Vanderbilt Law Review

Volume 35
Issue 6 *Issue 6 - November 1982*

Article 4

11-1982

Collateral Estoppel Without Mutuality: Accepting the Bernhard Doctrine

William S. Byassee

Collateral Estoppel Without Mutuality: Accepting the *Bernhard* Doctrine

Be not the first by whom
the new are tried,
Yet not the last to lay
the old aside.[1]

I. INTRODUCTION

Forty years have passed since Judge Traynor in *Bernhard v. Bank of America*[2] ignored Alexander Pope's advice by signaling the willingness of the American judicial system to change its conception of the proper scope of the doctrine of collateral estoppel. Prior to the *Bernhard* decision, collateral estoppel, or issue preclusion,[3] operated only to bind mutual parties: a party could invoke the benefits of a prior judgment to preclude an opponent in subsequent litigation only if the judgment would have bound that party had the court decided the prior suit the opposite way.[4] In *Bernhard* Judge Traynor "extirpate[d] the mutuality requirement and put it to the torch,"[5] replacing it with a condition that only "the party against whom the plea [of collateral estoppel] is asserted" need be a party or in privity with a party to the prior adjudication.[6]

A majority of federal[7] and state[8] courts have accepted Judge

---

1. A. POPE, AN ESSAY ON CRITICISM Pt. II, 1, 133 (1709).

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

3. "Issue preclusion" is Professor Vestal's terminology for the effect of collateral estoppel, since it precludes relitigation of identical issues in subsequent actions for separate claims. He distinguishes it from claim preclusion, traditionally termed res judicata, which precludes relitigation of the same claim or cause of action once a court has rendered a judgment on it. *See* Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29, 30 (1964); *see generally infra* notes 21-26 and accompanying text.

4. *See infra* notes 64-84 and accompanying text.

5. Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 26 (1965).

6. Bernhard v. Bank of Am., 19 Cal. 2d 807, 813, 122 P.2d 892, 895 (1942).

7. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313 (1971).

8. *See, e.g.*, Pennington v. Snow, 471 P.2d 370 (Alaska 1970); Standage Ventures, Inc. v. State, 114 Ariz. 480, 562 P.2d 360 (1977); Bernhard v. Bank of Am., 19 Cal. 2d 807, 122

Traynor's modification, which allows a stranger to a prior action to preclude a party to that action from relitigating an issue he litigated previously and lost. Nevertheless, the mutuality requirement is not without its vocal supporters, and the so-called *Bernhard* doctrine still enjoys less than universal acceptance by both state courts[9] and commentators.[10] The overall trend, however, has been toward steady abandonment of the mutuality requirement. Although many scholars have objected to the *Bernhard* doctrine[11] and some courts have resisted its adoption,[12] the requirement inevitably will become the "dead letter" that one court already has labelled it.[13]

In this process the mutuality requirement mirrors many other once viable judicial principles that the legal community long ac-

---

P.2d 892 (1942); Pomeroy v. Waitkus, 183 Colo. 344, 517 P.2d 396 (1973); Morneau v. Stark Enter., 56 Hawaii 420, 539 P.2d 472 (1975); Illinois State Chamber of Commerce v. Pollution Control Bd., 78 Ill. 2d 1, 398 N.E.2d 9 (1979); Schneberger v. United States Fidelity & Guaranty Co., 213 N.W.2d 913 (Iowa 1973); Hossler v. Barry, 403 A.2d 762 (Me. 1979); Pat Perusse Realty Co. v. Lingo, 249 Md. 33, 238 A.2d 100 (1968); Home Owners Fed. Sav. & Loan Ass'n v. Northwestern Fire & Marine Ins. Co., 354 Mass. 448, 238 N.E.2d 55 (1968); Lustic v. Rankila, 269 Minn. 515, 131 N.W.2d 741 (1964); Gerhardt v. Miller, 532 S.W.2d 852 (Mo. Ct. App. 1975); Peterson v. Nebraska Natural Gas Co., 204 Neb. 136, 281 N.W.2d 525 (1979); Paradise Palms Community Ass'n v. Paradise Homes, 89 Nev. 27, 505 P.2d 596 (1973); Sanderson v. Balfour, 109 N.H. 213, 247 A.2d 185 (1968); Desmond v. Kramer, 96 N.J. Super. 96, 232 A.2d 470 (1967); Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956); Anco Mfg. & Supply Co. v. Swank, 524 P.2d 7 (Okla. 1974); Bahler v. Fletcher, 474 P.2d 329 (Or. 1970); Melbourn v. Benham, 292 N.W.2d 335 (S.D. 1980); Sample v. Chapman, 7 Wash. App. 129, 497 P.2d 1334 (1972); Moore v. Sun Lumber Co., 276 S.E.2d 797 (W. Va. 1981); McCourt v. Algiers, 4 Wis. 2d 607, 91 N.W.2d 194 (1958).

