinarily be considered final in respect to a claim (or a separable part of a claim, see Comment e below) if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement that may be consequent upon the particular kind of adjudication. Finality will be lacking if an issue of law or fact essential to the adjudication of the claim has been reserved for future determination, or if the court has decided that the plaintiff should have relief against the defendant of the claim but the amount of the damages, or the form or scope of other relief, remains to be determined.

The fact that a judgment is treated as final for purposes of res judicata does not necessarily mean that it is final for other purposes, for example, priority among lienors on property.

As to the more pliant view of finality that is appropriate with respect to issue preclusion, see the second sentence of the text of this Section and Comment g below.

c. Judgments granting or denying continuing relief. A judgment concluding an action is not deprived of finality for purposes of res judicata by reason of the fact that it grants or denies continuing relief, that is, requires the defendant, or holds that the defendant may not be

required, to perform acts over a period of time. Judgments of these types are rendered typically in actions for injunctions, specific performance, alimony, separate maintenance, and child support and custody.

The *res judicata* consequences of such judgments follow normal lines while circumstances remain constant, but those consequences may be affected when a material change of the circumstances occurs after the judgment. Thus if the judgment denied on the merits the continuing relief sought, but there has been a later material change of conditions, a new claim may arise upon the later facts (to be considered sometimes in combination with the old), and that claim will be held not barred by the previous judgment. See §24, Comment f. If the judgment was one granting continuing relief, and a change of circumstances makes the judgment too burdensome or otherwise inapposite as a regulation of ongoing conduct, it is ordinarily possible for the party concerned to apply to the rendering court for a modification of the terms of the judgment. See §73. And in deciding whether a judgment granting or denying continuing relief should be given any preclusive effect in a later action on a different claim, the question arises whether the issues in the two actions are materially different because of events which occurred in the interim, in which case preclusion is to that extent to be denied. See §27, Comment c.

As to the special problem that arises in determining whether or to what extent a judgment granting continuing relief is entitled to full faith and credit, see §18, Comment d; Restatement, Second, Conflict of Laws §109.

d. Judgment final but not a bar. A judgment may be final for purposes of *res judicata* although it embodies an adjudication that does not bar the plaintiff from maintaining another action against the defendant on the same claim. In such a case, there may be issue preclusion in another action between the parties on the same or a different claim as to issues that were decided as a basis for the judgment. See §17(3) and Comments c and d; §20 and Comment b. Examples of judgments that do not bar another action on the same claim are those resulting from a decision that the court lacks jurisdiction over the subject matter of the action or over the defendant, or from certain voluntary or involuntary dismissals of an action. See §20. A judgment denying an application for intervention does not preclude assertion after intervenor's claim in a subsequent action unless the denial was on grounds having a preclusive effect, for example, that the intervenor's application failed to state a claim upon which relief might be granted.

e. Judgment final as to a part of an action or claim. A judgment may be final in a *res judicata* sense as to a part of an action although the litigation continues as to the rest. Thus in a bankruptcy or receivership proceeding the claim of a particular creditor may be finally adjudicated although the proceeding is not closed. So also in an action in which the plaintiff has joined a number of claims against the defendant, the rules of practice—for example, Rule 54(b) of the Federal Rules of Civil Procedure—may permit entry of judgment on particular claims as they are adjudicated, with the action continuing as to the remaining claims.

A judgment may be final as to part of a claim. Thus in an action upon a running account which is ordinarily taken to comprise but a single claim (see §24, Comment d), the parties may agree or the court may direct that particular items be separately litigated and there may then be final judgments with respect to those items.

f. Proceedings to set aside or reverse judgment. A judgment otherwise final for purposes of the law of *res judicata* is not deprived of such finality by the fact that time still permits commencement of proceedings in the trial court to set aside the judgment and grant a new

trial or the like; nor does the fact that a party has made such a motion render the judgment nonfinal. This is the case even when a statute or rule of court provides that the judgment cannot be executed upon or otherwise enforced during the period allowed for making such a motion and the further period until the motion if made is decided. The judgment ceases to be final if it is in fact set aside by the trial court, as it would be upon the granting of a motion for a new trial.

There have been differences of opinion about whether, or in what circumstances, a judgment can be considered final for purposes of res judicata when proceedings have been taken to reverse or modify it by appeal. The better view is that a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo; finality is not affected by the fact that the taking of the appeal operates automatically as a stay or supersedeas of the judgment appealed from that prevents its execution or enforcement, or by the fact that the appellant has actually obtained a stay or supersedeas pending appeal.

The pendency of a motion for new trial or to set aside a judgment, or of an appeal from a judgment, is relevant in deciding whether the question of preclusion should be presently decided in the second action. It may be appropriate to postpone decision of that question until the proceedings addressed to the judgment are concluded.

Application of this Comment may give rise to a problem of inconsistent judgments when a judgment under appeal, relied on as a basis for a second judgment, is later reversed. This problem is considered at §16.

g. Criteria for determining finality in the application of issue preclusion. The requirement of finality of judgment is interpreted strictly, as indicated in Comment a, when bar or merger is at stake. This is natural when it is considered that the effect of a judgment as bar or merger is to “extinguish” a claim, and, when there is merger, to create a new claim based on the judgment itself. See §17(1),(2). Usually there is no occasion to interpret finality less strictly when the question is one of issue preclusion, that is, when the question is whether decision of a given issue in an action may be carried over to a second action in which it is again being litigated. (If the second action is on the same claim, preclusion is an instance of direct estoppel; if it is on a different claim, preclusion is an instance of collateral estoppel. See §17, Comment c.) But to hold invariably that that kind of carry-over is not to be permitted until a final judgment in the strict sense has been reached in the first action can involve hardship—either needless duplication of effort and expense in the second action to decide the same issue, or, alternatively, postponement of decision of the issue in the second action for a possibly lengthy period of time until the first action has gone to a complete finish. In particular circumstances the wisest course is to regard the prior decision of the issue as final for the purpose of issue preclusion without awaiting the end judgment. See Illustrations 1-3. Before doing so, the court should determine that the decision to be carried over was adequately deliberated and firm, even if not final in the sense of forming a basis for a judgment already entered. Thus preclusion should be refused if the decision was avowedly tentative. On the other hand, that the parties were fully heard, that the court supported its decision with a reasoned opinion, that the decision was subject to appeal or was in fact reviewed on appeal, are factors supporting the conclusion that the decision is final for the purpose of preclusion. The test of finality, however, is whether the conclusion in question is procedurally definite and not whether the court might have had doubts in reaching the decision.

Application of the present Comment, like application of Comment f, may result in inconsistent judgments; see §16.

*Illustrations:*

1. A, owner, brings an action against B, builder, for fraudulently inducing A to enter a construction contract. A moves in that action to stay arbitration of B's claim against A for payments due under the contract, contending that the arbitration clause is ineffective because it was induced by fraud. After a thorough hearing, the court grants A a preliminary injunction against arbitration. B appeals under a statute permitting review of such an interlocutory order. The appellate court reverses on the facts, finding that A failed to show that there was even a substantial issue as to fraud. If the court in a separate action by B against A to compel arbitration determines that the negative finding as to fraud in the first action was adequately deliberated and firm, that finding should be accepted as conclusive even though the first action has not reached final judgment in the strict sense.

2. In the course of an interpleader action to determine the security interests of a number of claimants in property of a debtor, claimant A applies for a determination as to the validity of notes made by claimant B and endorsed to A, evidently secured by part of the interpleaded property. The interpleader court makes various findings upholding the validity of the notes, but an appeal is dismissed on the ground that a determination of liability without more is not an appealable final decision. If the court in a separate action by A against B to recover the amount of the notes determines that the findings as to the validity of the notes were adequately deliberated and firm, it should hold those findings conclusive in the separate action. The court as a discretionary matter may hold the issues as to the validity of the notes to be conclusively settled.

3. In a jurisdiction that permits "split" trials (a trial of liability followed, if liability is found, by a separate trial to ascertain the damages), the jury in a negligence case finds for the plaintiff A as to liability, the defendant B having denied his own negligence and pleaded contributory negligence on the part of A. Under the law of the jurisdiction, B cannot appeal at this point as there is no judgment that qualifies as final for that purpose; an appealable judgment would be reached later, when, in the second phase of trial, another jury assessed the damages. But prior to the second phase, the jury's verdict as to liability may be held conclusive as to the issues of A's and B's negligence in any other action between them in which the same issues appear.

## §14 Effective Date of Final Judgment

For purposes of res judicata, the effective date of a final judgment is the date of its rendition, without regard to the date of commencement of the action in which it is rendered or the action in which it is to be given effect.

### **Comment:**

a. General. In order that a final judgment shall be given res judicata effect in a pending action, it is not required that the judgment shall have been rendered before that action was commenced. Nor is a judgment, otherwise entitled to res judicata effect in a pending action, to be deprived of such effect by the fact that the action in which it was rendered was commenced later than the pending action. It is merely required that rendition of the final judgment shall antedate its application as res judicata in the pending action. Thus when two actions are pending which are based on the same claim, or which involve the same issue, it is the final judgment first rendered in one of the actions which becomes conclusive in the other action (assuming any further prerequisites are met), regardless of which action was first brought.

b. Cross-reference. As to the question of which of two inconsistent judgments is entitled to conclusive effect in a third pending action, see §15.

## §15 Inconsistent Judgments

When 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.

### **Comment:**

a. Cross-reference. As to what constitutes the “later” judgment, see §14.

b. Rationale. The considerations of policy which support the doctrine of res judicata are not so strong as to require that the court apply them of its own motion when the party himself has failed to claim such benefits as may flow from them. Accordingly, when a prior judgment is not relied upon in a pending action in which it would have had conclusive effect as res judicata, the judgment in that action is valid even though it is inconsistent with the prior judgment. It follows that it is this later judgment, rather than the earlier, that may be successfully urged as res judicata in a third action, assuming that other prerequisites are satisfied. Indeed, the later of the two inconsistent judgments is ordinarily held conclusive in a third action even when the earlier judgment was relied on in the second action and the court erroneously held that it was not conclusive. See Comment e below.

c. Application to merger, bar, and issue preclusion. The rule stated in this Section governs the effect of a judgment by way of merger, bar, or issue preclusion. See Illustrations 1-3.

#### *Illustrations:*

1. A sues B on a promissory note. B denies that he executed the note. There is a trial resulting in a verdict for B, and judgment is rendered in B’s favor. A brings a second action against B on the note, and B defaults, and judgment is given for A for the amount of the note and interest thereon. Thereafter A brings an action against B on the second judgment. The judgment for B in the first action is no defense.

2. A sues B on a promissory note. Judgment is given for A against B by default. A brings an action against B on the judgment. B defends on the ground that the court had no jurisdiction over him in the original action, and the defense is upheld and judgment given for B. Thereafter A brings an action against B on the first judgment. The judgment in the second action is a defense, even though the court is of the opinion that the court in the first action had jurisdiction over B.

3. In an action between the taxing authority and a taxpayer a question as to the value of property on January 1, 1970, to be used as the basis for a deduction for depreciation, is litigated and determined. In a second action between the same parties involving a tax for the following year the same issue is raised but the prior judgment is not shown, and the court makes a different determination as to the value of the property on January 1, 1970. In a third action between the same parties involving a tax for a third year, the judgment in the second action, if shown, is conclusive as to the value of the property on January 1, 1970.

d. Application to actions involving title. The rule of this Section is applicable where a question of title to property is raised in the three actions. If the first judgment adjudges that one of the parties has title, and in a second action the prior judgment is not alleged, or is alleged but erroneously held to be not conclusive, and title is adjudged to be in the other party, then in a third action the later judgment and not the earlier is conclusive under the rules of res judicata.

e. Cross-reference to Restatement, Second, of Conflicts. Although the later judgment is ordinarily held conclusive even though it erroneously denied res judicata effect to the earlier judgment, the rule may be different if the error consisted of a denial of full faith and credit to the judgment of a sister state and the losing party was denied review in the Supreme Court of the United States. "In such a situation, it might be thought inappropriate to require that conclusive effect be given under full faith and credit to the later inconsistent judgment." Restatement, Second, Conflict of Laws §114, Comment b.



## §16 Judgment Based Upon a Judgment That Is Subsequently Reversed

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.

Note: For rules concerning relief from judgments, see Chapter 5.

### Comment:

a. How the problem arises. Under §13, Comments f and g, a judgment in an action may be regarded as final for purposes of res judicata, and be entitled to conclusive effect in a second action, notwithstanding the fact that it is still liable to be nullified, for example, by a post-judgment motion such as a motion for a new trial, or by reversal on appeal. If judgment is rendered in the second action on the basis of the judgment in the first, and the judgment in the first is then nullified, the problem arises what is to happen to the second, dependent judgment.

b. How the problem may be avoided. This Section states a solution to the problem just put, but it is an inconvenient solution at best. It may be feasible for the court in the second action to avoid the problem. When the second action is being maintained in the same jurisdiction as the first, and is simply repetitious of the first, that is, involves the same claim between the same parties, the second action may be subject from the outset to dismissal ("abatement") on the basis of the defense of "other action pending," leaving only the first action and obviating the problem altogether. When that step has not been taken, or the actions are being maintained in different jurisdictions, or there is not an identity of claims but rather an identity of issues, it may still be advisable for the court that is being asked to apply the judgment as res judicata to stay its own proceedings to await the ultimate disposition of the judgment in the trial court or on appeal. This course commends itself if the disposition will not be long delayed and especially if there is substantial doubt whether the judgment will be upheld.

c. Solution of the problem. As stated in Comment a above, the problem when met head-on is that of a judgment based and dependent upon an earlier judgment which subsequently is nullified. It has been contended that the later judgment should then be automatically nullified. The current doctrine, however, is that the later judgment remains valid, but a party, upon a showing that the earlier judgment has been nullified and that relief from the later judgment is warranted, may by appropriate proceedings secure such relief.

If, when the earlier judgment is set aside or reversed, the later judgment is still subject to a post-judgment motion for a new trial or the like, or is still open to appeal, or such a motion has actually been made and is pending or an appeal has been taken and remains undecided, a party may inform the trial or appellate court of the nullification of the earlier judgment and the consequent elimination of the basis for the later judgment. The court should then normally set aside the later judgment. When the later judgment is no longer open to a motion for a new trial or the like at the trial court level, nor subject to appeal, the fact of the nullification of the earlier judgment may be made the ground for appropriate proceedings for

relief from the later judgment with any suitable provision for restitution of benefits that may have been obtained under that judgment. See Chapter 5.

## Topic 2. Personal Judgments

### §17 Effects of Former Adjudication—General Rules

A valid and final personal judgment is conclusive between the parties, except on appeal or other direct review, to the following extent:

- (1) If the judgment is in favor of the plaintiff, the claim is extinguished and merged in the judgment and a new claim may arise on the judgment (see §18);
- (2) If the judgment is in favor of the defendant, the claim is extinguished and the judgment bars a subsequent action on that claim (see §19);
- (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment (see §27).

These general rules are subject to exceptions: as to Subsections (1) and (2), see §§20 and 26; as to Subsection (3), see §28.

#### **Comment:**

a. Merger (Subsection (1)). When a valid and final personal judgment is rendered in favor of the plaintiff, the claim is generally merged in the judgment. This means that the claim, whether it was valid or not, is extinguished, and the judgment with new rights of enforcement thereof is substituted for the claim. Merger is dealt with in greater detail in §18. Compare the exceptions to the general rule against splitting of claims in §26.

b. Bar (Subsection (2)). When a valid and final personal judgment is rendered in favor of the defendant, the judgment is generally a bar to a subsequent action on the claim. It is sometimes said that there is an “estoppel by judgment,” but that term is not used in the Restatement of this subject. If the original claim was valid, it is extinguished by the judgment; if it was not valid, the effect of the judgment is conclusively to establish its invalidity. The general rule as to bar is dealt with in greater detail in §19, and the exceptions to the general rule in §20.

c. Issue preclusion (Subsection (3)). A valid and final personal judgment, whether in favor of the plaintiff or of the defendant, has a further effect—that of issue preclusion. In a subsequent action between the parties, the judgment generally is conclusive as to the issues raised in the subsequent action if those issues were actually litigated and determined in the prior action and if their determination was essential to the judgment. When the subsequent action is on a different claim, this effect of the judgment is sometimes designated a collateral estoppel. It is also sometimes called an “estoppel by verdict,” but that phrase is not used in this Restatement; it is misleading, since it is not a verdict but the judgment that is conclusive upon the parties.

When an issue is actually litigated and determined in an action, the determination is also generally conclusive in any subsequent action between the parties on the same claim. This effect of the judgment is sometimes designated a direct estoppel. Ordinarily, after a judgment is rendered in an action, the claim is extinguished by the judgment's bar or merger effect, and therefore it is impossible to maintain a subsequent action on the claim. But there are exceptions. For example, when a judgment for the defendant is based on lack of jurisdiction, improper venue, or nonjoinder or misjoinder of parties, the plaintiff is not precluded from maintaining another action on the claim (see §20(1)). Also, when the defendant interposes a counterclaim on which an affirmative judgment in his favor is not permitted to be rendered, and he obtains judgment on the counterclaim, he is not precluded from subsequently maintaining an action on his claim to secure further relief (see §21(2)). See also the exceptional interstate situations referred to in §18, Comment d below, where after judgment upon a claim there may be a subsequent action upon that claim in a sister state.

d. Erroneous judgment. The general rules stated in this Section are applicable to a valid (see §§1- 12) and final (see §13) judgment, even if it is erroneous and subject to reversal. If the judgment is erroneous, the unsuccessful party's remedy is to have it set aside or reversed in the original proceedings. Such a remedy may be sought by a motion for a new trial or other relief in the court that rendered the judgment, or by an appeal or other proceedings for review of the judgment in an appellate court.

c. Relief from judgment. Questions as to the right to relief from a judgment obtained by fraud or the like are dealt with in Chapter 5.

e. Effect of judgment on persons who were not parties. Questions as to the effect of a judgment upon persons who were not parties to the action in which the judgment was rendered are dealt with in Chapter 4.

### §18 Judgment for Plaintiff—The General Rule of Merger

When a valid and final personal judgment is rendered in favor of the plaintiff:

- (1) The plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment; and
- (2) In an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action.

This general rule is subject to the exception stated in §26.

Cross-reference to exceptions. The question of the dimensions of a claim for purposes of merger (as well as bar) is considered in §§24- 26. Attention is invited particularly to §26; in the cases there described, maintenance of an action on all or part of an original claim is permitted even though, by the ordinary application of the present Section, the claim would be wholly merged in a judgment previously obtained upon it.

#### **Comment:**

a. The doctrine of merger. When the plaintiff recovers a valid and final personal judgment, his original claim is extinguished and rights upon the judgment are substituted for it. The plaintiff's original claim is said to be "merged" in the judgment. It is immaterial whether the defendant had a defense to the original action if he did not rely on it, or if he did rely on it and judgment was nevertheless given against him. It is immaterial whether the judgment was rendered upon a verdict or upon a motion to dismiss or other objection to the pleadings or upon consent, confession, or default.

b. Action not maintainable on the original claim in the same state. After merger of the original claim in a judgment for the plaintiff, the plaintiff may not maintain an action on the original claim in the state that rendered the judgment. If he attempts to do so, the defendant can set up the prior judgment as a defense.

This rule has practical effects because it might be advantageous to the plaintiff, despite his judgment, to bring a new action on the original claim. It is true that if the judgment was obtained on a liquidated claim, it would not be of any advantage to bring another action; but if the claim was unliquidated, the plaintiff might hope to recover a larger sum than that awarded to him by the judgment. Thus, if he brought an action against the defendant for negligently causing him personal injury, and after a trial the jury awarded him a certain sum and judgment was given for that sum, he might later be able to prove that the injury was more serious than had appeared at the trial. Even though he had no further evidence to offer, he might hope that new jury would award a greater sum. Since, however, his claim has been merged in the judgment, he cannot maintain an action on the original claim. See Illustrations 1-2, and §25, Comment c, where certain exceptional situations are noted.

The same principle holds where the judgment obtained in the original action required the defendant to perform acts other than the payment of money or to refrain from such acts. The

judgment precludes an action on the original claim seeking, perhaps, alternative or additional relief. See Illustration 3, and compare §25, Comment j.

The fact that the judgment was based on error does not preclude the defendant from setting the judgment up as a defense to an action on the original claim. If it was erroneous, the plaintiff might have taken steps to have it set aside or reversed in the original proceeding.

*Illustrations:*

1. A brings an action against B for negligently causing injury to A. At the trial A is unable to prove any serious injury to his person. Verdict is given for A for \$100 and judgment is entered thereon. Thereafter it appears that A's injuries are more serious than proved at the trial. A is precluded by the judgment from maintaining a second action against B for the collision.

2. The facts are the same as stated in Illustration 1, except that at the trial of the first action A offers evidence of nervous shock, and the court erroneously excludes such evidence. A is precluded by the judgment from maintaining a second action against B for the collision.

3. A and B enter into a contract for the sale of land located in State X. B refuses to convey the land. A brings an action for specific performance in State X, and a judgment is entered in his favor ordering B to convey the land. A is precluded by the judgment from maintaining a second action in State X to secure money damages in lieu of specific performance, or to obtain damages for delay in conveying the land in addition to the specific performance already adjudged.

c. Enforcement of a judgment in the same state. A judgment for the plaintiff awarding him a sum of money creates a debt in that amount in his favor. He may maintain proceedings by way of execution for enforcement of the judgment. He may also be able to maintain an action upon the judgment. Ordinarily no useful purpose is served by bringing an action in the same state upon the judgment instead of executing upon it, but if the period for executing upon a judgment has run or the period of the statute of limitations applicable to the judgment has almost run, the plaintiff can by appropriate proceedings revive the executability of the judgment or bring an action upon the judgment and obtain a new judgment upon which the limitations period will run again.

Similarly, when a plaintiff has obtained a judgment other than one for the payment of money—such as a judgment ordering the defendant to engage or refrain from engaging in certain conduct—the plaintiff may seek enforcement of the judgment by proceedings in the nature of execution or by application for contempt or other sanctions, and with the passage of time, revivor or suit upon the judgment may become necessary to effectuate or preserve the plaintiff's rights.

When the plaintiff brings an action upon the judgment, the defendant cannot avail himself of defenses which he might have interposed in the original action. See Illustration 4. It is immaterial whether he interposed the defense or failed to do so or even defaulted in the original action. Nor does the fact that the judgment was erroneous preclude the plaintiff from maintaining an action upon it. See Illustrations 5 and 6.

In an action on the judgment the defendant may interpose matters which have arisen since the rendition of the judgment and constitute defenses to its enforcement such as payment, release, accord and satisfaction, or the statute of limitations. He may also interpose a counterclaim. It is immaterial that he might have interposed that counterclaim in the original action but did not do so, see §22, unless the counterclaim was required to be interposed in the original action for the reasons set forth in §22(2).

When the judgment calls for performance, positive or negative, over a period of time, the question may arise whether circumstances have so changed as to make enforcement inequitable.

A special problem arises when a plaintiff obtains judgment in an action based on a prior judgment and that prior judgment is then reversed on appeal. This question is considered in §16.

*Illustrations:*

4. A brings an action against B on a promissory note. B defaults. Judgment is given for A. A brings an action against B on the judgment. In this action B is precluded from denying that he executed the note and from setting up an affirmative defense such as fraud or illegality.

5. A brings an action against B for breach of contract. B defends on the ground that his promise was without consideration. The court erroneously rules that the promise, although without consideration, is enforceable. Verdict and judgment are given for A. A brings an action against B on the judgment. B is precluded from setting up the lack of consideration as a defense to the action.

6. A brings an action against B for negligently injuring him. Verdict is given for A for \$10,000. B moves for a new trial on the ground that the damages awarded by the jury are excessive. The court erroneously denies the motion and judgment is given for A on the verdict. A brings an action against B on the judgment. B is precluded from defending on the ground that the damages awarded in the first action were excessive.

d. Effect of judgment in another state—full faith and credit. This subject is dealt with in Restatement, Second, Conflict of Laws §§93-121, but a summary statement in this and the following Comments may be found useful.

Under the Full Faith and Credit Clause of the Constitution, a large category of judgments must be given the same res judicata effects by sister states as they are accorded in the respective states of rendition. Thus, valid, final, nonmodifiable judgments for the payments of money are entitled to such full respect in sister states. See id. §§100- 101, and Illustrations 7 and 8 below.

Certain judgments, although valid and final, may constitutionally be denied all res judicata effects in the courts of sister states, but sister states may choose to give these judgments res judicata effects including that of merger. Thus, under current constitutional interpretation, a sister state may deny all effect to a judgment for support or the like insofar as it remains subject to modification in the state of rendition either as to sums that have accrued and are unpaid or as to sums that will accrue in the future; on the other hand, the sister state may elect to accord to such judgments the res judicata consequences that would attach in the respective states where rendered. See id. §109. So also a judgment which involves an improper interference with important interests of a sister state may be denied res judicata effects by that sister state. See id. §103. A judgment denying equitable relief is entitled to effect in a sister state under the rules of bar. And a judgment ordering the doing of an act other than payment of money or enjoining the doing of the act is entitled to effect in a sister state by way of issue preclusion; arguably the Constitution does not require that such a judgment be given effect in a sister state by way of merger, but the current tendency is to accord that effect also. See id. §102, and Illustration 9 below.

*Illustrations:*

7. A brings an action in State X against B for battery. B denies the battery. Verdict and judgment are given for A for \$100. A sues B in State Y for the same battery. B sets up the prior

judgment as a defense. The court in State Y is bound to give full faith and credit to the judgment and thus may not entertain the action.

