

# RES JUDICATA IN FEDERAL TAX CASES

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*Res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum.*

A WEAPON which makes white black and straightens curves would seem to be a useful item in the armament of any lawyer, perhaps especially of a tax lawyer. Yet it is always possible for a bludgeon to miss its mark. And it should not be surprising to find that the use of the indiscriminating instrument of res judicata in tax litigation may sometimes result in neither black nor white, nor straightened lines. It is the purpose of this article to examine the extent to which res judicata has found application in the tax field and to attempt some evaluation of the doctrine as an aid in the disposition of tax controversies.<sup>1</sup>

Res judicata is a sort of estoppel, in the sense that it forecloses effective assertion of or investigation into the truth. In this guise it has sometimes been elaborately subdivided into estoppel by judgment, estoppel by verdict, the rule against splitting causes of action, and so on.<sup>2</sup> While these classifications are a recognition that the problem has many aspects, the term res judicata is used broadly here to indicate any situation in which a judgment or decision rendered in one proceeding is for any reason given conclusive effect in subsequent litigation.

The problem may be posed and a background laid by stating the two principal tax cases in which the principle of res judicata has been considered by the Supreme Court: one a case of four years' standing, the other decided within recent months. The first of these, *Tait v. Western Maryland Railway*,<sup>3</sup> presented the issue whether the taxpayer might deduct for the years 1920 through 1925 an amortized proportion of the discount on bonds sold by a predecessor company. In a previous case, the Circuit Court of Appeals had held that the same taxpayer

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1. The consideration is confined almost solely to federal tax cases, though the danger of this is recognized. See Griswold, Book Review (1935) 48 HARV. L. REV. 1032, 1034; PAUL, STUDIES IN FEDERAL TAXATION (1937) iii, 66. Courts and the Board of Tax Appeals have drawn little on non-tax authorities in res judicata cases. For state cases on the problems here discussed see Comments (1933) 33 COL. L. REV. 1404, (1933) 46 HARV. L. REV. 692. See also 2 FREEMAN, JUDGMENTS (5th ed. 1925) §§ 851-52.

There is a brief discussion of the present questions in Paul, *Res Judicata in Federal Taxation* (1937) 15 TAX MAG. 260.

2. See generally von Moschzisker, *Res Judicata* (1929) 38 YALE L. J. 299.

3. 289 U. S. 620 (1933).

might make the deduction for the years 1918 and 1919.<sup>4</sup> The Supreme Court held that the earlier decision was *res judicata*,<sup>5</sup> and that it foreclosed any consideration of the merits of the controversy.<sup>6</sup> In reaching this result the Court rejected the contention that *res judicata* was inapplicable because the formal parties on behalf of the Government in the two cases were different. It also held that the first judgment was binding, although it was based in part on a stipulation, and although evidence contrary to this stipulation was offered in the second proceeding. "The very right now contested arising out of the same facts appearing in this record, was adjudged in the prior proceeding."<sup>7</sup>

In the more recent Supreme Court case, *Blair v. Commissioner*,<sup>8</sup> the ultimate question was who should be taxed for the income of a trust. The taxpayer was a beneficiary under a trust instrument providing that the trust income should be paid to the beneficiaries "directly upon their separate order and receipt therefor," and that the income should not be "subject to the payment of the debts or obligations" of the beneficiaries. In 1923, the taxpayer executed a series of instruments assigning various portions of the trust income to his children, and the assigned income was thereafter paid directly to the assignees. The Commissioner, nevertheless, assessed all of the income to the taxpayer for the year 1923; and this action was upheld by the Circuit Court of Appeals on the ground that the trust was a spendthrift trust and that consequently the income was unassignable.<sup>9</sup> While this case was going through the courts, the Commissioner determined deficiencies on the same ground for several succeeding years, and the taxpayer filed petitions with the Board of Tax Appeals. Thereafter, the trustees of the trust, of whom the taxpayer was one, joined the other beneficiaries as parties in a proceeding

4. *Western Maryland Ry. v. Commissioner*, 33 F. (2d) 695 (C. C. A. 4th, 1929), *rev'd*, 12 B. T. A. 889 (1928).

5. The conclusiveness of the prior decision was thought to follow from *New Orleans v. Citizens' Bank*, 167 U. S. 371 (1897), where a similar result had been reached with respect to a state property tax. The decision in *United States v. Stone & Downer Co.*, 274 U. S. 225 (1927), that *res judicata* was inapplicable to decisions of the Court of Customs Appeals, was distinguished on the ground of the long continued practice of that Court at a time when its jurisdiction was final.

6. Whether a corporation not enjoying the benefits of *res judicata* may deduct amortized discounts on a predecessor's bonds, is not yet entirely clear. *Cf. New York Cent. R. R. v. Commissioner*, 79 F. (2d) 247 (C. C. A. 2d, 1935), *cert. denied*, 296 U. S. 653 (1935); *American Gas & Elec. Co. v. Commissioner*, 85 F. (2d) 527 (C. C. A. 2d, 1936); *Coast Counties Gas & Elec. Co. v. Commissioner*, 33 B. T. A. 1199 (1936), (1936) 46 YALE L. J. 314.

7. 289 U. S. 620, 626 (1933). A similar effort to show different facts in the second case failed in *Leininger v. Commissioner*, 86 F. (2d) 791 (C. C. A. 6th, 1936).

8. 57 Sup. Ct. 330 (1937). The case is also discussed at pp. 1344-45, *infra*.

9. *Commissioner v. Blair*, 60 F. (2d) 340 (C. C. A. 7th, 1932), *cert. denied*, 238 U. S. 602 (1933).

in the Illinois courts, seeking a construction of the trust instrument and a determination of the validity of the assignments. The action resulted in an opinion of the state court that the trust restrained alienation only at the suit of creditors; and the assignments were held valid.<sup>10</sup> This decision was then presented to the Board in the second tax controversy; and the Supreme Court ultimately held that the first decision was not res judicata, although it was a case between the same parties and on the same issue, namely, the validity of the assignments. But the subsequent decision of the Illinois Appellate Court was held to be conclusive against the Government, although the Government was not a party to it.

Here, then, are two decisions on the effect of a prior adjudication in a tax controversy when the same question is presented in a subsequent tax case. In one, the prior tax decision was held to be res judicata; in the other, it was not. This much the two decisions have in common: Both went against the Government. In this, at least, res judicata appears to be different from other forms of estoppel, which so far have operated almost invariably against the interests of the taxpayer.<sup>11</sup> The two cases, too, are sufficient to show that res judicata is a very slippery concept, no less puzzling to apply in actual cases than are some of the other formulae of the law. Under such circumstances, these cases, though decisions of the Supreme Court, cannot be regarded as fixed points. With them as a background, however, we may undertake to survey the decisions which the courts and the Board have rendered in the field.

### I. THE TRIBUNAL

As a first question, we may ask: What sort of decisions have that element of quality or dignity which is essential to make them the basis for a plea of res judicata in subsequent controversies? One thing, at least, is clear. Res judicata is a function of the judicial process. The decision of a court may be given conclusive effect in the same court,<sup>12</sup>

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10. *Blair v. Linn*, 274 Ill. App. 23 (1934) (one judge dissenting).

11. See Maguire and Zimet, *Hobson's Choice and Similar Practices in Federal Taxation* (1935) 48 HARV. L. REV. 1281, 1299-1300. In Comment (1933) 33 COL. L. REV. 1404, 1413, n. 51, it is stated that of eighty-five cases, mostly state decisions, in which res judicata was raised, the contention was made on behalf of the government in only eleven. The proportion in the federal tax cases here considered is higher, but the taxpayer has fared distinctly better than the Treasury.

12. *Donald v. White Lumber Co.*, 68 F. (2d) 441 (C. C. A. 5th, 1934); *Second Nat. Bank v. United States*, 66 Ct. Cls. 166 (1928), *cert. denied*, 280 U. S. 553 (1929); *International Curtis Marine Turbine Co. v. United States*, 74 Ct. Cls. 132, 56 F. (2d) 708 (1932); *Chicago Junction Rys. v. United States*, 80 Ct. Cls. 824, 10 F. Supp. 156 (1935); *Bowe-Burke Mining Co. v. Willcuts*, 45 F. (2d) 394 (D. Minn. 1930). All but the first of these cases and all of the cases cited in the next two footnotes involved second suits with respect to taxes for the same year or on the same estate. The cases in these three footnotes are, of course, in addition to those in the second paragraph of note 33, *infra*, involving Board decisions which had been reviewed by the courts.

in another court,<sup>13</sup> or by the Board of Tax Appeals;<sup>14</sup> and a decision in a state court may be a bar to subsequent proceedings in a federal court.<sup>15</sup> But the determinations of the Commissioner of Internal Revenue are not binding on him either with respect to the same year or subsequent tax years,<sup>16</sup> and consequently are not *res judicata*.<sup>17</sup>

Between these two points, however, the question is far from clear. Are the decisions of the Board of Tax Appeals *res judicata*, even though this effect was not accorded to determinations of the Committee on Appeals and Review which preceded it and performed similar functions? Here a distinction must be made between the position of the Board of Tax Appeals under the Revenue Act of 1924 and its position under the Act of 1926. Doubtless it was in part because of the feeling that the Board under the 1924 Act was in substance not very different from the Committee preceding it, that it was concluded that the Board's decisions were not *res judicata* in subsequent controversies.<sup>18</sup> Its determinations were to a considerable extent administrative, in fact as well as in form. Either party could start a suit in a district court within a year after the Board's decision. While in this action the Board's findings were "prima facie evidence of the facts therein stated,"<sup>19</sup> the trial in the district court was a trial *de novo*, and neither party was limited to the evidence or the grounds presented before the Board. The decision of the Board became final if no new action was begun within the year, but the parties would not ordinarily regard the Board proceeding as the ultimate occasion for the determination of tax liability. As one court has said, "The hearing before the Board was at that time little more than a preliminary skirmish, a run for luck."<sup>20</sup> Yet, although

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13. *Second Nat. Bank v. Woodworth*, 66 F. (2d) 170 (C. C. A. 6th, 1933); *Bertelsen v. White*, 58 F. (2d) 792 (D. Mass. 1932), *aff'd*, 65 F. (2d) 719 (C. C. A. 1st, 1933); *Art Metal Const. Co. v. United States*, 82 Ct. Cls. 666, 13 F. Supp. 756 (1936); *United States v. Utah Idaho Sugar Co.*, 15 A. F. T. R. 1037 (D. Utah 1934); *Guettel v. United States*, 17 F. Supp. 725 (W. D. Mo. 1936).

14. *Garcin v. Commissioner*, 22 B. T. A. 1027 (1931), *remanded on stipulation of parties*, 79 F. (2d) 993 (C. C. A. 4th, 1935) (transferee case).

15. *United States v. Guaranty Trust Co.*, 76 F. (2d) 747 (C. C. A. 2d, 1935).

16. *Burnet v. Porter*, 283 U. S. 230 (1931); *McIlheny v. Commissioner*, 39 F. (2d) 356 (C. C. A. 4th, 1930); *Tonningsen v. Commissioner*, 61 F. (2d) 199 (C. C. A. 9th, 1932); *Omaha Baum Iron Store, Inc. v. United States*, 80 Ct. Cls. 67, 8 F. Supp. 703 (1934), *cert. denied*, 296 U. S. 576 (1935); *Art Metal Const. Co. v. United States*, 17 F. Supp. 854 (Ct. Cls. 1937); *West Huntsville Cotton Mills Co. v. Commissioner*, 22 B. T. A. 1216 (1931); *Ford & Co. v. Commissioner*, 28 B. T. A. 156 (1933); *Fisher v. Commissioner*, 29 B. T. A. 1041 (1934).

17. It is usually said that the Commissioner is not bound by his own decisions. But sometimes the point is put in terms of *res judicata*. See *Co-operative Pub. Co. v. Commissioner*, 5 B. T. A. 340, 343 (1926).

18. These cases are discussed at p. 1324, *infra*.

19. REVENUE ACT OF 1924 § 900 (g).

20. *Blair v. Curran*, 24 F. (2d) 390, 392 (C. C. A. 1st, 1928).

both the Court of Claims<sup>21</sup> and the Board<sup>22</sup> have held that Board decisions before the 1926 Act do not have conclusive effect,<sup>23</sup> these Board decisions are not wholly without vitality. A decision of the Board under the 1924 Act establishes a *prima facie* case in a subsequent suit even as to a different taxable year.<sup>24</sup> And where the decision of the Board, though in a case filed under the 1924 Act, had been based on a stipulation filed by way of compromise, the decision is binding in subsequent litigation; like a consent judgment, it is contractual in nature.<sup>25</sup>

The decisions of the present Board, as constituted under the Revenue Act of 1926, have apparently passed the line separating the merely "administrative," which are subject to reexamination, from the "judicial,"

21. *Daily Pantagraph, Inc. v. United States*, 68 Ct. Cls. 251, 37 F. (2d) 783 (1929); *Lattimore v. United States*, 82 Ct. Cls. 97, 12 F. Supp. 895 (1935); *Van Dorn Iron Works Co. v. United States*, 82 Ct. Cls. 684, 13 F. Supp. 758 (1936).

22. *Appeal of Union Metal Mfg. Co.*, 4 B. T. A. 287 (1926); *Monroe Stationery Co. v. Commissioner*, 15 B. T. A. 1227 (1929); *Stegeman v. Commissioner*, 25 B. T. A. 949 (1932) (transferee case). In the *Union Metal* case the Board expressly overruled the decision in *Appeal of Gilliam Mfg. Co.*, 2 B. T. A. 272 (1925). Though the inconclusive nature of the Board's determination under the early Act was a material factor in the case, much of the Board's opinion is on grounds which would deny *res judicata* in all tax cases. The *Union Metal* case was generally regarded as holding that *res judicata* was not applicable in federal tax cases, until the contrary was established in *Tait v. Western Maryland Ry.*, 289 U. S. 620 (1933). See, *e.g.*, *Goodell-Pratt Co. v. Commissioner*, 6 B. T. A. 1235 (1927); *Monroe Stationery Co. v. Commissioner*, *supra*.

23. The date of the hearing before the Board and of its decision were material in determining the mode of review of Board decisions under the 1926 Act. If the hearing had been held before the 1926 Act became law, the circuit court of appeals had no jurisdiction of a petition for review. The only remedy was to pay the tax and sue in a district court for a refund. REVENUE ACT OF 1926 § 283 (j), *Blair v. Curran*, 24 F. (2d) 390 (C. C. A. 1st, 1928). But if the petition was filed under the 1924 Act and the hearing and decision came after the 1926 Act was enacted, the taxpayer had an option to pay the tax and sue in the district court, or to seek review of the Board's decision by a circuit court of appeals. Indeed, apparently he might do both. REVENUE ACT OF 1926 § 283 (b); see *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716, 727-28 (1929). Review by the district court would be *de novo* as before, while review by the circuit court of appeals would be on the record made before the Board. In either event, it would seem that the court decision should be the basis for *res judicata*. This was expressly recognized in the *Old Colony* case, *supra*, at 728, and it was so held in *Portage Silica Co. v. Commissioner*, 29 B. T. A. 881 (1934) and *Mills Automatic Merchandising Corp. v. United States*, Ct. Cls., May 3, 1937. Cf. *Van Dorn Iron Works Co. v. United States*, 82 Ct. Cls. 684, 13 F. Supp. 758 (1936) (*res judicata* not applicable to Board decision where taxpayer's petition for review in a circuit court of appeals was dismissed for lack of prosecution). The contrary result was reached somewhat questionably in *Patterson v. Anderson*, S. D. N. Y., Oct. 5, 1936.