9. *See, e.g.*, Russell v. Russell, 404 So. 2d 662 (Ala. 1981); Daigneau v. National Cash Register Co., 247 So. 2d 465 (Fla. 1971); Smith v. Wood, 115 Ga. App. 265, 154 S.E.2d 646 (1967); State v. Speidel, 392 N.E.2d 1172 (Ind. Ct. App. 1979); Keith v. Schiefen-Stockham Ins. Agency, Inc., 209 Kan. 537, 498 P.2d 265 (1972); Stillpass v. Kenton County Airport Bd., 403 S.W.2d 46 (Ky. 1966); Trahan v. Liberty Mut. Ins. Co., 303 So. 2d 606 (La. Ct. App. 1974); Howell v. Vito's Trucking and Excavating Co., 386 Mich. 37, 191 N.W.2d 313 (1971); National Mortgage Corp. v. American Title Ins. Co., 299 N.C. 369, 261 S.E.2d 844 (1980); Armstrong v. Miller, 200 N.W.2d 282 (N.D. 1972); Whitehead v. General Tel. Co., 20 Ohio St. 2d 108, 254 N.E.2d 10 (1969); Cole v. Arnold, 545 S.W.2d 95 (Tenn. 1977); Atchley v. Superior Oil Co., 482 S.W.2d 883 (Tex. Civ. App. 1972); Norfolk & W. Ry. v. Bailey Lumber Co., 221 Va. 638, 272 S.E.2d 217 (1980).

10. *See, e.g.*, 1B J. MOORE, FEDERAL PRACTICE ¶ 0.412[1] (2d ed. 1982); Greenebaum, *In Defense of the Doctrine of Mutuality of Estoppel*, 45 IND. L.J. 1 (1969); Overton, *The Restatement of Judgments, Collateral Estoppel, and Conflict of Laws*, 44 TENN. L. REV. 927 (1977); Note, *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 MICH. L. REV. 612 (1978).

11. *See supra* authorities cited note 10.

12. *See supra* authorities cited note 9.

13. *See* B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 147, 225 N.E.2d 195, 198, 278 N.Y.S.2d 596, 601 (1967) ("[t]o recapitulate, we are saying that the 'doctrine of mutuality' is a dead letter").

cepted, then gradually challenged, and eventually discarded in favor of other rules that—at least arguably—more effectively serve desired policy goals. Tradition, judicial conservatism, and the inertia of long-established precedent combine to guarantee that each overthrow is a lengthy and intricate matter. The entire legal system must reorient and reeducate itself: what once was truth is now error. This process occurs more smoothly if the changes are perceived not as a break with tradition but as a logical progression based on an underlying continuity of principles.

Most commentators on the *Bernhard* doctrine, both pro and con, have viewed it as a radical departure from settled collateral estoppel application, "putting to the torch," to use Professor Currie's metaphor, traditional principles and replacing them with an untested and arguably dangerous doctrine. Opponents have raised a parade of horribles that they contend will result from abandoning the mutuality requirement. This Note adopts a more moderate position: the *Bernhard* doctrine is but a minor alteration of collateral estoppel principles. It has not and will not generate the unfairness and injustice that its critics have predicted. After tracing the development of the principle of collateral estoppel from its origins in early English common law, this Note discusses some suggested justifications for the mutuality requirement and some generally accepted exceptions to its use. It then examines the growth of the *Bernhard* doctrine and compares how the courts have applied both the mutuality requirement and the *Bernhard* doctrine. Finally, the Note seeks to determine whether the dangers voiced by the *Bernhard* critics actually have materialized. The Note concludes that abandonment of the mutuality requirement has affected minimally the results of recent collateral estoppel cases. Its most obvious effect has been to shift the burden of proof in nonmutuality cases away from the party asserting preclusion—who no longer bears the burden of proving the applicability of some exception to the *Bernhard* doctrine—onto the party precluded, to show that the issue was not litigated adequately in the prior suit. This shift better serves the policy goals of collateral estoppel to put an end to litigation and to utilize most efficiently the resources of the judicial system.