8. A brings an action for divorce against B, her husband, in State X, in which A and B are domiciled. The court grants the divorce and directs B to pay A the sum of \$10,000 as alimony, the amount being based upon the resources of the defendant including land in State Y. After receiving payment of the \$10,000, A sues in State Y to obtain further alimony out of the land of B in that state. The court in State Y is bound to give full faith and credit to the judgment by dismissing the action.

9. A and B enter into a contract for sale of land located in State Y. B refuses to convey the land. A brings an action for specific performance in State X and judgment is entered in his favor ordering B to convey the land. State Y may perhaps be within its constitutional rights in refusing to entertain an action by A against B to enforce the State X judgment. On the other hand, it is constitutionally permissible for State Y to entertain such an action and respect the State X judgment fully, and correspondingly to refuse to entertain an action on A's original claim. See also Illustration 10.

e. Action on original claim in another state. When State Y is not required by the Constitution to regard a State X judgment as merging the claim, and State Y accordingly, in exercising its discretion, refuses to allow enforcement of the judgment as such, the plaintiff is not precluded from maintaining in State Y an action on the original claim. As indicated in Comment d, in certain cases State Y is then at liberty to deny all carry-over effects from the State X judgment; in other cases, as where the State X judgment ordered or prohibited acts other than the payment of money, State Y is required to accept the judgment as conclusive upon the issues actually litigated and determined in the State X action. See Restatement, Second, Conflict of Laws §§95, 102, and Illustration 10 below. In the latter class of cases, therefore, State Y will be entitled to deviate from the State X adjudication only in respect to the form of relief it is prepared to provide; the practical distinction between, on the one hand, allowing an action on the original claim but with issues concluded by direct estoppel based on the State X judgment, and, on the other hand, granting enforcement of the State X judgment, may be quite narrow. See Comment f below.

*Illustration:*

10. On the facts of Illustration 9, if State Y chooses to entertain an action on the original claim, it is nevertheless required to give direct estoppel effect to issues determined by State X.

f. Enforcement of judgment in another state. State Y may be required by the Constitution or, when not so required, may as a matter of comity choose to regard a State X judgment as merging the underlying claim and accordingly to enforce the State X judgment. When the State X judgment is for payment of money, the customary way to secure enforcement of the judgment in State Y is to bring an action there upon the judgment. But a more direct method of enforcement may be available in State Y; for example, the Uniform Enforcement of Foreign Judgments Act provides for the registration of the State X judgment in State Y and facilitates its enforcement there. See also Title 28, U.S. Code, §1963; Restatement, Second, Conflict of Laws §99. When the State X judgment orders or forbids acts other than the payment of money, enforcement of the judgment in State Y is obtained in some situations by bringing an action on the judgment but in other cases by less direct procedures as prescribed by State Y. See Restatement, Second, Conflict of Laws §99; §102 and Comment e thereon.

g. Incidents of claim preserved. When by reason of the plaintiff's obtaining judgment upon a claim the original claim is extinguished and rights arise upon the judgment, advantages to



which the plaintiff was entitled with respect to the original claim may still be preserved despite the judgment. Thus if a creditor has a lien upon property of the debtor and obtains a judgment against him, the creditor does not thereby lose the benefit of the lien. Similarly, where by statute an employee is given priority as to a claim for personal injuries in the reorganization of a railroad, such priority is not lost when the employee has obtained a judgment against the railroad.

h. Effect on claim based on federal law. When a judgment has been rendered on a claim based on state law, there are circumstances in which a claim based on federal law may still be asserted. See §86.

i. Counterclaim. This Section is applicable not only when the plaintiff brings a subsequent action against the defendant, but also when he attempts to interpose a counterclaim in a subsequent action brought by the defendant against him. When the plaintiff has obtained a judgment against the defendant which has the effect under this Section of merging the original claim, he cannot avail himself of the original claim by interposing it as a counterclaim in a subsequent action brought by the defendant against him. See Illustration 11. On the other hand he may interpose the judgment by way of counterclaim. See Illustration 12.

*Illustrations:*

11. A brings an action against B on a promissory note. B denies that he executed the note. Verdict and judgment are given for A in the amount of the note, with interest and costs. Thereafter B brings an action against A for the breach of contract. Since A's right of action on the note is merged in the judgment, A is precluded from relying on the note by way of counterclaim.

12. The facts are as stated in Illustration 11. A can set up the judgment by way of counterclaim.

j. Merger in a judgment on a judgment. When the plaintiff has obtained a judgment against the defendant and brings an action upon the judgment, and obtains a judgment in that action, the first judgment is not merged in the second judgment, whether the second action is brought in the same State in which the first judgment was rendered or is brought in another State. The plaintiff can enforce either judgment by execution or otherwise, but satisfaction of one of the judgments operates also as satisfaction of the other.

k. Judgment of a federal court. When the judgment is that of a federal court, federal law in general governs its effects. See §87.

## §19 Judgment for Defendant—The General Rule of Bar

A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.

This general rule is subject to the exceptions stated in §§20 and 26.

### **Comment:**

a. Rationale. It is frequently said that a valid and final personal judgment for the defendant will bar another action on the same claim only if the judgment is rendered “on the merits.” The prototype case continues to be one in which the merits of the claim are in fact adjudicated against the plaintiff after trial of the substantive issues. Increasingly, however, by statute, rule, or court decision, judgments not passing directly on the substance of the claim have come to operate as a bar. Although such judgments are often described as “on the merits” or as “operating as an adjudication on the merits,” that terminology is not used here in the statement of the general rule because of its possibly misleading connotations.

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. These considerations may impose such a requirement even though the substantive issues have not been tried, especially if the plaintiff has failed to avail himself of opportunities to pursue his remedies in the first proceeding, or has deliberately flouted orders of the court.

The general rule stated in this Section requires that errors underlying a judgment be corrected on appeal or other available proceedings to modify the judgment or to set it aside, and not made the basis for a second action on the same claim.

The rule stated in this Section is subject to the exceptions set forth in §20 as well as to the exceptions to the rule against the splitting of a claim set forth in §26.

b. Statutes and rules of court. In determining the scope of the general rule (and the exceptions to it) in a particular jurisdiction, it is essential to consult the relevant statutes and rules of court in that jurisdiction. Among the most significant of these provisions is Rule 41 of the Federal Rules of Civil Procedure, which has served as a model for similar provisions in many states and which, as amended, provides:

(a). Voluntary Dismissal: Effect Thereof.

(1). By Plaintiff: by Stipulation. Subject to the provisions of Rule 23(3), or Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2). By Order of the Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff’s instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff’s motion to dismiss, the

action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b). *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). 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.

(c). *Dismissal of Counterclaim, Cross-Claim or Third-Party Claim.* The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d). *Costs of Previously Dismissed Action.* If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

c. *Counterclaim.* The rule stated in this Section is applicable not only to a case in which the plaintiff brings another action against the defendant on the same claim, but also to one in which the plaintiff seeks to avail himself of the original claim by interposing it as a counterclaim in a subsequent action brought by the defendant against him.

d. *Judgment for defendant on insufficiency of the complaint.* The rule stated in this Section is applicable to a judgment for the defendant on demurrer or motion to dismiss for failure to state a claim. Such a result is warranted by the ease with which pleadings may be amended, normally at least once as a matter of course, and by the unfairness of requiring the defendant to submit to a second action (often initiated long after the first has come to an end) when no such amendment is sought, or when no appeal has been taken from an erroneous denial of leave to amend.

*Illustration:*

1. A brings an action against B to obtain a one-half interest in land and to establish a trust on the land. A demurrer to the complaint is sustained on the grounds that it fails to allege a writing sufficient to satisfy the applicable statute of frauds. Judgment is rendered for B and A does not seek leave to amend; one year later A brings a second action on the same claim in which he alleges a writing sufficient to satisfy the statute of frauds. The second action is barred by the first judgment.

e. *Judgment for defendant based on the plaintiff's failure to prosecute, to obey an order of the court, or to appear.* The rule stated in this Section is applicable to a judgment for

defendant based on the failure of the plaintiff to prosecute his claim with diligence, to obey an order of the court, or to appear at the appointed time. This result is explicitly provided for in Rule 41 of the Federal Rules of Civil Procedure, quoted in Comment b, above. In those jurisdictions where statutes or rules provide that such dismissals shall not operate as an adjudication "on the merits" (i.e., shall not operate as a bar), or shall not so operate unless otherwise specified, the effect of the dismissal would be governed by §20.

f. Judgment for defendant on grounds that may not preclude an action in another jurisdiction. This Restatement is concerned primarily with the effect of a judgment in the state in which it is rendered. Generally, a judgment that operates to bar another action on the same claim in one state will, under the Full Faith and Credit Clause of the United States Constitution, bar an action on the same claim in another state. See Restatement, Second, Conflict of Laws §95, Comment c. This may not necessarily be the case, however, if the action is barred by the statute of limitations of the first state but not of the second, or if a contract valid where made is unenforceable under the public policy of the first state but is enforceable under the public policy of the second. See Restatement, Second, Conflict of Laws §110. With respect to the rendering state, a judgment for the defendant on such grounds falls within the rule of this Section.

g. Summary judgment for defendant. The rule stated in this Section is applicable to a case in which it is determined before trial that there is no genuine dispute with respect to any material fact and that, as a matter of law, the defendant is entitled to judgment. See, for example, Rule 56 of the Federal Rules of Civil Procedure.

h. Judgment for defendant during or after trial. The rule stated in this Section is applicable to a judgment for defendant based on a direct verdict, on a jury verdict, on a judgment notwithstanding the verdict, or on any other determination during or after trial. Under the modern systems of procedure prevailing in most jurisdictions, issues not raised by the pleadings that are tried by express or implied consent are treated as if they had been raised in the pleadings. In such jurisdictions, the claim or claims barred by a judgment for defendant must be determined on the basis of the whole record, including the pleadings and the evidence. It is generally possible in such jurisdictions for any party to obtain an amendment of the pleadings, even after judgment, in order that the pleadings will conform to the evidence, and such an amendment may be of assistance in resolving any future controversy over the res judicata effect of the judgment.

## §20 Judgment for Defendant—Exceptions to the General Rule of Bar

(1) A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim:

(a) When the judgment is one of dismissal for lack of jurisdiction, for improper venue, or for nonjoinder or misjoinder of parties; or

(b) When the plaintiff agrees to or elects a nonsuit (or voluntary dismissal) without prejudice or the court directs that the plaintiff be nonsuited (or that the action be otherwise dismissed) without prejudice; or

(c) When by statute or rule of court the judgment does not operate as a bar to another action on the same claim, or does not so operate unless the court specifies, and no such specification is made.

(2) A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied, unless a second action is precluded by operation of the substantive law.

### **Comment:**

a. General. This Section enumerates the situations in which a valid and final personal judgment for the defendant does not bar the plaintiff from bringing another action on the same claim. It takes special note of the substantial impact of statutes and rules of court.

There is, perhaps inevitably, some degree of overlap between the matters dealt with in this Section and the exceptions, set forth in §26, to the general rule against splitting of a "claim." There are, however, two important lines of distinction. First, the present Section deals with instances in which the general rule of bar does not apply—i.e., instances in which the plaintiff remains entirely free to prosecute all or any part of his claim (except as limited by the direct estoppel effect of the first judgment); Section 26, on the other hand, deals in large part with instances in which after the first judgment the plaintiff no longer retains the full freedom he once had—with instances of what might be described as "partial merger or bar." Compare, for example, Illustration 2 to the present Section with Illustration 1 to §26. Second, the present Section does not deal with instances in which policy reasons favoring the maintenance of the second action come to light only after the first action is completed; such instances are included within the scope of §26. See, for example, Illustrations 4 and 6 to §26.

b. Effect of judgment as to issues decided. The rules of issue preclusion (see §§27, 28) apply to a valid and final personal judgment for the defendant even though the judgment is one which, under this Section, does not bar another action on the same claim.

*Illustration:*

1. A brings an action against B for personal injuries, and the action is dismissed for improper venue on the ground that the judicial district in which suit was brought was not the district of defendant's residence as required by law. Although A is not barred from maintaining an action on the claim in another district, the rules of issue preclusion are applicable to the determination that venue was improper in the initial action.

c. Rationale of Subsection (1)(a). The grounds stated in this Clause for the granting of judgments of dismissal that do not operate as a bar to a second action are among the most frequent and widely recognized grounds for such dismissals. The reason for this result may be found in the threshold character of the determination on which the judgment is based.

Dismissals on the grounds specified in this Clause are explicitly referred to as not operating as an adjudication "on the merits" in Rule 41(b) of the Federal Rules of Civil Procedure and in many of the state rules patterned on that provision.

*Illustration:*

2. A brings an action against B for personal injuries in a federal court, basing jurisdiction on diversity of citizenship. The action is dismissed on the ground that the alleged diversity does not in fact exist. A is not barred from bringing another action on the same claim in a court of competent jurisdiction.

d. Specification that dismissal on any of the grounds in Subsection (1)(a) is "with prejudice" or "on the merits". A court in dismissing on any of these grounds may specify that its decision is "with prejudice" or "on the merits", or words to that effect. While there are instances in which a court may have discretion to determine that a judgment of dismissal shall operate as a bar (see Comment n to this Section), a judgment may not have an effect contrary to that prescribed by the statutes, rules of court, or other rules of law operative in the jurisdiction in which the judgment is rendered. Thus in a jurisdiction having a rule patterned on Rule 41(b) of the Federal Rules of Civil Procedure, a dismissal for lack of jurisdiction, for improper venue, or for nonjoinder may not be a bar regardless of the specification made. And even in the absence of such a rule, a dismissal on any of these grounds is so plainly based on a threshold determination that a specification that the dismissal will be a bar should ordinarily be of no effect.

e. Alternative determinations. A dismissal may be based on two or more determinations, each of which, standing alone, would render the judgment a bar to another action on the same claim. In such a case the judgment operates as a bar. See Illustration 3.

A dismissal may be based on two or more determinations, at least one of which, standing alone, would not render the judgment a bar to another action on the same claim. In such a case, if the judgment is one rendered by a court of first instance, it should not operate as a bar. See Illustration 4. Even if another of the determinations, standing alone, would render the judgment a bar, that determination may not have been as carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense it has some of the characteristics of dicta. And, of critical importance, the losing party, although entitled to appeal from both determination, may be dissuaded from doing so as to the determination going to the "merits" because the alternative determinations, which in itself does not preclude a second action, is clearly correct. The rules of res judicata should not encourage or foster appeals in such instances.

If the judgment resting on alternative determinations discussed in the preceding paragraph is that of an appellate court, the question whether it bars another action on the same claim is a difficult one. See the discussion of an analogous question on the context of

issue preclusion, §27, Comments i and o. But in any event, the judgment should not operate as a bar if one of the determinations is that the court in which the action was brought lacked subject matter or personal jurisdiction to adjudicate the claim.

*Illustrations:*

3. A brings an action against B for breach of contract and after trial without a jury, the court holds for B on the basis that (a) the contract is unenforceable because not in writing and (b) in any event B was induced to enter the agreement by A's fraud. A is barred from bringing a second action on the same claim.

4. The facts are the same as in Illustration 3, but the trial court also holds that the action is premature because the time for B's performance has not yet arrived. A is not barred from bringing suit on the claim after that time has arrived.

f. Voluntary nonsuit or dismissal without prejudice (Subsection (1)(b)). At common law the plaintiff is permitted to submit to a nonsuit, which does not operate as a bar to another action on the same claim, at any time before the jury has rendered its verdict or before the court, sitting without a jury, has announced its judgment. By statute or rule of court in most states, an earlier stage is fixed after which the plaintiff cannot insist on such a nonsuit. This stage is sometimes the close of the evidence, sometimes the opening of trial or some specified period prior to trial, sometimes (as in Rule 41(a) of the Federal Rules of Civil Procedure) the filing of an answer or a motion for summary judgment. When these modifications of the common law rule so permit, it is generally held that the parties may agree to a voluntary nonsuit or dismissal without prejudice at a later stage or the court may allow such a dismissal on such terms and conditions as it deems proper.

g. Compulsory nonsuit or dismissal without prejudice. Formerly the plaintiff could not be compelled to submit to a nonsuit or involuntary dismissal without prejudice because of the insufficiency of evidence. By statute, rule of court, or rule of decision in most jurisdictions, however, the court has authority to order a dismissal without prejudice in such circumstances in order to afford the plaintiff another opportunity to make out his case. In a few jurisdictions—and their number is diminishing—it is the practice at the close of the plaintiff's evidence to grant a nonsuit, on defendant's motion, if the evidence is insufficient to justify a verdict in plaintiff's favor, but not to direct a verdict in favor of the defendant unless the defendant has put in his own evidence or has rested without putting in such evidence.

Whether a nonsuit or involuntary dismissal should be granted or a verdict directed is a matter of local practice not within the scope of this Restatement.

h. Effect of statute or rule providing that dismissal shall operate as a bar. In order for Subsection (1)(b) to be applicable, the specification that a dismissal is without prejudice must not be inconsistent with a governing statute or rule in the jurisdiction. For example, by statute or rule of court in many jurisdictions, a voluntary dismissal operates as a bar to another action on the same claim when filed by a plaintiff who has once dismissed in any court of the United States or any state an action based on or including that claim. In such circumstances, a notation in the record that a nonsuit or dismissal is "without prejudice," or words to that effect, is not effective because the judgment operates as a bar as a matter of law.

i. Form of direction by the court. It is not necessary that the court employ the words "without prejudice" in order for a nonsuit or dismissal to come within the scope of Subsection (1)(b). What is essential is that the court manifest an intention on the record that the judgment shall not bar another action on the same claim. Thus, for example, if dismissal of an action is

based on the pendency of another action between the parties on the same claim, the dismissal plainly contemplates that the other action shall be allowed to proceed.

j. Dismissals which, by statute or rule of court, do not operate as a bar to another action on the same claim (Subsection (1)(c)). Subsection (1)(c) recognizes the growing importance in this area of statutes and rules of court, which reflect a wide variety of views as to the circumstances in which fairness to the defendant and avoidance of undue burdens on the courts require that a dismissal operate as a bar. Thus even among those states that have statutes or rules closely patterned on Rule 41 of the Federal Rules of Civil Procedure, there are variations, for example as to the time periods when there is a right to a voluntary dismissal, and as to whether certain dismissals (e.g., for failure to prosecute) operate as a bar in the absence of a specification by the court. Among the states whose statutes or rules are not closely patterned on Rule 41, variations are even wider. A few have left the matter largely to the common law, while others have made specific provision as to the availability of nonsuits, or as to the effect of other dismissals before or during trial. Reference to these local materials is essential in determining whether a given judgment operates as a bar.

k. Rationale for Subsection (2). A determination by the court that the plaintiff has no enforceable claim because the action is premature, or because he has failed to satisfy a precondition to suit, is not a determination that he may not have an enforceable claim thereafter, and does not normally preclude him from maintaining an action when the claim has become enforceable. The rule of this Subsection and the rationale behind it shade over into the rule that subsequent events may give rise to a new claim that is not barred by a prior judgment (see §24, Comment f).

The rule stated in this Subsection is applicable whether the fact that the action is premature, or that a precondition has not been satisfied, appears on the face of the pleadings, as a result of pretrial discovery, or from the evidence at trial.

l. Where time for performance has not arrived. The rule stated in this Subsection is applicable to a case in which the time for performance had not arrived when the plaintiff brought the action.

*Illustration:*

5. On January 1, 1972, A sues B alleging that in consideration of the payment of \$100 by A, B agreed to deliver certain goods to A, and that B has failed to deliver the goods. At the trial it appears that the goods were to be delivered on June 1, 1972. The court directs a verdict for B and judgment is given on the verdict for B. A is not precluded from maintaining an action for breach of the contract after June 1, 1972, if B has failed to deliver the goods on or before that day.

m. Where a condition precedent has not been performed. The rule stated in this Subsection is applicable where the liability of the defendant is conditional upon the happening of some event (see Illustration 6). As a matter of substantive law, however, the failure of the plaintiff to establish the existence of the condition precedent in the original action may fix the relationship of the parties so that it is no longer open to him to satisfy that condition. For example, failure of one party to render substantial performance under a contract at the time of suit against the other party for nonpayment may free the other party of any obligation on the contract (see Illustration 7). In addition, the failure of a party to satisfy a condition precedent within a reasonable time may defeat a second action even though the first dismissal does not itself operate as a bar.

*Illustrations:*



6. A suffers personal injuries when hit by a car driven by B, and brings an action against B's insurer to recover for those injuries. The action is dismissed on the ground that, in the absence of a judgment against B, no action can be brought by A against B's insurer. A is not precluded from suing the insurer after a judgment against B has been obtained.

7. A sues B for failure to pay the contract price for certain services. Judgment is given for B on the ground that A has not rendered substantial performance. If, as a matter of substantive contract law, the effect of the judgment is to discharge B from any duty under the contract, A is barred from bringing a second action for breach of the same contract whether or not he renders, or offers to render, the remaining services due under the contract. See Restatement, Second, Contracts §237.

n. Unfair to subject defendant to a second action. The rule of this Subsection is not an inflexible one. In some instances, the doctrines of estoppel or laches could require the conclusion that it would be plainly unfair to subject the defendant to a second action.

## §21 Judgment for Defendant on His Counterclaim

(1) Where the defendant interposes a counterclaim on which judgment is rendered in his favor, the rules of merger are applicable to the claim stated in the counterclaim, except as stated in Subsection (2).

(2) Where judgment on a counterclaim is rendered in favor of the defendant, but he is unable to obtain full recovery in the action because of the inability of the court to render such a judgment and the unavailability of such devices as removal to another court or consolidation with another action in the same court, the defendant is not precluded from subsequently maintaining an action for the balance due on the claim stated in the counterclaim.

For statement of the general rule of merger and its exceptions, see §§18, 26.

### **Comment:**

a. Effect of judgment for defendant on the counterclaim. A defendant who interposes a counterclaim is, in substance, a plaintiff as far as the counterclaim is concerned. The general rule of merger stated in §18, and its exceptions in §26, are therefore applicable: the claim asserted in the counterclaim will normally be merged in the judgment if the defendant obtains judgment in his favor on the counterclaim.

The rule stated in this Subsection is applicable whether or not the claim stated in the counterclaim is liquidated, whether or not the plaintiff has obtained judgment in his favor on his claim against the defendant, and whether or not there is an affirmative award to the plaintiff because the plaintiff proved his claim and his judgment exceeded in amount the judgment on the defendant's counterclaim. See Illustrations 1 and 2.

#### *Illustrations:*

1. A brings an action against B for breach of a contract. B denies that he broke the contract, and sets up by way of counterclaim a claim against A for breach of another contract. At the trial there is a verdict for A on the first contract for \$200, and a verdict for B on the second contract for \$300, and judgment is given for B for \$100. B can maintain an action against A on the judgment, but cannot maintain an action on the contract which was the subject of the counterclaim, even though he may now be able to prove greater damages than the jury awarded him.

2. The facts are as stated in Illustration 1, except that the verdict for A is for \$300 and the verdict for B is for \$200, and the judgment is for A for \$100. B cannot maintain an action on the contract which was the subject of the counterclaim.

b. Rationale for Subsection (2). In most jurisdictions, it is provided by statute or rule that an affirmative judgment may be rendered in favor of the defendant on his counterclaim. Even where no such judgment may be rendered, it may be possible for the defendant to bring a separate action in the same court and to have it consolidated with the original action against him. And if the original action is brought in a court of limited jurisdiction, it is frequently provided that a defendant having a counterclaim exceeding that limit may have the entire case transferred to a competent court. Nevertheless there may be instances when a defendant is

unable to obtain full recovery on a counterclaim because the law imposes a limitation on the authority of the court to render such a judgment and devices such as removal or consolidation are unavailable (see Illustration 3), or because the plaintiff is suing as an assignee and is not personally liable on the counterclaim (see Illustration 4).

It is true that in these instances the defendant, under the rule in Subsection (2), is allowed to split his claim by employing it partially as a defense to the plaintiff's claim and partially as a basis for a subsequent action. But since the plaintiff has selected the time and place of suit, it would be unfair to the defendant to put him to the choice on the one hand of permitting the plaintiff to recover against him and bringing a separate action, or on the other hand of preventing the plaintiff's recovery only by the entire extinguishment of his claim.

*Illustrations:*

3. In a court that has jurisdiction to give judgments for not more than \$100, A brings an action against B on a promissory note for \$60. B denies that he executed the note and pleads by way of counterclaim a claim against A for damages for breach of another contract. (The law of the state where the action is brought does not allow removal of the entire case to a court of general jurisdiction under such circumstances, nor does it provide any other device for recovery of more than \$100 in the original action.) At the trial it is determined that B did not execute the note and that A is liable for breach of contract in the amount of \$500. Judgment is given that B recover from A \$100. B is not precluded from subsequently maintaining an action against A for breach of the same contract. (The application of the doctrine of issue preclusion in a subsequent action is governed by §§27, 28.)

4. A (B's assignee) sues C on a claim for \$300 which B had against C for money lent. C sets up a defense to this claim and pleads by way of counterclaim a claim for \$500 against B which arose before the assignment and of which A had notice at the time of the assignment. At the trial there is a verdict for A on his claim and a verdict for C on the counterclaim, and judgment is given that A recover nothing. C is not precluded by the judgment from subsequently maintaining an action against B to recover on the same claim as that interposed as a counterclaim.

c. Effect of judgment on subsequent actions. Whenever a subsequent action is permitted to be brought on the same claim as that stated in a prior counterclaim, the principle of direct estoppel applies to issues actually litigated and determined in the prior action. See §17 and Comment (d) thereon; §27. If the prior action was litigated in a court of limited jurisdiction, the preclusive effect of any determinations in that court should be governed by the criteria set forth in §28 and Comment d thereon.

d. Where ruling denying judgment of full recovery for defendant is erroneous. The rule of this Subsection is applicable where a judgment awarding full recovery for the defendant on his counterclaim is denied on the ground of the court's inability or lack of authority to render such a judgment, although the ruling is erroneous. See §26 and Comment d thereon.