24. *Commissioner v. American Seating Co.*, 50 F. (2d) 681 (C. C. A. 7th, 1931); *Goodell-Pratt Co. v. Commissioner*, 6 B. T. A. 1235 (1927).

25. *Backus v. United States*, 75 Ct. Cls. 69, 59 F. (2d) 242 (1932), *cert. denied*, 288 U. S. 610 (1933).

which are the basis of res judicata.<sup>26</sup> The 1926 Act provided that the Board is "continued as an independent agency in the Executive Branch of the Government."<sup>27</sup> This terminology was expanded by the Supreme Court in *Old Colony Trust Company v. Commissioner*,<sup>28</sup> where it was said that the Board "is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided." All in all, a good deal of ink has been spilled on the subject of the exact nature of the Board.<sup>29</sup> But there seems to be very little room to doubt that for present purposes its decisions are essentially judicial. As one court has put it:<sup>30</sup>

"The Board of Tax Appeals, while not a court, has by statute been endowed with capacity to render decisions final and binding on both Commissioner and taxpayer unless reversed on appeal. Its decisions in matters over which it has jurisdiction are therefore not open to collateral attack, and it cannot be doubted that in this sense a decision of the Board is comparable to the judgment of a court."<sup>31</sup>

Regardless of the exact form of words which we may be forced to choose because of our notions of the effect of the constitutional grant of judicial power and of the implications of the separation of powers, the fact remains that the activity actually carried on by the Board is judicial and solely judicial, in the sense that what the Board does is the impartial determination of questions of fact and law, after full hearing, with a minimum of judgments in the field of policy. We have, if you like, the paradox that, of all the non-judicial tribunals in our

26. There is some authority that administrative decisions may be the basis of res judicata when they are judicial in nature. See Abel, *Administrative Determinations and Full Faith and Credit* (1937) 22 IOWA L. REV. 461, 515-25; Comment (1933) 46 HARV. L. REV. 692, 695, n. 21. But it seems fundamentally misleading to say that the activities of the Board are in any true sense "administrative."

27. REVENUE ACT OF 1926 § 1000, amending REVENUE ACT OF 1924 § 900.

28. 279 U. S. 716, 725 (1929).

29. Cf., *c.g.*, *Helvering v. Rankin*, 295 U. S. 123, 131 (1935); *Commissioner v. Liberty Bank & Trust Co.*, 59 F. (2d) 320 (C. C. A. 6th, 1932); *Underwood v. Commissioner*, 56 F. (2d) 67 (C. C. A. 4th, 1932); the opinion of Goodrich in *Garden City Feeder Co. v. Commissioner*, 27 B. T. A. 1132, 1137 (1933), *rev'd*, 75 F. (2d) 804 (C. C. A. 8th, 1935); *Pierce Oil Corp. v. Commissioner*, 30 B. T. A. 469, 474 (1934); see 5 PAUL AND MERTENS, *FEDERAL INCOME TAXATION* (1934) §§ 43.01-43.02, Comment (1933) 46 HARV. L. REV. 692, 695.

30. *American S. S. Co. v. Wickwire Spencer Steel Co.*, 8 F. Supp. 562 (S. D. N. Y. 1934). Citations are omitted.

31. *Id.* at 566; see *Backus v. United States*, 75 Ct. Cls. 69, 103, 59 F. (2d) 242, 258 (1932), *cert. denied*, 288 U. S. 610 (1933) ("The functions of the Board of Tax Appeals are judicial.").

government system, the one which is in form most intimately incorporated into the executive branch is carrying on a function as intrinsically judicial as that exercised by any court. In any event, there is now substantial agreement that decisions of the Board are a basis of *res judicata*<sup>32</sup> whether they have been reviewed by a court or not.<sup>33</sup>

## II. THE ISSUES

We may turn next to the nature or subject matter of the decisions which may be *res judicata* in a subsequent tax litigation. It will be con-

32. The only dissent from this view seems to come from the Sixth Circuit. In *Nachod & U. S. Signal Co. v. Helvering*, 74 F. (2d) 164, 166 (C. C. A. 6th, 1934), the court expressly passed "the question whether the Board of Tax Appeals acts to such extent judicially as to give its decisions the binding force required by the doctrine of *res judicata*;" and Judge Allen, in her dissenting opinion [*id.* at 169], said, "I concur in the view that the doctrine of *res judicata* does not apply to an order of the Board of Tax Appeals," although it does not seem that the majority actually expressed such a view. *Cf. Leininger v. Commissioner*, 86 F. (2d) 791, 792 (C. C. A. 6th, 1936).

33. An unreviewed Board decision is conclusive in a later case involving a different tax year. *Greenbaum v. United States*, 17 F. Supp. 83 (Ct. Cls. 1936); *Missouri Pacific R. R. v. Commissioner*, 22 B. T. A. 267 (1931); *Carney v. Commissioner*, 22 B. T. A. 721 (1931) (transferee case); *Haller v. Commissioner*, 26 B. T. A. 395 (1932), *aff'd*, 68 F. (2d) 780 (App. D. C. 1934); *Sand Springs Ry. v. Commissioner*, 31 B. T. A. 392 (1934); *Wobber Bros. v. Commissioner*, 31 B. T. A. 133 (1934); *Parker v. Commissioner*, 31 B. T. A. 644 (1934), *appeal dismissed*, 75 F. (2d) 1010 (C. C. A. 9th, 1935); *cf. Donald v. J. J. White Lumber Co.*, 68 F. (2d) 441 (C. C. A. 5th, 1934). But *cf. Nachod & U. S. Signal Co. v. Helvering*, 74 F. (2d) 164 (C. C. A. 6th, 1934). An unreviewed Board decision is likewise conclusive in another proceeding with respect to the same tax year. *Continental Petroleum Co. v. United States*, 87 F. (2d) 91 (C. C. A. 10th, 1936); *T. W. Warner Co. v. United States*, 15 F. Supp. 160 (Ct. Cls. 1936); *Bindley v. Heiner*, 38 F. (2d) 489 (W. D. Pa. 1930); *cf. Western Wheeled Scraper Co. v. United States*, 72 F. (2d) 487 (C. C. A. 7th, 1934); *Warren Mfg. Co. v. Tait*, 60 F. (2d) 982 (D. Md. 1932); *Western Wheeled Scraper Co. v. United States*, 15 A. F. T. R. 1001 (N. D. Ill. 1934), *appeal dismissed on stipulation*, 73 F. (2d) 1019 (C. C. A. 7th, 1934). And see the second paragraph of note 40, *infra*. The same result has been reached when the decision of the Board was based on a stipulation. *Bankers Reserve Life Co. v. United States*, 71 Ct. Cls. 279, 44 F. (2d) 1000 (1930), *cert. denied*, 283 U. S. 836 (1931); *Backus v. United States*, 75 Ct. Cls. 69, 59 F. (2d) 242 (1932), *cert. denied*, 288 U. S. 610 (1933); *Castle v. United States*, 17 F. Supp. 515 (Ct. Cls. 1937); *American Woolen Co. v. United States*, 374 C. C. H. 1937 Fed. Tax Serv. ¶ 9212 (Ct. Cls. 1937); *cf. Pankratz Lumber Co. v. Poe*, 16 A. F. T. R. 1103 (W. D. Wash. 1935).

A prior *court* decision reviewing a Board proceeding for a previous taxable year is conclusive when the same issue is presented again. *Tait v. Western Maryland Ry.*, 289 U. S. 620 (1933); *Leininger v. Commissioner*, 86 F. (2d) 791 (C. C. A. 6th, 1936); *Worm v. Harrison*, 374 C. C. H. 1937 Fed. Tax Serv. ¶ 9234 (N. D. Ill. 1937); *Green v. Commissioner*, 26 B. T. A. 719 (1932) (transferee case); *Portage Silica Co. v. Commissioner*, 29 B. T. A. 881 (1934); *Marshall v. Commissioner*, 29 B. T. A. 1075 (1934), *appeal dismissed for want of prosecution*, C. C. A. 6th, April 9, 1935; *James v. Commissioner*, 31 B. T. A. 712 (1934); *Terre Haute Elec. Co. v. Commissioner*, 33 B. T. A. 975 (1936); *Pryor & Lockhart Development Co. v. Commissioner*, 34 B. T. A. 687 (1936).

venient to divide the inquiry by considering separately cases in which the second controversy involves taxes for the same year or on the same estate as the first,<sup>34</sup> and cases in which the second controversy involves a different tax year.

*A. The Same Tax Year.* Where the same issue is concerned in the subsequent case, the problem presented is one of the ordinary application of res judicata but this situation has arisen rarely. The principal case in which an effort has been made to relitigate a point once determined with respect to the same tax liability is *Art Metal Construction Company v. United States*.<sup>35</sup> The taxpayer first brought a suit to recover a refund which the Commissioner had denied on the ground that an amendment filed out of time was not sufficient to perfect a claim for refund phrased in general terms. The Circuit Court of Appeals agreed with the Commissioner and denied recovery.<sup>36</sup> An application for *certiorari* was denied.<sup>37</sup> Subsequent decisions of the Supreme Court,<sup>38</sup> however, appeared to establish that this result was wrong, and the taxpayer brought another suit in the Court of Claims to secure the same refund. This was held to be barred by res judicata. If there is to be anything of res judicata in tax cases, it is hard to see how the decision could have been otherwise despite the obvious hardship to the taxpayer.<sup>39</sup>

34. Because of the recurrent nature of the income tax, res judicata questions are usually presented in income tax cases. The questions have been encountered, however, in the following estate tax cases: *Second Nat. Bank v. United States*, 66 Ct. Cls. 165 (1928), *cert. denied*, 280 U. S. 553 (1929); *Second Nat. Bank v. Woodworth*, 65 F. (2d) 170 (C. C. A. 6th, 1933); *Bindley v. Heiner*, 38 F. (2d) 489 (W. D. Pa. 1930); *Guettel v. United States*, 17 F. Supp. 725 (W. D. Mo. 1936); *City Nat. Bank v. Commissioner*, 16 B. T. A. 719 (1929); *Carnrick v. Commissioner*, 21 B. T. A. 12 (1930); *cf. Boston Safe Deposit & Trust Co. v. Commissioner*, 66 F. (2d) 179 (C. C. A. 1st, 1933), *cert. denied*, 290 U. S. 700 (1933).

35. 82 Ct. Cls. 666, 13 F. Supp. 756 (1936). In *Missouri Pacific R. R. v. Commissioner*, 22 B. T. A. 267 (1931), the parent corporation had intervened in a subsidiary's proceeding before the Board, and was held bound when the same question, affiliation, was later presented in a case involving its own liability for the same year. *Cf. Warren Mfg. Co. v. Tait*, 60 F. (2d) 982 (D. Md. 1932); *United States v. Guaranty Trust Co.*, 76 F. (2d) 747 (C. C. A. 2d, 1935); *United States v. Utah Idaho Sugar Co.*, 15 A. F. T. R. 1037 (D. Utah 1934).

36. *Art Metal Const. Co. v. United States*, 47 F. (2d) 558 (C. C. A. 2d, 1931).

37. *Art Metal Const. Co. v. United States*, 283 U. S. 863 (1931).

38. *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62 (1933); *United States v. Factors & Finance Co.*, 288 U. S. 89 (1933); *Bemis Bro. Bag Co. v. United States*, 289 U. S. 28 (1933); *George Moore Ice Cream Co. v. Rose*, 289 U. S. 373 (1933).

39. The prosecution of this claim was dogged throughout with misfortune. In April, 1936, Congress passed a special Act giving the Court of Claims jurisdiction to determine the taxpayer's case, "any finding, determination, judgment, rule of law, or statute to the contrary notwithstanding." 80 CONG. REC. 5916, 5972 (1936). But, on May 5, 1936, the President vetoed the bill [SEN. DOC. NO. 205, 74th Cong., 2d Sess. (1936); 80 CONG. REC. 6768 (1936)], treating it in his veto message as an ordinary instance



More frequently there has been an effort to present in the second suit a point not raised or passed upon in the first decision. Attempts of this sort have been almost uniformly unsuccessful. Whether the second suit involves an income tax on the same year's income,<sup>40</sup> or an estate tax on the same estate,<sup>41</sup> the courts quite consistently hold that a cause of action

of the waiving of the Statute of Limitations, without disclosing any awareness of the intervening Supreme Court decisions or of their bearing on the merits of the taxpayer's claim.

40. *American Woolen Co. v. United States*, 374 C. C. H. 1937 Fed. Tax Serv. ¶ 9212 (Ct. Cls. 1937); *Chicago Junction Rys. v. United States*, 80 Ct. Cls. 824, 10 F. Supp. 156 (1935); *International Curtis Marine Turbine Co. v. United States*, 74 Ct. Cls. 132, 56 F. (2d) 708 (1932); *Backus v. United States*, 75 Ct. Cls. 69, 59 F. (2d) 242 (1932), *cert. denied*, 288 U. S. 610 (1933); *Bankers Reserve Life Co. v. United States*, 71 Ct. Cls. 279, 44 F. (2d) 1000 (1930), *cert. denied*, 283 U. S. 836 (1931); *Continental Petroleum Co. v. United States*, 87 F. (2d) 91 (C. C. A. 10th, 1936); *Bertelsen v. White*, 58 F. (2d) 792 (D. Mass. 1932), *aff'd*, 65 F. (2d) 719 (C. C. A. 1st, 1933); *Bow-Burke Mining Co. v. Willcuts*, 45 F. (2d) 394 (D. Minn. 1930); *cf. Greylock Mills v. White*, 55 F. (2d) 704 (D. Mass. 1932), *aff'd*, 63 F. (2d) 866 (C. C. A. 1st, 1933), *cert. denied*, 289 U. S. 760 (1933). Where the first decision is one by or through the Board, the resultant finality is in part due to the provisions of the REVENUE ACT OF 1926 § 284 (d), and the REVENUE ACTS OF 1928, 1932, 1934 and 1936 § 322 (d). Under these sections, if the taxpayer files an appeal with the Board, no refund shall be made "and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court" except in accordance with a decision of the Board which has become final. *Cf. Continental Petroleum Co. v. United States*, *supra*, at 94; *Bankers Reserve Life Co. v. United States*, *supra*; *Bindley v. Heiner*, 38 F. (2d) 489 (W. D. Pa. 1930); see *Kelly v. United States*, 57 Sup. Ct. 335 (1937). Section 179 of the Judicial Code has much the same effect on judgments of the Court of Claims. *Bertelsen v. White*, *supra*.

Once a petition is filed with the Board, a court has no jurisdiction of a subsequent suit against either the United States or a collector. *Brampton Woolen Co. v. Field*, 56 F. (2d) 23 (C. C. A. 1st, 1932); *James v. United States*, 69 Ct. Cls. 215, 38 F. (2d) 140 (1930), *cert. denied*, 282 U. S. 856 (1930). But if a suit for a refund has been started before the taxpayer's petition to the Board, the jurisdiction of the court is not defeated. Both cases may proceed; the one first terminated apparently will be controlling. *Ohio Steel Foundry Co. v. United States*, 69 Ct. Cls. 158, 38 F. (2d) 144 (1930).