II. The Principle of Collateral Estoppel

A. The Policy Basis for Collateral Estoppel

As a legal principle collateral estoppel promotes finality of de-

cision,[14] which benefits the legal system in several ways. First, litigation must reach an end for the results to be meaningful. Without some finality principle the losing party would be free to retry lawsuits continually in the hope of eventually obtaining a more favorable decision. A principle of preclusion prevents the harassment that results from these repetitious suits.[15] Second, preclusion promotes public confidence in the legal system[16] and permits interested parties to predict and plan future affairs[17] based on the results obtained in a prior lawsuit. Knowing that subsequent litigation will not supersede these results, litigants may depend upon the rights and liabilities established previously in planning their future financial needs or business decisions. Nonparties also may depend upon the precedential value of the suit to assist them in charting a future course of action.[18] Last, precluding relitigation promotes judicial economy[19] by eliminating the need for allocating judicial time and expense to duplicate the efforts made in an earlier suit. This duplication is of particular concern in light of the heavy docket backlog that courts presently face. Preclusion conserves judicial resources by narrowing the areas of conflict in a lawsuit through elimination from further contention of those issues

---

14. *See, e.g.*, Taylor v. Sartorious, 130 Mo. App. 23, 40, 108 S.W. 1089, 1094 (1908) (application of collateral estoppel depends upon "the policy of law to end litigation by preventing a party who has had one fair trial of a question of fact, from again drawing it into controversy").

15. *See, e.g.*, Bernhard v. Bank of Am., 19 Cal. 2d 807, 811, 122 P.2d 892, 894 (1942); Vestal, *supra* note 3, at 31, 34. Some commentators have noted that this harassment rationale is not relevant to the debate since a stranger to the prior suit who has not litigated previously is the one attempting to prevent multiple suits; the party who lost in the prior action has no objection to relitigation. *See, e.g.*, Overton, *supra* note 10, at 934. Nevertheless, noting a "reason to be concerned" over the losing party's choice, the United States Supreme Court has contended that relitigation constitutes an "arguable misallocation of resources," since it diverts time and money from alternative uses in favor of a dispute over an already-decided issue. Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971).

16. *See, e.g.*, Vestal, *supra* note 3, at 31, 33-34.

17. *See, e.g.*, Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Callen & Kadue, *To Bury Mutuality, Not to Praise It: An Analysis of Collateral Estoppel After* Parklane Hosiery v. Shore, 31 HAST. L.J. 755, 763-64 (1980).

18.

> [F]inality allows the parties to plan their conduct outside the judicial forum, whether by allowing them to use resources for purposes other than judicial battle, by encouraging them to behave in ways approved by the prior decision, by discouraging them from behaving in a manner they know to be illegal, or by preventing the estopped party from using the threat of relitigation to extract concessions from a person who was not a party to the prior action.

Callen & Kadue, *supra*, at 763-64.