## §22 Effect of Failure to Interpose Counterclaim

(1) Where the defendant may interpose a claim as a counterclaim but he fails to do so, he is not thereby precluded from subsequently maintaining an action on that claim, except as stated in Subsection (2).

(2) A defendant who may interpose a claim as a counterclaim in an action but fails to do so is precluded, after the rendition of judgment in that action, from maintaining an action on the claim if:

(a) The counterclaim is required to be interposed by a compulsory counterclaim statute or rule of court, or

(b) The relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action.

### **Comment:**

a. Rationale for Subsection (1). In the absence of a statute or rule of court otherwise providing (see Subsection (2)(a) and Comment e), the defendant normally has the option of interposing a claim as a counterclaim or of bringing a separate action against the plaintiff. The justification for the existence of such an option is that the defendant should not be required to assert his claim in the forum or the proceeding chosen by the plaintiff but should be allowed to bring suit at a time and place of his own selection.

Even in jurisdictions having a statute or rule making certain counterclaims compulsory, such provisions may not apply when no answer or other responsive pleading is filed, and generally do not apply when the counterclaim does not arise out of the same transaction or occurrence as the plaintiff's claim. See Rule 13(a) of the Federal Rules of Civil Procedure, quoted in Comment e, below.

b. Where facts constituting defense are ground for counterclaims. In the absence of a statute or rule of court otherwise providing, the defendant's failure to allege certain facts either as a defense or as a counterclaim does not normally preclude him from relying on those facts in an action subsequently brought by him against the plaintiff. See Subsection (2)(b) and Comment f thereon for discussion of the exception to this rule. The failure to interpose a defense to the plaintiff's claim precludes the defendant from thereafter asserting the defense as a basis for attacking the judgment (see §18). But the defendant's claim against the plaintiff is not normally merged in the judgment given in that action, and issue preclusion does not apply to issues not actually litigated (see §27). The defendant, in short, is entitled to his day in court on his own claim.

#### *Illustrations:*

1. A brings an action against B for the negligent driving of an automobile by B resulting in a collision with an automobile driven by A. B fails to plead and judgment by default is given against him. B is not precluded from subsequently maintaining an action against A for his own injuries on the ground that those injuries were the result of A's negligence.

2. A, a physician, brings an action against B for the price of medical services rendered to B. B fails to plead and judgment by default is given against him. B is not precluded from subsequently maintaining an action against A for malpractice relating to the services sued upon in the prior action. (B is precluded, however, from seeking restitution of any amount paid pursuant to the judgment. See Comment f.)

3. A brings an action against B for the purchase price of a boiler sold by A to B. B defends on the sole ground that the price has been paid, and judgment is given for A. B is not precluded from subsequently maintaining an action against A, in which he alleges that A was guilty of breach of warranty and that the boiler was defective and exploded, causing damage to B. (B is precluded, however, from seeking restitution of any amount paid pursuant to the judgment. See Comment f.)

c. Defense and counterclaim—Judgment for plaintiff; issue preclusion. Where the same facts constitute a ground of defense to the plaintiff's claim and also a ground for a counterclaim, the defendant alleges those facts as a defense but not as a counterclaim, and after litigation of the defense judgment is given for the plaintiff, the rules of issue preclusion apply. See §§27, 28. Those rules will normally preclude relitigation, in a second proceeding between the parties, of issues determined in the first proceeding.

*Illustration:*

4. A, a physician, brings an action against B for the price of medical services rendered to B. B in his answer alleges that A was negligent and that the services were of no value. It is determined that A was not negligent, and judgment is given for A. B is precluded from thereafter relitigating the issue of A's negligence in an action against A for injuries caused by A's alleged malpractice relating to the services sued upon in the prior action.

d. Defense and counterclaim—Judgment for defendant; splitting claims. Where the same facts constitute a defense to the plaintiff's claim and a ground for counterclaim, and the defendant sets up these facts as a defense but not as a counterclaim, and after litigation of the defense judgment is given for the defendant, the defendant is not precluded by the rule of merger from maintaining a subsequent action against the plaintiff based upon these facts. See Illustration 5. In the subsequent action, the rules of issue preclusion (see §§27, 28) will apply to issues litigated and determined in the first action.

In the early law a defendant in an action at law having some equitable ground for resisting the action could not interpose it as a defense but had to assert it, if at all, in an independent suit in equity which would serve as a check upon the law action. (A common example was a claim of fraud, mistake, or duress as a ground for rescission of a contract that was the subject of an action at law.) Later it became possible for the defendant in such a situation to interpose the equitable matter as a defense to the action at law, and such a course is now generally open. For most purposes, it is of no consequence whether such equitable matter is categorized as a defense or a counterclaim, but it is significant for purposes of applying the rule against splitting. Because of the difficulty of determining whether or not a particular defense should be considered "equitable" in such cases, application of the rule against splitting should turn on whether the defendant's grounds for resisting the claim are cast as a defense or as a counterclaim; if the latter, the rule will preclude a later action on the same claim. Though formalistic, such an approach facilitates predictability and obviates the need for historical inquiry into the scope of equity jurisdiction. See Illustration 6.

*Illustrations:*

5. A brings an action against B for the negligent driving of an automobile by B resulting in a collision with an automobile driven by A. B in his answer denies that he was negligent and alleges that the collision was due to A's negligence. After trial of these issues judgment is given for B. B is not precluded by the doctrine of merger from thereafter maintaining an action against A for the damage done to him by the collision.

6. A brings an action against B for breach of contract. Judgment is rendered for B on the ground that the contract was obtained by fraud. B is not precluded from thereafter bringing an action against A for damages resulting from the fraud if the ground was asserted as a defense, but is precluded if it was asserted as a counterclaim for rescission.

e. Compulsory counterclaim statutes and rules of court. Rule 13(a) of the Federal Rules of Civil Procedure provides that, with certain exceptions, "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against the 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." Failure to interpose such a counterclaim by a defendant who has appeared precludes its assertion in a subsequent action.

Many states have adopted compulsory counterclaim statutes or rules of court similar or identical to Federal Rule 13(a). The relevant provisions of governing statutes and rules must therefore be consulted to determine the result of the failure to interpose a counterclaim in a particular jurisdiction. (Such provisions may require dismissal of a second action even while the initial action, in which the counterclaim could have been asserted, is still pending.)

*Illustrations:*

7. The facts are the same as in Illustration 3 but the action by A against B is brought in a jurisdiction having a rule identical to Rule 13 of the Federal Rules of Civil Procedure. B is precluded from thereafter bringing an action against A for breach of warranty.

8. The facts are the same as in Illustration 7 but B files only a motion to dismiss for failure to state a claim, and the motion is granted. If such a motion is not "a pleading" within the meaning of the compulsory counterclaim rule, B is not precluded from thereafter bringing an action against A for damage done to him by the collision.

f. Special circumstances under which failure to interpose a counterclaim will operate as a bar. Normally, in the absence of a compulsory counterclaim statute or rule of court, the defendant has a choice as to whether or not he will pursue his counterclaim in the action brought against him by the plaintiff. There are occasions, however, when allowance of a subsequent action would so plainly operate to undermine the initial judgment that the principle of finality requires preclusion of such an action. This need is recognized in Subsection (2)(b).

For such an occasion to arise, it is not sufficient that the counterclaim grow out of the same transaction or occurrence as the plaintiff's claim, nor is it sufficient that the facts constituting a defense also form the basis of the counterclaim. The counterclaim must be such that its successful prosecution in a subsequent action would nullify the 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 (see Illustration 9), or by depriving the plaintiff in the first action of property rights vested in him under the first judgment (see Illustration 10). Ordinarily the conclusion that the subsequent action could not be maintained under Subsection (2)(b) would not be reached unless the prior action had

eventuated in a judgment for plaintiff since only in such a case would there be the threat of nullification of the judgment or of impairment of rights to which the Subsection is addressed.

The instances in which this Subsection applies are to be distinguished from instances in which the defendant has grounds for relief from the judgment that were not available to him in the form of a counterclaim in the original action. See Chapter 5. In addition, in some jurisdictions, continued separation of law and equity may necessitate a separate equitable action by the defendant in order to assert matters which, under most procedural systems, may be asserted as a defense or counterclaim in the original action. Cf. §26(c) and Comment c thereon.

*Illustrations:*

9. A brings an action against B for failure to pay the contract price for goods sold and delivered and recovers judgment by default. After entry of final judgment and payment of the price, B brings an action against A to rescind the contract for mutual mistake, seeking restitution of the contract price and offering to return the goods. The action is precluded.

10. A brings an action against B to quiet title to certain real estate and obtains judgment by default. B then brings an action against A to quiet title to the same property, alleging that at the time of the first action, B had acquired title to the property by adverse possession. The action is precluded.

### §23 Judgment for Plaintiff on Defendant's Counterclaim

Where the defendant interposes a claim as a counterclaim and a valid and final judgment is rendered against him on the counterclaim, the rules of bar are applicable to the judgment.

For statement of the general rule of bar and its exceptions, see §§19, 20, and 26.

**Comment:**

Rationale. A defendant who interposes a counterclaim is, in substance, a plaintiff, as far as the counterclaim is concerned, and the plaintiff is, in substance, a defendant. Thus under the general rule of bar stated in §19, if a judgment is rendered against the defendant on his counterclaim, he cannot thereafter maintain an action on the claim stated in the counterclaim unless the judgment does not operate as a bar under the exceptions stated in §§20 and 26.



## §24 Dimensions of “Claim” for Purposes of Merger or Bar—General Rule Concerning “Splitting”

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff’s claim pursuant to the rules of merger or bar (see §§18, 19), the 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.

(2) What factual grouping constitutes a “transaction”, and what groupings constitute a “series”, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.

The general rule of this Section is exemplified in §25, and is subject to the exceptions stated in §26.

### **Comment:**

a. Rationale of a transactional view of claim. In defining claim to embrace all the remedial rights of the plaintiff against the defendant growing out of the relevant transaction (or series of connected transactions), this Section responds to modern procedural ideas which have found expression in the Federal Rules of Civil Procedure and other procedural systems.

“Claim,” in the context of *res judicata*, has never been broader than the transaction to which it related. But in the days when civil procedure still bore the imprint of the forms of action and the division between law and equity, the courts were prone to associate claim with a single theory of recovery, so that, with respect to one transaction, a plaintiff might have as many claims as there were theories of the substantive law upon which he could seek relief against the defendant. Thus, defeated in an action based on one theory, the plaintiff might be able to maintain another action based on a different theory, even though both actions were grounded upon the defendant’s identical act or connected acts forming a single life-situation. In those earlier days there was also some adherence to a view that associated claim with the assertion of a single primary right as accorded by the substantive law, so that, if it appeared that the defendant had invaded a number of primary rights conceived to be held by the plaintiff, the plaintiff had the same number of claims, even though they all sprang from a unitary occurrence. There was difficulty in knowing which rights were primary and what was their extent, but a primary right and the corresponding claim might turn out to be narrow. Thus it was held by some courts that a judgment for or against the plaintiff in an action for personal injuries did not preclude an action by him for property damage occasioned by the same negligent conduct on the part of the defendant—this deriving from the idea that the right to be free of bodily injury was distinct from the property right. Still another view of claim looked to sameness of evidence; a second action was precluded where the evidence to support it was the same as that needed to support the first. Sometimes this was made the

sole test of identity of claim; sometimes it figured as a positive but not as a negative test; that is, in certain situations a second action might be precluded although the evidence material to it varied from that in the first action. Even so, claim was not coterminous with the transaction itself.

The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

This definition of claim to engross the relevant transaction, as envisioned in this Topic, simplifies the application of the rules of merger and bar (see, for example, §25, Comment a); it enhances the benefits deriving from those rules without causing undue hardship. Equating claim with transaction, however, is justified only when the parties have ample procedural means for fully developing the entire transaction in the one action going to the merits to which the plaintiff is ordinarily confined. A modern procedural system does furnish such means. It permits the presentation in the action of all material relevant to the transaction without artificial confinement to any single substantive theory or kind of relief and without regard to historical forms of action or distinctions between law and equity. A modern system allows allegations to be made in general form and reads them indulgently; it allows allegations to be mutually inconsistent subject to the pleader's duty to be truthful. It permits considerable freedom of amendment and is willing to tolerate changes of direction in the course of litigation. Parties can resort to compulsory processes besides private investigations to ascertain the facts surrounding the transaction, thereby measurably avoiding surprise at the trial. The pretrial conference contributes to the same end of developing the whole case. 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.

The developments here described should be seen in relation to modern liberal provisions as to counterclaims and joinder of claims and parties as well as the liberal attitude taken by federal courts toward "ancillary" and "pendent" jurisdiction. It should be noted, however, that if more than one party has a right to relief arising out of a single transaction, each such party has a separate claim for purposes of merger and bar.

Because the transactional view set forth in this Section assumes as the present standard a modern system of procedure with the general characteristics described in this Comment, there is a need to allow exceptions to the general rule where the judgment is rendered in a jurisdiction whose procedural system has not been modernized, especially one where unification of law and equity has not been achieved. These exceptions are set forth in §26(c).

b. Transaction: application of a pragmatic standard. The expression "transaction, or series of connected transactions," is not capable of a mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the cases. And underlying the standard is the need to strike a delicate balance between, on the one hand, the interests of the defendant and of the courts in bringing litigation to a close and, on the other, the interest of the plaintiff in the vindication of a just claim.

It should be emphasized that the concept of a transaction is here used in the broad sense it has come to acquire in the interpretation of statutes and rules governing pleading and other

aspects of civil procedure. Thus the overtones of voluntary interchange often associated with the term in normal speech do not obtain.

In general, the expression connotes a natural grouping or common nucleus of operative facts. Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded. But the opposite does not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series.

c. Transaction may be single despite different harms, substantive theories, measures or kinds of relief. A single transaction ordinarily gives rise to but one claim by one person against another. When a person by one act takes a number of chattels belonging to another, the transaction is single, and judgment for the value of some of the goods exhausts the claim and precludes the injured party from maintaining one action for the remainder. In the more complicated case where one act causes a number of harms to, or invades a number of different interests of the same person, there is still but one transaction; a judgment based on the act usually prevents the person from maintaining another action for any of the harms not sued for in the first action. See Illustrations 1 and 2.

That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief. See Illustrations 3 and 4.

*Illustrations:*

1. A and B, driving their respective cars, have a collision injuring A and damaging his car. The occurrence is single, and so is A's claim. If A obtains a judgment against B on the ground of negligence for the damage to the car, he is prevented by the doctrine of merger from subsequently maintaining an action for the harm to his person.

2. The facts are the same as in Illustration 1, except that B obtains a judgment on the ground that A has failed to prove B's negligence. The preclusion is the same, but explained by the doctrine of bar. (Note: Illustrations 1 and 2 assume that A is the sole owner of the right to recover for harm to his person and to his car. Questions of the effect of subrogation, and partial subrogation, are dealt with in §37.)

3. A lends goods to B on the understanding that B will return them in good condition. Upon B's failure to return A's goods to him, A might conceivably have rights against B upon alternative theories of negligent loss of the goods, breach of a contractual duty to return the goods, or wrongful conversion of the goods, depending upon the precise facts proved or varying emphasis put upon the facts, and A's relief might be for the return of the goods or for money damages (possibly calculated in varying ways). The transaction is single and it follows that if A sues upon it and a judgment is rendered which extinguishes the claim under the rules of merger or bar, A is precluded from suing B a second time, even on a view of the facts or a theory not presented, or a form or measure of relief not sought, in the first action.

4. A and B both mistakenly believe that A is indebted to B. A delivers a chattel to B in payment of the supposed debt. Upon discovery of the mutual mistake, A under the old law

might have alternative recourses as follows: to notify B that he rescinded and to demand return of the chattel and, upon refusal, to sue at law in replevin for return of the chattel (assuming the jurisdiction did not require a trespassory taking to maintain replevin) or in trover for the value of the chattel; to sue at law in general assumpsit for goods sold and delivered; to bring a bill in equity for specific restitution. Under modern law A could still proceed on alternative theories to recover the chattel or its value (possibly calculated in varying ways). The transaction, however, is single and if a judgment is rendered which extinguishes the claim, A is precluded from suing B a second time, even on a theory not presented in the first action.

d. Successive acts or events as transaction or connected series; considerations of business practice. When a defendant is accused of successive but nearly simultaneous acts, or acts which though occurring over a period of time were substantially of the same sort and similarly motivated, fairness to the defendant as well as the public convenience may require that they be dealt with in the same action. The events constitute but one transaction or a connected series. See Illustration 5 and 6, and compare Illustrations 7 and 8 in which the events are not so related as to constitute one transaction or a connected series.

When a person trespasses daily upon the land of another for a week, although the owner of the land might have maintained an action each day, such a series of trespasses is considered a unit up to the time when action is brought. Thus if in the case stated the landowner were to bring suit on January 15, including in his action only the trespass on January 10, and obtain a judgment, he could not later maintain an action for the trespasses on January 11 through January 15.

When a number of items are overdue on a running account between two persons, and the creditor, bringing an action on the account, fails to include one among several past due items, judgment for or against the creditor precludes a further action by him to recover the omitted item. This conforms to ordinary commercial understanding and convenience. On the other hand, when there is an undertaking, for which the whole consideration has been previously given, to make a series of payments of money—perhaps represented by a series of promissory notes, whether or not negotiable—the obligation to make each payment is considered separate from the others and judgment can be obtained on any one or a number of them without affecting the right to maintain an action on the others. The same applies to the obligations represented by coupons attached to bonds or other evidences of indebtedness which are similarly considered separate. See also Illustration 9.

*Illustrations:*

5. A brings an action against B Co., a street railway company, alleging that the motorman was negligent in starting the car while A was alighting and that as a result A broke his arm. After a verdict and judgment for A, A brings a new action against B Co. alleging that after alighting from the car he fell into a trench negligently left by B Co. beside the road and broke his leg. The action is precluded.

6. On the false accusation that A was engaging in disorderly conduct at a racetrack, B Co., the owner of the track, caused A in successive acts to be assaulted, slandered, physically detained, and prosecuted criminally. A sues B Co. for the assault and slander. If a judgment is rendered that extinguishes the claim, A may not maintain a second action for the detention or for malicious prosecution.

7. B owes A \$500 on an obligation that matured on February 1. A visits B on June 1 and requests payment, whereupon B commits an unprovoked assault upon A. A sues B on the debt and recovers. A may maintain a second action against B based on the assault.

8. A, under a contract of employment with B, is discharged from the job on the alleged ground of his technical incompetence. A year later B, in response to an inquiry from C, a prospective employer of A, states that A is an habitual drunkard. A may sue B and recover against him for wrongful discharge without thereby forfeiting his right to sue B on the basis of his report to C.

9. A pays state income taxes for the years 1973 and 1974 and state property tax for the year 1973. Each of these annual taxes is considered separate so that actions for refund of these tax payments respectively could be maintained without fear of splitting.

e. Multiple parties. The rule against splitting as stated in this Section takes as its model a claim and action by a single plaintiff against a single defendant. A transaction may, however, involve more than two persons, and an adjudication between two parties may have legal effects upon third persons who may or may not have been involved in the transaction. As to situations of these types, see §§36, 37, 41- 61.

The problem of splitting as it may affect a person not a party to an action is dealt with at §§37, 45- 58. Splitting in relation to assignment of, or subrogation to a claim is dealt with at §§37 and 55.

f. Change of circumstances. Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first. See Illustrations 10-12. Where important human values—such as the lawfulness of a continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.

Compare §13, Comment c (judgments granting or denying continuing relief); §20(2) (judgment for defendant when action is premature); §25, Comment c (attempts to recover increased damages); §26(f) (extraordinary situations where merger or bar is inapposite).

*Illustrations:*

10. A brings an action against B to set aside a transfer of land on the ground that it was procured by fraud. A fails to prove the fraud and judgment is given for the defendant. A is not precluded from maintaining an action to recover the land on the ground that since judgment was rendered B has forfeited the land to the plaintiff for breach of a condition in the conveyance.

11. A judgment of divorce awards custody of a minor child of the marriage to the wife after a contest over her suitability as a mother. Upon a later demonstration by the husband, on the basis of subsequent experience, that the wife is in fact unsuitable, custody may be awarded to the husband.

12. The government fails in an action against a defendant under an antitrust statute for lack of adequate proof that the defendant participated in a conspiracy to restrain trade. The government is not precluded from a second action against the same defendant in which it relies on conspiratorial acts post-dating the judgment in the first action, and may rely also on acts preceding the judgment insofar as these lend significance to the later acts.

g. When the jurisdiction of the court is limited. The rule stated in this Section as to splitting a claim is applicable although the first action is brought in a court which has no jurisdiction to

give a judgment for more than a designated amount. When the plaintiff brings an action in such a court and recovers judgment for the maximum amount which the court can award, he is precluded from thereafter maintaining an action for the balance of his claim. See Illustrations 13 and 15. It is assumed here that a court was available to the plaintiff in the same system of courts—say a court of general jurisdiction in the same state—where he could have sued for the entire amount. Compare §26, Comment c. The same considerations apply when the first action is brought in a court which has jurisdiction to redress an invasion of a certain interest of the plaintiff, but not another, and the action goes to judgment on the merits. See Illustration 14. The plaintiff, having voluntarily brought his action in a court which can grant him only limited relief, cannot insist upon maintaining another action on the claim.

Compare §25, Comment e, and §26, Comment d(1), on special problems of state and federal competencies.

*Illustrations:*

13. A brings an action against B for negligently causing him personal injury. Instead of suing in a court of general jurisdiction of the state, A brings his action in a court which has no jurisdiction to give a judgment for more than \$500. At the trial A's damages are assessed at \$1,000. Judgment is given for A for \$500. A cannot maintain an action against B to recover further damages.

14. In an automobile collision, A is injured and his car damaged as a result of the negligence of B. Instead of suing in a court of general jurisdiction of the state, A brings his action for the damage to his car in a justice's court, which has jurisdiction in actions for damage to property but has no jurisdiction in actions for injury to the person. Judgment is rendered for A for the damage to the car. A cannot thereafter maintain an action against B to recover for the injury to his person arising out of the same collision.

15. A person suing upon certain claims against the United States has a choice of courts: he may sue in a United States District Court, but in that event he may not recover in excess of \$10,000; alternatively he may sue in the United States Court of Claims, and recovery is then unlimited. A sues the United States in the District Court; his claim is assessed at \$25,000; he recovers judgment for \$10,000. A cannot maintain an action in the Court of Claims to recover further damages.

h. Joinder of multiple claims. As provided in this Section, a plaintiff who brings an action upon part of a claim and succeeds or loses on the merits may not sue to recover upon the rest of the claim. Thus the plaintiff is under some compulsion not to split a claim. There is no like compulsion on a plaintiff who has a number of claims against a defendant to join them in a single action; he may join them if he wishes, but he is not obliged to do so out of fear that he will lose any claims that he omits to join. Joinder of multiple claims is permissive, not compulsory. Rule 18(a) of the Federal Rules of Civil Procedure is typical. It provides: "Joinder of claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party."

This still leaves the possibility that a plaintiff, actually having a single claim but mistakenly believing that he has a number of them, may commence a limited lawsuit and then run afoul of the rule against splitting. A plaintiff must take this risk into account in framing his action.

As to counterclaims, permissive or compulsory, see §§21- 23.

## §25 Exemplifications of General Rule Concerning Splitting

The rule of §24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action

- (1) To present evidence or grounds or theories of the case not presented in the first action, or
- (2) To seek remedies or forms of relief not demanded in the first action.

### **Comment:**

a. Evidence, grounds, theories of recovery, remedies, forms of relief. It is difficult to draw clear lines among these terms. Fortunately, the sense of §§24 and 25 is such that sharp delineations are not required.

The rule of §24 puts some pressure on the plaintiff to present all his material relevant to the claim in the first action; this is similar to the coercion on the defendant to produce all his defenses (see §18). The material to be brought forward comprises, roughly, “evidence”—connoting facts; “grounds”—facts grouped under a legal characterization; “theories of the case”—premises drawn from the substantive law; “remedies or forms of relief”—measures or kinds of recovery.

The purpose of the present Section is to show how the rule of §24 applies to various situations, some of which have given trouble under earlier formulations of the concept of claim (see §24, Comment a).

b. Successive actions based on different evidence supporting the same ground. A mere shift in the evidence offered to support a ground held unproved in a prior action will not suffice to make a new claim avoiding the preclusive effect of the judgment. It is immaterial that the plaintiff in the first action sought to prove the acts relied on in the second action and was not permitted to do so because they were not alleged in the complaint and an application to amend the complaint came too late. See Illustrations 1-3.

#### *Illustrations:*

1. A brings an action against B, alleging that A was employed by B, that B did not furnish A a safe place to work, and that as a result A suffered personal injuries. After a verdict and judgment for B, A brings a new action for the same injuries alleging other acts of negligence on the part of B, for example, improper instruction by B's foreman. The second action is precluded.

2. A sues B for breach of a contract calling for delivery of certain appliances, alleging as the breach that the appliances did not meet the agreed specifications. After judgment for B, A commences a second action, this time alleging late delivery of the appliances as the breach. The second action is precluded.