41. *Second Nat. Bank v. Woodworth*, 66 F. (2d) 170 (C. C. A. 6th, 1933); *Second Nat. Bank v. United States*, 66 Ct. Cls. 166 (1928), *cert. denied*, 280 U. S. 553 (1929); *Bindley v. Heiner*, 38 F. (2d) 489 (W. D. Pa. 1930); *Guettel v. United States*, 17 F. Supp. 725 (W. D. Mo. 1936).

This rule has not been invoked in the long drawn out litigation over the tax on the estate of William Waldorf Astor. In *Farmers' Loan & Trust Co. v. Bowers*, 29 F. (2d) 14 (C. C. A. 2d, 1928), the tax paid on a trust created in 1916 was recovered—a result that seems erroneous in the light of later Supreme Court decisions, especially *Reinecke v. Smith*, 289 U. S. 172 (1933). Different suits were then brought to recover the tax paid on two other trusts. Judgments against the Government for about \$10,000,000, with nearly as much more in interest, were reversed on appeal; the cases are now awaiting retrial. *Farmers' Loan & Trust Co. v. Bowers*, 68 F. (2d) 916 (C. C. A. 2d, 1934), *cert. denied*, 293 U. S. 565 (1934), 296 U. S. 649 (1935), 299 U. S. 582 (1936). The rule against splitting a cause of action apparently has not been raised in the later actions, apparently because the Farmers' Loan & Trust Company

cannot be split up and litigated in separate parts. This, of course, is not a result peculiar to tax cases. In *Stark v. Starr*,<sup>42</sup> the Supreme Court said that a litigant

“is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.”

This principle is a sort of corollary of the rule, illustrated in *Lewis v. Reynolds*,<sup>43</sup> that a suit for the recovery of a tax throws open all questions relating to the same tax year. The principle is rather absolute in its character. The second suit is barred though the facts upon which it rests occurred after the first case was decided,<sup>44</sup> or though its basis is a Supreme Court decision announced after the close of the first litigation.<sup>45</sup> Nor is the application of the rule dependent upon what was actually open to litigation in the first case. Thus, a taxpayer may not sue in court except upon a ground which he has specified in a claim for refund.<sup>46</sup> But if he sues on a claim for a particular year and the case goes to judgment, he may not thereafter bring a suit on another claim for the same year, even though the ground of the second suit was not available in the first for want of an adequate refund claim at that time.<sup>47</sup>

There are a few cases that do not fit very well into this rather ironclad rule. In *Cambridge Loan & Building Company v. United States*,<sup>48</sup> it appeared that the Commissioner had allowed a claim for refund in part and denied it in part. The taxpayer sued and recovered as to the disallowed part. In the meantime the allowed portion had not been paid, due, apparently, to mechanical misunderstandings in the Bureau of Internal Revenue. The taxpayer eventually was forced to sue for the allowed portion of its claim. This was, in fact, a second suit for the recovery of tax for the same taxable year, but recovery was allowed

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paid the tax as trustee of the respective trusts, and under the New York practice a trustee of several trusts is considered legally as a different person in the case of each trust.

42. 94 U. S. 477, 485 (1876).

43. 284 U. S. 281 (1932).

44. *Bindley v. Heiner*, 38 F. (2d) 489 (W. D. Pa. 1930).

45. *Guettel v. United States*, 17 F. Supp. 725 (W. D. Mo. 1936).

46. *United States v. Felt & Tarrant Mfg. Co.*, 283 U. S. 269 (1931).

47. *Chicago Junction Rys. v. United States*, 80 Ct. Cls. 824, 10 F. Supp. 156 (1935); *cf. Bowe-Burke Mining Co. v. Willcuts*, 45 F. (2d) 394 (D. Minn. 1930); *International Curtis Marine Turbine Co. v. United States*, 74 Ct. Cls. 132, 56 F. (2d) 703 (1932). Another situation in which a judgment concerning one year's taxes may be conclusive in a subsequent suit over the same taxes, is that involving the liability of a transferee. These cases are discussed at pp. 1347-51, *infra*.

48. 74 Ct. Cls. 500, 57 F. (2d) 936 (1932).

by the Court on the then current account-stated theory,<sup>49</sup> on the ground that the allowance of the claim for refund gave rise to a new cause of action independent of that for the recovery of the tax.

More difficult to justify is the recent decision in *Ventura Consolidated Oil Fields v. Rogan*.<sup>50</sup> The Commissioner made an improper assessment without sending the taxpayer a prior deficiency notice complying with the Statute. Thereafter the Commissioner determined an additional deficiency, of which the taxpayer was duly notified. The notice disclosed the prior assessment and took it into account in fixing the amount of the deficiency. The taxpayer then filed a petition with the Board which did not question the prior assessment. Pursuant to a stipulation, the Board determined deficiencies, and they were paid. When the collector later undertook to collect the amount of the prior assessment, the taxpayer sought an injunction on the ground that the assessment was invalid. In granting the injunction the appellate court held that the decision of the Board did not establish the validity of the prior assessment, even though the question was open before the Board and the validity of the assessment was assumed by it in determining the deficiencies. In effect, a second suit with respect to the same tax year was allowed, and the taxpayer was permitted to litigate a point which had been open for determination in the prior proceeding. This result seems to be in conflict with the view adopted in another recent case where the Court of Claims said:<sup>51</sup>

"Under the statute and the ruling which we have made in several decisions the order of the Board became *res judicata* not only as to such matters as were submitted to the Board, but as to all other matters with reference to the taxes for these two years which might have been presented."

A distinguishable situation involving a second suit with regard to the same year, is presented with respect to overpayments determined by the Board of Tax Appeals. The Board's jurisdiction was originally limited to reviewing the correctness of a deficiency asserted by the Commissioner, but in 1926, this was extended to permit determination of the amount of any overpayment.<sup>52</sup> However, the Board regarded its authority as limited to the determination of the fact and the amount of the overpayment. Whether that overpayment was refundable or not might depend upon questions that related to the claims for refund

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49. Cf. *Bonwit Teller & Co. v. United States*, 283 U. S. 258 (1932), *qualified in* *Stearns Co. v. United States*, 291 U. S. 54 (1934).

50. 86 F. (2d) 149 (C. C. A. 9th, 1936), *cert. denied*, 57 Sup. Ct. 610 (1937).

51. *American Woolen Co. v. United States*, 374 C. C. H. 1937 Fed. Tax Serv. ¶ 9212 (Ct. Cls. 1937).

52. REVENUE ACT OF 1926 §§ 284 (e), 319 (c).

and the Statute of Limitations.<sup>53</sup> If the Board found an overpayment, the Commissioner had to decide whether it was refundable, and the taxpayer aggrieved by his adverse decision had no recourse except through a suit in court. The statutory limitations of the Board's authority are reflected in the results reached in the application of *res judicata*. Where a suit is brought in a court to recover an overpayment determined by the Board of Tax Appeals which the Commissioner has refused to refund, the cases are in accord that the decision of the Board is *res judicata* as to the fact of overpayment.<sup>54</sup> If the court finds that refund of the overpayment is barred for failure to file a proper claim or petition in time, the taxpayer is not entitled to judgment though the Board's decision establishes the overpayment.<sup>55</sup> In 1934, however, the Board was given authority to determine whether the tax was paid within a period so as to make it refundable.<sup>56</sup> The Board's decision on this point should, of course, be *res judicata*.<sup>57</sup>

There is another group of cases in which a determination by the Board for a particular tax year does not bar a subsequent suit. If, in connection with a claim for abatement, the taxpayer furnished a bond to insure the payment of the tax which might eventually be determined to be due,

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53. Appeal of Dickerman & Englis, Inc., 5 B. T. A. 633 (1926); Gould-Mercereau Co. v. Commissioner, 21 B. T. A. 1316, 1323 (1931).

54. Warner Co. v. United States, 15 F. Supp. 160 (Ct. Cls. 1936); National Fire Ins. Co. v. United States, 72 Ct. Cls. 663, 52 F. (2d) 1011 (1931); Western Wheeled Scraper Co. v. United States, 72 F. (2d) 487 (C. C. A. 7th, 1934); Pankratz Lumber Co. v. Poe, 16 A. F. T. R. 1103 (W. D. Wash. 1935); cf. United States v. Elgin Nat. Watch Co., 66 F. (2d) 344 (C. C. A. 7th, 1933); Western Wheeled Scraper Co. v. United States, 15 A. F. T. R. 1001 (N. D. Ill. 1934), *appeal dismissed on stipulation*, 73 F. (2d) 1019 (C. C. A. 7th, 1934); Goodenough v. United States, Ct. Cls., May 3, 1937.

55. National Fire Ins. Co. v. United States, 72 Ct. Cls. 663, 52 F. (2d) 1011 (1931).

56. REVENUE ACT OF 1934 § 322 (d). The same section is in the 1936 Act. In the REVENUE ACT OF 1934 § 504, a corresponding amendment was made to the REVENUE ACTS OF 1928 and 1932 § 322 (d), and to the REVENUE ACT OF 1926 § 284 (e).

57. The Board still has no power to order a refund. Jones v. Commissioner, 34 B. T. A. 280 (1936). The committee reports on the 1934 Act [H. R. REP. NO. 704, 73d Cong., 2d Sess. (1934) 35; SEN. REP. NO. 558, 73d Cong., 2d Sess. (1934) 44] affirmed the intention of Congress to enable the Board "to terminate the litigation in one proceeding;" but it is clear that the statute is not yet broad enough to reach that result.

An interesting question may be raised as to the jurisdiction of the circuit courts of appeals to review a decision of the Board determining an overpayment. If the court affirms the Board's determination of an overpayment, may the Commissioner still refuse to pay on the ground that a proper claim was not filed? If he may, there would seem to be reason to doubt that the appeal is within the judicial power. Cf. Gordon v. United States, 2 Wall. 561 (U. S. 1865); United States v. Jones, 119 U. S. 477, 430 (1885). Yet it is quite clear that on review of the Board's decision the court could not determine the refundability of the overpayment, since that question was not before the Board, and there would ordinarily be no basis in the record for a decision on that point. Perhaps the decision on overpayment might be regarded as the equivalent of a declaratory judgment on that subject alone.

the Government may recover on this bond although the Board of Tax Appeals has determined that because of the Statute of Limitations there is no tax deficiency.<sup>58</sup> The issue before the Board is not the same as that before the court in the suit on the bond, because there may be liability on the bond although the liability for the tax has expired.<sup>59</sup> A decision that the tax is barred by limitations therefore is not a decision on a point relevant in the suit on the bond. "The effective scope of the decision rendered is no broader than the issue, opinion, and findings."<sup>60</sup> And this was held to be true even though the statute provided that the decision of the Board that the tax was barred by the Statute of Limitations should "be considered as its decision that there is no deficiency with respect to such tax."<sup>61</sup> A literal construction of the statute, the court held, would not be consonant with the legislative intent.

An interesting variation of this point appeared in *Hilton Lumber Co. v. Grissom*,<sup>62</sup> where a bond was executed to cover a tax liability. The taxes were paid after the statutory period had expired, and a consent judgment was entered dismissing a suit on the bond and cancelling it. The taxpayer then brought an action to recover the tax payment, alleging that it was made after the limitation period had expired. This suit was held to be barred by the judgment entered in the suit brought on the bond. Although there is an element of *res judicata* here, the decision is primarily an application of the rule that, after a tax bond has been satisfied by payment, the money may not be recovered because it was collected as a tax after the statutory time for such a collection had expired.<sup>63</sup>

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58. *Gulf States Steel Co. v. United States*, 287 U. S. 32 (1932); *United States v. Martin Hotel Co.*, 59 F. (2d) 549 (C. C. A. 8th, 1932), *cert. denied*, 287 U. S. 651 (1932) (deposit in escrow); *United States v. Wyoming Central Ass'n*, 70 F. (2d) 869 (C. C. A. 10th, 1934).

59. *United States v. John Barth Co.*, 279 U. S. 370 (1929).

60. *Gulf States Steel Co. v. United States*, 287 U. S. 32, 44 (1932).

61. REVENUE ACT OF 1924 § 906 (e), as amended. The bond in suit in the *Gulf States Steel* case was given after the period for the collection of taxes had expired, but it was the successor of two earlier bonds, the first made just before the expiration of the statutory period. In *United States v. Wyoming Central Ass'n*, 70 F. (2d) 869 (C. C. A. 10th, 1934), the bond was executed after the limitations period had expired. The effect given to the bond was thus similar to that given to a waiver executed after the expiration of the statutory period. *Cf. Helvering v. Newport Co.*, 291 U. S. 485 (1934). There is a curious consequence here—giving a waiver or a bond after the statutory period has expired will bind the taxpayer, while an actual payment of the tax out of time may ordinarily be recovered.

62. 70 F. (2d) 892 (C. C. A. 4th, 1934), *cert. denied*, 293 U. S. 613 (1934).

63. *Roberts Sash & Door Co. v. United States*, 69 Ct. Cls. 363, 38 F. (2d) 716 (1930), *aff'd per curiam*, 282 U. S. 812 (1930); *Bryant-Link Co. v. Hopkins*, 47 F. (2d) 1068 (C. C. A. 5th, 1931); *United States v. Root*, 62 F. (2d) 385 (C. C. A. 5th, 1933), *cert. denied*, 289 U. S. 733 (1933); *Simmons Mfg. Co. v. Routzahn*, 62 F. (2d) 947 (C. C. A. 6th, 1933), *cert. denied*, 289 U. S. 751 (1933).

*B. Different Tax Years.* In the previous paragraphs, the discussion has been limited to cases in which the second suit involved liability for taxes in the same tax year or on the same estate as the first. Much more difficult is the question whether a decision for one tax year is conclusive in a subsequent litigation involving a different year, and the cases, in result at least, are enshrouded in confusion. There is agreement that *res judicata* in this situation is limited to the precise question which was decided in the former case; but there is little harmony in determining what types of questions fit this test. Questions of law and of fact are infinite in variety, and there is an imperceptible gradation from the few situations in which it is clear that precisely the same issue is involved in two litigations for different years, to the multitude of cases in which it is equally clear that the questions involved are different. Between the two extremes is a wide area of doubt. And there are further difficulties. Even if we grant that *res judicata* applies to questions of law and to questions of fact, does it apply to the law portion of mixed questions of law and fact? All cases involve both law and facts, although the one or the other may not be in dispute in a particular controversy. How far, then, does *res judicata* apply to the law when the facts in the second case, though different, are found not to be different in legal effect? And when we talk about a question of fact being *res judicata*, does that apply to the evidentiary facts only or to the ultimate facts, though there may be an attempt to offer different evidentiary facts in the two cases?<sup>64</sup>

The tax decisions give no satisfactory answers to questions of this sort. It may be useful, however, to attempt to list the cases along the scale which extends from the "same issue" at one end to "different issue" at the other. We may take up first the cases in which *res judicata* was held applicable. This result has been reached where the second case involved the same ultimate fact as that decided in the first: the value of minerals or timber on March 1, 1913,<sup>65</sup> and the amount of earnings of a corporation since March 1, 1913, available for dividends on January 1, 1918.<sup>66</sup> Of course, there is a certain amount of law in determinations

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64. Another question may be raised as to the influence of variations in the burden of proof in the two cases. *Peck v. Commissioner*, 34 B. T. A. 402 (1936); *cf. Pan-kratz Lumber Co. v. Poe*, 16 A. F. T. R. 1103 (W. D. Wash. 1935); *Thomas Cusak Co. v. Commissioner*, 17 B. T. A. 1105 (1929). The question as to penalties [see p. 1354, *infra*] is quite similar.