19. *See, e.g.*, Zdanok v. Glidden Co., 327 F.2d 944, 953 (2d Cir. 1964).

that the courts already have decided.[20]

B. Development of the Doctrine

Although commentators often classify the modern doctrine of collateral estoppel as a branch of—or at least as derived from—the principle of res judicata,[21] these two principles of English common law had different origins.[22] Common to both these notions is the concept of preclusion: the inability, in a later suit, to relitigate the result reached in a prior suit. In res judicata this preclusive effect depends upon the *judgment* previously reached and includes both merger—which joins into the judgment all claims that the prior suit could have litigated—and bar—which extinguishes the claim or cause of action, leaving only the judgment, and thus prevents later litigation of the claim by the losing party.[23] This notion that a judgment has an independent preclusive effect is characteristic of the Roman law.[24]

The principle of collateral estoppel precludes relitigation of factual *issues* that a court decided in a prior suit.[25] The preclusive effect depends not upon the judgment itself but upon the actual determination of issues during the course of the prior litigation; the judgment simply ensures the finality of the issue resolution.[26] This principle stems not from the Norman introduction of Roman law into Britain, but from the Germanic influence on pre-Conquest Saxon law.[27]

Early Germanic law contained no concept of res judicata—the preclusive effect of a prior adverse judgment on a later claim.[28] Un-

---

20. *See* Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217, 220 (1954).

21. *See, e.g.*, Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281, 281 n.1 (1957); von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 300-01 (1928); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1012 (1967).

22. Res judicata originates from Roman law, while collateral estoppel stems from the Germanic law system. Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41, 41 (1940). *See infra* notes 27-51 and accompanying text.

23. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.3 (1977).

24. *See* Millar, *supra* note 22, at 42.

25. F. JAMES & G. HAZARD, *supra* note 23, § 11.16.

26. Although courts and commentators commonly refer to the modern doctrine as estoppel by judgment, *see, e.g.*, Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942), the original principle operated irrespective of a final judgment in the first action. Millar, *supra* note 22, at 53-56. *See infra* notes 38-41 and accompanying text.

27. Millar, *supra* note 22, at 44.

28. Millar, *supra* note 22, at 42 (translating Seelman, *Der Rechtszug im älteren deutschen Recht*, 107 GIERKES UNTERSUCHUNGEN ZUR DEUTSCHEN STAATS—UND RECHTSGES-

less the parties themselves agreed otherwise, the law permitted a subsequent action and a new judgment.[29] Nevertheless, the system possessed some principle of finality in that the facts themselves, as the earlier suit determined them, retained significance:

> In case of a renewed controversy as to the same matter it was not the judgment in the former proceeding that the previously successful party invoked, but the state of things [*Sachverhalt*] established in the former controversy. Not the fact that a judgment has been rendered, that an earlier court has made this or that pronouncement, . . . but the fact that . . . [w]hat a party in due form has admitted, what witnesses have declared, what members of an inquest have pronounced, what the parties have sworn, these retain significance for all time to come.[30]

Thus, the parties' own acts and statements antecedent to judgment precluded them from alleging the contrary in a subsequent action.[31]

Incorporated into the English common law as estoppel by record, this principle remained distinct from res judicata both conceptually and as applied. For example, in *Outram v. Morewood*[32] plaintiff sued a husband and wife in trespass for mining coal on property that plaintiff claimed he owned. Defendants entered a plea averring that the wife had obtained the land in question by devise from her first husband.[33] Plaintiff then in replication pled estoppel by record based on a prior suit which had determined that the land devised to the wife did not include the coal mine.[34] Permitting the estoppel plea, Lord Ellenborough noted that

> [i]t is not the recovery, but *the matter alleged* by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having once been distinctly put in issue by them, . . . has been, on such issue joined, solemnly found against them.[35]

In many cases the procedural application of either bar or estoppel yielded the same substantive effect—the preclusion of relitigation by a losing party,[36] and perhaps for that reason, the com-

---

CHICHTE 90, 198 (1911)).

29. *Id.* (quoting Seelman, *supra* note 28, at 103).

30. *Id.* (quoting Seelman, *supra* note 28, at 198-99).

31. Millar, *supra* note 22, at 44.

32. 102 Eng. Rep. 630 (1803).

33. *Id.* at 631.

34. *Id.* at 632-33.

35. *Id.* at 633.