3. A brings an action to recover damages for his expulsion from the B society, alleging that his expulsion was wrongful because of want of notice. After judgment for B, A commences a second action to recover damages for the same expulsion, this time alleging that the expulsion was wrongful because he was not given a proper hearing. The second action is precluded.

c. Attempts to recover increased damages. Typically, even when the injury caused by an actionable wrong extends into the future and will be felt beyond the date of judgment, the

damages awarded by the judgment are nevertheless supposed to embody the money equivalent of the entire injury. Accordingly, if a plaintiff who has recovered a judgment against a defendant in a certain amount becomes dissatisfied with his recovery and commences a second action to obtain increased damages, the court will hold him precluded; his claim has been merged in the judgment and may not be split. See Illustrations 4-5. It is immaterial that in trying the first action he was not in possession of enough information about the damages, past or prospective, or that the damages turned out in fact to be unexpectedly large and in excess of the judgment. Similarly, when judgment has gone against the defendant in a certain amount, he may not maintain an action against the former plaintiff to reclaim part of the judgment when it appears from subsequent events that the judgment was excessive.

In cases in which a second action is precluded as stated above, it may be open to a party to make a direct attack on the judgment by appeal for any errors in assessing the damages. In exceptional cases relief from the judgment can possibly be secured by motion for a new trial on newly discovered evidence or by other procedures for post-judgment relief. See §71. Also in some instances the substantive law of the jurisdiction may provide for periodic payments, subject to reconsideration on the basis of changed circumstances, or may allow express reservation in the judgment of a party's right, upon the future happening of described events, to claim additional damages (or, possibly, remission of some of the damages awarded in the judgment) (see Illustration 6). Compare §26(b) (express reservation of plaintiff's right to split a claim); §13, Comment c (modification of continuing judgment upon proof of changed circumstances).

*Illustrations:*

4. A brings an action against B for conversion of a derrick, and obtains judgment for the value of the derrick. Thereafter he brings a new action to recover the loss of profits from a valuable contract which he was unable to perform because of the conversion of the derrick. The prior judgment merges the claim and precludes the action.

5. A brings an action against B for conversion of goods, claiming \$50 as damages. B pays this amount into court and judgment for the amount is given for A. A then brings another action for the same conversion, alleging that the goods were worth \$100, and giving credit for the amount he has already received, stating that he had underestimated the value of the goods. The action is precluded.

6. A's farm is injured by the continuous discharge of sulphur dioxide gas by B Co.'s manufacturing plant on adjacent land. In A's nuisance action against B Co., the court finding that the pollution "has continued for several years and will continue for an indefinite period into the future," awards A a certain amount of damages for the "permanent loss of market value" of A's farm. The judgment may provide, if the substantive law permits, that A has a right to seek additional damages if the level of pollution caused by defendant's continuing conduct should increase.

d. Successive actions changing the theory or ground. Having been defeated on the merits in one action, a plaintiff sometimes attempts another action seeking the same or approximately the same relief but adducing a different substantive law premise or ground. This does not constitute the presentation of a new claim when the new premise or ground is related to the same transaction or series of transactions, and accordingly the second action should be held barred. See Illustrations 7-9.

*Illustrations:*



7. A brings an action against B for the cancellation of a contract made with B, alleging that the contract was procured by the undue influence and fraud of B. After verdict and judgment for B, A brings a new action for the cancellation of the contract, alleging mental incompetency of A. The prior judgment is a bar.

8. A sues B alleging that while A was riding in an automobile owned and driven by B, a collision occurred which resulted from wilful and wanton misconduct by B, and that A suffered personal injuries. After verdict and judgment for B, A brings a new action for the same injury alleging that A was a passenger for hire and that the injury resulted from B's negligence. The prior judgment bars the action.

9. The trustee in bankruptcy of A Co. commences an action against B Co. charging that B Co., in order to destroy A Co. as a competitor, acquired the controlling stock interest in A Co. and manipulated its affairs so that it was forced into bankruptcy. This action is brought in a federal court under section 7 of the Clayton Act, and judgment is rendered for the defendant because the trustee fails to establish the necessary elements of a violation of that statute. The trustee is precluded from a second action against B Co. charging substantially the same acts but as part of a conspiracy under sections 1 and 2 of the Sherman Act.

e. State and federal theories or grounds. A given claim may find support in theories or grounds arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground. If however, the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded. See Illustrations 10-11.

Compare §26(1)(c), Comment c(1), dealing with the case where the plaintiff is unable for jurisdictional reasons to present both the state and federal theories or grounds in the first action. See also §86.

*Illustrations:*

10. A commences an action against B in a federal court for treble damages under the federal antitrust laws. After trial, judgment is entered for the defendant. A then seeks to commence an action for damages against B in a state court under the state antitrust law grounded upon substantially the same business dealings as had been alleged in the federal action. Even if diversity of citizenship between the parties did not exist, the federal court would have had "pendent" jurisdiction to entertain the state theory. Therefore unless it is clear that the federal court would have declined as a matter of discretion to exercise that jurisdiction (for example, because the federal claim, though substantial, was dismissed in advance of trial), the state action is barred.

11. A sues B on a common law basis in a state court for unfair competition. After trial judgment is entered for the defendant. A then attempts to bring an action against B in a federal court upon the same behavior, now claiming infringement of A's federally protected trademark. The action is barred. The claimed violation of federal right could have been urged as a ground of liability in the state court action, as state courts have concurrent jurisdiction with the federal courts to enforce that right.

f. Successive actions for different remedies. As the result of a single transaction or a connected series of transactions giving rise to a unitary claim, the plaintiff may be entitled to a number of alternative or cumulative remedies or forms of relief against the defendant. In a modern system of procedure it is ordinarily open to the plaintiff to pursue in one action all the possible remedies whether or not consistent, whether alternative or cumulative, and whether of the types historically called legal or equitable.

Therefore it is fair to hold that after judgment for or against the plaintiff, the claim is ordinarily exhausted so that the plaintiff is precluded from seeking any other remedies deriving from the same grouping of facts.

Preclusion is narrower when a procedural system in fact does not permit the plaintiff to claim all possible remedies in one action; see §26(c) and Comment c(2) thereon.

g. Alternative remedies for tort. When a person has alternative remedies in tort or for restitution, he may in the same action apply for the two remedies alternatively and try them both out. On the other hand he may content himself from the outset with seeking only one remedy. In either case, judgment for the plaintiff for one of the remedies or against him with respect to the relief sought ordinarily extinguishes the entire claim. See Restatement of Restitution §§145-46.

Thus where the defendant converts and sells the plaintiff's chattel, the plaintiff is entitled to maintain an action in tort for conversion, or for money had and received to recover the amount of the proceeds of the sale of the chattel. Judgment granting or denying one of the remedies precludes the plaintiff from another action on the claim under the rules of merger or bar even if he did not seek the other alternative remedy.

In an action for conversion of a chattel a judgment for the plaintiff for the value of the chattel precludes him from maintaining a subsequent action of replevin. Since, however, the judgment until it is satisfied does not transfer to the defendant the title to the chattel, the plaintiff is not deprived of the privilege of self-help and may seize the chattel. In that case, however, he loses his right to enforce the judgment. See Restatement of Restitution §145, Comment b.

h. Action for breach of contract or for restitution. When an enforceable contract has existed between plaintiff and defendant, and the plaintiff asserts that he has performed in accordance with the terms of the contract, but that the defendant has failed to perform his corresponding duties, the remedies or forms of relief that can typically be claimed by the plaintiff are recovery of the value of the defendant's promised performance less the value of any as yet unperformed part of the plaintiff's promised performance (called an action for breach of contract), or recovery of the value of what the plaintiff has given in performance of the contract (called an action for restitution). The plaintiff may pursue both remedies alternatively in one action, but whether he chooses to do so or sues for only one of the two remedies, a judgment in the action which extinguishes the claim under the rules of merger or bar precludes the plaintiff from another action on the same transaction. See Illustrations 12-14.

There are situations where it is found that no enforceable contract has existed, and the defendant is accordingly not liable for breach of contract, but the plaintiff would nevertheless be entitled to the remedy of restitution consisting of the value of the benefit received by the defendant from the plaintiff. Here, too, the plaintiff is free to litigate the entire transaction in one lawsuit, is expected to do so, and is not permitted simply to try out one theory after the other in separate actions.

Ordinarily the plaintiff avoids any question of being precluded from a remedy through merger or bar by seeking all plausible remedies at the outset of the action, proving his full case, and securing the recovery to which he is entitled on the facts. If the plaintiff fears that he may suffer in a strategic sense from mingling his case for breach of contract with his alternative case for restitution, he may apply to the court for the clear separation of the issues for trial.

If the plaintiff was initially confident of what he could prove and confined his suit to breach of contract, only to find that that remedy was doubtful, he would ordinarily react by amending promptly to extend the suit to the restitutionary remedy (having obtained leave of court, if needed, for the amendment) and the action would proceed on the changed basis. In many procedural systems, it is provided by statute or rule that "leave to amend shall be freely given when justice so requires." See, for example, Rule 15(a) of the Federal Rules of Civil Procedure. And even in the absence of such a provision, it is clear that the scope of a trial court's discretion to refuse an amendment is considerably narrower when the effect of the refusal is wholly to preclude presentation of a theory of recovery than it is when the question is simply one of the time and place of presentation.

In exceptional situations, despite diligent preparations on either side, it may be unfair to expect the plaintiff to support a sudden shift of position or the defendant to meet it. In such an event the court, in entering judgment for the defendant (the charge of breach of contract having failed of proof), may declare that the judgment is without prejudice to a new trial or a further action in which the plaintiff may seek the restitutionary remedy. Thereby any unjust retention of benefits may be prevented; see §26(b) and Comment b thereon. See Illustrations 15-16.

*Illustrations:*

12. A and B enter into a contract by which A agrees to deliver a horse to B and B agrees to deliver a cow to A. A delivers the horse to B but B refuses to deliver the cow to A. A sues B for the recovery of the value of the cow. The jury finds a verdict for A for \$100 and judgment is given for A for that amount. A is precluded from maintaining an action against B for the value of the horse.

13. A and B enter into a contract by which A agrees to deliver a horse and a mare to B and B agrees to deliver a cow to A. A delivers the horse to B and B then refuses to go on with the contract. A sues B for the recovery of the value of the cow less the value of the mare. Upon a jury verdict for A for \$50, judgment is given for A for that amount. A is precluded from maintaining an action against B for the value of the horse.

14. A brings an action against B alleging that A and B entered into a contract by which A agreed to pay B \$100 and B agreed to deliver a horse to A, and that A paid B the \$100 but B refused to deliver the horse. A demands repayment of the \$100. B denies the payment and after trial, A's evidence being inadequate, judgment is entered for B. An action by A for the value of the horse is barred.

15. A brings an action against B for damages on a theory of breach of contract. At trial, A is unable to establish the claimed agreement with sufficient clarity, and judgment goes for B. A is precluded from maintaining an action for restitution of the benefits he conferred upon B through his performance under the agreement until B wrongfully discharged him. When it appeared at the trial that adequate proof of the terms of the agreement might be lacking, A could have applied to amend as far as might be necessary to try the case on a restitutionary theory. If the amendment was refused, A could apply for a declaration in the ensuing

judgment for B that the judgment was without prejudice to a new trial or a fresh action on the restitutionary remedy. (The correctness of a refusal of leave to amend or to make the requested declaration in the judgment could be made the subject of review on appeal.)

16. The situation is the same as in Illustration 15, except that A's action for breach of contract fails (a) because there is no contract owing to mutual mistake, or (b) because the statute of limitations has run, or (c) because the contract is unenforceable under the statute of frauds. Judgment for B in each instance has the ordinary preclusive effect of a judgment for the defendant given for such a reason. A could have requested leave to amend to a restitution theory, attempting thereby to obviate the respective defenses to his action, and ultimately A could have sought a declaration in the judgment to prevent preclusion of the restitutionary theory.

i. "Legal" and "equitable" phases of a claim. When "law" and "equity" with their distinctive remedies were separately administered, a plaintiff had to choose between the two "sides" when he brought his action, and the choice could be difficult, as the dividing line was not exact. Also, it was sometimes impossible to dispose completely in a single action of an entire transaction or controversy, since it might require a combination of legal and equitable remedies. The difficult remedial situation created by the law-equity division naturally had important restrictive effects on the operation of the doctrines of merger and bar. These are overcome when law and equity are "merged" or unified into the "one form of action" so that a pleader may and is expected to demand in a single action any and all remedies suited to the case. The point is emphasized by the customary provision in modern rules or codes of procedure that, except where judgment is by default, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." See Rule 54(c) of the Federal Rules of Civil Procedure.

(1). Remission from "law" to "equity" or "equity" to "law" unnecessary and improper. Formerly, if the plaintiff brought an action at law in which judgment was given for the defendant because the plaintiff's remedy was solely by a suit in equity, the plaintiff was not precluded from maintaining a suit in equity. Conversely, if the plaintiff brought a suit in equity that was dismissed because his remedy was solely by an action at law, the plaintiff was not precluded from maintaining an action at law; this was true, for example, where the suit in equity was dismissed because the plaintiff had an adequate remedy at law, or on the ground of such delay or hardship or impropriety of the plaintiff's conduct as barred a suit in equity but not an action at law.

In a unified system of procedure, the plaintiff in the situations mentioned would ordinarily be entitled to be awarded in the first action any remedy called for by the facts, whether the remedy would formerly have been denominated legal or equitable; hence one action should suffice. See Illustrations 17-18.

(2). "Legal" and "equitable" relief possible in single action. Formerly, a plaintiff who brought a suit in equity to enjoin the continuance of wrongful conduct might not be permitted to demand in the same suit the prior damages resulting from the wrong, or, where the system was somewhat less strict, might be permitted, but would not be obliged to make the demand in the same suit (a demand for "cleanup" damages). Accordingly, judgment in the equity suit either would not preclude an action by the plaintiff at law to recover the damages, or, in the laxer systems, would preclude the action only if the plaintiff had in fact sought the damage remedy in the equity suit. Today, after unification, the damage remedy would be considered part of the unitary claim for purposes of merger and bar. See Illustration 19. So also a

judgment granting or denying specific performance of a contract should preclude an action for money damages for breach.

(3). Alternative relief in a single action on a contract as written or as reformed. Formerly, when the plaintiff brought an action at law for breach of a written contract and failed to prove a breach, and judgment was accordingly given for the defendant, the plaintiff was not precluded from a suit in equity to reform the contract on the ground of mistake or fraud or some other ground, and to enforce the contract as reformed. Today, in a unified system, he would ordinarily be precluded from a second action, assuming, as would very likely be the case, that the facts basing the proposed second action were part of the same transaction as those grounding the first. See Illustration 20.

(4). “Equitable” ground for a claim withheld from an action cannot be used as a defense in a later action. Where an action is brought for cancellation of a contract, and the plaintiff in his complaint alleges certain grounds for cancellation, and at the trial he is unable to prove these grounds and judgment is given against him, and thereafter an action is brought against him for breach of the contract, he cannot defeat the action by setting up as a defense any ground for cancellation that existed at the time of the original action. See Illustration 21. Compare §22(2)(b) and Comment f thereon.

(5). Cross-reference. This Comment i, like the general rule of §24 which it exemplifies, assumes as the present standard situation a modern system of procedure with the general characteristics described in §24, Comment a. For exceptions to the general rule of §24 where the judgment was rendered in a jurisdiction whose procedural system has not been modernized—especially one where unification of law and equity has not been substantially achieved—see §26(c).

*Illustrations:*

17. A sues B seeking specific restitution of grain belonging to A and converted by B. Formerly, if the action was brought in equity it would be dismissed because the plaintiff had an adequate remedy at law, and A would not be precluded from an action at law. In a modern system there would be no reason for dismissal or remission to a second action.

18. A, a manufacturer, contracts with B for the manufacture and delivery by B to A of certain subassemblies in which B is expert. B commits a material breach of contract. It is doubtful whether B’s performance is so special as to entitle A to a judgment of specific performance. Formerly, if A brought an action in equity and the court held that specific enforcement was not available, it might dismiss the action, remitting A to an action at law. In a modern system, A in a single action could demand specific performance or, if that were held unavailable, money damages, and relief would be given as found appropriate. Indeed, appropriate relief could be given without regard to the demands.

19. A student at a state university commences an action against the state authorities seeking to enjoin them from exacting from him tuition charges which, he claims, discriminate unconstitutionally against him, a nonresident of the State, as compared with resident students paying lower tuition charges. Judgment goes for the defendants, the court finding no constitutional deprivation. The student then commences a second action, on Constitutional and other grounds, to secure a refund of a portion of the tuition charges paid. When law and equity were separate, the second action might not be precluded. In a unified system it would be. (If in the first action the student had succeeded in obtaining an injunction and he then sought to bring a second action for a refund, he would likewise be precluded.)

20. A sues B for breach of a written contract claiming money damages. There is no breach unless the contract is interpreted in a certain way. At trial A fails because the court does not accept A's interpretation and rejects parol evidence offered by A as to the meaning of the contract. Formerly the action—an action at law—would have been dismissed but A would be free to commence a suit in equity to reform the contract to accord with what A claims to have been the true intention of the parties. In a modern system A could seek any needed remedy in a single action. Hence if in the first action judgment went for B for failure to prove a breach of the contract as written, and A did not seek reformation in that action, A would be barred from a second action for reformation.

21. A policy insuring against liability from the operation of an automobile is issued by A Insurance Co. to B, the owner of a truck. In operating the truck B injures a third person and the third person recovers against B. A Co. brings a suit in equity to cancel the policy, alleging that it was secured by B by fraud. A Co. fails to prove fraud, and a judgment is given for B. B sues on the policy. A Co. interposes two defenses, alleging that the policy was procured by fraud and that it was issued by an employee of A Co. who was not authorized to issue it. A Co. is precluded by the prior judgment from relying upon either of these defenses.

j. Cumulative remedies. Where the plaintiff may in one action claim two or more remedies cumulatively rather than alternatively, all arising from the same transaction, but seeks fewer than all of these remedies, and a judgment is entered that extinguishes the claim under the rules of merger or bar, he is precluded from maintaining another action for the other remedies. Thus if the plaintiff in an action against another in wrongful possession of his land may claim judgment not only for repossession but for damages for the wrongful detention, but seeks and recovers a judgment for repossession only, he may not maintain another action for damages for the detention. In the older law, when the several cumulative remedies might have to be sued for in successive separate actions (in the case supposed, an action of ejectment followed by an action for trespass for mesne profits), judgment in an action for one remedy would not preclude a second action for another remedy, but today a plaintiff may generally cumulate his remedies in a single action, with the preclusionary results mentioned.

k. Mutually exclusive remedies. A plaintiff is said to have mutually exclusive remedies where, in consequence of a single transaction, he has one remedy if, but only if, a certain proposition is found, and another remedy if, but only if, a contrary proposition is found. Where the plaintiff commences his action in a tribunal or jurisdiction which allows him to demand the two remedies in the alternative upon allegations of the two contrary propositions, the situation is similar to that discussed in Comment g (alternative remedies for tort). The case is otherwise where the plaintiff is obliged for jurisdictional or other reasons to sue in one court or tribunal if he means to base his action on one proposition, and to sue in a different court or tribunal if he means to rely on the contrary proposition. In that situation, if the plaintiff obtains a judgment for one of the remedies, he is precluded from maintaining a second action for the other remedy, but if he fails in one action because the foundational proposition is held not to exist, he may maintain the second action. See Illustration 22.

Compare §26(c) and Comment c(1) thereon.

*Illustration:*

22. A suffers personal injuries in consequence of negligence for which B is responsible. Under the law of the State, if A was an employee of B at the time, his sole remedy is under the workmen's compensation law; if A was not an employee, then he has an ordinary common law action. A applies to the workmen's compensation tribunal but fails because he is found not to

have been B's employee. A is not precluded from maintaining a court action against B on the common law basis.

l. Forms of action. At common law under the formulary system the plaintiff had to cast his action in one appropriate form, or two or more appropriate alternative forms regarded as mutually compatible. He could not join alternative forms that were regarded as mutually repugnant. Thus trover could be joined with trespass upon the case, but trespass and trespass upon the case were repugnant and could not be joined as alternatives even where each was independently appropriate to the facts. If the plaintiff recovered judgment, he was precluded from another action; if judgment went against him for failure to prove the necessary facts, he was likewise precluded; but if judgment went against him because he had selected an inappropriate form, he was not precluded from maintaining another action in the proper remedial form.

Some jurisdictions even after the abolition of the forms of action reached rather similar results under a doctrine called "theory of pleadings." When the plaintiff in his complaint relied upon one theory, he was not entitled to recover on a different theory, even though he had alleged facts sufficient to entitle him to recover on that other theory and had proved those facts at the trial. If judgment was given for the defendant because of such a discrepancy, the plaintiff was held not precluded from maintaining an action on the other theory. So if the plaintiff alleged that he had been induced to enter a described contract by the defendant's fraud, and that he had performed under the contract, but the defendant had failed to give the promised counter-performance, judgment would go for the defendant if the plaintiff failed to prove the fraud, even though he proved his other allegations which made out a case for breach of contract. The plaintiff could then commence a fresh action for breach of contract if the limitations period had not run.

The possibilities of repetitive litigation fostered by the formulary system or the "theory of pleadings" philosophy should be eliminated in a modern system of procedure where, in general, the remedy is to accord with the facts proved and the applicable substantive law without artificial constriction by forms of action or the like.

m. Election of remedies. This subject cannot be fully treated in this Restatement, but the bearing it should have upon res judicata can be briefly sketched.

There are some situations in which a plaintiff who originally had two alternative remedies has by his conduct before bringing an action—followed, perhaps, by justified reliance on the part of the defendant—disentitled himself to one of the remedies. For example, if a buyer, after learning that he has been defrauded, uses and thereby materially alters the condition of the thing bought, he may lose the remedy of rescission for the fraud, involving a tender of return of the thing and recovery of the purchase price, and be confined to an action for deceit, that is, a money recovery of the difference between the value of the thing as falsely represented, and its actual value. The commencement of an action looking to a particular remedy accompanied by prejudicial reliance by the defendant may conceivably have a similar effect by way of estoppel.

Sometimes it is held that the mere beginning of an action for one remedy is itself an election preventing recourse to another remedy deemed in some sense "inconsistent". In a mature procedural system the mere commencement of an action for a given remedy should not of itself prevent the granting of a different remedy when warranted by the facts proved (perhaps after amendment in the course of trial). Ordinarily a plaintiff may pursue alternative remedies, however "inconsistent," with final "election" postponed to a late stage of the

action—after the proof is in or even after the fact-finder, court or jury, has made its findings on both alternatives. See Illustration 23. In such circumstances, if the plaintiff seeks but one remedy, and judgment is entered for or against him, he should be precluded from a second action by the rules of merger or bar. This is properly explained on *res judicata* principles rather than on any notions of election of remedies. See Illustrations 24-25. Courts have not always analyzed the situation carefully. Thus, in the case where a plaintiff could have sued for alternative remedies, but has sued for only one, and after denial of the relief sought has commenced a second action for the other remedy, the second court sometimes says that the result in the first action proves that the plaintiff did not in fact have alternative remedies and that therefore he could not have made a true election; whence, says the court, it follows that he may maintain the second action for the remedy he did not pursue in the first action. Sometimes a court reaches the same conclusion by asserting that the two remedies were not “inconsistent” and so no election was involved. As already indicated, in a modern procedural system in which the plaintiff had ample opportunity to develop his whole case in the first action, he should be held precluded from a second action.

*Illustrations:*

23. A bought certain shares of stock on the strength of alleged false representations made by the seller B. A commences an action for the alternative remedies associated with rescission and deceit. If he succeeds in establishing the facts, the judgment may appropriately provide that he may elect within a certain period either to recover back the purchase price upon tendering the shares, or to receive damages in the amount determined by the evidence.

24. On the facts stated in Illustration 23, A brings an action for deceit, demanding the difference between the value of the shares had they been as represented and their actual value. Judgment is entered for the defendant after trial, upon a finding that he did not make the alleged representations. A second action for rescission, in which A offers to return the shares and demands his money back, is precluded by the rule of bar.

25. If, on the facts stated in Illustration 23, A had first commenced an action for rescission and failed because of laches, he would be barred from commencing a second action for damages for deceit.



## §26 Exceptions to the General Rule Concerning Splitting

(1) When any of the following circumstances exists, the general rule of §24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

- (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or
- (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; or
- (c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief; or
- (d) The 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; or
- (e) For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course; or
- (f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

(2) In any case described in (f) of Subsection (1), the plaintiff is required to follow the procedure set forth in §§78- 82.

### Cross Reference.

This Section presents a set of exceptional cases in which, after judgment that would otherwise extinguish the claim under the rules of merger or bar (see §§18, 19), the plaintiff is nevertheless free to maintain a second action on the same claim or part of it. There is a

kinship between this Section and §20, which describes the exceptions to the general rule of bar. Lines of distinction between the two Sections are suggested at §20, Comment a.

**Comment:**

a. Consent to or acquiescence in splitting (Subsection (1) (a)). A main purpose of the general rule stated in §24 is to protect the defendant from being harassed by repetitive actions based on the same claim. The rule is thus not applicable where the defendant consents, in express words or otherwise, to the splitting of the claim.

The parties to a pending action may agree that some part of the claim shall be withdrawn from the action with the understanding that the plaintiff shall not be precluded from subsequently maintaining an action based upon it. The agreement will normally be given effect. Or there may be an effective agreement, before an action is commenced, to litigate a part of a claim in that action but to reserve the rest of the claim for another action. So also the parties may enter into an agreement, not directed to a particular contemplated action, which may have the effect of preserving a claim that might otherwise be superseded by a judgment, for example, a clause included routinely in separation agreements between husband and wife providing that the terms of the separation agreement shall not be invalidated or otherwise affected by a judgment of divorce and that those terms shall survive such a judgment.

Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim. See Illustration 1.