65. *Portage Silica Co. v. Commissioner*, 29 B. T. A. 881 (1934); *Donald v. J. J. White Lumber Co.*, 68 F. (2d) 441 (C. C. A. 5th, 1934); *cf. American Chemical Paint Co. v. McCaughan*, E. D. Pa., April 21, 1937 (value of a patent).

66. *James v. Commissioner*, 31 B. T. A. 712 (1934). In *Commissioner v. American Seating Co.*, 50 F. (2d) 681 (C. C. A. 7th, 1931) a determination of invested capital for one year was relied on for the following year. The previous findings were held to make a *prima facie* case. It should be noted that the first decision of the Board was

such as these. The same result has been reached in cases apparently involving more law and less fact, with the ultimate fact issue identical in the two cases—whether certain transactions constituted a gift of stock from a husband to a wife,<sup>67</sup> whether bonds were issued for consideration,<sup>68</sup> and whether contracts had value on March 1, 1913.<sup>69</sup> In other cases, *res judicata* has been held applicable where the question was more nearly one of law with the ultimate facts in the two cases identical, or at least similar in the geometric sense: the deductibility of amortized discount on a predecessor's bonds;<sup>70</sup> the deductibility of depreciation by a lessor and the lessor's liability for tax on the taxes paid for it by the lessee;<sup>71</sup> the construction and legal effect of a will;<sup>72</sup> and the deductibility of payments made on certain notes where the previous case had allowed the deduction of payments made on other notes executed under similar circumstances.<sup>73</sup> Finally, and more doubtfully, the rule of *res judicata* has been applied to determinations of a partnership relationship between the taxpayer and others,<sup>74</sup> and of the taxability of a business trust as an "association."<sup>75</sup> In these cases the question does involve a large element of law; but the facts in succeeding years are necessarily different, and the ultimate legal consequence is very much a function not only of the prior decision on the law, but also of the possibly dissimilar facts.

We may turn next to cases in which the rule of *res judicata* was held not applicable although the questions in the two cases were at least

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under the 1924 Act [see pp. 1323-24, *supra*]; and the second case was decided before the *Western Maryland* case established the role of *res judicata* in tax cases.

67. *Marshall v. Commissioner*, 29 B. T. A. 1075 (1934), *appeal dismissed for want of prosecution*, C. C. A. 6th, April 9, 1935. But the previous decision was held not *res judicata* as to *subsequent*, though similar, transactions.

68. *Sand Springs Ry. v. Commissioner*, 31 B. T. A. 392 (1934).

69. *Worm v. Harrison*, 374 C. C. H. 1937 Fed. Tax Serv. ¶ 9234 (N. D. Ill. 1937); *Wobber Bros. v. Commissioner*, 31 B. T. A. 133 (1934).

70. *Tait v. Western Maryland Ry.*, 289 U. S. 620 (1933). *Res judicata* was not relied upon by the taxpayer in *Old Colony R. R. v. Commissioner*, 284 U. S. 552 (1932), involving the treatment of premium on bonds issued before 1913.

71. *Terre Haute Elec. Co. v. Commissioner*, 33 B. T. A. 975 (1936).

72. *Haller v. Commissioner*, 26 B. T. A. 395 (1932), *aff'd*, 68 F. (2d) 780 (App. D. C. 1934). But *cf.* *Blair v. Commissioner*, 57 Sup. Ct. 330 (1937), discussed at pp. 1344-45, *infra*, where there was an intervening state court decision.

73. *Greenbaum v. United States*, 17 F. Supp. 83 (Ct. Cls. 1936).

74. *Leininger v. Commissioner*, 86 F. (2d) 791 (C. C. A. 6th, 1936); *Parker v. Commissioner*, 31 B. T. A. 644 (1934), *appeal dismissed*, 75 F. (2d) 1010 (C. C. A. 9th, 1935).

75. *Pryor & Lockhart Development Co. v. Commissioner*, 34 B. T. A. 687 (1936). But *cf.* *Brooklyn Trust Co. v. Commissioner*, 31 B. T. A. 1070 (1935), *aff'd*, 80 F. (2d) 865 (C. C. A. 2d, 1936), *cert. denied*, 298 U. S. 659 (1936); *Uniform Printing & Supply Co. v. Commissioner*, 33 B. T. A. 1073 (1936), *rev'd*, 88 F. (2d) 75 (C. C. A. 7th, 1937).

closely related. Some of these cases seem quite indistinguishable from those just mentioned. A decision that income from a contract with a water district was exempt has been held not res judicata in a case arising under a subsequent but substantially identical contract.<sup>76</sup> In another case, a decision on the legal effect of certain margin transactions was held not res judicata as to similar transactions in subsequent years, for, "although the law may be the same, the facts, though similar, are different and, being different, they were not passed upon in that case."<sup>77</sup> In other cases it is more clear that the real question at issue relates to the effect of facts which change from year to year. This has been recognized in denying res judicata in cases involving the question whether a corporation was "formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders,"<sup>78</sup> whether a corporation was "doing business,"<sup>79</sup> whether the taxpayer was a "business league,"<sup>80</sup> whether a corporation's activities were "charitable,"<sup>81</sup> and whether a group of corporations was affiliated in the respective taxable years.<sup>82</sup> Similarly, where the statutory provision involved in the two cases is not the same, res judicata is not applicable.<sup>83</sup>

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76. *Strickland v. Commissioner*, 32 B. T. A. 804 (1935). The decision in *Volunteer State Life Ins. Co. v. Commissioner*, 35 B. T. A. 491, 495 (1937), is very similar.

77. *Snyder v. Commissioner*, 73 F. (2d) 5, 6 (C. C. A. 3d, 1934), *aff'd*, 295 U. S. 134 (1935). The res judicata point was not raised in the Supreme Court.

78. *United Business Corp. v. Commissioner*, 33 B. T. A. 83 (1935), *remanded pursuant to stipulation*, C. C. A. 2d, Aug. 31, 1936; *Almours Securities, Inc. v. Commissioner*, 35 B. T. A. 61 (1936). In the former case the Board said: "The application of § 220 in any particular taxable year is wholly dependent upon whether the facts and circumstances pertaining to that year bring the taxpayer within the scope of that section—that is, was the corporation *availed of* for the prohibited purpose during the taxable year in question, irrespective of a finding by the Board and the courts that it was so *availed of* in a prior taxable year." 33 B. T. A. 83, 87-88 (1935). In the *Almours Securities* case, where the prior decision was based on a stipulation, res judicata was also held inapplicable to the issue raised by the word "formed" in the statute.

79. *International Salt Co. v. Phillips*, 3 F. (2d) 678 (M. D. Pa. 1925), *rev'd on other grounds*, 9 F. (2d) 389 (C. C. A. 3d, 1925), *which was rev'd*, 274 U. S. 718 (1927).

80. *Uniform Printing & Supply Co. v. Commissioner*, 33 B. T. A. 1073 (1936), *rev'd*, 88 F. (2d) 75 (C. C. A. 7th, 1937).

81. *Peck v. Commissioner*, 34 B. T. A. 402 (1936).

82. See *Appeal of Canyon Lumber Co.*, 4 B. T. A. 940 (1926); *cf. D. J. & T. Sullivan, Inc. v. Commissioner*, 17 B. T. A. 1258 (1929), *appeal dismissed*, 48 F. (2d) 1073 (C. C. A. 9th, 1931). But see *B. F. Sturtevant Co. v. United States*, 18 F. Supp. 23 (D. Mass. 1937), where the court said that if the prior decision "was not technically res adjudicata, the decision of the Board is at least *prima facie* evidence of the propriety of consolidation." Where the two cases involve the same year, as where the parent had intervened in a subsidiary's case, and later the same question arose as to the parent's taxes, there is, of course, a basis for res judicata. *Missouri Pacific R. R. v. Commissioner*, 22 B. T. A. 267 (1931).

83. See *Brooklyn Trust Co. v. Commissioner*, 31 B. T. A. 1070 (1935), *aff'd*, 80 F. (2d) 865 (C. C. A. 2d, 1936), *cert. denied*, 298 U. S. 659 (1936); *Gus Sun Bookling*



Perhaps the most important case in which *res judicata* has been rejected is *Tait v. Commissioner*,<sup>84</sup> where it was held that a prior decision of the Board of Tax Appeals allowing depreciation at the rate of fifteen per cent on certain machinery did not preclude a determination for a subsequent year that an allowance of eight and one-half per cent was proper. Though the court's opinion is very brief and gives no real consideration to the problem, the result reached seems a desirable one. There should be no vested right (or disability) in a matter involving as much of a continuing judgment as a depreciation rate.<sup>85</sup>

Comparatively little difficulty is presented by a final group of cases in which *res judicata* was urged, but was held inapplicable because the issue previously decided was plainly quite different from that raised in the later case. A decision that corporations were affiliated does not establish that one may deduct another's net loss;<sup>86</sup> a decision against the deductibility of depreciation does not prevent the deduction of obsolescence;<sup>87</sup> a decision that particular transactions were gifts from a husband to his wife is not conclusive as to other transactions occurring at different times;<sup>88</sup> and an acquittal for filing false amended returns does not bar penalties for filing false original returns.<sup>89</sup> Even though the second suit is between different parties from those in the first, the resulting inconclusiveness of the prior judgment has sometimes been put on the ground that the questions in the two cases were different.<sup>90</sup>

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*Exchange Co. v. Commissioner*, 9 B. T. A. 1197 (1928). But *cf.* the penalty cases, pp. 1351-55, *infra*, and Comment (1933) 33 Col. L. Rev. 1404, 1405.

84. 78 F. (2d) 193 (C. C. A. 3d, 1935). In *Western Wheeled Scraper Co. v. United States*, 15 A. F. T. R. 1001 (N. D. Ill. 1934), *appeal dismissed on stipulation*, 73 F. (2d) 1019 (C. C. A. 7th, 1934), the depreciation involved in the two cases was for the same years, not different years; *res judicata* was applied.

85. See also *Bankers Pocahontas Coal Co. v. Burnet*, 287 U. S. 308, 311-12 (1932), where the Court found it did not have to pass upon the contention that a prior decision involving a depletion allowance was *res judicata* in a later case.

86. *J. M. Smucker Co. v. Keystone Stores Corp.*, 12 F. Supp. 286 (W. D. Pa. 1935), *aff'd sub nom. Franklin v. United States*, 83 F. (2d) 1010 (C. C. A. 3d, 1936).

87. *Terre Haute Elec. Co. v. Commissioner*, 33 B. T. A. 975 (1936).

88. *Marshall v. Commissioner*, 29 B. T. A. 1075 (1934), *appeal dismissed for want of prosecution*, C. C. A. 6th, April 9, 1935.

89. *Hanby v. Commissioner*, 67 F. (2d) 125 (C. C. A. 4th, 1933); *cf.* *Scharton v. Commissioner*, 32 B. T. A. 459 (1935), *dismissed without written opinion*, C. C. A. 1st, April 29, 1936 (a judgment dismissing an indictment under the statute of limitations does not bar the assertion of fraud penalties).

90. In *American S. S. Co. v. Wickwire Spencer Steel Co.*, 8 F. Supp. 562 (S. D. N. Y. 1934), it was held that a decision in a transferor's case that certain waivers were invalid was not a bar to a decision in the transferee's case that the transferee was estopped to assert that invalidity. *Cf.* *Boston Safe Deposit & Trust Co. v. Commissioner*, 66 F. (2d) 179 (C. C. A. 1st, 1933), *cert. denied*, 290 U. S. 700 (1933), where a decision of the Board evaluating charitable remainders for estate tax purposes was held not to foreclose the question, arising in a subsequent income tax case, whether the income was "permanently set aside" for charitable purposes.

Before leaving this aspect of the general problem, reference should be made to one case which may easily be misconstrued. In *Western Wheeled Scraper Company v. United States*,<sup>91</sup> the plaintiff, suing to recover 1919 taxes, relied on a decision in a previous case involving 1920 taxes where it had been determined, on stipulation, that the taxpayer had overstated its closing inventory for 1919. The holding of the Court of Claims appears to have been that mere proof of this fact was not sufficient to establish that the taxpayer had overpaid its taxes for 1919. Although this was enough to dispose of the case, the Court based its result, in part, on the ground that the Board of Tax Appeals, under the statute creating it, is limited in its authority to years for which deficiencies have been determined, and "shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid."<sup>92</sup> For this reason, said the court,<sup>93</sup> "the application of the rule of *res adjudicata* as herein claimed" is expressly excluded. Perhaps the saving words are "as herein claimed." Certainly, the statute could not be fairly construed as making the rule of *res judicata* generally inapplicable to decisions of the Board of Tax Appeals so far as different years are concerned. The argument would be just as applicable to a decision of a court on review of a Board decision; yet the decision given conclusive effect in *Tait v. Western Maryland Railway*<sup>94</sup> was made in a case which had come through the Board of Tax Appeals.<sup>95</sup> That the Board does not have jurisdiction over controversies other than those properly brought before it does not distinguish it from other tribunals; no court has jurisdiction to render a judgment which cannot be based on the pleadings before it. Yet it cannot be successfully contended that the decision of a court is not *res judicata* in another case because the court did not have jurisdiction of the second controversy when it decided the first. *Res judicata* does not depend on principles of jurisdiction, but on principles of peace.

*C. Other Questions.* The way in which the issues were decided may become material in the application of *res judicata*. Must an adjudication have been on the merits, or will a case be the basis of *res judicata* although it was decided on stipulation, dismissed on the petitioner's motion, or allowed to go by default? There is considerable confusion on

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91. 82 Ct. Cls. 646, 13 F. Supp. 762 (1936), *cert. denied*, 57 Sup. Ct. 32 (1936). But see *Chicago Cemetery Ass'n v. United States*, N. D. Ill., April 23, 1937.

92. REVENUE ACT OF 1928 § 272 (g), continued without change in the REVENUE ACTS OF 1932, 1934, and 1936.

93. 82 Ct. Cls. 646, 652, 13 F. Supp. 762, 764 (1936).

94. 289 U. S. 620 (1933).

95. This and other similar cases in which Board decisions have been held *res judicata* as to subsequent years were distinguished by the government on the ground that the precise point was not raised. See Brief in Opposition, pp. 7-8, *Western Wheeled Scraper Co. v. United States*, U. S. Sup. Ct., October Term, 1936, No. 237.

these questions. When both actions relate to the same year's taxes, it seems clear that the first case is binding in the second although the first decision was based on stipulation rather than adjudication.<sup>96</sup> There is here the sanction of contract or compromise as well as that of *res judicata*. The same result has also been reached where the prior proceeding was dismissed on the taxpayer's own motion<sup>97</sup> or went by default.<sup>98</sup> The Board has, however, refused to follow this rule in transferee proceedings when the decision against the transferor was based upon a stipulation;<sup>99</sup> in a few cases refusal to give the effect of *res judicata* to a case based upon a stipulation has been extended to cases against the same taxpayer for a subsequent year.<sup>100</sup> When the issue is the liability of the same taxpayer for a subsequent year, there is little reason to quarrel with the result if it is kept within proper bounds. Where the entire controversy is disposed of by the Board on stipulation and without any consideration, there has been no adjudication. But where a stipulation of facts is filed which the Board considers in rendering an actual decision, there is an adjudication which, under proper circumstances, should be *res judicata* in a subsequent case as to questions

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96. In the following cases the decision based on stipulation was by the Board: *Continental Petroleum Co. v. United States*, 87 F. (2d) 91 (C. C. A. 10th, 1936); *American Woolen Co. v. United States*, 374 C. C. H. 1937 Fed. Tax Serv. ¶ 9212 (Ct. Cls. 1937); *Castle v. United States*, 17 F. Supp. 515 (Ct. Cls. 1937); *Backus v. United States*, 75 Ct. Cls. 69, 59 F. (2d) 242 (1932), *cert. denied*, 288 U. S. 610 (1933); *National Fire Ins. Co. v. United States*, 72 Ct. Cls. 663, 52 F. (2d) 1011 (1931); *Bankers Reserve Life Co. v. United States*, 71 Ct. Cls. 279, 44 F. (2d) 1000 (1930), *cert. denied*, 283 U. S. 836 (1931).