36. *See, e.g.*, Kempton and Coopers Case, 74 Eng. Rep. 285 (1589). Millar, *supra* note 22, at 52 n.53 & authorities cited therein.

mon-law courts did not always recognize the distinction between the two principles.[37] Despite the similar application of bar and estoppel, the basis for the preclusion by estoppel, as Professor Millar points out, "was not the judgment *qua* judgment . . . but . . . the process, . . . the pleadings and verdict, as authenticated by the judgment, and by virtue not of *res judicata* but of the restraint upon contradiction of the previous record involved in the idea of estoppel."[38] Thus, estoppel by record developed from the same principles as the more recent doctrines of estoppel by deed and estoppel *in pais*.[39] All three principles contain a recognition "that by [actions and assertions] in the previous cause the party had created or participated in creating a condition from which the law would not suffer him to recede."[40]

The initial clarity of the estoppel by record principle faded under long exposure to the res judicata doctrine of Roman law, which modified the Germanic concept in two ways. First, although in its early application to matters of record this estoppel required no final judgment,[41] by the time of Coke in the seventeenth century matters that the complaint alleged worked an estoppel only after a judgment,[42] not after a nonsuit. This modification signaled not an adoption of the Roman preclusion principle, but merely an assertion that the "estoppel was inchoate and unenforceable unless the former proceeding had terminated in the manner prescribed."[43] Nevertheless, the final judgment requirement, combined with the general tendency on the part of courts and commentators to con-

---

37. *See, e.g.*, Vanlandingham v. Ryan, 17 Ill. 25, 28 (1855) ("We do not sanction the technical distinction which makes a former recovery a har only when pleaded as an estoppel.").

38. Millar, *supra* noto 22, at 52.

39. *Id.* at 53. Estoppel by deed occurs when a grantor who did not have title at the time of a conveyance subsequently obtains title. The estoppel precludes the grantor from denying title at the time of the conveyance, and the subsequently-acquired title inures to the benefit of the grantee. *See* Denny v. Wilson County, 198 Tenn. 677, 281 S.W.2d 671 (1954). Estoppel *in pais*, or equitable estoppel, arises from the voluntary conduct of one party, relied upon by a second party to the second party's detriment. The estoppel precludes the first party from acting contrary to his original conduct and asserting a right he otherwise would have had against the second party. *See* American Bank & Trust Co. v. Trinity Universal Ins. Co., 251 La. 445, 205 So. 2d 35 (1967).

40. Millar, *supra* note 22, at 53 (footnoto omitted).

41. *See* Millar, *supra* note 22, at 54.

42. E. COKE, 2 THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 352b (1st Am. ed. 1853) ("matters alleged by way of supposall in counts shall not conclude after non-suit: otherwise it is after judgment given. . .").

43. Millar, *supra* note 22, at 54.

flate the two types of preclusion,[44] prompted adoption of the loose terminology of "estoppel by judgment" for the doctrine.[45]

Second, procedural changes in pleading and evidence that have shifted the acts of identifying and limiting the contested issues from the pleadings to other areas of the litigation process (discovery, for instance) have stripped the record of much of its substantive content. As the estoppel began to operate more by evidence extrinsic to the pleadings and less "by record," the need arose for new terminology. "Estoppel by judgment"—already familiar—became the generic term for all instances of preclusion, and thus res judicata subsumed estoppel as one of its branches in "utter disregard of history."[46] Commentators remained sufficiently aware of the distinct origins of this branch of preclusion to dub it "collateral estoppel,"[47] but they ignored the historical reasons underlying this designation, other than that the term was intended to distinguish between the effects of estoppel and res judicata.[48] Apparently, as Professor Millar has concluded,

> the text-writers have . . . [never considered] the possibility that the word could have come into employment as something other than an arbitrary designation of the restraint upon contradiction of the judicial record. . . . [I]t was not the prohibition of record-contradiction, but something behind this, that is to say, the inability, induced by the act of the party, to recede from a position taken or a result co-operatively reached in the former proceeding—an inability coming in the dawn of English procedure, to be evidenced by the inviolable record—that historically lay at the root of the expression.[49]

The record contradiction rationale is of more than merely historical significance, for American courts have recognized it on occasion.[50] Their failure to do so consistently has resulted in the devel-

---

44. *See supra* notes 36-38 and accompanying text.

45. Trevivan v. Lawrence, 91 Eng. Rep. 241, 242, (K.B. 1704) (reporter notes that "the court held that the defendants were estopped by this judgment . . .").