*Illustration:*

1. After a collision in which A suffers personal injuries and property damage, A commences in the same jurisdiction one action for his personal injuries and another for the property damage against B. B does not make known in either action his objection (usually called "other action pending") to A's maintaining two actions on parts of the same claim. After judgment for A for the personal injuries, B requests dismissal of the action for property damage on the ground of merger. Dismissal should be refused as B consented in effect to the splitting of the claim.

b. Express reservation by the court (Subsection (1)(b)). It may appear in the course of an action that the plaintiff is splitting a claim, but that there are special reasons that justify his doing so, and accordingly that the judgment in the action ought not to have the usual consequences of extinguishing the entire claim; rather the plaintiff should be left with an opportunity to litigate in a second action that part of the claim which he justifiably omitted from the first action. A determination by the court that its judgment is "without prejudice" (or words to that effect) to a second action on the omitted part of the claim, expressed in the judgment itself, or in the findings of fact, conclusions of law, opinion, or similar record, unless reversed or set aside, should ordinarily be given effect in the second action. Cf. §20(1)(b), and Comments f-i thereto.

For an instance where such special treatment of the plaintiff may be called for, see §25, Comment h (possible reservation of action for restitution relief after plaintiff fails in action for breach of contract).

It is emphasized that the mere refusal of the court in the first action to allow an amendment of the complaint to permit the plaintiff to introduce additional material with respect to a claim, even where the refusal of the amendment was urged by the defendant, is not a reservation by the court within the meaning of Clause (b). The plaintiff's ordinary recourse against an incorrect refusal of an amendment is direct attack by means of appeal from an adverse judgment. See §25(a), Comment b.

c. Where formal barriers existed against full presentation of claim in first action (Subsection (1)(c)). The general rule of §24 is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a litigant's presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.

The formal barriers referred to may stem from limitations on the competency of the system of courts in which the first action was instituted, or from the persistence in the system of courts of older modes of procedure—the forms of action or the separation of law from equity or vestigial procedural doctrines associated with either.

(1). Limitations on the jurisdiction of a system of courts. A given transaction may result in possible liability under the law of a state and alternatively under a federal statute enforceable exclusively in a federal court. When the plaintiff brings an action in the state court, and judgment is rendered for the defendant, the plaintiff is not barred from an action in the federal court in which he may press his claim against the same defendant under the federal statute. See Illustration 2. Compare §25(1), Comment e.

Similarly, a given transaction may result in possible liability under several theories of the law of a state, but the state's provisions for "long-arm" service of process may, on the facts presented, limit judicial jurisdiction over the defendant to the adjudication of only one of those theories. For example, an out-of-state defendant may be subject to a state's jurisdiction for the commission of a tort but not, on the particular facts, for a breach of contract. In such a case, the plaintiff, having lost his action in tort, should not be precluded from pursuing a contract remedy in a state in which jurisdiction over the defendant can be obtained.

*Illustration:*

2. A Co. brings an action against B Co. in a state court under a state antitrust law and loses on the merits. It then commences an action in a federal court upon the same facts, charging violations of the federal antitrust laws, of which the federal courts have exclusive jurisdiction. The second action is not barred.

(2). Effect of the persistence of older modes of procedure. Section 25, Comments i and l, describe a series of situations in which a plaintiff in earlier times was disabled from presenting his full claim in a single action because of formal inhibitions imposed by the historical division between "law" and "equity," or the forms of action, or related procedural modes. The rules of merger and bar reflected those disabilities and in various situations permitted a plaintiff to present in a second action what he was disabled from presenting in the first. In a modern system of procedure such disabilities should no longer exist, and the law as to merger and bar adjusts itself correspondingly. Where, however, a jurisdiction has not yet modernized its procedure, then, to the extent that the disabilities continue, the older law of merger and bar,

as sketched in the cited Section and Comments, would apply to judgments rendered by those courts.

d. Erroneous decision that formal barrier exists. Where the court determines that the plaintiff cannot enforce a given claim or a part of it in that action but must enforce it, if at all, in another action, the judgment does not preclude the plaintiff from maintaining the other action even though it appears that the determination made in the first action was erroneous. The determination is binding between the parties under the principle of direct estoppel. See §17, Comment c. It is immaterial that no appeal was taken from the ruling of the court in the first action. See Illustration 3.

Although the erroneous decision in the first action does not preclude the plaintiff from maintaining a second action, it does not necessarily follow that the second court will entertain the action; for example, the action may be based on a subject matter which is beyond the subject matter jurisdiction of the second court.

*Illustration:*

3. A brings suit against B upon a contract by which A agreed to buy from B, and B to sell and deliver to A, certain shares of stock. A prays specific performance of the contract, or if that remedy be not available, for money damages. The court finds that the contract is not of a type subject to specific performance, and thereupon dismisses the action stating that the plaintiff must start a fresh action "at law." A is entitled to maintain an action seeking to recover money damages, although the court in the second action is persuaded that under the controlling precedents the dismissal of the first action was erroneous and that that action should have gone forward on the demand for money damages.

e. Implementation of a statutory or constitutional scheme (Subsection (1)(d)). The adjudication of a particular action may in retrospect appear to create such inequities in the context of a statutory scheme as a whole that a second action to correct the inequity may be called for even though it would normally be precluded as arising upon the same claim. See Illustration 4. Again, it may appear from a consideration of the entire statutory scheme that litigation, which on ordinary analysis might be considered objectionable as repetitive, is here intended to be permitted. See Illustration 5.

Similar inequities in the implementation of a constitutional scheme may result from inflexible application of the rules of merger and bar, especially when there is a change of law after the initial decision. When such inequities involve important ongoing social or political relationships, a second action should be allowed even if the claim set forth is not viewed as different from that presented in the initial proceeding. See Illustration 6.

*Illustrations:*

4. At the time a bank is closed for insolvency, 326 shares of bank stock stand in the name of shareholder A; 325 shares have been previously presented to the bank for transfer but have not in fact been transferred. B, the superintendent of banks, sues for the statutory assessment on the one share not presented for transfer and recovers judgment. After it is decided in separate litigation against other shareholders that there is statutory liability on shares not actually transferred prior to closing, B sues A on the 325 shares. The action may be maintained. Ordinarily the action would be precluded as B would be held to have split his claim, but here the interest in uniform treatment of shareholders of the bank, the policy that none should benefit by mistake or even misconduct of the public official, predominates.

5. For nonpayment of rent, landlord A brings a summary action to dispossess tenant B from leased premises. A succeeds in the action. A then brings an action for payment of the

past due rent. The action is not precluded if, for example, the statutory system discloses a purpose to give the landlord a choice between, on the one hand, an action with expedited procedure to reclaim possession which does not preclude and may be followed by a regular action for rent, and, on the other hand, a regular action combining the two demands.

6. A et al., black pupils and parents, bring suit against the B board of education to invalidate and enjoin the operation of a state school "tuition grant" law on the ground that it fosters racial discrimination and is therefore unconstitutional. The court holds the law constitutional as applied and enters judgment for the defendant. Appeal is not taken, and is not warranted by the state of the law at the time of the judgment. Thereafter the United States Supreme Court in another action between different parties strikes down as unconstitutional a similar tuition grant law of another state. A et al. then commence a new action against the B board seeking the relief that was denied in the previous action. Whether or not the claims in the two actions by A et al. are regarded as the same, the second action is not barred by the first judgment. In a matter of such public importance the policy of nationwide adherence to the authoritative constitutional interpretation overcomes the policies supporting the law of res judicata. See also §§83, 86.

f. Substantive policy: rationale for Subsection (1)(e). Just as the allowance of several actions with respect to the same transaction may be required by a statutory scheme of regulation, so the courts, unaided by statute, may conclude that strong substantive policies favor such allowance with respect to cases involving anticipated continuing or recurrent wrongs. Illustrations from the fields of contracts and torts are discussed in Comments g and h.

g. Contracts—plaintiff's option in case of material breach. A judgment in an action for breach of contract does not normally preclude the plaintiff from thereafter maintaining an action for breaches of the same contract that consist of failure to render performance due after commencement of the first action. Compare §24, Comment d. But if the initial breach is accompanied or followed by a "repudiation" (see Restatement, Second, Contracts §250), and the plaintiff thereafter commences an action for damages, he is obliged in order to avoid "splitting," to claim all his damages with respect to the contract, prospective as well as past, and judgment in the action precludes any further action by the plaintiff for damages arising from the contract.

In the event of a "material" breach (see Restatement, Second, Contracts §241) that is not accompanied or followed by a repudiation, the plaintiff is entitled to treat the contract as at an end and to recover damages for performances not yet due as well as those already due on the theory that there has been a total breach of contract. If the plaintiff does this, a judgment extinguishing the claim under the rules of merger or bar precludes another action by him for further recovery on the contract. On the other hand, although the breach is material, the plaintiff may elect to treat it as being merely a partial breach. If he so elects, he is entitled to maintain an action for damages sustained from breaches up to the time of the institution of the action, and the judgment does not preclude a further action by him for a breach occurring after that date. See Illustration 7, and Restatement, Second, Contracts §236, Comment b.

*Illustration:*

7. A and B make a contract under which A employs B. B commits a material breach of the contract, but requests A to allow the employment to continue. A says that he will do so, but that he must have damages for the breach already committed. A accordingly brings an action against B for the breach. Judgment is given for A. A is not precluded from thereafter

maintaining an action against B for a breach of the contract committed after the first action was commenced.

h. Nuisance—plaintiff's option to treat as "temporary" or "permanent". When the defendant is maintaining a structure or operating a business on his own land which causes continuing or recurrent harm to the plaintiff in the use of his land, it is clear that in suing for damages the plaintiff, to avoid splitting, must claim all damages suffered to the time of suit. This follows from the same principle that applies to an action for repeated trespasses. See §24, Comment d.

A number of jurisdictions distinguish "temporary" from "permanent" nuisances, the plaintiff being confined to successive actions for damages when the nuisance is temporary, but allowed only a single action for total damages when the nuisance is "permanent." However, the criteria for deciding whether a nuisance is temporary or permanent are often unclear. The plaintiff is then at risk if he mistakenly believes that the nuisance is temporary rather than permanent. He is in danger of splitting his claim if he seeks and recovers only past damages; and if he delays his suit, believing that on the footing of a temporary nuisance he can at least recover the damages sustained during the period of limitations preceding the institution of suit, he may lose his claim for damages altogether, for with respect to a permanent nuisance, limitations may be held to run as a single period from the time when the nuisance arose, and that period may have expired.

To avoid the traps just described, the Restatement, Second, Torts §930(1) and Comment b thereon, supported by some authority, would allow the plaintiff an option in cases of "continuing or recurrent tortious invasions." The plaintiff may elect, at least in doubtful cases, to treat a nuisance as temporary and sue from time to time for damages sustained in the period next preceding the institution of suit without fear of splitting. On the other hand the plaintiff may elect to sue for total damages alleging that the nuisance will probably continue for the indefinite future. If the defendant disputes the allegation, the issue is tried, and if held for the plaintiff, he recovers in full; otherwise he is remitted to successive actions. (In some instances, where the public interest precludes injunctive relief against a nuisance, an award of damages for the past and future is said to rest on a theory of "inverse condemnation.")

i. Extraordinary situations where merger or bar is inapposite (Subsection (1)(f)). In addition to cases falling within Subsections (a)-(e), there remains a small category of cases in which the policies supporting merger or bar may be overcome by other significant policies. Such an exception to the rules of merger and bar is not lightly to be found but must be based on a clear and convincing showing of need. And although it may not be feasible to compile an exhaustive description of cases in this category, it is both feasible and desirable to describe illustrative instances in an effort to give content to the concept of "extraordinary circumstances." Confined within proper limits, this concept is central to the fair administration of the doctrine of res judicata.

One instance is a case in which the question at issue is the validity of a continuing restraint or condition having a vital relation to personal liberty. Although civil actions attacking penal custody resulting from criminal convictions are beyond the scope of this Restatement, such actions do illustrate the need to moderate conventional notions of finality when personal liberty is at stake. A similar need may be found in cases involving civil commitment of the mentally ill, or the custody of a child. And substantive policy may militate in favor of allowing one spouse to sue the other for divorce even though the grounds sued upon could fairly have

been comprehended within the transaction, or nucleus of facts, underlying a previous action between the same parties. See Illustration 8.

It is not suggested that the concept of finality has no place in such cases, or that the court in every such case must allow splitting or relitigation without limit. What is indicated is the need for greater flexibility and, in some matters of this type, the need for special legislative treatment.

See also the discussion in §24, Comment f, of situations in which changed circumstances afford a basis for concluding that the second action constitutes a different claim from the first.

Another instance is a case in which the prior litigation has failed to yield a coherent disposition of the controversy. Such cases are extremely rare, but may occur, for example, when the disposition of a claim and counterclaim in a prior action has left the parties with inconsistent interests in disputed property. See Illustration 9.

*Illustrations:*

8. A wife, A, sues her husband, B, for separate maintenance on the basis of desertion, and secures a judgment. A later commences another action for divorce against B on grounds which existed when she sued for maintenance. A should not be precluded, for it is unwise to compel her to demand the most drastic remedy against B in the first action, and also unwise to deprive her of a divorce if she is now prepared to make the case for it.

9. Husband A contracts to sell a farm by warranty deed to be signed also by his wife to release her dower; the purchaser B makes a down payment and enters into possession. The wife then refuses to join in the deed. B sues A for a form of specific performance unprecedented in the jurisdiction, namely, a deed from A alone but with some allowance or arrangement to provide for the outstanding inchoate dower. A answers and counterclaims for rescission. Judgment goes against B on the main claim as the requested relief is held to be unavailable; judgment is against A on the counterclaim as no basis for rescission on his part is shown. Subsequently A commences an action for ejectment against B because of B's refusal to complete payment except on the impossible condition of the tender of a deed in which the wife joins. B in his answer relies on the dismissal of the counterclaim in the first action as *res judicata*, and he counterclaims, tendering the balance of the purchase price and seeking specific performance in the form of a deed by A alone. A's reply to the counterclaim relies on the dismissal of B's claim in the first action as *res judicata*. By the usual rules both claim and counterclaim might well be precluded. But here the previous action has left the parties not in a state of repose but in an unstable and intolerable condition. A cannot complain of harassment as he himself has commenced the second action. B's position is the more equitable. B is entitled to judgment on his counterclaim.

j. Mistake or fraud, concealment, or misrepresentation by the defendant. A defendant cannot justly object to being sued on a part or phase of a claim that the plaintiff failed to include in an earlier action because of the defendant's own fraud. Thus, when the defendant takes several articles at one time and on being asked by the plaintiff fraudulently denies taking some of them and suit is brought for the remainder, a judgment in that action does not bar the plaintiff from subsequently maintaining an action for those articles not included in the first action. So when there have been several breaches of contract some of which are concealed by the defendant, a judgment for the other breaches does not prevent an action for those concealed although prior in occurrence to the others. So also when the plaintiff brings an action against the defendant for cancellation of a contract made between them, alleging that the plaintiff was mentally incompetent at the time of the making of the contract, and a verdict

and judgment are given for the defendant, the plaintiff is not precluded from maintaining a second action for the cancellation of the contract on the ground of a misrepresentation the defendant concealed from the plaintiff at the time when the first action was brought. See §§71, 72.

The result is the same when the defendant was not fraudulent, but by an innocent misrepresentation prevented the plaintiff from including the entire claim in the original action.

The result is different, however, where the failure of the plaintiff to include the entire claim in the original action was due to a mistake, not caused by the defendant's fraud or innocent misrepresentation.

k. Procedural condition upon certain Subsection (1) cases. The reference in Subsection (2) to the procedure set forth in Chapter 5 points to a possible requirement that the plaintiff in the specified cases must apply to the court that rendered the first judgment for a decision as to whether a second action is maintainable. See §78.



## §27 Issue Preclusion—General Rule

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.

Exceptions to this general rule are stated in §28.

### **Comment:**

a. Subsequent action between the same parties. The rule of issue preclusion is operative where the second action is between the same persons who were parties to the prior action, and who were adversaries (see §38) with respect to the particular issue, whether the second action is brought by the plaintiff or by the defendant in the original action. It is operative whether the judgment in the first action is in favor of the plaintiff or of the defendant. The effect of a judgment for the defendant in the first action may be to require a judgment for the defendant in the second action. See Illustration 1. A judgment for the plaintiff in the first action may have the effect of enabling him to recover in the second action without proving his claim, provided that the controlling issues were litigated and determined in the prior action, but the defendant is not precluded from defending the second action on the basis of an issue not litigated and determined in the first action. See Illustration 2.

#### *Illustrations:*

1. A brings an action against B to recover interest due on a promissory note which A alleges was executed by B and was payable to A. B denies that he executed the note. After a trial on this issue there is a verdict and judgment for B. Thereafter A sues B for a second installment of interest. The determination that B did not execute the note is conclusive in the second action.

2. A brings an action against B for failure to deliver goods on January 1, 1972, in accordance with the terms of an installment contract. B defends on the basis that the contract should be rescinded because of A's fraud in obtaining it. After a trial on this issue, there is a verdict and judgment for A. Thereafter, A sues B for failure to deliver goods on June 1, 1972, in accordance with the same contract. B is precluded by the prior judgment from seeking rescission on the basis of fraud. B is not precluded, however, from setting up other defenses, for example, that he was discharged of the duty to deliver on June 1 because of occurrences beyond his control.

b. Direct and collateral estoppel. In some cases, a judgment does not preclude relitigation of all or part of the claim on which the action is brought. See §§20, 26. In such cases, the rule of this Section precludes relitigation of issues actually litigated and determined in the first action when a second action is brought on the same claim. See Illustration 3. Issue preclusion in a second action on the same claim is sometimes designated as direct estoppel. If, as more frequently happens, the second action is brought on a different claim, the rule of this Section also applies; in such cases, preclusion is sometimes designated as collateral estoppel.

#### *Illustration:*

3. A brings an action against B for personal injuries arising out of an automobile accident. Jurisdiction is asserted over B, a nonresident, on the basis that the automobile involved in the

accident was being operated in the state by or on his behalf. After trial of this issue, the action is dismissed for lack of jurisdiction. In a subsequent action by A against B for the same injuries, brought in the state of B's residence, the prior determination that the automobile was not being operated by or on behalf of B is conclusive.

c. Dimensions of an issue. One of the most difficult problems in the application of the rule of this Section is to delineate the issue on which litigation is, or is not, foreclosed by the prior judgment. The problem involves a balancing of important interests: on the one hand, a desire not to deprive a litigant of an adequate day in court; on the other hand, a desire to prevent repetitious litigation of what is essentially the same dispute. When there is a lack of total identity between the particular matter presented in the second action and that presented in the first, there are several factors that should be considered in deciding whether for purposes of the rule of this Section the "issue" in the two proceedings is the same, for example: 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? For examples of cases in which such factors are relevant, see Illustrations 4, 5, and 6.

Sometimes, there is a lack of total identity between the matters involved in the two proceedings because the events in suit took place at different times. In some such instances, the overlap is so substantial that preclusion is plainly appropriate. See Illustration 8. Preclusion ordinarily is proper if the question is one of the legal effect of a document identical in all relevant respects to another document whose effect was adjudicated in a prior action. And, in the absence of a showing of changed circumstances, a determination that, for example, a person was disabled, or a nonresident of the state, in one year will be conclusive with respect to the next as well. In other instances the burden of showing changed or different circumstances should be placed on the party against whom the prior judgment is asserted. See Illustration 7. In still other instances, the bearing of the first determination is so marginal because of the separation in time and other factors negating any similarity that the first judgment may properly be given no effect. See Illustration 9.

An issue on which relitigation is foreclosed may be one of evidentiary fact, of "ultimate fact" (i.e., the application of law to fact), or of law. See also Comment j below. Thus, for example, if the party against whom preclusion is sought did in fact litigate an issue of ultimate fact and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact. See Illustration 4. And similarly if the issue was one of law, new arguments may not be presented to obtain a different determination of that issue. See Illustration 6.

*Illustrations:*

4. A brings an action against B to recover for personal injuries in an automobile accident. A seeks to establish that B was negligent in driving at an excessive rate of speed. After trial, verdict and judgment are given for B. In a subsequent action by B against A for injuries in the same accident, A is precluded from setting up B's negligence as a defense, whether or not the alleged negligence is based on an assertion of excessive speed. It is reasonable to require A to bring forward all evidence in support of the alleged negligence in the initial proceeding. (It is

assumed in this Illustration that the forum has no applicable compulsory counterclaim rule. See §22.)

5. A brings an action against B to recover royalties due under an oil lease for oil produced from certain wells. After trial, judgment is given for A, the court finding that all the wells in question are covered by the lease. In a second action by A against B for later royalties under the lease with respect to the same wells, B seeks to assert for the first time that one of the wells was not covered by the lease because it was diagonally drilled into state-owned underwater land adjacent to the leased land. Whether B is precluded with respect to this assertion under the rule of this Section should turn on application of the factors described in this Comment, particularly the relation between the evidentiary presentation, the applicable rule of law, and the claim involved in each of the two proceedings.

6. A brings an action against B to recover an installment payment due under a contract. B's sole defense is that the contract is unenforceable under the statute of frauds. After trial, judgment is given for A, the court ruling that an oral contract of the kind sued upon is enforceable. In a subsequent action by A against B to recover a second installment falling due after the first action was brought, B is precluded from raising the statute of frauds as a defense, whether or not on the basis of arguments made in the prior action, but is not precluded from asserting as a defense that the installment is not owing as a matter of law on any other ground.

7. A brings an action against B to set aside a conveyance of Blackacre by C to B on the ground that at the time of the conveyance C was mentally incompetent. After trial, verdict and judgment are given for A. A second action is brought by A against B to set aside a conveyance of Whiteacre by C to B which took place one week after the conveyance of Blackacre. Unless B can establish changed circumstances occurring in the time between the two conveyances, the prior judgment is conclusive that C was incompetent when Whiteacre was conveyed. (The result would be the same if the Whiteacre conveyance had occurred one week before the Blackacre conveyance.)

8. The facts are as stated in Illustration 7, except that the Whiteacre conveyance occurred immediately after the Blackacre conveyance. If the two actions are held to involve different claims, the prior judgment is conclusive that B was incompetent when Whiteacre was conveyed.

9. In an action brought by the A corporation against the taxing authorities with respect to taxes for the year 1940, judgment is based on a determination that A should have been taxed as a nonresident corporation because it had no office or place of business in the state. A similar action is brought by A with respect to taxes for the year 1970. If it is concluded that the separation in time between the two proceedings is so great that the first determination has little if any bearing on the question whether A had an office or place of business in the state in 1970, then the first judgment should be given no effect on that question and A should have the same burden of proof as that imposed on any other taxpayer.

d. When an issue is actually litigated. When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this Section. An issue may be submitted and determined on a motion to dismiss for failure to state a claim, a motion for judgment on the pleadings, a motion for summary judgment (see Illustration 10), a motion for directed verdict, or their equivalents, as well as on a judgment entered on a verdict. A determination may be based on a failure of pleading or of proof as well as on the sustaining of the burden of proof.

The determination of an issue by a judge in a proceeding conducted without a jury is conclusive in a subsequent action whether or not there would have been a right to a jury in that subsequent action if collateral estoppel did not apply. See Illustrations 10 and 11.

*Illustrations:*

10. In January, B agrees to buy a horse from A, and in February B agrees to buy Blackacre from A. A brings a suit for specific performance of the February agreement; B alleges with supporting proof that he was an infant when the agreement was made, and the court enters summary judgment for B on that ground. Thereafter A brings an action against B for damages for breach of the January agreement and demands a jury. The judgment in the prior suit is conclusive that B was an infant when the contract was made.

11. The facts are as stated in Illustration 10, except that in the first proceeding the issue of infancy is decided for B after trial without a jury on the basis of conflicting evidence of B's age. The judgment in the prior suit is conclusive that B was an infant when the contract was made.

e. Issues not actually litigated. A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action. There are many reasons why a party may choose not to raise an issue, or to contest an assertion, in a particular action. The action may involve so small an amount that litigation of the issue may cost more than the value of the lawsuit. Or the forum may be an inconvenient one in which to produce the necessary evidence or in which to litigate at all. The interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation.

It is true that it is sometimes difficult to determine whether an issue was actually litigated; even if it was not litigated, the party's reasons for not litigating in the prior action may be such that preclusion would be appropriate. But the policy considerations outlined above weigh strongly in favor of nonpreclusion, and it is in the interest of predictability and simplicity for such a result to obtain uniformly.

Sometimes the party against whom preclusion is asserted is covered by an insurance policy and represented by insurance company counsel in the prior action but not in the subsequent action. In such instances, preclusion with respect to unlitigated issues seems particularly unfair.

An issue is not actually litigated if the defendant might have interposed it as an affirmative defense but failed to do so; nor is it actually litigated if it is raised by a material allegation of a party's pleading but is admitted (explicitly or by virtue of a failure to deny) in a responsive pleading; nor is it actually litigated if it is raised in an allegation by one party and is admitted by the other before evidence on the issue is adduced at trial; nor is it actually litigated if it is the subject of a stipulation between the parties. A stipulation may, however, be binding in a subsequent action between the parties if the parties have manifested an intention to that effect. Furthermore under the rules of evidence applicable in the jurisdiction, an admission by a party may be treated as conclusive or be admissible in evidence against that party in a subsequent action.

In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in

a subsequent action. The judgment may be conclusive, however, with respect to one or more issues, if the parties have entered an agreement manifesting such an intention.

It should be noted that, although issue preclusion does not apply to issues not actually litigated, there is a concept of estoppel in pais, not dealt with in this Restatement, which may be applicable in appropriate cases. Under this concept, a person who makes a representation may be estopped to deny its truth if the person to whom it was made has changed his position in reliance.

f. Extrinsic evidence to determine what issues were litigated. If it cannot be determined from the pleadings and other materials of record in the prior action what issues, if any, were litigated and determined by the verdict and judgment, extrinsic evidence is admissible to aid in such a determination. Extrinsic evidence may also be admitted to show that the record in the prior action does not accurately indicate what issues, if any, were litigated and determined.