In the following cases the prior proceeding was before the Court of Claims: *Second Nat. Bank v. United States*, 66 Ct. Cls. 166 (1928), *cert. denied*, 280 U. S. 553 (1929); *Second Nat. Bank v. Woodworth*, 66 F. (2d) 170 (C. C. A. 6th, 1933); *Bertelsen v. White*, 58 F. (2d) 792 (D. Mass. 1932), *aff'd*, 65 F. (2d) 719 (C. C. A. 1st, 1933); *United States v. Utah Idaho Sugar Co.*, 15 A. F. T. R. 1037 (D. Utah 1934).

97. *Warren Mfg. Co. v. Tait*, 60 F. (2d) 982 (D. Md. 1932).

98. *Garcin v. Commissioner*, 22 B. T. A. 1027 (1931), *remanded on stipulation of parties*, 79 F. (2d) 993 (C. C. A. 4th, 1935) (transferee case).

99. See p. 1349, *infra*.

100. *Volunteer State Life Ins. Co. v. Commissioner*, 35 B. T. A. 491 (1937). In *Appeal of Union Metal Mfg. Co.*, 4 B. T. A. 287 (1926), deciding generally against the application of *res judicata* to tax cases, the Board said: "We should be even more hesitant about applying it to facts thus stipulated for argument's sake." *Id.* at 290. In *Almours Securities, Inc. v. Commissioner*, 35 B. T. A. 61 (1936), the opinion relied almost entirely on the transferee decisions; the result reached seems to have been right, since the question involved was one as to which an adjudication as to one year should not be *res judicata* as to another year in any event. See note 78, *supra*. *Cf.* *International Salt Co. v. Phillips*, 3 F. (2d) 678 (M. D. Pa. 1925), *rev'd on other grounds*, 9 F. (2d) 389 (C. C. A. 3d, 1925), *which was rev'd*, 274 U. S. 718 (1927); *Bone v. United States*, 46 F. (2d) 1010 (M. D. Ga. 1931).

both of law and fact.<sup>101</sup> On at least one occasion the Board has so held.<sup>102</sup>

Very little attention has been paid to the question whether a prior judgment claimed to be conclusive must be pleaded, offered in evidence, or whether it may be the subject of judicial notice. One court has determined that it will take judicial notice of its own records for the purpose of *res judicata*,<sup>103</sup> and the Board has taken judicial notice of a prior decision "under the circumstances."<sup>104</sup> The Supreme Court has recently passed over the question of the exact form and time in which *res judicata* must be presented.<sup>105</sup>

The seeming absolutism of the rule of *res judicata* encounters some obstacles when there are two previous judgments, each inconsistent with the other. This situation was presented in *Donald v. J. J. White Lumber Company*.<sup>106</sup> The Government obtained a decision before the Board as to the value of certain timber on March 1, 1913. A suit was then brought against the collector with respect to a subsequent year, and a value favorable to the taxpayer was fixed by the court.<sup>107</sup> Finally, a third action was brought for a still later year. In this last suit both parties relied on the principle of *res judicata*. The court held that "where there are two conflicting judgments, the last in point of time is the one which controls."<sup>108</sup> Where a Board decision for a subsequent

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101. See 2 FREEMAN, JUDGMENTS (5th ed. 1925) §§ 660-65.

102. *James v. Commissioner*, 31 B. T. A. 712 (1934). The decision given conclusive effect in *Tait v. Western Md. Ry.*, 289 U. S. 620 (1933), was founded upon a stipulation of facts.

103. *Bowe-Burke Mining Co. v. Willcuts*, 45 F. (2d) 394 (D. Minn. 1930).

104. *Woodley Petroleum Co. v. Commissioner*, 16 B. T. A. 253 (1929). Judicial notice will not be taken of a prior proceeding involving a different taxpayer. *Igleheart v. Commissioner*, 77 F. (2d) 704 (C. C. A. 5th, 1935). But see *Drake v. Commissioner*, 30 B. T. A. 475 (1934), where the two proceedings were considered and decided at the same time. During the period when *res judicata* was thought to be inapplicable to tax cases, there were decisions that findings in a prior proceeding would make a *prima facie* case, but that they must be introduced in evidence. *Goodell-Pratt Co. v. Commissioner*, 6 B. T. A. 1235 (1927); *Wholesale Coal Co. v. Commissioner*, 16 B. T. A. 550 (1929); *cf. Reserve Natural Gas Co. v. Commissioner*, 15 B. T. A. 951 (1929); *Thomas Cusak Co. v. Commissioner*, 17 B. T. A. 1105 (1929).

105. *Blair v. Commissioner*, 57 Sup. Ct. 330, 331-32 (1937); *cf. Southern Pacific R. R. v. United States*, 168 U. S. 1 (1897); *United States v. Bliss*, 172 U. S. 321 (1899).

106. 68 F. (2d) 441 (C. C. A. 5th, 1934).

107. The prior Board decision was not relied on by the Government, in line with its then contention and the Board's decisions that *res judicata* was not applicable to tax cases.

108. 68 F. (2d) 441, 442 (C. C. A. 5th, 1934). See the closely analogous result in *Blair v. Commissioner*, 57 Sup. Ct. 330 (1937); *cf. Continental Oil Co. v. United States*, 14 F. Supp. 533 (Ct. Cls. 1936). The issue is more fully developed in the petition for certiorari and the brief in opposition, *Continental Oil Co. v. United States*, U. S. Sup. Ct., October Term, 1936, No. 839.

year became final pending a court review of a decision involving the same issue for a prior year, *res judicata* was, with doubtful propriety, held inapplicable.<sup>109</sup> In another case, a circuit court of appeals regarded itself bound by a state court decision, although an appeal was pending in the state courts.<sup>110</sup>

### III. PARTIES

Another question arising in the application of the principle of *res judicata* relates to the parties in the respective cases. There is no difficulty when the parties are the same in both cases. But to what extent may the parties be different in form or substance without affecting the conclusive effect of the prior judgment?

It is quite clear that the requirement as to parties is met if the party in the second suit is in "privity" with the party in the first.<sup>111</sup> Whether there is such privity becomes material in many federal tax cases because tax controversies may involve any one of three parties on the Government's side — the United States, the Commissioner, or a collector. If the problem could be approached afresh, it should be fairly clear that for the purposes of *res judicata* these parties are all in privity. The Government is the real party in interest in all tax controversies, and the fact that for reasons of history some officer or former officer of the Government is made the nominal party, should not obscure the substance of the situation.<sup>112</sup>

Since there are three possible classes of parties on the Government side, there are six combinations in which an adjudication involving one may be raised as *res judicata* in a subsequent suit against another. All of these combinations have been presented in actual cases. The principle of *res judicata* is applied where the Commissioner was a party to the first action and the second is against the United States<sup>113</sup> or against the

109. *Nachod & U. S. Signal Co. v. Helvering*, 74 F. (2d) 164 (C. C. A. 6th, 1934).

110. *United States v. Guaranty Trust Co.*, 76 F. (2d) 747 (C. C. A. 2d, 1935); *cf. Commissioner v. American Seating Co.*, 50 F. (2d) 681 (C. C. A. 7th, 1931). Of course, an interlocutory order is not *res judicata* at a later stage of the same case. *Holmes v. Donald*, 84 F. (2d) 188 (C. C. A. 5th, 1936).

111. 1 FREEMAN, JUDGMENTS (5th ed. 1925) §§ 407-43.

112. Of course, if no one representing the Government was a party to the first action, the decision is not binding on the Government. *Bowers v. American Surety Co.*, 30 F. (2d) 244 (C. C. A. 2d, 1929), *cert. denied*, 279 U. S. 865 (1929). *Cf. pp. 1343-45, infra.*

113. *Tait v. Western Maryland Ry.*, 289 U. S. 620 (1933); *Western Wheeled Scraper Co. v. United States*, 72 F. (2d) 487 (C. C. A. 7th, 1934); *Continental Petroleum Co. v. United States*, 87 F. (2d) 91 (C. C. A. 10th, 1936); *Art Metal Const. Co. v. United States*, 82 Ct. Cls. 666, 13 F. Supp. 756 (1936); *T. W. Warner Co. v. United States*, 15 F. Supp. 160 (Ct. Cls. 1936); *Greenbaum v. United States*, 17 F. Supp. 83 (Ct. Cls. 1936); *American S. S. Co. v. Wickwire Spencer Steel Co.*, 8 F. Supp. 562 (S. D. N. Y. 1934); *Western Wheeled Scraper Co. v. United States*, 15 A. F. T. R. 1001 (N. D.

collector.<sup>114</sup> The same result has been reached where the United States was the party to the first action and the subsequent suit is against the collector<sup>115</sup> or against the Commissioner.<sup>116</sup> A judgment involving the United States in one court is, of course, effective as *res judicata* in a subsequent suit against the United States in another court.<sup>117</sup>

In the other two possible situations, the collector was nominally the party on the Government side in the first litigation. Here, to date, the cases reach the other result: The prior judgment in the suit against the collector is not *res judicata* in a subsequent suit against the United States<sup>118</sup> or against the Commissioner.<sup>119</sup> These decisions appear to rest on no substantial basis, and should be overruled if the doctrine of *res judicata* is to be retained at all in federal tax cases. The notion that a judgment in a suit involving a collector is not *res judicata* in a subsequent tax suit against another officer or against the United States rests upon a

Ill. 1934), *appeal dismissed on stipulation*, 73 F. (2d) 1019 (C. C. A. 7th, 1934); *cf.* Bankers Reserve Life Co. v. United States, 71 Ct. Cls. 279, 44 F. (2d) 1000 (1930), *cert. denied*, 283 U. S. 836 (1931) (Board's decision based on stipulation); Castle v. United States, 17 F. Supp. 515 (Ct. Cls. 1937) (same); National Fire Ins. Co. v. United States, 72 Ct. Cls. 663, 52 F. (2d) 1011 (1931) (Board's decision on a different issue); B. F. Sturtevant Co. v. United States, 18 F. Supp. 28 (D. Mass. 1937) (Board's decision "at least *prima facie* evidence"). But *cf.* Western Wheeled Scraper Co. v. United States, 82 Ct. Cls. 646, 13 F. Supp. 762 (1936), *cert. denied*, 57 Sup. Ct. 32 (1936), discussed at p. 1337, *supra*.

114. *Tait v. Western Maryland Ry.*, 289 U. S. 620 (1933); *Donald v. J. J. White Lumber Co.*, 68 F. (2d) 441 (C. C. A. 5th, 1934); *Bindley v. Heiner*, 38 F. (2d) 489 (W. D. Pa. 1930); *Warren Mfg. Co. v. Tait*, 60 F. (2d) 982 (D. Md. 1932); *Greylock Mills v. White*, 55 F. (2d) 704 (D. Mass. 1932), *aff'd*, 63 F. (2d) 866 (C. C. A. 1st, 1933), *cert. denied*, 289 U. S. 760 (1933); *Pankratz Lumber Co. v. Poe*, 16 A. F. T. R. 1103 (W. D. Wash. 1935); *Worm v. Harrison*, 374 C. C. H. 1937 Fed. Tax Serv. ¶9234 (N. D. Ill. 1937).

115. *Second Nat. Bank v. Woodworth*, 66 F. (2d) 170 (C. C. A. 6th, 1933); *Bertelsen v. White*, 58 F. (2d) 792 (D. Mass. 1932), *aff'd*, 65 F. (2d) 719 (C. C. A. 1st, 1933); *cf.* *Hilton Lumber Co. v. Grissom*, 70 F. (2d) 892 (C. C. A. 4th, 1934), *cert. denied*, 293 U. S. 613 (1934).

116. *Garcin v. Commissioner*, 22 B. T. A. 1027 (1931), *remanded on stipulation of parties*, 79 F. (2d) 993 (C. C. A. 4th, 1935) (transferee case).

117. *Art Metal Const. Co. v. United States*, 82 Ct. Cls. 666, 13 F. Supp. 756 (1936); *Guettel v. United States*, 17 F. Supp. 725 (W. D. Mo. 1936).

118. *Sage v. United States*, 250 U. S. 33 (1919); *Joplin Ice Co. v. United States*, 15 A. F. T. R. 1018, (W. D. Mo. 1934), *aff'd on other grounds*, 87 F. (2d) 174 (C. C. A. 8th, 1936); see *Petroleum Iron Works Co. v. United States*, 78 Ct. Cls. 646, 650, 5 F. Supp. 558, 559 (1934); *McKinney v. United States*, 62 Ct. Cls. 180 (1926), *cert. denied*, 273 U. S. 716 (1926). The judgment is binding in a subsequent suit against the same collector. *Donald v. J. J. White Lumber Co.*, 68 F. (2d) 441 (C. C. A. 5th, 1934).

119. *Bankers Pocahontas Coal Co. v. Burnet*, 287 U. S. 308 (1932); *Brooklyn Trust Co. v. Commissioner*, 80 F. (2d) 865 (C. C. A. 2d, 1936), *cert. denied*, 293 U. S. 659 (1936); *cf.* *Gus Sun Booking Exchange Co. v. Commissioner*, 9 B. T. A. 1197 (1928).

dictum of Mr. Justice Holmes in *Sage v. United States*.<sup>120</sup> The opinion proceeds entirely on the ground that the action against the collector is "personal" in its nature. This theory has been consistently followed in other situations: An action against a collector may not be continued against his successor in office,<sup>121</sup> while on the death of a collector, the action may be revived in the name of his personal representative.<sup>122</sup> It will serve no purpose here to go into the historical justification for all this. It seems clear that, whatever the basis may have been in the past for regarding the action against a collector as "personal,"<sup>123</sup> that basis has now quite gone. *Cessat ratione, cessat lex*. Since the *Sage* case was decided, it has been established that the right to sue the collector may be taken away by Congress in a proper case without substituting any other remedy.<sup>124</sup> And in *George Moore Ice Cream Company v. Rose*,<sup>125</sup> the Supreme Court specifically held that where the collector acted pursuant to an assessment — as is almost invariably the case — the United States becomes a party to the judgment as a matter of law. A few extracts from the opinion are sufficient to show the real inapplicability of the reasons advanced in the *Sage* case:

"The Collector did act under the directions of the Secretary of the Treasury, or other proper officer of the Government in the collection of the tax . . . His duty being imperative, he is protected by the command of his superior from liability for trespass, and is

120. 250 U. S. 33 (1919). That it was a dictum has recently been pointed out in *Cudahy Packing Co. v. Harrison*, 18 F. Supp. 250, 254 (N. D. Ill. 1937).

121. *Smietanka v. Indiana Steel Co.*, 257 U. S. 1 (1921); *Union Trust Co. v. Wardell*, 258 U. S. 537 (1922).