46. Millar, *supra* note 22, at 58.

47. Scott, *supra* note 26, at 3. Austin Scott and Warren Seavy were reporters for the RESTATEMENT OF JUDGMENTS (1942).

48.

> It was with some hesitation that we determined to use the term "collateral estoppel." There is no doubt that the word estoppel is frequently used very loosely. A good deal may be said for confining it to the situation where a person is precluded from showing the falsity of a representation made by him upon which another has relied . . . . It seemed unwise, however, to invent a new terminology. The use of the word estoppel in this connection is common. It seemed to us, therefore, that it was best to use it in bringing out the distinction between the effect of a judgment on the original cause of action, . . . and its effect upon other causes of action . . . .

Id. at 3 n.4.

49. Millar, *supra* note 22, at 58-59.

50. *See, e.g.*, Sly v. Hunt, 159 Mass. 151, 34 N.E. 187 (1893).

opment of a notion that the judgment itself precludes the parties to a former suit. This judgment theory is the basis of much of the current mutuality debate.[51]

C. *Requirements for Application*

The Supreme Court in *Cromwell v. County of Sac*[52] provides the most authoritative discussion of the requirements for application of collateral estoppel principles, as distinct from the res judicata doctrine. Plaintiff in *Cromwell* brought suit to collect the principal due on four bonds that the county had issued to construct a new courthouse. In an earlier action to collect interest installments on the same bonds, the trial court had determined that the bonds were fraudulent in their inception. On appeal, the Supreme Court affirmed the finding of fraud and denied recovery of the interest installments. The Court based its decision on the absence of a finding by the trial court that plaintiff was a bona fide purchaser for value.[53] In the second suit, for the collection of principal, defendant attempted to rely on the Supreme Court's decision as collateral estoppel, but the Court held that the preclusion extended only to the fraud issue, and did not apply to any finding that plaintiff was not a purchaser for value, since "nothing [was] adjudged in the former action in the finding that the plaintiff had not made such proof in that case which can preclude the present plaintiff from making such proof here."[54] When a party brings a second suit on a separate claim, "the prior action operates as an estoppel only as to those matters in issue . . . upon the determination of which the finding or verdict was rendered."[55] The ambigu-

---

"A verdict and judgment are conclusive, by way of estoppel, only as to those facts which were necessarily involved in them, without the existence and proof or admission of which, such a verdict and judgment could not have been rendered. An estoppel is an admission or determination under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterwards drawn in question . . . . When a fact has been once determined in the course of a judicial proceeding, and a final judgment has been rendered in accordance therewith, it cannot be again litigated between the same parties without virtually impeaching the correctness of the former decision, which, from motives of public policy the law does not permit to be done. The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or the groundwork upon which it must have been founded."

Id. at 153, 34 N.E. at 188 (quoting Burlen v. Shannon, 99 Mass. 200, 203 (1868)).

51. *See infra* text accompanying notes 154-59.

52. 94 U.S. 351 (1877).

53. *Id.* at 359-60.

54. *Id.* at 360.

55. *Id.* at 353.

ity of the previous determination[56] whether the purchaser gave value for the bonds prevented its preclusive use in the later suit.

Based on this discussion, authorities require four conditions for the operation of collateral estoppel: identity of issue between the initial and subsequent suits,[57] actual litigation and determination of the issue in the first suit,[58] necessity of the determination to the result,[59] and participation in both suits of the parties that the estoppel benefits and precludes.[60] While the parties may disagree about the existence of each of the first three requirements in a particular case,[61] they have accepted generally the appropriateness of each condition. Substantial criticism of the final requirement of mutuality, however,[62] has led to its abandonment in many jurisdictions.[63]

D. The Mutuality Requirement

Due process requirements limit the application of collateral estoppel against nonparties to a lawsuit;[64] the effects of a prior action may bind only parties and their privities.[65] The collateral estoppel doctrine traditionally has made this limitation mutual: a litigant may not benefit from a prior adjudication unless an opposite finding by the court also would have bound him.[66] The practical effect of mutuality is to permit preclusion only when both the party asserting estoppel in the later suit and his opponent were

---

56. The absence of a finding that plaintiff had given value for the bonds may have indicated that he gave no value or that the parties offered no proof on that issue.