The party contending that an issue has been conclusively litigated and determined in a prior action has the burden of proving that contention.

g. If several issues litigated. If several issues are litigated in an action, and in a subsequent action between the parties, one of the parties relies on the judgment as conclusive of one of the issues, that party must show that the issue was determined by the judgment in the prior action.

If several issues are litigated in an action, and a judgment cannot properly be rendered in favor of one party unless all of the issues are decided in his favor, and judgment is given for him, the judgment is conclusive with respect to all the issues.

*Illustration:*

12. A brings an action against B to recover interest on a promissory note payable to A, the principal not yet being due. B alleges that he was induced by the fraud of A to execute the note, and further alleges that A gave him a release under seal of the obligation to pay interest. After a trial of these issues, verdict and judgment are given for A. After the note matures, A brings an action against B for the principal. The judgment in the prior suit is conclusive that B was not induced by the fraud of A to execute the note.

h. Determinations not essential to the judgment. If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation.

*Illustrations:*

13. A brings an action against B to recover interest on a promissory note payable to A, the principal not yet being due. B alleges that he was induced by the fraud of A to execute the note, and further alleges that A gave him a release under seal of the obligation to pay interest. The court, sitting without a jury, finds that A had given such a release but that B was not induced by A's fraud to execute the note, and gives verdict for B on which judgment is entered. After the note matures A brings an action against B for the principal of the note. B is not precluded from defending this action on the ground that B was induced by A's fraud to execute the note.

14. A, as owner of a trademark, brings an action against B for infringement. B denies the validity of the trademark and denies infringement. The court finds that the trademark is valid,

but that B had not infringed it, and gives judgment for B. Thereafter A brings an action against B alleging that since the rendition of the judgment B infringed the trademark. B is not precluded from defending this action on the ground that the trademark is invalid.

i. Alternative determinations by court of first instance. If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone. See Illustration 14. Cf. §20, Comment e.

It might be argued that the judgment should be conclusive with respect to both issues. The matter has presumably been fully litigated and fairly decided; the determination does support, and is in itself sufficient to support, the judgment for the prevailing party; and the losing party is in a position to seek reversal of the determination from an appellate court. Moreover, 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.

There are, however, persuasive reasons for analogizing the case to that of the nonessential determination discussed in Comment h. First, a determination in the alternative may not have been as carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense it has some of the characteristics of dicta. Second, and of critical importance, the losing party, although entitled to appeal from both determinations, might be dissuaded from doing so because of the likelihood that at least one of them would be upheld and the other not even reached. If he were to appeal solely for the purpose of avoiding the application of the rule of issue preclusion, then the rule might be responsible for increasing the burdens of litigation on the parties and the courts rather than lightening those burdens. Compare Comment o, dealing with the effect of an appellate decision based on alternative determinations.

There may be causes where, despite these considerations, the balance tips in favor of preclusion because of the fullness with which the issue was litigated and decided in the first action. But since the question of preclusion will almost always be a close one if each case is to rest on its own particular facts, it is in the interest of predictability and simplicity for the result of nonpreclusion to be uniform.

The case discussed, and exemplified by Illustration 15, is to be distinguished from a case in which there are alternative bases for a determination that is essential to the judgment. In such a case, failure to appeal from that determination cannot be attributed to the losing party's anticipation that the judgment will be affirmed on other grounds. Thus relitigation of the issue so determined is properly precluded under the rule of this Section. See Illustration 16.

*Illustrations:*

15. A brings an action against B to recover interest on a promissory note payable to A, the principal not yet being due. B alleges that he was induced by the fraud of A to execute the note, and further alleges that A gave him a binding release of the obligation to pay interest. The court, sitting without a jury, finds that B was induced by A's fraud to execute the note and also finds that A had given him a binding release of the obligation to pay interest. Judgment for B is not appealed. After the note matures, A brings an action against B for the principal of the note. The prior judgment is not a defense to the action, and the issue of fraud must be relitigated if B chooses to raise it.

16. The facts of the first action are as stated in Illustration 15, but in the second action A sues for another installment of interest before the principal becomes due. The determination that B is not liable for interest on the note is conclusive, even though there were alternative bases for that determination.

The distinction between Illustrations 15 and 16 is that the first action, even though decided on alternative grounds, necessarily adjudicated the issue as to liability for interest, but did not necessarily adjudicate the issue—fraud—relevant to recovery of the principal.

j. Determinations essential to the judgment. It is sometimes stated that even when a determination is a necessary step in the formulation of a decision and judgment, the determination will not be conclusive between the parties if it relates only to a “mediate datum” or “evidentiary fact” rather than to an “ultimate fact” or issue of law. It has also been stated that even a determination of “ultimate fact” will not be conclusive in a later action if it constitutes only an “evidentiary fact” or “mediate datum” in that action. Such a formulation is occasionally used to support a refusal to apply the rule of issue preclusion when the refusal could more appropriately be based on the lack of similarity between the issues in the two proceedings. If applied more broadly, the formulation causes great difficulty, and is at odds with the rationale on which the rule of issue preclusion is based. The line between ultimate and evidentiary facts is often impossible to draw. Moreover, even if a fact is categorized as evidentiary, great effort may have been expended by both parties in seeking to persuade the adjudicator of its existence or nonexistence and it may well have been regarded as the key issue in the dispute. In these circumstances the determination of the issue should be conclusive whether or not other links in the chain had to be forged before the question of liability could be determined in the first or second action.

The appropriate question, then, is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. If so, the determination is conclusive between the parties in a subsequent action, unless there is a basis for an exception under §28—for example, that the significance of the issue for purposes of the subsequent action was not sufficiently foreseeable at the time of the first action.

*Illustrations:*

17. A brings an action against C to recover for personal injuries caused in an automobile accident involving a car driven by B and owned by C. A alleges that C is liable for B’s negligence because B was driving with C’s express or implied permission within the meaning of applicable state law making an owner liable in such circumstances. The action is defended by C’s insurer; at the trial, the evidence is in conflict as to whether B was employed by C at the time of the accident and whether he was driving the car on C’s business or on a frolic of his own. After trial, verdict and judgment are given for A, with explicit findings that B was C’s employee and was driving the car within the scope of his employment at the time of the accident. When C fails to satisfy the judgment, A brings an action against C’s insurer to collect the proceeds of the policy. C’s insurer is precluded from defending on the basis of a clause in the policy limiting coverage to accidents caused by the owner or by persons acting within the scope of their employment by the owner. Although the “ultimate” question in the first action was one of express or implied permission to use the car, the finding as to scope of employment precludes relitigation of that issue in the second action. (Note: C’s insurer, having defended the first action, is bound to the same extent as C. See §57.)

18. A, an attorney, brings an action against B, an attorney, for a declaratory judgment as to the rights and interests of the parties in certain attorneys’ fees collected by B. At trial, there

is a conflict in the evidence with respect to the terms of an oral agreement between A and B, and in particular with respect to the date after which all fees received would be shared. After trial, judgment is given for B on the basis that A had no right or interest in the fees in question. There is an explicit finding that the fee-sharing agreement between A and B did not apply to sums collected before January 1971, and that the fees in question were collected before that date. In a subsequent action by A against B for a share of fees collected by B after the first action was instituted but before January 1971, A is precluded from showing that his agreement with B extended to these fees.

k. Requirement of a valid, final judgment. The requisites of a valid judgment are set forth in §1, and the definition of a final judgment may be found in §13. Particular reference is made to the distinction in §13 between finality for purposes of merger and bar and finality for purposes of issue preclusion. Pursuant to this distinction, a litigation may have reached a stage at which issue preclusion is appropriate even though claim preclusion—application of the rules of merger and bar—is not.

l. Effect on pending action. If two actions which involve the same issue are pending between the same parties, it is the first final judgment rendered in one of the actions which becomes conclusive in the other action, regardless of which action was brought first. See §14.

m. Inconsistent judgments. If in two successive actions between the same parties the same issue is actually litigated and determined, and that issue arises in a third action between the parties, the rules for determining which judgment is conclusive with respect to that issue are those set forth in §15.

n. Judgment not precluding another action on the same claim. A judgment that does not preclude another action on the same claim—one that is not a bar—may have collateral as well as direct estoppel effects. See §20, Comment b. If, however, a judgment of dismissal is wholly without prejudice, then it has no conclusive effect between the parties in a subsequent action on the same or a different claim.

o. Effect of an appeal. If a judgment rendered by a court of first instance is reversed by the appellate court and a final judgment is entered by the appellate court (or by the court of first instance in pursuance of the mandate of the appellate court), this latter judgment is conclusive between the parties.

If the judgment of the court of first instance was based on a determination of two issues, either of which standing independently would be sufficient to support the result, and the appellate court upholds both of these determinations as sufficient, and accordingly affirms the judgment, the judgment is conclusive as to both determinations. In contrast to the case discussed in Comment i, the losing party has here obtained an appellate decision on the issue, and thus the balance weighs in favor of preclusion.

If the appellate court upholds one of these determinations as sufficient but not the other, and accordingly affirms the judgment, the judgment is conclusive as to the first determination.

If the appellate court upholds one of these determinations as sufficient and refuses to consider whether or not the other is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination.



## §28 Exceptions to the General Rule of Issue Preclusion

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

- (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
- (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) 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 laws; or
- (3) 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
- (4) 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 action; or
- (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

### **Comment:**

a. Inability to obtain review (Subsection (1)). As noted in §27, Comments h and i, the availability of review for the correction of errors has become critical to the application of preclusion doctrine. If review is unavailable because the party who lost on the issue obtained a judgment in his favor, the general rule of §27 is inapplicable by its own terms. Similarly, if there was an alternative determination adequate to support the judgment, the rule of §27 does not apply.

There is a need for an analogous exception to the rule of preclusion when the determination of an issue is plainly essential to the judgment but the party who lost on that issue is, for some other reason, disabled as a matter of law from obtaining review by appeal or, where appeal does not lie, by injunction, extraordinary writ, or statutory review procedure. Such cases can arise, for example, because the controversy has become moot, or because the law does not allow review of the particular category of judgments.

The exception in Subsection (1) applies only when review is precluded as a matter of law. It does not apply in cases where review is available but is not sought. Nor does it apply when there is discretion in the reviewing court to grant or deny review and review is denied; such denials by a first tier appellate court are generally tantamount to a conclusion that the questions raised are without merit.

Note: With respect to controversies that have become moot, it is a procedural requirement in some jurisdictions, in order to avoid the impact of issue preclusion, that the appellate court reverse or vacate the judgment below and remand with directions to dismiss.

Cross-reference. An acquittal in a criminal case in certain limited contexts can have preclusive effect in a subsequent civil proceeding, even though the prosecution is unable to obtain review. See §85. One reason why such effect is generally not accorded is the difference in the burden of proof in the two proceedings. Cf. Comment f, below.

b. Issues of law (Subsection (2)). The distinction between issues of fact and issues of law is often an elusive one. In an action tried to a jury, a party may be entitled to a directed verdict “as a matter of law,” or a question like that of the meaning of a written contract may be a question of “law” in the sense that it is decided by the judge rather than the jury. In addition, courts and commentators frequently refer to “mixed question of fact and law,” suggesting that the journey from a pure question of fact to a pure question of law is one of subtle gradations rather than one marked by a rigid divide. Thus the question whether A negligently caused injury to B, for example, may involve the application of a recognized legal standard to a set of undisputed historical facts, may involve a dispute over the allocation and extent of the burden of persuasion, or over the legal standard of due care, or may involve a dispute over what actually happened.

When the claims in two separate actions between the same parties are the same or are closely related—for example, when they involve asserted obligations arising out of the same subject matter—it is not ordinarily necessary to characterize an issue as one of fact or of law for purposes of issue preclusion. If the issue has been actually litigated and determined and the determination was essential to the judgment, preclusion will apply. See §27, and Comment c and Illustration 6 thereto. See also Illustration 1, below. In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded as one of “law.” Thus if a corporation issues a series of notes for the repayment of a loan, and the holder of the notes brings an action on one of them, and the corporation’s defense that issuance of the notes was ultra vires is rejected by the court, the judgment is conclusive on that issue in a subsequent action on another of the notes.

On the other hand, if the issue is one of the formulation or scope of the applicable legal rule, and if the claims in the two actions are substantially unrelated, the more flexible principle of stare decisis is sufficient to protect the parties and the court from unnecessary burdens. A rule of law declared in an action between two parties should not be binding on them for all time, especially as to claims arising after the first proceeding has been concluded, when other

litigants are free to urge that the rule should be rejected. Such preclusion might unduly delay needed changes in the law and might deprive a litigant of a right that the court was prepared to recognize for other litigants in the same position. See Illustration 2.

*Illustrations:*

1. A brings an action against B to recover for infringement of the trademark "Florasynth" by use of the trade name "Flora Essential Oils." The court grants judgment for B on B's motion to dismiss for failure to state a claim, holding that the name "Flora" is a descriptive word of extensive and common use and is not subject to appropriation as a trademark. In a second action by A against B for infringement of the same trademark, in which the allegations of the complaint are the same except that the asserted infringement is limited to the period after the first judgment, the judgment in the first action is conclusive on the issue whether the name "Flora" is subject to appropriation as a trademark.

2. A brings an action against the municipality of B for tortious injury. The court sustains B's defense of sovereign immunity and dismisses the action. Several years later A brings a second action against B for an unrelated tortious injury occurring after the dismissal. The judgment in the first action is not conclusive on the question whether the defense of sovereign immunity is available to B. Note: The doctrine of stare decisis may lead the court to refuse to reconsider the question of sovereign immunity. See §29, Comment i.

c. Change in applicable legal context; avoidance of inequitable administration of the laws. Even when claims in two actions are closely related, an intervening change in the relevant legal climate may warrant reexamination of the rule of law applicable as between the parties. Such reexamination is particularly appropriate when the application of the rule of issue preclusion would impose on one of the parties a significant disadvantage, or confer on him a significant benefit, with respect to his competitors. See Illustration 3. But even when such competition is lacking, reexamination is appropriate if the change in the law, or other circumstances, are such that preclusion would result in a manifestly inequitable administration of the laws. See Illustration 4.

In determining whether the applicable legal context has changed, or that applying preclusion would result in inequitable administration of the law, it is important to recognize that two concepts of equality are in competition with each other. One is the concept that the outcomes of similar legal disputes between the same parties at different points in time should not be disparate. The other is that the outcomes of similar legal disputes being contemporaneously determined between different parties should be resolved according to the same legal standards. Applying issue preclusion invokes the first of these concepts, treating temporally separated controversies the same way at the expense of applying different legal standards to persons similarly situated at the time of the second litigation. The problem is illustrated by the situation where a taxpayer's liability for tax in a certain transaction in one tax year is determined according to a particular interpretation of the tax law, and that interpretation is thereafter abandoned in favor of another interpretation. If issue preclusion is applied in a subsequent tax year, the taxpayer will receive treatment different from that accorded to other taxpayers similarly situated at that time. On the other hand, refusing to apply issue preclusion invokes the second concept of equality. Thus, in the situation posed, if the taxpayer's liability in subsequent years is determined according to the new interpretation of the law, the taxpayer will be treated in those years in the same way as other taxpayers but in a way inconsistent with the determination previously made with respect to him.

Comparable problems can arise in other types of transactions in which the same fact pattern presents itself in adjudications occurring over the course of time.

In deciding whether to apply issue preclusion, or instead to apply a subsequent emerging legal standard, the choice is between two forms of disparity in resolution of legal controversy. In making the choice, the courts sometime pose the question as whether the “rights” involved in the two successive actions are the same. This only poses the problem in different terminology. The same is true of attempting a distinction between an issue of “mixed law and fact” and an issue of the “governing legal rule” because the essential problem is that there has been change in the law but not the facts. Rather, the choice must be made in terms of the importance of stability in the legal relationships between the immediate parties, the actual likelihood that there are similarly situated persons who are subject to application of the rule in question, and the consequences to the latter if they are subject to different legal treatment. In this connection it can be particularly significant that one of the parties is a government agency responsible for continuing administration of a body of law that affects members of the public generally, as in the case of tax law. Refusal of preclusion is ordinarily justified if the effect of applying preclusion is to give one person a favored position in current administration of a law.

*Illustrations:*

3. A, a state agency, brings an action against B to revoke B’s wholesale liquor license on the ground that B has violated the law governing the license by selling only to himself as a retailer. The court grants B’s motion to dismiss for failure to state a claim, holding that the conduct charged does not violate the law. In a subsequent action by A against C, a higher court holds that identical conduct by C is ground for the revocation of C’s wholesale liquor license. In a second action against B for revocation of B’s license, A is not precluded from asserting that since the first dismissal, B has continued, as before, to sell only to himself as a retailer.

4. A, a non-profit organization, brings an action against B, the tax commissioner, for a refund of property taxes on the ground that it is exempt as a charity. The court gives judgment for B, adopting a narrow definition of the charitable exemption. Shortly after, a higher court of the same jurisdiction grants a property tax refund to C, an organization quite similar to A, and in doing so formulates a much broader definition of the exemption. In a subsequent action by A against B for a refund of property taxes paid for the following year, A is not precluded from asserting that it is entitled to the charitable exemption. It does not matter that the nature of A’s activities has not changed since the first action.

5. A, an employer, brings an action against B, a labor union, to enjoin a strike in breach of a collective bargaining agreement. The action is dismissed on the ground that a statute deprives the court of jurisdiction to issue such injunctions. In a subsequent case involving two different parties, the decision in A v. B is overruled and jurisdiction to enjoin such a strike is sustained. A is not precluded from asserting jurisdiction in an action to enjoin B from continuing the same strike, from engaging in another strike in breach of the same contract, or from engaging in a strike in breach of a subsequent contract.

d. Courts of the same state (Subsection (3)). Not infrequently, issue preclusion will be asserted in an action over which the court rendering the prior judgment would not have had subject matter jurisdiction. In many such cases, there is no reason why preclusion should not apply; the procedures followed in the two courts are comparable in quality and extensiveness, and the first court was fully competent to render a determination of the issue on which preclusion is sought. In other cases, however, there may be compelling reasons why

preclusion should not apply. For example, the procedures available in the first court may have been tailored to the prompt, inexpensive determination of small claims and thus may be wholly inappropriate to the determination of the same issues when presented in the context of a much larger claim. The scope of review in the first action may have been very narrow. Or the legislative allocation of jurisdiction among the courts of the state may have been designed to insure that when an action is brought to determine a particular issue directly, it may only be maintained in a court having special competence to deal with it. In such instances, after a court has incidentally determined an issue that it lacks jurisdiction to determine directly, the determination should not be binding when a second action is brought in a court having such jurisdiction. The question in each case should be resolved in the light of the nature of litigation in the courts involved and the legislative purposes in allocating jurisdiction among the courts of the state.

*Illustrations:*

6. A brings an action against B to recover for property damage in a court whose jurisdiction is limited to claims not exceeding \$2,000. The rules governing the conduct of litigation applicable in the court are substantially the same as those in courts of general jurisdiction. After trial, verdict and judgment are rendered for A on the basis of a finding of B's negligence. In a subsequent action by B against A for \$10,000 for personal injuries arising out of the same occurrence, the finding of B's negligence in the first action is conclusive.

7. The facts are the same as in Illustration 6, except that the first action is brought in a small claims court which has a jurisdictional ceiling of \$500, and which operates informally without pleadings, counsel, or rules of evidence. The finding of B's negligence is not conclusive in the second action.

8. In a probate court proceeding involving the estate of A, in which B and C are active and adverse participants, it is determined that C is A's legitimate son. A subsequent action by B against C is brought in a court of general jurisdiction for a declaratory judgment that C is not entitled to share in the proceeds of a certain inter vivos trust because he is not A's legitimate son. The procedures followed in the probate court are of comparable quality to those in the court of general jurisdiction. The determination of legitimacy in the prior action is conclusive.

9. H brings an action for forcible entry and detainer against W before a justice of the peace. W defends on the ground that the parties are legally married and that under the law of the State such an action cannot be maintained between spouses. The justice of the peace rejects the defense, ruling that the parties are not legally married. A subsequent action for divorce is brought between W and H in the domestic relations court, which has exclusive jurisdiction over divorce actions. The determination in the prior action that the parties are not legally married is not conclusive.

e. Courts of different states; state and federal courts. This Restatement deals primarily with the effect of a judgment in the courts of the state in which it was rendered. The problem covered in Subsection (3), however, frequently arises when the second action is brought in the courts of another state, or in the federal courts. The problem also arises when the first action is brought in a federal court and the second action in a state court. In many such cases, the Full Faith and Credit Clause or the Supremacy Clause of the United States Constitution, or federal statutes or rules of decision, may require that preclusive effect be given to the first judgment. For example, in a state court action on a patent license agreement, a determination may be made that the agreement terminated on a particular date; such a determination would be conclusive in a subsequent federal court action between the same parties for patent

infringement. See 28 U.S.C. §1738. And in a federal court action for patent infringement, a determination that the patent is invalid would be conclusive on that issue in a subsequent state court action on a license agreement. See Article VI, Clause 2, of the U.S. Constitution (the Supremacy Clause). On the other hand, a determination in a state court action on a patent license agreement upholding the defense that the patent was invalid for want of invention would not be held binding in a subsequent federal court action for patent infringement if the Congressional grant of exclusive jurisdiction in patent infringement cases to the federal district courts is construed to require otherwise. The question in each such case would be resolved in the light of the legislative purpose in vesting exclusive jurisdiction in a particular court. See §86. See also the related discussion in Comment d to this Section.

As a further example, a court in State A may determine an issue involving title to land in State B, even though the A court would not have had jurisdiction over the land itself. In such a case, the determination is conclusive as between the parties to the proceeding in State A and should be given preclusive effect in State B and other states. See Restatement, Second, Conflict of Laws §95. The different question of the extraterritorial effect of a decree ordering the conveyance of land in another state, or of other equity decrees, is dealt with in Restatement, Second, Conflict of Laws §102, and discussed in §18, Comment d.

f. Differences in the burden of persuasion (Subsection (4)). To apply issue preclusion in the cases described in Subsection (4) would be to hold, in effect, that the losing party in the first action would also have lost had a significantly different burden being imposed. While there may be many occasions when such a holding would be correct, there are many others in which the allocation and weight of the burden of persuasion (or burden of proof, as it is called in many jurisdictions) are critical in determining who should prevail. Since the process by which the issue was adjudicated cannot be reconstructed on the basis of a new and different burden, preclusive effect is properly denied. This is a major reason for the general rule that, even when the parties are the same, an acquittal in a criminal proceeding is not conclusive in a subsequent civil action arising out of the same event. See §85.

*Illustrations:*

10. A brings an action against B for injuries incurred in an automobile accident involving cars driven by A and B. Under the governing law, A has the burden of proving his freedom from contributory negligence. Verdict and judgment are given for B on the basis that A has not sustained that burden. In a subsequent action by B against A for injuries incurred in the same accident, the issue of A's negligence (on which B now has the burden of persuasion) is not concluded by the first judgment.

11. A brings an action against B to recover on a promissory note. B defends on the ground that he was induced by A's fraud to give this and other notes in the series, but fails to establish fraud by clear and convincing evidence as required by law. After judgment for A, the law is changed to provide that in such cases fraud need be proved only by a preponderance of the evidence. In an action by A on another note in the series, B is not precluded from asserting the defense of fraud.

g. Rationale for Subsection (5). As stated in the introduction to Title E, the policy supporting issue preclusion is not so unyielding that it must invariably be applied, even in the face of strong competing considerations. There are instances in which the interests supporting a new determination of an issue already determined outweigh the resulting burden on the other party and on the courts. But such instances must be the rare exception, and litigation to

establish an exception in a particular case should not be encouraged. Thus it is important to admit an exception only when the need for a redetermination of the issue is a compelling one.

h. Potential adverse impact on persons not parties. There are many instances in which the nature of an action is such that the judgment will have a direct impact on those who are not themselves parties. For example, an agency of government may bring an action for the protection or relief of particular persons or of a broad segment of the public, or an individual may sue as representative of a class. In such cases, when a second action is brought, due consideration of the interests of persons not themselves before the court in the prior action may justify relitigation of an issue actually litigated and determined in that action. For example, in a class action, see §41, members of the class may be content to have a particular person represent them in connection with one claim, not knowing or having reason to know that an issue may be litigated in the action that is crucial to the determination of another, unrelated claim in which they have an interest.

i. Unforeseeability that issue would arise in the context of the second action. As noted in §27, Comment j, it is not necessary to the application of the rule of preclusion that the issue be one of "ultimate fact" in either the first or the second action. But at the same time, preclusion should not operate to foreclose redetermination of an issue if it was unforeseeable when the first action was litigated that the issue would arise in the context of the second action, and if that lack of foreseeability may have contributed to the losing party's failure to litigate the issue fully. Such instances are rare, but they may arise, for example, between institutional litigants as a result of a change in the governing law. Thus, a determination in an action between the taxing authorities and a corporate taxpayer that a transfer of property has not occurred may become relevant to a wholly different question of tax liability under an amendment to the tax law passed after the initial judgment was rendered. Another example of a case in which a determination may have unforeseeable consequences is one in which that determination is relevant to a claim involving property acquired after the first judgment has become final.

j. Lack of fair opportunity to litigate in the initial action. In an action in which an issue is litigated and determined, one party may conceal from the other information that would materially affect the outcome of the case. Such concealment may be of particular concern if there is a fiduciary relationship between the parties. Or one of the parties may have been laboring under a mental or physical disability that impeded effective litigation and that has since been removed. Or it may be evident from the jury's verdict that the verdict was the result of compromise. Or the amount in controversy in the first action may have been so small in relation to the amount in controversy in the second that preclusion would be plainly unfair.