122. *Patton v. Brady*, 184 U. S. 608 (1902). We have currently such quaint proceedings as tax suits in which the Hartford-Connecticut Trust Company is defendant, and is, in form, cast in judgment. See *American Chain Co. v. Hartford-Connecticut Trust Co.*, 86 F. (2d) 105 (C. C. A. 2d, 1936). In this case the District Court granted judgment for over \$600,000, plus interest. 11 F. Supp. 770 (D. Conn. 1935). It seems unlikely that the Trust Company's shareholders were much exercised over the prospect of having to meet this loss.

123. There seems to have been little basis in substance for this view, even in the past. When the Government was briefing *George Moore Ice Cream Co. v. Rose*, 289 U. S. 373 (1933), it could point to no recorded instance where a collector had been denied a certificate of probable cause. But *cf.* *Toledo Railways & Light Co. v. McMaken*, 17 F. Supp. 338, 345 (N. D. Ohio, 1936).

124. *Graham & Foster v. Goodcell*, 282 U. S. 409 (1930); *United States v. Jefferson Elec. Mfg. Co.*, 291 U. S. 386 (1934); *cf.* *Anniston Mfg. Co. v. Davis*, 87 F. (2d) 773 (C. C. A. 5th, 1937), *aff'd*, U. S. Sup. Ct., May 17, 1937; *Butler v. Carney*, 17 F. Supp. 133 (D. Mass. 1936).

125. 289 U. S. 373 (1933). The decision was that the REVENUE ACT OF 1924 § 1014, allowing recovery of taxes though paid without protest, was applicable to a suit against a collector, although the taxes had been paid without protest before the enactment of the section, so that the collector was subject to no liability under the law in force at the time of payment.

entitled as of right to a certificate converting the suit against him into one against the Government . . . One does not speak of probable cause when justification is complete . . .

"A suit against a Collector who has collected a tax in the fulfillment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. There may have been utility in such procedural devices in days when the Government was not suable as freely as now. They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court."<sup>126</sup>

In the light of these more recent determinations of the nature of the liability of the collector, the decision in the *Sage* case should no longer be followed.<sup>127</sup> The Court has not hesitated to overrule its decisions in other circumstances. The dictum in the *Sage* case and its progeny should be relegated to the same limbo.

In other cases, no one representing the Government was a party in the earlier litigation. In this situation, it might be supposed that it would indeed be clear that the prior decision is not binding on the Government. A decree of a state court approving a receiver's report showing certain losses is not sufficient to establish these losses for tax purposes.<sup>128</sup> A surrogate court decree approving an executor's account, though accepted by the estate tax division of the Bureau of Internal Revenue in fixing the amount of the federal estate tax, is not *res judicata* as to the value of stock included in the account when the issue arises in a subsequent income tax case.<sup>129</sup> And the decision of a state court, based on

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126. *George Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 381-83 (1933). Citations are omitted.

127. In *Second Nat. Bank v. Woodworth*, 66 F. (2d) 170 (C. C. A. 6th, 1933), holding a judgment in favor of the United States conclusive in a subsequent suit against the collector, the court held that the *Moore* case made the *Sage* case inapplicable. This decision was cited with approval by the Supreme Court in *Tait v. Western Maryland Ry.*, 289 U. S. 620, 627 (1933). It is perhaps not without significance that the *Moore* case and the *Western Maryland* case were decided in the same month. See also the remarks of the court in *Anniston Mfg. Co. v. Davis*, 87 F. (2d) 773, 779 (C. C. A. 5th, 1937), *aff'd*, U. S. Sup. Ct., May 17, 1937.

128. *Austin v. Helvering*, 77 F. (2d) 373 (App. D. C. 1935); *Guaranty State Bank v. Commissioner*, 12 B. T. A. 543 (1928).

129. *Carrick v. Commissioner*, 21 B. T. A. 12 (1930); *Nicholson v. Commissioner*, 21 B. T. A. 795 (1930); *Jackson v. Commissioner*, 32 B. T. A. 470 (1935); *cf. Fidelity & Columbia Trust Co. v. Lucas*, 52 F. (2d) 298 (W. D. Ky. 1931), *rev'd on other grounds*, 66 F. (2d) 116 (C. C. A. 6th, 1933).



the verdict of a jury, that a bequest was valid as a charitable gift, does not conclude the issue whether the bequest is deductible for estate tax purposes.<sup>130</sup> These results seem fairly clear until they are turned around. If the state court had found that there was no loss in the bank cases or that the charitable gift was not valid, it seems very likely that the Government would have found in the state decision strong and perhaps conclusive support for the denial of the deduction claimed.<sup>131</sup>

The difficulty is emphasized when the recent decision in *Blair v. Commissioner*<sup>132</sup> is recalled. In that case there had been a prior decision by the Circuit Court of Appeals in a tax case between the same parties holding that the trust of which the taxpayer was a beneficiary was a spendthrift trust and that the assignments made by the taxpayer were invalid. Then there was a state court decision to the contrary to which the Government was not a party and could not have been a party if it had sought to be. When the issue arose again in a tax case concerning a subsequent year, the prior tax decision was held no longer applicable, while the intervening state court decision was found to be conclusive. "The supervening decision of the state court interpreting that law in direct relation to this trust cannot justly be ignored in the present proceeding so far as it is found that the local law is determinative of any material point in controversy."<sup>133</sup> Thus we are thrown back squarely to the problem of the effect of state law on federal tax questions. This is a very elusive topic, the analysis of which does not seem yet to have been completed, and which we cannot undertake to examine here.<sup>134</sup>

130. *City Nat. Bank v. Commissioner*, 16 B. T. A. 719 (1929); *Eagan v. Commissioner*, 43 F. (2d) 881 (C. C. A. 5th, 1930). But *cf.* *Smith v. Commissioner*, 78 F. (2d) 897 (C. C. A. 1st, 1935), (1936) 49 HARV. L. REV. 844. Of course, it might be said that the question whether a gift is charitable so as to be valid under state law is not necessarily the same as the question whether it is charitable within the deduction provision of the estate tax law. The concept, however, is an almost uniformly accepted one, and it is doubtful if such a distinction really exists. See *Eagan v. Commissioner*, *supra*, at 883.

131. *Cf.* *Eagan v. Commissioner*, 42 F. (2d) 881, 883 (C. C. A. 5th, 1930), where the court intimated that a state decree against the trust would have been conclusive: "The Revenue Act did not intend to except trusts which could not lawfully take effect, but only those which can and do become operative." But see *Olympia Veneer Co. v. Commissioner*, 22 B. T. A. 892, 909 (1931), where a state decision that certain payments were dividends was considered not conclusive in the federal tax proceeding.

132. 57 Sup. Ct. 330 (1937). See pp. 1321-22, *supra*.

133. 57 Sup. Ct. 330, 332 (1937).

134. *Cf.* *Group No. 1 Oil Corp. v. Bass*, 283 U. S. 279 (1931); *Burnet v. Harmel*, 287 U. S. 103 (1932); *Freuler v. Helvering*, 291 U. S. 35 (1934); *Smith v. Commissioner*, 78 F. (2d) 897 (C. C. A. 1st, 1935), (1936) 49 HARV. L. REV. 844; *Barton, The Effect of State Laws on Federal Tax Laws* (1932) 10 TAX MAG. 11; *Comment* (1934) 34 COL. L. REV. 526.

In the *Freuler* case the federal statute expressly referred the tax question to the "order governing the distribution" [REVENUE ACT OF 1921 § 219 (d)], and that this

The *Blair* decision does, however, seem susceptible to certain comments. In the first place, whatever may be the effect of a state court decision where there has not been a prior determination of the question between the parties now before the court, there had been such a prior decision in the *Blair* case. Though the application of the rule of res judicata there might shut out relevant light, that is the nature of the rule of res judicata. The Court does seem to have been a little summary in its handling of this question. Moreover, it is not wholly clear that the state court decision is the ultimate word on the construction of the trust instrument. The issue in that case was between the trustees, the beneficiary, and the assignee. If a controversy should arise between a trustee in bankruptcy and another beneficiary of the trust, perhaps in another appellate district or eventually before the state supreme court, the trustee in bankruptcy no doubt would contend that the property passed to him because the prior state decision established the trust interest as property which the bankrupt "could by any means have transferred."<sup>135</sup> If the prior temper of Illinois courts in spendthrift trust cases is any test, he is very likely to be met with the answer that this was *res inter alios acta*. Which, then, of the state decisions will be conclusive in federal tax matters? And, in the meantime, is not the fact that the state decision first rendered makes the property subject to the claim of the trustee in bankruptcy sufficient to cast grave doubt on it as a final determination of the law of the state? For the time being, however, it seems to be established that a federal tax decision will not be res judicata in a subsequent case between the same parties if there is an intervening state court decision that is regarded as controlling under the nebulous rules governing the effect of state law on federal tax questions.

There is a third group of cases in which a prior decision involving one party may be urged as binding in the later case of another taxpayer—cases in which the two taxpayers were both parties to the same transaction, and different aspects of the transaction are presented in subsequent tax controversies. In *Hall v. Commissioner*,<sup>136</sup> the petitioner had transferred stock to a corporation in exchange for other stock, and the question was whether any taxable gain was realized from the exchange. In a pre-

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made the order of the state court binding in determining the federal tax question, was a basis of the decision. *Freuler v. Helvering*, 291 U. S. 35, 44-45 (1934). No statute making such an express reference to the state court decision was involved in the *Blair* case.

135. BANKRUPTCY ACT § 70 (a) (5), 30 STAT. 544, 565 (1898), 11 U. S. C. § 110 (a) (5) (1934); *cf.* *Eaton v. Boston Safe Deposit & Trust Co.*, 240 U. S. 427 (1916); see *GRISWOLD, SPENDTHRIFT TRUSTS* (1936) §§ 356-61.

136. 31 B. T. A. 125 (1934); *cf.* *Farrell v. Commissioner*, 35 B. T. A. 265, 268, 271 (1937).

vious case it had appeared that the corporation had sold the stock it had received, and its gain had been computed on the transferor's basis, on the theory that the transaction was a tax-free exchange under the reorganization provisions of the Revenue Act. The transferor's contention that this decision was conclusive in his case was rejected. A similar result was reached in an estate tax case in which the Commissioner contended that a transfer had been made in contemplation of death, though in computing the gain from a later sale of the same property he had taken the position that it was not in contemplation of death.<sup>137</sup> Situations of this sort have been presented in different guise in a few other cases.<sup>138</sup> Where several persons take part on the same side of a transaction, as, for instance, where there is a syndicate of several members, or where the same issue arises separately as to the beneficiaries of the same estate, a decision in the case of one, though persuasive, is not conclusive in the case of another.<sup>139</sup>

It is a natural reaction to say that in these circumstances the Government should not be allowed to blow both hot and cold with respect to the same transaction. It is difficult for the layman, at least, to see that, with our system of throwing every doubtful point into litigation, there are situations in which the Commissioner must take inconsistent positions until the Supreme Court has settled the issue one way or the other. If the Commissioner makes up his mind as to what he thinks is right and follows that conclusion consistently in early cases on both sides of the question, the Supreme Court may eventually decide that his solution was wrong, with the net result that both classes of taxpayers pay no tax when only one should have gone free. Only by taking a position in favor of the Government on both sides of the question until the issue

137. See *Igleheart v. Commissioner*, 77 F. (2d) 704, 713 (C. C. A. 5th, 1935).

138. *Boston Safe Deposit & Trust Co. v. Commissioner*, 66 F. (2d) 179 (C. C. A. 1st, 1933), *cert. denied*, 290 U. S. 700 (1933); *Bone v. United States*, 46 F. (2d) 1010 (M. D. Ga. 1931) (a decision in a corporation's case that deductions for officers' salaries were excessive was held not controlling in favor of an officer's contention that the excessive portion received by him was taxable as a dividend) [*cf. William S. Gray & Co. v. United States*, 68 Ct. Cls. 480, 35 F. (2d) 968 (1929)]; *Bateman v. Commissioner*, 34 B. T. A. 351 (1936) (the first decision determined that a corporation was a personal service corporation, but did not establish the amount of its income, and thus was held not conclusive on the latter point in a case involving a shareholder's tax).

139. *Gwin v. Commissioner*, 14 B. T. A. 393 (1928), *aff'd on this point sub nom. Lincoln Bank & Trust Co. v. Commissioner*, 51 F. (2d) 78 (C. C. A. 6th, 1931), *cert. denied*, 285 U. S. 548 (1932); *Appeal of Suhr*, 4 B. T. A. 1198 (1926); *Appeal of Walz*, 4 B. T. A. 1202 (1926). But *cf. Missouri Pacific R. R. v. Commissioner*, 22 B. T. A. 267 (1931), where the petitioner in the second case was a party in the first proceeding.

Questions as to the identity of the parties in the two cases are also presented in the cases involving suits on bonds. [see pp. 1331-32, *supra*], and in the cases involving transferee liability [see pp. 1347-51, *infra*].

is finally settled, can the Commissioner protect the revenue.<sup>140</sup> For this reason the cases holding that a position taken in one case does not bar an inconsistent position in the other case seem right, though there is obvious difficulty if the inconsistent positions in fact lead to a double tax in the same transaction.

#### IV. TRANSFEREES

A special instance of the problem of parties is presented in proceedings brought against persons who have received a transfer of property from the original taxpayer,<sup>141</sup> for where there has been a previous determination of the transferor's liability, the conclusive effect of this determination in the later proceeding against the transferee may come into question. Under Section 311 of the Revenue Act of 1936,<sup>142</sup> the "liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax," may be asserted by deficiency notice; the transferee then has an option to pay the tax or to seek a redetermination from the Board of Tax Appeals. The statute thus provides a means of proceeding against the transferee substantially the same as if he were the primary taxpayer. The transferee proceeding may be originated either before or after the final determination of the tax liability of the transferor.

Since the statute provides a means for enforcing the "liability, at law or in equity, of a transferee," a first approach to the problem might be an examination of the extent of the liability of a transferee before the provision was enacted. There seem to have been few, if any, cases in which the Government had proceeded by suit against a transferee after

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140. The difficulty is far from imaginary. Consider, *e.g.*, the position which the Commissioner was forced to take by the decisions in *Warner v. Walsh*, 15 F. (2d) 367 (C. C. A. 2d, 1926), *United States v. Bolster*, 26 F. (2d) 760 (C. C. A. 1st, 1928), and *Allen v. Brandeis*, 29 F. (2d) 363 (C. C. A. 8th, 1928), and the resulting confusion and loss of revenue when the Supreme Court decided that these cases were wrong and that the Commissioner's first position had been correct. *Helvering v. Butterworth*, 290 U. S. 365, 369 (1933). The Commissioner's efforts to salvage something from the situation are shown in such cases as *White v. Stone*, 78 F. (2d) 136 (C. C. A. 1st, 1935), *cert. denied*, 296 U. S. 596 (1935), *cert. granted*, 56 Sup. Ct. 610 (1937). Similarly, the Commissioner might have been subject to criticism for laxness in the performance of his duty if he had consistently taken the position that the transfer involved in *Igleheart v. Commissioner*, 77 F. (2d) 704 (C. C. A. 5th, 1935), and in *Commissioner v. Igleheart*, 75 F. (2d) 151 (C. C. A. 7th, 1935), had not been made in contemplation of death.