57. *See, e.g.*, Dunlap v. Travelers Ins. Co., 223 S.C. 150, 74 S.E.2d 828 (1953). The issue also must be one of ultimate fact. *See* Evergreens v. Nunan, 141 F.2d 927, 930 (2d Cir. 1944); Polasky, *supra* note 20, at 222-24.

58. *See, e.g.*, United States v. Cathcard, 70 F. Supp. 653 (D. Neb. 1946).

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

60. This condition also is known as the "mutuality" requirement. *See infra* notes 64-84 and accompanying text.

61. For example, both defendant's due care and plaintiff's contributery negligence are bases for a jury verdict for defendant in a personal injury case. Are both issues (or either) essential to the judgment? *See* Halpern v. Schwartz, 426 F.2d 102 (2d Cir. 1970); *see also* Note, *Use of Juror Depositions to Bar Collateral Estoppel: A Necessary Safeguard or Dangerous Precedent?*, 34 VAND. L. REV. 143, 152-56 (1981).

62. *See infra* part III.

63. For a listing of the jurisdictions that no longer adhere to this requirement, see *supra* note 8.

64. Hansberry v. Lee, 311 U.S. 32 (1940). "[O]ne is not bound hy a judgment . . . in which he has not been made a party . . . ." *Id.* at 40.

65. *Id.* at 40.

66. *See supra* authorities cited note 9.

parties, or in privity with a party,[67] to the initial action.

Although courts largely have abandoned the requirement of mutuality in most situations,[68] commentators rely on several policy rationales to justify its continued use in connection with collateral estoppel. These justifications fall within the following three categories: principles of equity and fairness, the nature of an in personam judgment, and the fallibility of the judicial process.

First, authorities cite the general inequality and unfairness that would result from the ability of one party to take advantage of a prior judgment if the judgment would not bind him were it to go the other way.[69] While few scholars would defend this "windfall" theory, which is based on the symmetry of general mutuality doctrine, many courts continue to apply it.[70] Contemporary commentators view the principal focus of this rationale as the unfair allocation of litigation risks between the bound party, who may incur multiple liability absent the mutuality requirements, and the benefited party, who risks nothing if the initial suit ends in a result adverse to him.[71]

Second, several influential commentators have contended that this limitation on the preclusive effect of prior litigation stems not from the doctrine of mutuality per se, but from the nature of an in personam judgment—"from the general principles of our system of litigation . . . [requiring] that a party to an action . . . risk the loss of rights or the creation of liabilities only with reference to his adversaries . . . ."[72] That is, a stranger may not benefit from the results in a prior suit because "the effect of an in personam judgment should extend only to the parties before the court . . . . The doctrine of mutuality aids in keeping the in personam judgment

---

67. The classical notion of privity was of a successor in legal interest to a party. More recently, however, courts have expanded the concept to include any person whose relationship to a party is sufficiently close that the results of the litigation properly may bind him. *See* Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1459-60 (1968).

68. *See, e.g.*, Epstein v. Gluckin, 233 N.Y. 490, 135 N.E. 861 (1922); Ames, *Mutuality in Specific Performance*, 3 COLUM. L. REV. 1 (1903).

69. *See, e.g.*, RESTATEMENT OF JUDGMENTS § 96 comment a (1942); A. FREEMAN, JUDGMENTS § 407, at 889 (5th ed. 1925).

70. *See, e.g.*, Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co., 238 N.C. 679, 79 S.E.2d 167 (1953). For an early critique of this rationale, see Comment, *Privity and Mutuality in the Doctrine of Res Judicata*, 35 YALE L.J. 607 (1926).

71. *See* Greenebaum, *supra* note 10; Note, *supra* note 10 (common party in multiple suits statistically more likely to suffer greater economic loss if mutuality abandoned).

72. Seavey, *Res Judicata with Reference to Persons Neither Parties nor Privities—Two California Cases*, 57 HARV. L. REV. 98, 105 (1943).

within such proper bounds . . . ."[73] When mutuality is abandoned, these commentators contend, permitting the judgment to affect the rights of a party with respect to a stranger to the original action violates the in personam principle.