In some of these instances, relief from the first judgment may be available, at least within specified time limits, see §§70- 73; in others such relief is unavailable. But whether or not relief from the first judgment may be obtained, the court in the second proceeding may conclude that issue preclusion should not apply because the party sought to be bound did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the first proceeding. Such a refusal to give the first judgment preclusive effect should not occur without a compelling showing of unfairness, nor should it be based simply on a conclusion that the first determination was patently erroneous. But confined within proper limits, discretion to deny preclusive effect to a determination under the circumstances stated is central to the fair administration of preclusion doctrine.

### §29 Issue Preclusion in Subsequent Litigation with Others

A party precluded from relitigating an issue with an opposing party, in accordance with §§27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which considerations should be given include those enumerated in §28 and also whether:

- (1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
- (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;
- (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
- (4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;
- (5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;
- (6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
- (7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;
- (8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

**Comment:**

a. Issues affected. The rule of this Section applies only to preclude relitigation of issues that the party would have been precluded from relitigating with his original adversary.



Accordingly, preclusion may be imposed only if, as stated in §27, the issue was the same as that involved in the present action and was actually litigated and essential to a prior judgment that is valid and final.

b. *Rationale.* A party who has had a full and fair opportunity to litigate an issue has been accorded the elements of due process. In the absence of circumstances suggesting the appropriateness of allowing him to relitigate the issue, there is no good reason for refusing to treat the issue as settled so far as he is concerned other than that of making the burden of litigation risk and expense symmetrical between him and his adversaries. Equivalence of litigating risk, while a proper element in determining whether preclusion should be imposed, is only one of several considerations relevant in determining the fairness of estopping a party from retrying an issue he has already contested. The relevant considerations include all of those pertinent in determining whether issue preclusion should be applicable between the party sought to be bound and the adversary with whom he originally litigated the issue. If issue preclusion is inappropriate as between the original parties, it is likewise ordinarily inappropriate when invoked by a non-party. Accordingly, the qualifications stated in §28 apply to issue preclusion when it is invoked by a non-party. Illustrations 3, 4, 5, 7, 9, 10, and 11 to that Section exemplify circumstances in which a party should not be precluded from relitigating an issue against one who was not a party to the prior action.

When a non-party invokes issue preclusion, however, greater weight may be given to the factors stated in §28 and additional considerations may indicate the inappropriateness of imposing preclusion. These circumstances are enumerated in this Section. What combination of circumstances justifies withholding preclusion is a matter of sound discretion, guided by the general principle that a party should not be precluded unless his previous opportunity was at least the equivalent of that otherwise awaiting him in the present litigation.

c. *Incompatibility with remedial scheme.* Where a scheme of remedies limits the effect to be given the prior determination of an issue, the determination should not be given preclusive effect if doing so would be incompatible with that scheme. Thus, if a statute provides that a determination is limited to the action in which it is made, or that it is to be treated in subsequent actions as only prima facie evidence of the facts involved, the determination should not be given preclusive effect. Whether the scheme of remedies is properly construed as requiring such a limitation is beyond the scope of this Section. See §§83, 86.

d. *Fuller procedural opportunities in second action.* Preclusion may be withheld when the party against whom it is invoked can avail himself of procedures in the second action that were not available to him in the first action and that may have been significantly influential in determination of the issue. Differences in this regard include such procedures as discovery devices and plenary as distinct from summary hearing. It may also be relevant that the party against whom preclusion is invoked had no choice, or restricted choice, as to the forum in which the issue was litigated. The latter consideration is most often pertinent when preclusion is invoked in connection with establishing liability of the defendant in the second action ("offensive" use of preclusion), but is neither decisive in that situation nor irrelevant when preclusion is invoked to resist recovery by the plaintiff in the second action ("defensive" use of preclusion).

*Illustrations:*

1. A is the payee of a note executed by B and cosigned by C. In a summary proceeding involving B, A's claim on the note is defended on the ground of part payment and determined adversely to A. In A's subsequent action against C, the fact that A was compelled to litigate in

the summary proceeding may be considered in determining whether A should be precluded on the issue of part payment.

2. A, the driver of a car involved in a collision with a car driven by C, brings an action for substantial personal injuries against C in the state where the collision occurred. Judgment is for A. In a subsequent action by B, a passenger in A's car, against C, in the absence of other considerations the issues determined in the first action are conclusive against C notwithstanding that C was a defendant in the first action.

e. Failure to effectuate party joinder. A person in such a position that he might ordinarily have been expected to join as plaintiff in the first action, but who did not do so, may be refused the benefits of "offensive" issue preclusion where the circumstances suggest that he wished to avail himself of the benefits of a favorable outcome without incurring the risk of an unfavorable one. Such a refusal may be appropriate where the person could reasonably have been expected to intervene in the prior action, and ordinarily is appropriate where he withdrew from an action to which he had been a party. See also §42, Comment d, on opting out by a member of a class. Due recognition should be given, however, to the normally available option of a plaintiff to prosecute his claim without the encumbrance of joining with others whose situation does not substantially coincide with his own. On the other hand, where a plaintiff brings a subsequent action involving the same issues against a person whom he could appropriately have joined as a co-defendant in the first action, only strongly compelling circumstances justify withholding preclusion. See also §51.

*Illustrations:*

3. A stores goods in B's warehouse. The warehouse is destroyed as the result of C's alleged negligence. A brings an action against C for the loss of his property and recovers judgment. The fact that B could have joined in A's action may be considered in deciding whether, in a subsequent action by B against C, to give preclusive effect to determinations made in the first action.

4. A, injured while a passenger in a car owned by B and driven by C during the course of C's employment by D, brings an action against D for damages. D defends on the ground that C was not negligent; judgment is for D. In a subsequent action by A against B, the first action is preclusive against A on the issue of C's negligence.

f. Inconsistent prior determination. Giving a prior determination of an issue conclusive effect in subsequent litigation is justified not merely as avoiding further costs of litigation but also by underlying confidence that the result reached is substantially correct. Where a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted. The inference, rather, is that the outcomes may have been based on equally reasonable resolutions of doubt as to the probative strength of the evidence or the appropriate application of a legal rule to the evidence. That such a doubtful determination has been given effect in the action in which it was reached does not require that it be given effect against the party in litigation against another adversary.

g. Ambivalence of prior determination. The circumstances attending the determination of an issue in the first action may indicate that it could reasonably have been resolved otherwise if those circumstances were absent. Resolution of the issue in question may have entailed reference to such matters as the intention, knowledge, or comparative responsibility of the parties in relation to each other. Particularly where the issues have been tried to a jury, the circumstances may suggest that the issue was resolved by compromise or with more or less

conscious reference to such matters as insurance coverage or the litigants' relative financial position. In these and similar situations, taking the prior determination at face value for purposes of the second action would extend the effects of imperfections in the adjudicative process beyond the limits of the first adjudication, within which they are accepted only because of the practical necessity of achieving finality.

*Illustrations:*

5. A, a real estate developer, advertises vacation lots for sale. B, a real estate broker, and C, a retired schoolteacher, each contract to buy a lot but subsequently refuse to complete their contracts. In A's action for breach against C, C successfully defends on the ground that he reasonably relied on the advertising. The determination in the action between A and C that the statements were ones on which reliance might reasonably be placed is not preclusive in an action for breach by A against B.

6. A, a passenger asleep while traveling in C's car, is injured in a collision between C and a car driven by D. A recovers judgment against C on allegations that C was willfully negligent. B, a passenger who was awake and seated beside C, brings an action for his injuries to which C pleads contributory negligence and assumption of risk. C is not precluded as to the issue of his willful negligence.

7. In the crash of C's plane, A and B are killed. In a wrongful death action by A's representative, a judgment is awarded of \$35,000 despite evidence establishing damages recoverable by A's representative substantially exceeding that amount. In a subsequent action for the wrongful death of B, C is not precluded as to the issue of his liability.

h. Complication or prejudice in second action. Treating a previously litigated issue as conclusively determined may in some circumstances complicate the trial of the subsequent action or prejudice the interests of a party thereto who has a legal relationship to the party sought to be precluded. Where this is the case, little is gained by way of economy in foreclosing retrial of the issue, because substantial recanvassing of the evidence will in any event be necessary. At the same time, since the primary consideration in administering the rule of preclusion is fairness rather than consistency, it is inappropriate to invoke preclusion where it will embarrass or hinder a party who has not yet had his day in court.

*Illustration:*

8. A, while on premises owned by C, engages in an altercation with B, C's employee, as a result of which A is injured. B is thereafter tried and convicted of assaulting A, his plea of self-defense being rejected. In A's action for damages against B and C, the issue of B's liability may be litigated by both B and C if it appears that invoking preclusion against B may prejudice defense of the action by C.

i. Fresh determination of law. When the issue involved is one of law, stability of decision can be regulated by the rule of issue preclusion or by the more flexible rule of stare decisis. See §28, Comment b. If the rule of issue preclusion is applied, the party against whom it is applied is foreclosed from advancing the contention that stare decisis should not bind the court in determining the issue. Correlatively, the court is foreclosed from an opportunity to reconsider the applicable rule, and thus to perform its function of developing the law. This consideration is especially pertinent when there is a difference in the forums in which the two actions are to be determined, as when the issue was determined in the first action by a trial court and in the second action will probably be taken to an appellate court; when the issue was determined in an appellate court whose jurisdiction is coordinate with or subordinate to that of an appellate court to which the second action can be taken; or when the issue is of

general interest and has not been resolved by the highest appellate court that can resolve it. As indicated in §28, Comment c, it is also pertinent that the party against whom the rule of preclusion is to be applied is a government agency responsible for continuing administration of a body of law applicable to many similarly situated persons. When any of these factors is present, the rule of preclusion should ordinarily be superseded by the less limiting principle of stare decisis.

j. Other circumstances. The circumstances specified in this Section are illustrative rather than definitive of those that may be considered in determining application of issue preclusion. Important among such other circumstances is the disclosure that the prior determination was plainly wrong or that new evidence has become available that could likely lead to a different result. It is unnecessary that the party seeking to avoid preclusion show, as he must in seeking to set aside a judgment, that the evidence could not have been discovered with due diligence; the question is not whether a prior determination should be set aside but whether it should be treated as conclusive for further purposes.

*Illustration:*

9. C engages in conduct resulting in damage to the property of A and B that is stored in the same location. In A's action against C for damages, a key witness for C on the issue of C's negligence is unavailable. Judgment is for A. In B's subsequent action for his damage, C may be permitted to relitigate the issue of negligence upon a showing that the witness can be available at trial of the action.

## Topic 3. Judgments Based on Jurisdiction Over Things or Over Status

### §30 Judgments Based on Jurisdiction to Determine Interests in Things

A valid and final judgment in an action based only on jurisdiction to determine interests in a thing:

- (1) Is conclusive as to those interests with regard to all persons, if the judgment purports to have that effect (traditionally described as “in rem”), or with regard to the named parties, if the judgment purports to have that effect (traditionally described as “quasi in rem”); and
- (2) Does not bind anyone with respect to a personal liability; and
- (3) Is conclusive between parties, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.

Cross References:

The rules of issue preclusion are set forth in Topic 2, Title E, §§27, 28.

For related provisions on attachment, garnishment and similar proceedings (traditionally described as “quasi in rem”), see §32.

#### **Comment:**

*a. Effect of judgment on interests in a thing.* In certain actions based on jurisdiction over tangible or intangible property—such as actions to register the title to land in the name of the plaintiff, actions by the government to forfeit a thing used in violation of the revenue or other laws, proceedings to escheat a bank deposit, or admiralty proceedings to enforce a maritime lien on a vessel by sale—a court may enter a final judgment purporting to bind all persons in the world with respect to interests in the property (traditionally described as a judgment “in rem”). If the necessary prerequisites to the exercise of such jurisdiction are met, see §6, the judgment is valid and will have the purported effect.

Similarly, certain actions based on jurisdiction over property are brought to determine or establish interests in the property with respect to specific persons—interests that existed, or were claimed to exist, prior to the bringing of the action. (Examples include actions to partition land, to quiet or remove a cloud on title, or to foreclose a mortgage.) In such cases, a final judgment will bind those persons with respect to those interests if the prerequisites to the exercise of such jurisdiction are met, see §6, even though the persons were not amenable to the personal jurisdiction of the court. See Illustration 1.

The foregoing effects of a judgment with respect to interests in a thing must be distinguished from the effects as to issue preclusion—collateral and direct estoppel—discussed in Comment *d*, below. There can be no such preclusion except as between parties appearing and litigating particular issues. However, interests in the thing are conclusively determined even as to parties who default.

*Illustration:*

1. A brings an action in State X against B to quiet title to Blackacre, situated in State X. Jurisdiction is based on the presence of the property in State X; B is a nonresident and is served with notice outside the State. B does not appear in the proceeding and judgment is given to A. Thereafter B brings an action of ejectment against A in State X to recover Blackacre. A pleads the prior judgment. This is a valid defense to B's action.

*b. Possible extension of effect of judgment when personal jurisdiction might have been but was not obtained.* A judgment in an action based on jurisdiction over a thing is conclusive with respect to interests in the thing, but does not bind anyone with respect to a personal liability (unless the character of the action is changed as indicated in Comment c). Thus a judgment foreclosing a mortgage precludes a second action for foreclosure, but (in the absence of statute) does not merge or discharge the unpaid portion of the personal debt secured. By the established rule, the converse is also true: a personal action may be maintained on the debt and judgment therein will not preclude a later action resorting to the security (allowing credit for any recovery in the first action).

The established rule is proper in those situations where only one kind of jurisdiction, personal or nonpersonal, is available in the forum state. If personal jurisdiction is unavailable at the situs of realty, it should be possible, after foreclosing a mortgage on the land, to commence an action for any deficiency in a state where personal jurisdiction can be obtained over the mortgagor. This is simply an application of the proposition, basic to §26, that remedies which, through no fault of a plaintiff, were unavailable to him in a first action upon a claim, are not precluded by the judgment and may be asserted in a second action even though it arises out of the same transaction. On the other hand, where the two kinds of jurisdiction are available to a plaintiff but he fails to take advantage of them both, to allow him to bring successive nonpersonal and personal actions runs counter to the policy of res judicata. The justification has been often advanced that the two actions are pursuing different claims because one is against a person and the other against a thing. But both are affecting the interests of the same persons. A distinction exists in that the effect of the judgment in the nonpersonal action is limited to specific interests of those persons, but that is hardly enough to justify a departure from the general rules as to merger and bar. The view, however, that the general rules of bar and merger should apply without regard to the elusive issue of demarcation between personal and nonpersonal actions, see §5, Comment *b*, as yet enjoys only slight support in the commentaries, cases, or statutes.

*c. Personal liability: change in the character of the action.* An action initially directed to determine interests in a thing may be transformed and become pro tanto the basis for a personal judgment imposing personal liability. This comes about through the acquisition of personal jurisdiction over a party, normally through appropriate process based on contacts with the jurisdiction or through his general appearance therein to defend on the merits. (Note, however, that a party may be allowed to make less than a general appearance in order to defend on the merits. He may be allowed to make a "limited appearance," i.e., an appearance that does not subject him to the risk of any personal liability, or to the risk of any personal liability other than a judgment for costs. See §8, Comment *g*.)

*Illustration:*

2. A brings an action to register his title to Blackacre. Jurisdiction is based on the presence of the land in the state. In his complaint A states that B and C claim interests in the land. B and C are nonresidents and are served with notice outside the state. B enters a general appearance and makes a claim to the land, but C does not make an appearance. The court

gives judgment for A, registering the title to Blackacre in his name, and also gives a judgment against B and C for costs. The judgment is valid against B. It is valid against C regarding the title to Blackacre. It is also valid against C insofar as it purports to subject C to liability for costs if C was subject to in personam jurisdiction according to §5.

*d. Issue preclusion.* A valid judgment based only on jurisdiction over a thing is conclusive as to interests in the thing, even as to nonappearing parties (see Comment *a*). Such a judgment has no further conclusive effect except in accordance with the rules of issue preclusion set forth in §§27, 28. Under those rules, parties who have appeared in the action and litigated an issue as adversaries will normally be precluded from relitigating that issue if its determination was essential to the judgment.

A party who has appeared and litigated an issue in an action within the scope of this Section may properly be precluded from relitigating that issue whether his appearance was denominated as general, limited, or special. Such denominations properly relate to the question whether the appearing party can be subjected to personal liability in the action, not to the question whether an issue actually litigated and decided can be relitigated in a subsequent proceeding. However, if the circumstances were such that the party sought to be precluded did not have an adequate opportunity or incentive to litigate fully, there may be grounds for an exception to the general rule of preclusion under §28(e)(iii). (For a fuller discussion of issue preclusion, in the context of attachment jurisdiction, see §32, Comment *d*.)

*Illustration:*

3. A brings an action in State X against B to quiet title to Blackacre. Jurisdiction is based on the presence of Blackacre in State X. B appears in the action and claims title to Blackacre on the ground that a deed to Blackacre and Whiteacre given by B's father to A was invalid because of formal defects. The court determines that the deed was valid and gives judgment for A. That judgment precludes any later action by B against A to recover Blackacre. Moreover, in a subsequent action of ejectment by B against A to recover Whiteacre, the prior judgment is conclusive with respect to the formal validity of the deed. In this action, however, B is not precluded from claiming Whiteacre on the ground that by an earlier deed B's ancestor had conveyed Blackacre and Whiteacre to him.

### §31 Judgments Determining Status

(1) A judgment in an action whose purpose is to determine or change a person's status is conclusive upon the parties to the action:

(a) With respect to the existence of the status, and rights and obligations incident to the status which under the procedures governing the action are ordinarily determined therein, in accordance with the rules of claim preclusion stated in §§18-26 and subject to the qualifications stated in §13 concerning judgments granting or denying continuing relief;

(b) With respect to issues determined in the action, in accordance with the rules of issue preclusion stated in §§27-28.

(2) A judgment in an action whose purpose is to determine or change a person's status is conclusive with respect to that status upon all other persons, with the following qualifications:

(a) If a person has, under applicable law, an interest in such status such that he is entitled to contest its existence, the judgment is not conclusive upon him unless he was afforded an opportunity to be a party to the action;

(b) When a statute, rule of court, or provision of the judgment itself limits the effect of the judgment with respect to other persons, the effect of the judgment is limited accordingly;

(c) As against a person who is not entitled to contest the existence of the status, the judgment is not accorded effect to the extent it would result in unjust effect on that person's own status, rights, or obligations.

(3) The determination of a person's status in an action other than one whose purpose is to determine or change that status is conclusive upon the parties to the action, in accordance with the rules of issue preclusion, except in a subsequent action whose purpose is to determine or change the status in question.

**Comment:**

a. Scope. "Status" includes various forms of continuing legal relations between an individual and society as a whole, such as citizenship, or between an individual and one or more other specific persons, such as marriage and the parent-child relationship. It includes legal relations of indefinite term, such as citizenship or marriage, and ones that are usually



transitory, such as custody or the state of a person's being so mentally disturbed as to require suspension of the capacity to manage his own affairs.

Proceedings for the determination of status include divorce and annulment actions, filiation proceedings, proceedings for termination of a parent-child relationship (sometimes referred to as termination of parental rights), adoption proceedings, actions to revoke citizenship, proceedings for appointment of a conservator or guardian of property for a person who lacks capacity to manage his own affairs, and similar procedures. A characteristic of most such proceedings is that the state asserts an interest of its own in the determination, often manifested by procedures whereby the court undertakes an independent investigation of the facts and applicable legal standards, as well as relying on party presentations in this respect. The existence of a status can, however, be drawn in question in ordinary litigation. For example, a person asserting a claim for a survivor's benefit against a pension fund may be required to establish that he is the surviving spouse of the person covered by the fund. An action upon such a claim is not a proceeding whose purpose is to determine the status of the claimant as the spouse of the decedent. When a question of status arises in such an action, the effect of the determination of the status is governed by the rule of Subsection (3) of this Section. See Comment g, below.

There is no little difficulty in subsuming all the various types of status, and status determination proceedings, under a single *res judicata* rubric. The contrast between types of status is perhaps most sharply revealed in problems associated with divorce, where the present legal tendency is to treat as valid any divorce proceeding that is either legally colorable or acquiesced in by the parties, and those associated with paternity, where the tendency is to hold open the possibility of establishing legitimacy and the right to support against any judgment except one which is based on full and fair litigation of the question and which involves the child himself as a party. A further problem is that the decisions in this field are notoriously influenced by ad hoc sensitivity to circumstantial equities and to strongly held views as to the personal and social relationships involved. As a result, particularized formulations of legal rules often do not sustain themselves within categories of status relationships and can be carried over from one category to another only with greatest caution. Nevertheless, the general effect of the decisions is that the concepts of claim and issue preclusion have application to status determinations as well as to other types of litigation.

b. Rationale. The rules governing the effect to be accorded status determinations reflect adjustment of several intersecting and sometimes conflicting considerations. The state has a supervisory interest in the personal and social relationships associated with status, and with the proper allocation of rights and obligations concerning property and support that attend those relationships. That interest is expressed in rules usually requiring that legal formation and dissolution of status be officially reviewed and approved, sometimes through judicial proceedings, as a condition of their validity. The form of these proceedings reflects the state's interest in that they are conducted with the sole or principal purpose of determining status and with a view to making a determination that can be taken as a firm legal premise in all matters in which the status may subsequently be significant. The court usually acts not only as arbiter but as monitor in behalf of a public interest. In this sense, a proceeding to determine a status can be called a proceeding "in rem."

On the other hand, as indicated in Comment a, a question of status may arise as an incident to litigation whose aim is the resolution of some other kind of dispute. In order that the litigation may be expeditiously resolved, it is generally permissible to try the status issue

directly rather than referring it to a special proceeding for determination. When a status issue has thus been tried in the course of ordinary litigation, a conflict is presented between the general policy of the law of judgments that an issue fairly tried should not be retried and the policy of the law governing status that status should not be conclusively determined except in the special proceedings prescribed for that purpose.

Another set of conflicting considerations is presented when a status determination affects not only the persons immediately involved in the relationship but others as well. The conflict in this situation is between giving to a proceeding for determination of status the conclusive effect against all potentially interested persons that it is designed to have, and allowing a non-party to have his day in court on an issue that may vitally affect his own interests.

These conflicts are accommodated in the rules of this Section. Their theme is that the determination of a status in a proceeding for that purpose is conclusive on all persons except where strongly countervailing interests ought to be given precedence.

The rules stated in this Section apply to interstate recognition of judgments concerning status, subject to the qualifications stated in Restatement, Second, Conflict of Laws §§69-79. As noted there, the jurisdiction of a state to adjudicate a status and its incidents may be limited when the persons in the status relationship are not all amenable to personal jurisdiction in the state, and may be affected by the fact that another state has correlative authority to adjudicate the status or its incidents. The result of these limitations is that status adjudications, particularly concerning divorce and custody, may have more limited effects interstate than do status adjudications when all the affected persons are subject to personal jurisdiction. The decisions establishing the rules of recognition between states often advert to this peculiarity of status adjudications, sometimes asserting that they are peculiar for interstate recognition purposes because the states have unusual legal autonomy in this field, or that they are peculiar for *res judicata* purposes because of the inherently dynamic character of the relationships that may be involved. Insofar as these decisions reflect the latter consideration, they are relevant to this Section.

c. Application of rules of preclusion. The basic principles of claim preclusion and issue preclusion, particularly the concepts stated in §§24- 25 and 27- 28, are applicable to adjudications concerning status. The application of those principles and concepts is appropriately shaped, however, by the special characteristics of status determinations. There are several relevant variables in this respect. One is the type of status involved. For example, citizenship involves pervasive and permanent effects on such matters as rights of residence, political participation, pursuit of a vocation, and opportunity to abide with members of the person's family. On the other hand, the custody of a child is a transitory legal relationship that may be independent of other legal issues, even that of financial support. A second factor is whether substantive legal policy favors formality or vitality in the status. Formerly, for example, the law sought to discourage divorce regardless of the spouses' personal unhappiness, while today it makes subsisting interspousal conflict a basis in itself for divorce. A comparable change has occurred regarding a child's status as the offspring of its parents, so that the former disapprobation of an "illegitimate" child has been replaced by policies aimed at giving the child legal status equal to that of a child born in wedlock.

A third factor is whether the legal consequence at issue is a matter of property interest or financial support, on the one hand, or the legitimacy of a personal relationship, on the other. Where the matter in issue is the legitimacy of a personal relationship, the rules of preclusion

may be given effect with greater or less strictness depending on whether it will impugn the legitimacy of a “de facto” relationship.

These variables affect the content and weight of the factors involved in applying the rules of claim and issue preclusion but not the concepts on which the rules are based. Although the need for just determination on the merits is very important in status adjudications, the need for the stability that is achieved by finality is also very important. The problem of *res judicata* in status determinations is therefore the same as in other adjudications in analysis if not in poignancy.

d. Claim preclusion. An action to determine a status involves claims, within the rule of claim preclusion, in two respects. First, the existence or non-existence of the status depends on contentions of fact or law like those that may be advanced in support of a claim for a remedy of damages or injunction. Thus, annulment may be based alternatively on consanguinity of the parties, duress, fraudulent concealment of material facts, etc.; a right to custody may be based, in part at least, on the existence of a blood relationship, as well as upon the personal congeniality of the custody relationship. Second, there may be claims to property or obligations that normally attend adjudication of the status, for example, the division of property upon divorce and the obligation of support that is the practical object of a paternity determination.