141. See PAUL AND MERTENS, *FEDERAL INCOME TAXATION* (1934) §§ 46.29, 53.27.

142. This provision is the same as that contained in the REVENUE ACTS OF 1928, 1932, and 1934 § 311. It originally appeared, in slightly different form, as § 280 of the REVENUE ACT OF 1926. The constitutionality of the original section was sustained in *Phillips v. Commissioner*, 283 U. S. 589 (1931).

obtaining a judgment for taxes against the transferor.<sup>143</sup> But outside of the tax field there are many cases holding that in a proceeding by a judgment creditor of a corporation, the judgment, if obtained without fraud or collusion, is conclusive against a transferee or shareholder in fixing the liability of the corporation.<sup>144</sup> There is apparently no reason why this rule should not be applicable when the creditor's claim is for a tax.<sup>145</sup> Doubtless because of the paucity of authorities on the precise issue, the Board has approached the problem with very little reference to the earlier cases.

While the proceeding under Section 311 is not the Government's exclusive remedy against transferees,<sup>146</sup> most of the cases raising the question of res judicata have arisen before the Board of Tax Appeals, and have involved the conclusive effect of prior decisions of the Board. In a number of cases, the Board has held that its decision made on the merits in reviewing a deficiency determined against the transferor is conclusive as to the transferor's tax liability in a subsequent proceeding involving the transferee.<sup>147</sup> The prior decision is binding not only on

143. In none of the cases cited by Mr. Justice Brandeis in *Phillips v. Commissioner*, 283 U. S. 589, 592, n. 2 (1931), in which the United States proceeded by suit against transferees, had there been a previous judicial determination of the tax liability of the transferor. This was also true in *Leighton v. United States*, 289 U. S. 506 (1933), and the cases there cited.

144. *Selig v. Hamilton*, 234 U. S. 652 (1914); *Coe v. Armour Fertilizer Works*, 237 U. S. 413 (1915); *Royal Arcanum v. Green*, 237 U. S. 531 (1915); *Marin v. Augedahl*, 247 U. S. 142 (1918); *Hale v. Hardon*, 95 Fed. 747 (C. C. A. 1st, 1899); *American Nat. Bank v. Supplee*, 115 Fed. 657 (C. C. A. 3d, 1902); *Martin v. Wilson*, 120 Fed. 202 (C. C. A. 7th, 1903); *Champagne Lumber Co. v. Jahn*, 168 Fed. 510 (C. C. A. 7th, 1909); *Levy v. Equitable Trust Co.*, 271 Fed. 49 (C. C. A. 8th, 1921); *cf. Broderick v. Rosner*, 294 U. S. 629 (1935); see 6 THOMPSON, CORPORATIONS (3d ed. 1927) §§ 4981-96. In *Ball v. Warrington*, 108 Fed. 472 (C. C. A. 3d, 1901), and *Bissitt v. Kentucky River Nav. Co.*, 15 Fed. 353 (C. C. D. Ky. 1882), the prior judgment was refused conclusive effect on the ground that it was obtained by fraud or collusion. This circumstance, arising chiefly where the creditor is in control of the corporation, would not be likely to appear in federal tax cases.

145. See Rogge, *The Transferee of a Delinquent Taxpayer* (1928) 39 MICH. L. REV. 39, 71-72.

146. *Leighton v. United States*, 289 U. S. 506 (1933).

147. *Woodley Petroleum Co. v. Commissioner*, 16 B. T. A. 253 (1929); *Jahncke Service, Inc. v. Commissioner*, 20 B. T. A. 837 (1930), *appeal dismissed without written opinion*, C. C. A. 5th, Feb. 10, 1933; *Duval v. Commissioner*, 21 B. T. A. 1357 (1931), *aff'd*, 57 F. (2d) 496 (C. C. A. 5th, 1932); *Carney v. Commissioner*, 22 B. T. A. 721 (1931); *Garcin v. Commissioner*, 22 B. T. A. 1027 (1931), *remanded on stipulation of parties*, 79 F. (2d) 993 (C. C. A. 4th, 1935); *Green v. Commissioner*, 26 B. T. A. 719 (1932); *cf. Continental Oil Co. v. United States*, 14 F. Supp. 533 (Ct. Cls. 1936). In *Garcin v. Commissioner*, *supra*, the prior decision was by a United States district court; in all of the other cases the prior decision was the Board's.

Although the transferee is usually a stockholder who has received a liquidating distribution from a corporation, the rule applies to other situations, as in *Drake v. Com-*

the transferee, but also on the Commissioner. If the Board determined that there was no deficiency due from the transferor, the Commissioner may not proceed further against the transferee.<sup>148</sup> And the decision with respect to the transferor is conclusive equally as to the merits of the transferor's tax and on the question whether it was barred by limitations.<sup>149</sup>

There are a number of situations, however, in which the Board has concluded that a prior decision involving the transferor did not preclude a re-examination of the merits of the tax in the transferee's proceeding. Where the transferor's appeal was dismissed for want of jurisdiction, there is no decision on the merits which can be invoked by either party in a subsequent controversy over transferee liability.<sup>150</sup> As to this there can be little controversy, for there was, in effect, no appeal to the Board. In other situations in which the Board has refused to give conclusive effect to a prior decision against a transferor, the result is more doubtful. The Board has determined that the decision in the transferor's case will not be conclusive against the transferee where the transferor's petition was dismissed on its own motion,<sup>151</sup> or where the decision in the transferor's case was based on consent or on stipulation.<sup>152</sup>

These decisions seem difficult to support. Once the transferor has appealed to the Board, the decision which the Board may make becomes the final determination of the transferor's tax liability for the year in question, subject only to direct review by the circuit courts of appeals and the Supreme Court. The Board's jurisdiction becomes exclusive upon the filing of the petition.<sup>153</sup> When its decision becomes final, it determines the tax liability of the transferor whether the decision be after full hearing or on stipulation or consent. The transferor's tax liability thus becomes fixed, and the transferee's liability is to pay the tax

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missioner, 30 B. T. A. 475 (1934), in which the transferee was the beneficiary of the transferor's estate.

148. *Woodley Petroleum Co. v. Commissioner*, 16 B. T. A. 253 (1929); *Carney v. Commissioner*, 22 B. T. A. 721 (1931); *cf. American S. S. Co. v. Wickwire Spencer Steel Co.*, 8 F. Supp. 562 (S. D. N. Y. 1934), discussed at n. 160, *infra*.

149. *Green v. Commissioner*, 26 B. T. A. 719 (1932). But *cf. American S. S. Co. v. Wickwire Spencer Steel Co.*, 8 F. Supp. 562 (S. D. N. Y. 1934).

150. *Gay v. Commissioner*, 31 B. T. A. 580 (1934) (transferor's petition filed by an unauthorized officer); *cf. American Equitable Assurance Co. v. Commissioner*, 27 B. T. A. 247 (1932), *aff'd*, 68 F. (2d) 46 (C. C. A. 2d, 1933) (transferor's petition signed by transferee and hence ineffective). In the latter case the point was assumed rather than decided.

151. *Wayne Body Corp. v. Commissioner*, 22 B. T. A. 401 (1931), *modified on another point*, 22 B. T. A. 1207 (1931), *modified on another point*, 24 B. T. A. 524 (1931); *Stanley Co. v. Commissioner*, 26 B. T. A. 705 (1932).

152. *Keener Oil & Gas Co. v. Commissioner*, 32 B. T. A. 186 (1935); *cf. Bateman v. Commissioner*, 34 B. T. A. 351 (1936).

153. See note 40, *supra*.

due from the transferor,<sup>154</sup> regardless of the basis upon which the transferor's tax was determined. Many of the cases involve corporations with only a few stockholders where the transferee was throughout the real party in interest and where the transferor's case was controlled by the same counsel who appeared for the transferee.<sup>155</sup> There is here an additional reason for giving conclusive effect to the determination in the transferor's case, for it is well settled that a person in control of litigation is bound to the same extent as an actual party to the proceeding.<sup>156</sup> And where reliance is placed on a decision of the Board based upon stipulation or consent, there is generally the added sanction of contract.<sup>157</sup> The Board has not been wholly consistent in this group of cases. In *Garcin v. Commissioner*,<sup>158</sup> the decision against the transferor was a default judgment obtained in a federal district court. The Board held this binding on the transferees. It would seem that for this purpose a decision of the Board based upon consent or stipulation should be at least as effective as a default judgment of a district court.<sup>159</sup>

Here, as elsewhere, nice questions may arise as to the exact scope of the conclusive effect of a prior decision. This issue was presented in *American Steamship Company v. Wickwire Spencer Steel Company*.<sup>160</sup> In the transferor's case the Board found no deficiency because certain waivers of the Statute of Limitations, signed by the transferee without the transferor's authorization, were invalid as to the transferor. In a proceeding involving the transferee's liability, the District Court agreed that the decision of the Board would be binding on the validity of the waivers if that question were presented, but held that, having signed the waivers, the transferee was estopped from asserting their invalidity.<sup>161</sup> There was "no identity of issues in the two cases."<sup>162</sup> Thus the transferee

154. That is, to the extent that he has received assets from the transferor or is otherwise subject to liability. See 5 PAUL AND MERTENS, FEDERAL INCOME TAXATION (1934) § 46.41.

155. This was the case in *Wayne Body Corp. v. Commissioner*, 22 B. T. A. 401 (1931) cited *supra* note 151; *Keener Oil & Gas Co. v. Commissioner*, 32 B. T. A. 186 (1935).

156. See *Souffront v. La Compagnie des Sucreries*, 217 U. S. 475, 487 (1910); 1 FREEMAN, JUDGMENTS (5th ed. 1925) §§ 432-33.

157. See the cases in note 96, *supra*.

158. 22 B. T. A. 1027 (1931), *remanded on stipulation of parties*, 79 F. (2d) 993 (C. C. A. 4th, 1935).

159. Where the petition in the transferor's case had been filed with the Board under the 1924 Act, the Board's decision had only *prima facie* effect, and accordingly is not conclusive in the transferee's case. *Stegeman v. Commissioner*, 25 B. T. A. 949 (1932).

160. 8 F. Supp. 562 (S. D. N. Y. 1934).

161. The decision on estoppel was based on *Lucas v. Hunt*, 45 F. (2d) 781 (C. C. A. 5th, 1930). Cf. *McPherson v. Commissioner*, 54 F. (2d) 751 (C. C. A. 9th, 1932).

162. 8 F. Supp. 562, 566 (S. D. N. Y. 1934).

may be liable although no tax is due from his transferor. In another case,<sup>163</sup> the Board determined on stipulation that no tax was due from a transferor because it was a personal service corporation. The result of this was to make the corporation's income taxable to its stockholders much as if it had been a partnership.<sup>164</sup> In a subsequent proceeding involving the tax liability of one of the stockholders for the income of the corporation, the Board held that the prior decision was not conclusive as to the amount of the income — in part because the earlier case had been disposed of on a stipulation. Although this ground appears objectionable, the result seems right. The determination that the transferor was a personal service corporation and thus not subject to tax was not a decision on the issue of the amount of its income taxable to the shareholder.

## V. PENALTIES

The question of the interrelation of criminal proceedings and of civil penalties for fraud may arise in various situations. Under Section 145 of the Revenue Act of 1936, any person who "willfully fails" to pay any tax due, or to make a return, or to keep records, or to supply information, is guilty of a misdemeanor and may be fined up to \$10,000, and imprisoned up to one year. Any person "who wilfully attempts in any manner to evade or defeat any tax" is guilty of a felony and may be subjected to a fine of the same extent and imprisonment up to five years.<sup>165</sup> In each case the Statute provides that the criminal penalty shall be "in addition to other penalties provided by law." The penalties which are collected administratively are chiefly three: a penalty running up to twenty-five per cent "In case of any failure to make and file return . . . unless it is shown that such failure is due to reasonable cause and not due to willful neglect;"<sup>166</sup> a penalty of five per cent of a deficiency<sup>167</sup> imposed "If any part of the deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to

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163. *Bateman v. Commissioner*, 34 B. T. A. 351 (1936).

164. See REVENUE ACT OF 1918 §§ 200, 218 (e); *cf.* REVENUE ACT OF 1917 § 209.

165. Corresponding provisions have appeared in the REVENUE ACTS OF 1932 and 1934 § 145, and in the REVENUE ACT OF 1928 § 146. There were additional criminal provisions in the REVENUE ACT OF 1926 § 1114, and in the REVENUE ACT OF 1924 § 1017.

166. REVENUE ACT OF 1936 § 291. A similar provision was contained in the REVENUE ACT OF 1935 § 406, and, somewhat different in form, in the REVENUE ACTS OF 1928, 1932, and 1934 § 291, apparently originating in the REVENUE ACT OF 1918 § 250 (b). For the Treasury's views as to the application of the section see U. S. Treas. Reg. 94, Art. 291-1.

167. REVENUE ACT OF 1936 § 293 (a). This provision, included in the REVENUE ACTS OF 1928, 1932, and 1934 § 293 (a), finds its genesis in the somewhat different provisions of the REVENUE ACT OF 1918 § 250 (e), and in REV. STAT. § 3176 (1875).



defraud;"<sup>168</sup> finally, and most important, the "fraud" penalty of fifty per cent of the amount of any deficiency is added to the tax "if any part of any deficiency is due to fraud with intent to evade tax."<sup>169</sup>

It is clear from this résumé that the criminal and administrative penalties are not imposed in exactly the same terms, however plain it may be that facts which would show a "willful" attempt "to evade or defeat any tax" would ordinarily be sufficient to show "fraud with intent to evade tax." How far, then, will a determination under one of these provisions operate to bar a proceeding under another? Clearly the payment of penalties in addition to the tax will not bar a subsequent criminal prosecution,<sup>170</sup> for there is no previous adjudication, and thus no basis for the application of *res judicata*. Moreover, as has been pointed out, the criminal penalty is in terms imposed "in addition to other penalties provided by law." The suggestion that there is an invalid double punishment for the same offense is subject to the answer given in the cases discussed below where a penalty is allowed after a successful criminal prosecution.

Where the taxpayer has been subjected to fine or imprisonment in a criminal prosecution, the contention has sometimes been made that a fraud penalty may not thereafter be imposed. This penalty, it is said, constitutes a second punishment for the same offense, and creates the double jeopardy prohibited by the Fifth Amendment. This argument has been uniformly rejected, whether the judgment against the defendant in the criminal proceeding has been based upon a plea of guilty,<sup>171</sup> or upon the verdict of a jury<sup>172</sup> — for, it is said, Congress intended to impose cumulative penalties. In *Hanby v. Commissioner*,<sup>173</sup> the conclusion was put in these words:

"It is manifest that Congress intended to impose upon such unlawful and fraudulent conduct as that of the taxpayer in this case not

168. For an interesting discussion of the "negligence" and "failure to file return" penalties, see Kent, *The Treasury Point of View* (1935) 13 TAX MAG. 511.

169. REVENUE ACT OF 1936 § 293 (b). The same provision appeared in the REVENUE ACTS OF 1928, 1932, and 1934 § 293 (b), the REVENUE ACTS OF 1924 and 1926 § 275 (b), and the REVENUE ACTS OF 1918 and 1921 § 250 (b). It has been applied in many cases. For general discussions of the fraud penalty, see Brabson, *Fraud and Good Faith in Tax Cases* (1936) 14 TAX MAG. 3; Gardner, *The Compromise of Federal Taxes and Penalties* (1935) 13 TAX MAG. 635; Jackson, *Changes in Treasury Tax Policy* (1934) 12 TAX MAG. 342, 345; Kent, *Treasury Tax Problems* (1934) 12 TAX MAG. 527, 529.