The concept of “claim” is applicable in both respects, see §24. However, the characteristics or circumstances of the judgment in a status determination often invoke exceptions to the rule of claim preclusion. The portion of the judgment dealing with support, for example, may not purport to be final or may as a matter of law be open to subsequent revision. The concept of changed circumstances, §24, Comment f, often has application. Determinations of custody of children are usually of this character, being made according to the “best interests of the child” at the time. Although one of the factors in the best interests of the child is legal stabilization of his situation, so that a previously ordained custody arrangement is accorded significance, a custody judgment cannot determine conditions as they thereafter develop. The same is true of determinations of mental condition for the purpose of commitment or guardianship. Under evolving change in divorce law, a similar situation is presented where divorce may be based on the present incompatibility of the parties to a marriage.

*Illustration:*

1. H brings an action against W, his spouse, for divorce, on the ground of W’s adultery. A judgment for W precludes H from subsequently bringing an action for divorce based on the adultery complained of or of other associated or previous comparable misconduct. It does not preclude H from bringing an action for divorce on the ground that the marriage thereafter became irretrievably broken down.

Limitations on the competency of the court frequently are significant in status litigation, particularly divorce proceedings in which one of the spouses is not locally domiciled. These limitations require application of the exception stated in §26(1)(c) that preclusion does not apply to a claim for which the court could not provide a remedy. A state often has authority to dissolve a marriage without also having authority to determine the parties’ rights to property owned by them during marriage or their rights and obligations of support. The same may be true in matters of custody or parentage. Similar limitations may exist regarding the competency of a particular court within a state where all interested parties reside. When the court lacks competence to adjudicate an incident of a status relationship that comes within

the “transaction” involved in the status determination, claim preclusion does not apply to that incident.

In a status determination proceeding, the “transaction” for purposes of claim preclusion is established with primary reference to the matters ordinarily brought forward for resolution in such a proceeding. In a divorce proceeding, matters of alimony and property division are ordinarily considered and determined along with dissolution of the marriage; so also property interests in an annulment proceeding and accrued financial obligations in a paternity determination. The prevailing practice in the jurisdiction is an appropriate guide in defining the “transaction” because it is a fair determinate of reasonable party expectations.

e. Issue preclusion. Issues actually litigated between parties to a proceeding for determination of status are conclusive according to the general rule of issue preclusion stated in §§27- 28. The determination of issues is not binding on a non-party (unless for example he is represented in the action, see §41), even though the determination of the status as such may be conclusive on him.

f. Conclusiveness on non-parties (Subsection (2)). A status determination is ordinarily binding on non-parties because it effects a transformation of the legal status of the person involved which others have no legal authority to challenge. In this respect it is similar to status changes that parties are free to make without adjudicative proceedings, such as entry into marriage, renunciation of citizenship, or voluntary surrender of one’s property to a conservator or trustee. Rules governing proceedings to adjudicate status often designate those who must be made parties to, or given notice of, the proceedings. These rules thereby identify the persons who have legal authority to challenge the status determination. In some instances, a legal interest in the status sufficient to confer that authority has been found to exist as a matter of Constitutional law. Beyond this, applicable statutory and decisional law determines the persons who have such an interest.

The authorities in this respect are in profound conflict. However, much if not all of the conflict in the decisions is explainable by the fact that many courts have assumed, first, that if a status judgment can be attacked by any “stranger,” it must be subject to attack by all “strangers,” i.e. persons who were not parties to the status determination proceeding, and, second, that if a status judgment is valid for some purposes, it must be given effect for all purposes. The better considered authorities have recognized that the problems involved can be better resolved if these assumptions are discarded. Thus, a status determination can be treated as valid and conclusive against “remote strangers” but not as against persons whose own status and welfare are intimately bound in the relationship. Furthermore, a determination can be accepted as valid without giving effect to all the consequences that ordinarily follow from its existence.

*Illustrations:*

2. M and F are husband and wife and parents of a child, C. An action is brought to terminate the parental relation of M and F to C and to make C the child of A and B by adoption. F is neither given notice nor has knowledge of the proceeding. F is not bound by the purported termination of his parental relationship to C, or by the adoption of C by A and B.

3. M brings an action for divorce against F, seeking support for a child, C, of whom M claims F to be the father. No representative for C is designated in the action. F denies that he is the father of C. A judgment for F denying M support for C does not preclude an action by C against F for parental support.

A person having standing to challenge a status determination may lose the right to assert the challenge by undue delay after having actual notice of the determination. The governing considerations are stated in §74 regarding inequitable delay in asserting a claim. A relatively brief delay may be sufficient to terminate the right to challenge a status determination that is the basis of a new family relationship, such as a custody determination or an adoption.

Aside from persons having such a relationship to the status that they must be given opportunity to participate in its determination, all persons are legal by-standers to the proceeding and generally may not contest the determination that results. There are two exceptions to this general rule. Sometimes the rules governing a proceeding to adjudicate status expressly limit its effects on non-parties. The effect of such rules is to give a person affected by a status determination an opportunity to relitigate it that he would not otherwise have.

The other exception is that conclusive effect should not be given to a status determination in resolving another person's rights or obligations in which the status is an operative element, if doing so would impair an interest arising from a just reliance interest or otherwise result in substantial injustice. Some earlier authorities insisted that a judgment determining status must necessarily be conclusive on "all the world" if it was to be conclusive beyond the parties in any way. More carefully considered authorities, however, recognize that a status judgment can be treated as effective at large without enforcing all its legal ramifications, and that treating it as operative when the interests of others are involved should depend on considerations of equity and good conscience.

*Illustrations:*

4. W and H are divorced, H being obligated to pay W support until her death or remarriage. W subsequently marries A, then obtains an annulment of that marriage, and sues H for support payments accruing since the annulment. H may not contest the validity of the annulment proceeding but under applicable law governing family relationships it may result that H's obligation to pay support is not revived by the annulment in the absence of strongly compelling circumstances justifying the renewal of the obligation. Compare Illustration 5.

5. Same facts as Illustration 4, except that the annulment of W's marriage to A was obtained shortly after that marriage and on the ground that W was so mentally ill as to be incapable of consenting to marry. H may be held obligated to pay support to W from the date of judgment in the action by W.

6. W, the surviving spouse of D, marries A, whereupon T, the trustee of a pension fund of which W is beneficiary, ceases to pay W surviving spouse's monthly benefits that terminate upon remarriage. W thereafter obtains an annulment of her marriage to A. Under applicable law governing family relationships T may be held obligated to resume monthly payments to W for the period following the annulment of her marriage to A.

g. Status determination incident to other litigation. The question of a person's status may arise as an incident to the adjudication of some other controversy. Thus, a claimant of a property interest or social welfare benefit, as the "widower" or "widow" of another, may have to prove the prior marriage relationship with the decedent as against the person against whom the claim is asserted. The issues determined in the course of ascertaining the asserted status are preclusive on the parties in subsequent litigation, in the same way as any other factual issues determined between litigants.

*Illustrations:*

7. W, claiming to be the surviving spouse of D, brings an action against T, the trustee of a pension fund of which D was a beneficiary, for a surviving spouse's benefit under the pension plan. T defends on the ground that W was not married to D, but judgment is for W. T is precluded from disputing W's status as D's widow in an action by W for subsequent installments of the widow's benefit. Under the rule of §29, T would be precluded from doing so in an action by W's child for a benefit available to children of those covered by the pension plan.

8. Same facts as in Illustration 7. If judgment is for T, in a subsequent action in which W seeks another installment of the widow's benefit, W is precluded as to the issues determined in the first action.

The determination of issues is also preclusive against a party thereto who thereafter is involved in litigation with persons who were not parties to the first action, in accordance with the rule in §29. However, the determinations of status incident to resolving non-status litigation should not be given preclusive effects that disturb the purpose of special proceedings for determining status. When a person's status has been determined in non-status litigation, the issues should be conclusive in related non-status litigation, but not otherwise. See §28.

*Illustration:*

9. A brings an action against F to recover for goods supplied by A to C, on the ground that the goods were necessities for the support of C and that F is C's parent. A judgment for A is not preclusive against F in a subsequent action by C to establish that F is his parent.

### §32 Judgments in Actions Based on Attachment Jurisdiction

A valid and final judgment begun by attachment, garnishment, or similar process (traditionally described as “quasi in rem”) in which jurisdiction is exercised only with respect to the thing proceeded against and in which the plaintiff seeks not to determine the existence of interests in the thing but rather to apply the thing to the satisfaction of a claim against the defendant:

- (1) Is conclusive between parties as to the right to apply the thing to the claim; and
- (2) Does not bind the defendant to any personal liability, or determine the defendant’s interest in any other thing; and
- (3) Is conclusive between the parties, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.

Cross Reference.

The rules of issue preclusion are set forth in Topic 2, Title E, §§27, 28.

#### **Comment:**

a. Effect of judgment with respect to the thing proceeded against. This type of action, which is treated in §8, is a subtype of the action based on jurisdiction over a thing. Thus, by analogy to the rule of §30, a judgment in an action to apply a thing to satisfaction of a claim is binding upon the defendant in that respect, even though the defendant was not amenable to the personal jurisdiction of the court.

b. Personal liability. Comment c to §30 is applicable here. Although a valid judgment is conclusive as to the application of the defendant’s interest in the thing to the plaintiff’s claim, a personal judgment upon that claim cannot be given, nor can any other personal liability be imposed, unless the court has acquired jurisdiction over the defendant’s person. This normally occurs by reason of proper service of process or by the defendant’s general appearance. However, the defendant may be allowed to make less than a general appearance in order to defend on the merits. He may be allowed to make a “limited appearance,” i.e., an appearance that does not subject him to the risk of any personal liability, or to the risk of any personal liability other than a judgment for costs. See §8, Comment g.

c. Bar and merger. The problem of bar can arise only if the defendant appears. If that appearance is a general one, then the proceeding is converted into a personal action and the rules of bar for personal judgments are fully applicable. See §§19, 20.

On the other hand, if the successful defendant’s appearance is a limited one, no bar arises against plaintiff’s bringing of another suit, either in the same state or in another state, and based either on personal jurisdiction or on a new attachment or garnishment of other property belonging to the defendant. The unsuccessful plaintiff, however, is precluded from bringing another action that seeks to apply the same thing to payment of the same claim. This narrow preclusion with respect to the claim is said to be justified by a notion of fairness and mutuality; if the defendant seeks to defend on the merits while exposing to liability only his interest in the thing, he cannot expect a successful defense to safeguard all his property.

With regard to merger, the defendant's general appearance converts the action into a personal one and makes the rules of merger for personal judgments fully applicable. Thus, a valid, final judgment in favor of the plaintiff merges his claim in that judgment. See §18.

However, if the defendant defaults or makes an unsuccessful defense pursuant to a limited appearance, the plaintiff's claim is not merged in his judgment. Again, even if the proceeds of the attached or garnished property fully satisfy the plaintiff's judgment, he may maintain another suit on the same claim, based on personal jurisdiction or on a new attachment or garnishment of other property belonging to the defendant, either in the same state or in another state. (The defendant is entitled to credit for the amount which the plaintiff has received in the prior action and has applied to the payment of his claim. It should be noted, however, that the plaintiff is entitled to apply, and will be taken to have applied, the proceeds first to the payment of any costs awarded in the action. This is significant when no personal judgment for costs could be given; in that case, were the proceeds not applied to payment of costs, the plaintiff would be unable to recover them in any subsequent action for want of an enforceable judgment.)

Although the law and the generally accepted reasoning are otherwise, an argument can be made for requiring the plaintiff to risk his whole claim although the defendant by means of a limited appearance confines his risk to his interest in the thing attached or garnished. Where personal jurisdiction is available in the same state but is not availed of, to hold (a) that the plaintiff would be wholly barred by a defeat on the merits and (b) that his entire claim would be merged in a judgment in his favor, would foster the policy of res judicata that the plaintiff seek all available remedies simultaneously (see §30, Comment b). On the other hand, if personal jurisdiction is unavailable in the forum state, exercise of jurisdiction by attachment must be justified by special circumstances of the kind recognized in *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). Those circumstances also generally signify that plaintiff should not be regarded as having to put his whole claim at risk by bringing suit where defendant happens to have attachable property.

It may be noted that since the decision in *Shaffer v. Heitner*, supra, there is a much more limited sphere in which a state may exercise attachment jurisdiction without being able to exercise in personam jurisdiction at the same time.

*Illustrations:*

1. A brings an action against B to recover damages for breach of contract. Personal jurisdiction over B is not established, but an automobile worth \$500 belonging to him is attached and he is personally notified of the proceeding. Judgment by default is rendered in favor of A for his damages to be assessed. The jury impanelled to assess the damages gives a verdict of \$500 and judgment is rendered for A for \$500 and \$50 costs, to be paid out of the proceeds of the sale of the automobile. The automobile is sold for \$500, which sum is paid to A. Of this sum \$50 is applicable to the payment of the costs and \$450 toward the payment of A's claim. B is not liable for the deficiency. However, in a new action brought by A against B on the original claim, A will be entitled, if successful, to recover whatever damages may be awarded in that action, which may be more or less than \$500, less the sum of \$450, plus the costs of the new action.

2. A brings an action in State X upon a promissory note for \$1000 against B, who is domiciled in State Y. A garnishes C, who is indebted to B in the sum of \$600. B does not have sufficient contacts with State X to be subject to in personam jurisdiction but the circumstances are such that State X may exercise attachment jurisdiction. B does not appear in the action



although he has received notice of the action, and judgment is rendered for A, yielding a recovery of \$600. Thereafter A brings an action on the original claim to recover the balance of \$400 from B, who is subjected to the personal jurisdiction of the court. B may defend the action on the ground that he did not execute the note. A successful defense, however, will not affect the validity of the prior proceeding and the court will not direct A to restore the \$600.

3. The facts are as stated in Illustration 2, except that B makes a limited appearance in the first action and unsuccessfully defends on the ground that he did not execute the note. A is not precluded by the rule of merger from bringing a second action against B to recover the balance. (As to issue preclusion, see Comment d, below.)

d. Issue preclusion. A defendant faced with a proper proceeding to apply a thing to the satisfaction of a claim can do one of three things: default, appear generally, or, sometimes, make a limited appearance. If he defaults, then there will be no litigation of the issues, and therefore no issue preclusion in any case (see §27). The judgment will be binding only with respect to the right to apply the thing to payment of the claim. If he appears generally, the action is converted into a personal one, and therefore the rules of issue preclusion for personal judgments are called into play; in any subsequent action, the determination of any litigated issues upon which judgment is based will be binding upon the parties in accord with the general rules (see §§27, 28).

A problem arises when the defendant makes a limited appearance. It could be argued that since the purpose of a limited appearance is to limit the defendant's risk to the property proceeded against, such an appearance should have no direct or collateral estoppel effect, even as to issues actually litigated. Such an argument is especially forceful when the property on which jurisdiction is based bears little or no relation to the claim itself. Compare §§30, 31.

Although the question is a close one, this argument seems overcome by the reasons supporting application of the rules of issue preclusion in such a case. First the argument does not justify exempting the plaintiff from the rules of issue preclusion, since he has chosen the forum and since the choice as to a general or limited appearance is presumably the defendant's. Second, even as to the defendant, it is difficult to see why he should be allowed to relitigate an issue as to which he has had his fully day in court; indeed, if the forum in the initial proceeding was an inconvenient one, he may be able to avoid the impact of issue preclusion on the ground, available to any person against whom preclusion is sought, that he did not have an adequate opportunity or incentive to litigate in that proceeding. See §28(5)(c). A limited appearance allows the defendant to raise only some defenses, preserving others as well as any counterclaims for a later action if he wishes, and it allows him to avoid the risk of the direct imposition of a personal judgment. It is not necessary to allow him the further benefit of relitigating issues he has chosen to litigate in the initial proceeding.

### §33 Effect of Declaratory Judgment

A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.

Cross Reference:

The rules of issue preclusion are set forth in Topic 2, Title E, §§27, 28.

#### **Comment:**

a. When declaratory judgments are permitted. Historically, an action at law generally could not be maintained unless the defendant had already violated a duty owed to the plaintiff, and the purpose of the action was to redress the wrong already committed. On the other hand, in some circumstances a suit in equity might be maintained to prevent the commission of a threatened wrong and, even though no wrong had been committed or threatened, to secure a determination—which might well be called a declaration—of the rights of the parties. Thus a court of equity would entertain a suit to quiet title or to remove a cloud on the title to property, or a suit by a trustee for a construction of the trust instrument to determine the extent of his powers and duties. So also, an executor could bring a suit for the construction of a will.

By the modern action for a declaratory judgment, the power of the court to make declarations of rights is generalized and extended. The parties can have their rights declared in a broad range of situations before a claim has accrued but where it is probable that a claim would arise if a declaration were refused. But while the declaratory action is perhaps most important as a kind of preventive device, its use is not so restricted; it is also sometimes permitted after the wrong has been committed, when a coercive remedy could be awarded to or against the plaintiff in the declaratory action. The entertainment of an action for declaratory relief is, however, discretionary with the court; the likelihood that the action will in fact terminate the controversy, and the private or public utility of the declaration, are significant factors in exercise of discretion. A counterclaim for a declaration may also be entertained in appropriate cases.

Virtually all states have enacted statutes empowering their courts to render declaratory relief, and actions for such relief have become increasingly common. The legislation most widely adopted, the Uniform Declaratory Judgments Act, states that “Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.... The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.” The Act contains specific provisions with respect to maintaining actions seeking a declaration as to the construction or validity of deeds, wills, written contracts, statutes, ordinances, and franchises. It provides that “When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be effected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.” It also states: “Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper.”

Declaratory judgments are also permitted in the federal courts by statute. The Federal Declaratory Judgment Act (28 U.S.C. §§2201-02) states that "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.... Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." See also Rule 57 of the Federal Rules of Civil Procedure.

That there has been a prior adjudication between the parties bears on the allowance of a declaratory action. As is the case with other types of action, an action for a declaration may not be employed to relitigate a claim already adjudicated, or to evade the effects of preclusion with respect to issues already determined. Neither will a declaratory judgment be available to assert technical defects or mere error in a prior judgment. But when there is a basis for relief from the prior judgment, a declaratory action may provide a suitable vehicle for obtaining such relief. See §79. Moreover, a declaratory action may be employed to determine the meaning of an ambiguous judgment; here the declaration would not derogate from the binding effect of the prior decision, but would specify what was decided.

b. Preclusion as to matters declared. If a declaratory judgment is valid and final, it is conclusive, with respect to the matters declared, as to all persons who are bound by the judgment. This conclusive effect applies even as to a party who makes no appearance in the action. See Illustrations 1, 3, following Comment e. But in order to be bound, a person must have been an adversary of the prevailing party with respect to the matter declared. See §38.

If a non-appearing party were not concluded as to matters declared by the judgment, a defendant might abort all possible effects of the declaratory action by simply defaulting. On the other hand, the fact that one of the parties does not wish to litigate at a particular stage of a controversy may be a factor militating against entertainment of the action, especially where the proceeding involves the consequence of future action as distinguished from a dispute over present interests in property or present status. In any event a court should not make a declaration upon default on the basis of the pleadings alone but should require the plaintiff to present enough evidence to warrant the granting of declaratory relief. Such an examination of the evidence can be regarded as an aspect of the preliminary determination, required by the declaratory relief statutes, that there is a genuine controversy between the parties. See Illustration 3.

If the court permits a declaratory action to be maintained against a defaulting defendant, the preclusive effect of the judgment with respect to the matters declared may be viewed as a special instance of issue preclusion without adversary contest (compare Comment e, below), or perhaps more appropriately as a limited application of the rules of merger and bar in the special context of a declaratory proceeding.

c. Effects as to matters not declared. When a plaintiff seeks solely declaratory relief, the weight of authority does not view him as seeking to enforce a claim against the defendant. Instead, he is seen as merely requesting a judicial declaration as to the existence and nature of a relation between himself and the defendant. The effect of such a declaration, under this approach, is not to merge a claim in the judgment or to bar it. Accordingly, regardless of

outcome, the plaintiff or defendant may pursue further declaratory or coercive relief in a subsequent action.

A plaintiff who wins a declaratory judgment may go on to seek further relief, even in an action on the same claim which prompted the action for a declaratory judgment. This further relief may include damages which had accrued at the time the declaratory relief was sought; it is irrelevant that the further relief could have been requested initially. See Illustration 1. Nonmerger is justified by arguments based on the purpose of declaratory relief. A declaratory action is intended to provide a remedy that is simpler and less harsh than coercive relief, if it appears that a declaration might terminate the potential controversy. This idea that declaratory actions are to supplement rather than supersede other types of litigation is fortified by the provisions of the Uniform and Federal Acts for “further relief” when necessary or proper; these provisions represent a legislative scheme antithetical to merger (see §26(1)(d)).

A plaintiff who has lost a declaratory judgment action may also bring a subsequent action for other relief, subject to the constraint of the determinations made in the declaratory action. The theory is the same: a declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced. That approach is also applicable with respect to a counterclaim by a defendant that, in any other type of action, would be barred by §22.

A refusal to apply merger or bar can be defended in cases where declaratory relief is sought before accrual of a claim for ordinary relief. Here there is no familiar criterion for determining what issues and what relief should be foreclosed in a subsequent action by way of merger or bar. Also it can be persuasively urged that the declaratory plaintiff ought to be permitted to make a partial presentation of his side of the controversy, in the hope of preventing a full-blown claim from arising, without thereby losing his chance to pursue or defend that claim at a later time. Application of bar might also be undesirable because the risk of bar would discourage declaratory actions in the preclaim situation or at least discourage a possibly useful even though partial presentation of the controversy.

However, if the claim has already accrued, refusal of bar or merger effects permits a claim to be split. Although it may be undesirable to allow declaratory proceedings with regard to “matured” ordinary causes of action, doing so is procedurally intelligible. Since allowance of the declaratory remedy is discretionary, the court’s exercise of discretion to allow a declaratory action when a damages or injunctive remedy could have been pursued can be viewed as an express reservation of all issues not included in the declaratory proceeding. Under the rule of §26(1)(b), the judgment is not preclusive as to the issues so reserved.

A litigant’s seeking a declaratory remedy when he could have maintained a conventional action for coercive relief often signifies that he is in a quandary not only as to what his rights and duties are, but also as to how to secure their adjudication. Allowing piecemeal litigation in such a circumstance is comparable to the option to “split” recognized by §26(1)(e). And the opposing party can generally counter the effort to split either by objecting to the declaratory proceeding or by counterclaiming in such a way, including a request of his own for declaratory relief, as to get the whole controversy determined at once. In any event the court whose discretion is invoked by a declaratory action has means of preventing abuse. The court should lean toward declining the action if another remedy, such as a coercive action on an existing claim, is plainly available and would have wider *res judicata* effects. And as an aid in the sound exercise of discretion, the court may appropriately require the plaintiff to indicate the nature

of the issues or claims, related to the subject of the action, that could be presented for adjudication but are not incorporated in the complaint. Also, whether or not a claim has accrued, the court may reject a second declaratory action after judgment in the first if the matters sought to be declared could well have been raised in the first. See Illustration 2.

d. Standard actions cast in declaratory form. Pleadings sometimes interpolate declaratory prayers redundantly in standard actions but this should not produce differences in the res judicata consequences of those actions. Thus a pleader demanding money damages may also ask for a corresponding declaration. For res judicata purposes the action should be treated as an adversary personal action concluded by a personal judgment with the usual consequences of merger, bar, and issue preclusion. The same applies to a prayer for a declaration which would be the substantial equivalent of a judgment of rescission or reformation. So also an action to adjudicate interests in property, such as an action to quiet title, or to establish a status, such as divorce, may be cast in declaratory form. This should not alter the res judicata effects of the judgments.

e. Issue preclusion. As stated in Comment b, a declaratory judgment has binding effect with respect to the matters declared whether or not there has been adversary litigation with respect to those matters. But beyond this, any preclusion with respect to the determination of issues will occur only in accordance with the general rules of issue preclusion, and the exceptions thereto, in §§27, 28. This is true whether the judgment is based on personal jurisdiction or on other grounds. As to the latter, see §§30, 32.

The line between the preclusion described in Comment b and the more limited preclusion described here is necessarily indistinct, but since default judgments in declaratory actions are relatively rare, the problem of drawing that line is not pervasive. As a general guide, it may be useful to regard the preclusive effect of a declaratory judgment rendered on default as extending only to the ultimate determinations embodied in the declaration itself, and not to all the allegations on which the declaration may rest.

*Illustrations:*

1. A, owner of the copyright of a certain work, enters into an agreement with B by which A licenses B to reproduce the work upon payment of royalties calculated according to a complex formula. The agreement contains a clause which enables A, in case of a material breach of contract by B, to terminate the license and recover damages from B, and also (but here the meaning of the clause is obscure) to require B to cease publishing certain other copyrighted material which A has licensed B to reproduce. A commences an action against B for a declaration that B has committed a material breach of contract by miscalculating and underpaying the royalties. B appears and defends and the court makes the requested declaration in A's favor. A may maintain a second action against B to recover damages for the breach and to enjoin B from reproducing the other copyrighted material, and B is precluded from disputing that he committed the breach as declared in the first action. It does not matter that A could have maintained the coercive action without first seeking the declaration. (Note: In view of the availability of a coercive action at the time of the first proceeding, the court might have decided, in the exercise of its discretion, not to entertain the action for declaratory relief.)

2. After securing the declaration as stated in Illustration 1, A would not be precluded as a matter of law from maintaining a second action for a declaration that he was entitled to require B to cease reproducing the other copyrighted material, but the court in its discretion might decline to entertain the action on the ground that the latter declaration should have

been sought in the first action together with the declaration as to breach. A could then still maintain the coercive action described in Illustration 1.

3. B, although properly served with process, fails to appear in the declaratory action described in Illustration 1. The court should not make the requested declaration merely upon B's default, but should require A to make satisfactory proof of the breach as a basis for the declaration. A declaration thus supported is conclusive between the parties in subsequent litigation.