170. *Slick v. United States*, 1 F. (2d) 897 (C. C. A. 7th, 1924); *cf.* *United States v. McCormick*, 67 F. (2d) 867 (C. C. A. 2d, 1933), *cert. denied*, 291 U. S. 662 (1934).

171. *McLaughlin v. Commissioner*, 29 B. T. A. 247 (1933); *Epstein v. Commissioner*, 34 B. T. A. 925 (1936).

172. *Hanby v. Commissioner*, 67 F. (2d) 125 (C. C. A. 4th, 1933); *Castle v. United States*, 17 F. Supp. 515 (Ct. Cls. 1937) (suit to recover a penalty imposed by the Board pursuant to a stipulation).

173. 67 F. (2d) 125, 130 (C. C. A. 4th, 1933).

only a punishment by fine and imprisonment through criminal prosecution . . . but also the added penalty . . . Under such circumstances it has been held that the statute does not impose a second punishment for the same offense, but that the several penalties are parts of a whole which is not satisfied by the imposition of a part."

Though there is a certain element of casuistry in this way of putting it, the result seems justified. The only substantial difficulty is that resulting from *United States v. La Franca*,<sup>174</sup> and that is one easily disposed of on the ground that the case was based on the construction of statutes having no application to the tax situation.<sup>175</sup> Although prosecution does not bar the imposition of the penalty, the record of the criminal case is not conclusive in establishing the fraud upon which the penalty is based. Where the conviction was based upon a plea of guilty, the record of that plea "is receivable as an admission to be given weight according to the circumstances."<sup>176</sup>

The more difficult situation is presented when the criminal prosecution has resulted in an acquittal and the Commissioner thereafter undertakes to assert a fraud penalty. Three cases have involved such penalties after an unsuccessful criminal prosecution,<sup>177</sup> but only one of these appears to have raised the question squarely.<sup>178</sup> This is the *Mitchell* case; the taxpayer was acquitted on an indictment based on Section

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174. 282 U. S. 568 (1931). This was a proceeding to recover certain taxes, which the Court concluded to be penalties, imposed for the conduct of a liquor business. The defendant had previously been convicted for the same acts in a criminal proceeding. The prior conviction was held a bar to the imposition of the penalties.

175. The tenuous nature of the *La Franca* decision is apparent from the concurrent decision in *Various Items of Personal Property v. United States*, 282 U. S. 577 (1931), where forfeiture of property used in violation of liquor revenue laws was upheld, although its owner had previously been convicted in a criminal case of a violation of the same laws. There should also be noted a certain element of suspicion in the applicability of any case arising under the liquor laws during the prohibition era; various cases during this period, it seems, might have gone the other way if prohibition laws had not been involved. Cf. *United States v. Lefkowitz*, 285 U. S. 452 (1932).

176. *McLaughlin v. Commissioner*, 29 B. T. A. 247 (1933).

177. *Hanby v. Commissioner*, 67 F. (2d) 125 (C. C. A. 4th, 1933); *Scharton v. Commissioner*, 32 B. T. A. 459 (1935), *dismissed without written opinion*, C. C. A. 1st, April 29, 1936; *Mitchell v. Commissioner*, 32 B. T. A. 1093 (1935), *rev'd on this question*, C. C. A. 2d, May 10, 1937.

178. In the *Hanby* case, the acquittal was on a charge of filing false amended returns for 1917 to 1919, but the penalty was asserted for filing false original returns. *Hanby v. Commissioner*, 67 F. (2d) 125, 129 (C. C. A. 4th, 1933) ("the issue here involved, of fraud in the original returns, is wholly distinct."). Query, could the Government have maintained a criminal prosecution for the filing of the original returns after the acquittal with respect to the amended returns?

In the *Scharton* case, the indictment was held barred by the Statute of Limitations. *United States v. Scharton*, 285 U. S. 518 (1932).

146(b) of the Revenue Act of 1928, but the Board upheld the imposition of fraud penalties under Section 293(b) of the same Act. In reaching this result, the Board said:

"A careful study of the two sections convinces us that they are basically different in character and were enacted for wholly different purposes. The language of the two sections differs widely, and contemplates situations which may require entirely dissimilar proof."<sup>179</sup>

There would be little reason to doubt the correctness of this conclusion were it not for the case of *Coffey v. United States*,<sup>180</sup> which the Board cites only by inclusion in a quotation.<sup>181</sup> That case involved a proceeding brought by the United States to forfeit certain property for a violation of the internal revenue laws. The proceeding was held to be barred by the prior acquittal of the owner of the property in a prosecution under the same laws.

The *Coffey* case has been distinguished many times, but it has never been overruled or expressly qualified. There is reason to conclude, however, that it should not be applied to penalties under the present revenue laws. First, as a practical matter the issues are different in the two proceedings. In the criminal case the question before the jury is, should this defendant go to jail? In the penalty proceeding the issue involves money only. It seems plain that, rightly or wrongly, a jury might be influenced in such a situation by factors which should not be considered by the tax tribunal.<sup>182</sup> Secondly, as a legalistic matter the burden of persuasion in the two cases is different. In the criminal case the Government must prove guilt "beyond a reasonable doubt," while in the penalty proceeding the proof must be by "clear and convincing evidence."<sup>183</sup> The *Coffey* case was distinguished in part on the ground of differences in burden of proof in *Stone v. United States*.<sup>184</sup> The merits of these

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179. *Mitchell v. Commissioner*, 32 B. T. A. 1093, 1136 (1935), *rev'd on this question*, C. C. A. 2d, May 10, 1937.

180. 116 U. S. 436 (1886).

181. In dissenting, two members relied on the *Coffey* case.

182. This point is made in the note on the *Mitchell* case in (1936) 36 Col. L. Rev. 1006.

183. *Kerbaugh v. Commissioner*, 29 B. T. A. 1014 (1934), *aff'd*, 74 F. (2d) 749 (C. C. A. 1st, 1935); *Mitchell v. Commissioner*, 32 B. T. A. 1093, 1129 (1935), *rev'd in part*, C. C. A. 2d, May 10, 1937. In another situation, *res judicata* was said not to apply because of differences in the burden of proof. *Peck v. Commissioner*, 34 B. T. A. 402 (1936).

184. 167 U. S. 178, 188 (1897). A recent case making the same distinction as that in the *Stone* case is *United States v. Warner Bros. Pictures Inc.*, 13 F. Supp. 614, 616 (E. D. Mo. 1936). To the same effect is *Sourino v. United States*, 86 F. (2d) 309 (C. C. A. 5th, 1936), *cert. denied*, 57 Sup. Ct. 491 (1937) (proceeding to cancel a naturalization certificate held not barred by a prior acquittal on the charge of fraud in obtaining the naturalization). See (1936) 36 Col. L. Rev. 1006, 1007.

arguments do not appear to be wholly disproved by the recent reversal of the decision on this point in the *Mitchell* case.

## VI. CONCLUSION

If the cases thus reviewed demonstrate anything, it is "human reluctance to let controversial issues stay settled."<sup>185</sup> Although the Supreme Court has made it clear that res judicata applies to tax cases, there has been much more litigation in the field since the decision than before. There is room, at least, to consider the rule in operation and to examine the scope within which it can operate with maximum utility.

It should not be forgotten that "Res judicata is a principle of peace."<sup>186</sup> It is a rule which forecloses and shuts out truth, which may result in "the perpetuation of error,"<sup>187</sup> and which can therefore be justified only to the extent that it brings a compensating advantage. "Relief from redundant litigation"<sup>188</sup> may be such an advantage, but on this basis the principle of res judicata can be justified only so far as it does in fact eliminate repetitious lawsuits. Our examination of the cases shows, perhaps, that there are some circumstances in which litigation over the question whether res judicata is applicable or not, may well present more difficult questions than would be involved in re-examining the merits of the case itself. To this battleground res judicata brings no peace. It should be confined to the area within which it will in fact prevent further litigation, and within which its application may become so clear that complicated litigation over questions of its scope will be brought to a minimum.

Further difficulties with the rule of res judicata arise out of the procedural system for the review of federal tax decisions. Review by the Supreme Court in a tax case is never a matter of right; it is always discretionary. And either the taxpayer or the Government may incur a decision in an early litigation plainly contrary to the law as it is eventually established by the Supreme Court—and this though every effort has been made to obtain the highest Court's decision. The error may be irretrievable as to the particular case then litigated.<sup>189</sup> But it is difficult,

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185. The phrase is from Maguire and Zimet, *Hobson's Choice and Similar Practices in Federal Taxation* (1935) 48 HARV. L. REV. 1281, 1331. The authors continue: "Laymen more than lawyers, and lawyers perhaps more than judges, but even judges to some extent, are moved by the appeal of afterthought and afterdiscovery. It is indeed a problem to set acceptable boundary lines between the normal and very necessary rule of repose and the scattering concessions to people with hard cases."

186. *Holmes v. Donald*, 84 F. (2d) 188, 190 (C. C. A. 5th, 1936).

187. *Appeal of Union Metal Mfg. Co.*, 4 B. T. A. 287, 288 (1926).

188. *Tait v. Western Maryland Ry.*, 289 U. S. 620, 624 (1933); *Greenbaum v. United States*, 17 F. Supp. 83, 86 (Ct. Cls. 1936).

189. See *Art Metal Const. Co. v. United States*, 82 Ct. Cls. 666, 13 F. (2d) 756 (1936). Consider also the situation of the taxpayer who lost in *Steedman v. United*

at best, to defend the doctrine if it is extended to require perpetuation of mistake after error has been clearly shown. This is a very real danger. It has already occurred to the detriment of both the taxpayer<sup>100</sup> and the Government.<sup>191</sup> It was with such decisions in mind that the Special Committee on Federal Taxation of the American Bar Association made its last report.<sup>192</sup> The Committee, referring to the *Western Maryland* case, said:

"As a result of this decision, if the taxpayer secures a decision of a court, even though not the Supreme Court, with respect to a particular income tax question which recurs in later years, he becomes entitled to the benefit, or subject to the burden, of the decision, even though it is later determined in other cases that the decision is wrong. This causes a lack of uniformity in the application of the law among the taxpayers and this result does not seem to be required by any fundamental principle involved in the doctrine of *res adjudicata*. The year litigated is of course closed by the judgment, but there seems to be no reason why the taxpayer should be treated more or less favorably in a later year than the law as finally determined warrants, merely because he had litigation about some previous year's taxes. This point deserves further study to determine whether or not the principle of the *Tait vs. Western Maryland Railway Company* decision as applied to subsequent taxable years should be changed by legislation."<sup>193</sup>

Although the Committee suggests the possibility of legislation, it is not clear that this is the best or the necessary way to solve the problem.

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States, 63 Ct. Cls. 226 (1927), *cert. denied*, 275 U. S. 528 (1927), when the Supreme Court subsequently decided in *Crooks v. Harrelson*, 282 U. S. 55 (1930) that he had been right all the time; or of the taxpayer in *Means v. United States*, 69 Ct. Cls. 539, 39 F. (2d) 748 (1930), *cert. denied*, 282 U. S. 849 (1930), if the Supreme Court had gone the other way in *Burnet v. Guggenheim*, 288 U. S. 280 (1933). Legislative grace is not an effective remedy, though it seems the only one available in such cases. See note 39, *supra*.

190. See the decisions in *Waller v. Commissioner*, 40 F. (2d) 892 (C. C. A. 5th, 1930), *cert. denied*, 282 U. S. 889 (1930), and in *Herold v. Commissioner*, 42 F. (2d) 942 (C. C. A. 5th, 1930), which were rejected by the Supreme Court in a later case involving the same instrument. *Palmer v. Bender*, 287 U. S. 551 (1933). See also *Hitchcock v. Commissioner*, 44 F. (2d) 756 (C. C. A. 6th, 1930), where the taxpayer was protected only by a rehearing [49 F. (2d) 1078 (C. C. A. 6th, 1931)] granted after the Supreme Court's decision in *Burnet v. Logan*, 283 U. S. 404 (1931).

191. *Cf. Pryor & Lockhart Development Co. v. Commissioner*, 34 B. T. A. 687 (1936), where an earlier decision in *Commissioner v. Pryor & Lockhart Development Co.*, 70 F. (2d) 154 (C. C. A. 10th, 1934)—a petition for certiorari had been filed in vain, 293 U. S. 574 (1934)—was held to be *res judicata* for a subsequent year, although intervening decisions of the Supreme Court [*e.g.*, *Morrissey v. Commissioner*, 296 U. S. 344 (1935)] make it clear that the first decision was wrong.

192. (1936) 61 A. B. A. Rep. 821.

193. *Id.* at 831.

Statutes often seem to breed disputes rather than to solve them. Res judicata is a judge-made doctrine, and the courts can mould it to fit the need and the circumstances. There is a place for res judicata in our tax system, but the extent of its proper application does not follow from the fact that we have it or ought to have it.

With these considerations in view, we may hazard a statement of the limits within which res judicata can operate with maximum advantage, keeping in mind that, unless the limits are clear, questions of the application of the rule are likely to provoke as much litigation as the rule is intended to eliminate. There is reason to believe that res judicata will be of maximum benefit in federal tax litigation if it is applied under the following circumstances:

1. A final judgment of a court or a decision of the Board of Tax Appeals with respect to an income tax for any taxable year, or an estate tax on any estate, should bar any further proceeding with respect to the same taxable year or the same estate.

2. Where different taxable years are involved in the two cases, res judicata should be applied much more narrowly than has been true in some cases in the past. Not only should it be confined to issues which are identical in the two cases, but the word "identical" should be rigidly construed to apply only to situations where the applicable statute is unchanged and all of the controlling facts occurred before the earlier of the tax years. Examples of such issues are the determination of March 1, 1913 value, the construction of a will or other instrument, and other situations in which the question may properly be thought of as static. An issue should not be regarded as "identical" if it is merely similar, as where the question is whether an organization was a trust or association in successive tax years or was a personal holding corporation, or where the issue concerns different transactions or the construction or legal effect of different instruments, however similar the transactions or instruments may be. The ordinary rule of *stare decisis* is sufficiently rigid to provide for these situations; the extension of res judicata to them leads only to continued litigation as to its application.<sup>194</sup>

3. Even where the issues are identical in the sense just indicated, a decision with respect to one tax year should not be regarded as res judicata with respect to a subsequent year when an intervening controlling decision has established the error of the first decision. It is

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194. This paragraph is entirely consistent with the Supreme Court's decision in *Tait v. Western Maryland Ry.*, 289 U. S. 620 (1933). The Court there referred to the rule as applying to the "identical question" [*id.* at 624]; and the question there raised was of the sort here suggested as "identical." It is not necessary to modify or qualify any Supreme Court decision; it is necessary only to fix the scope of the res judicata rule a little more narrowly, perhaps, than in non-tax cases, because of the inherent recurring nature of tax liability.

not overlooked that the application of this rule would involve some close and difficult questions. That could be met to some extent by the adoption of a presumption in favor of Supreme Court decisions and against the application of *res judicata*. In any event, to meet and decide these questions would be better than to perpetuate a decision that has been established to be error. The function here is analogous to that of a bill of review, but without the limitations of that obscure device.

4. Finally, the application of *res judicata* should be wholly independent of the identity of the party who appears on the Government side of either case — whether it be the United States, the Commissioner, or a collector.

Development along these lines would not eliminate all *res judicata* questions. There would seem to be some room to hope, though, that it would tend to minimize such disputes as have followed in the wake of the *Western Maryland* decision — to the end that *res judicata* may come to be in actuality as well as in theory “a principle of peace.”