Last, the mutuality requirement limits the preclusive effect of incorrect determinations. The judicial system is not infallible and sometimes reaches a result that violates basic notions of truth and justice. The mutuality rule prevents nonparties from compounding the mistake and raising the outcome in the initial suit to the status of objective truth.[74] The victim of an aberrational decision should have the opportunity to relitigate the issue against a nonparty to the original action in order to reach a more just result.[75] While several reasons support this conclusion, the multiple claimant anomaly[76] is the most widely recognized:[77]

> An express train speeds through the night. Suddenly, as it enters a curve, the locomotive leaves the rails, followed by half a dozen tumbling passenger cars. Fifty passengers are injured. Fifty actions for personal injuries are filed against the railroad . . . . A full trial is had [in the first case] on the issue of the railroad's negligence, and the result is a verdict and judgment for the plaintiff. The judgment becomes final. What is the status of the forty-nine remaining actions?[78]

Without the limitation imposed by mutuality, the outcome of the first suit precludes the railroad from denying negligence in each of the remaining actions. Nevertheless, had the railroad won the negligence issue, that result would not have estopped any of the other claimants from relitigating—from demanding his own day in court. The problem becomes more obvious when each of the first twenty-five claimants loses, and then, for whatever reason, the twenty-sixth plaintiff wins. Although the results in the initial twenty-five suits indicate a strong probability that the railroad was not negligent, absent a mutuality requirement no principle prevents the final twenty-four plaintiffs from riding the preclusive coattails of this one aberrational verdict.[79] What rationale justifies raising the twenty-sixth verdict to an objective truth while ignoring

---

73. Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 301 (1961).

74. *See* Hornstein v. Kramer Bros. Freight Lines, 133 F.2d 143, 145 (3d Cir. 1943); Spettigue v. Mahoney, 8 Ariz. App. 281, 286, 445 P.2d 557, 562 (1968).

75. *See* Moore & Currier, *supra* note 73, at 310.

76. Currie, *supra* note 21, coined the term and described the problem it denotes.

77. Greenebaum, *supra* note 10; Moore & Currier, *supra* note 73; Overton, *supra* note 10; Semmel, *supra* note 67.

78. Currie, *supra* note 21, at 281.

79. *Id.* at 285-87.

the prior actions?

Another justification for the mutuality requirement that falls within the third category is the fallibility of the jury system. Largely uncontrollable factors that influence the outcome of a trial include jury prejudice, the jury's sympathy for an injured plaintiff, its inclination to return a compromise verdict,[80] or simply the combination of unique trial conditions:

> [t]he selection of the judge and jury, the choice of counsel, the availability of witnesses, the manner of presentation of their testimony, the dynamics of the rapport between witnesses and fact-finder, and the personalities and appearances of the parties as they impress the fact-finder in various ways, are all matters that defy scientific analysis, are affected by fortuitous circumstances and variously determine the outcome of a contest . . . .[81]

Because none of these influences touches the merits of a case, an outcome that is attributable to them should not bind the losing party in a later suit in which these same conditions would not be present.

Finally, a party to litigation may subordinate his search for truth to strategic or tactical considerations. He may limit the resources committed to a particular case because of its relative insignificance and difficulty in preparation.[82] He may decide to forego an appeal even though he lost on the liability issue because of the favorable amount of the damage award.[83] He may have litigated in an unfavorable forum not of his choosing.[84] Without the mutuality requirement, these tactical measures affect not only the instant suit, but subsequent actions as well. Both attorney and client operate at a disadvantage in making their litigation decisions since they must consider not only the circumstances of the instant case, but also the effect their decisions may have on potential—perhaps unforeseeable—suits.

E. Exceptions to Mutuality

Several classes of well-established exceptions[85] moderate the harsh results that universal application of mutuality sometimes would produce.[86] Courts do not require mutuality when some rela-

---

80. *See, e.g.*, Leipert v. Honold, 39 Cal. 2d 462, 247 P.2d 324 (1952).

81. Spettigue v. Mahoney, 8 Ariz. App. 281, 286, 445 P.2d 557, 562 (1968).

82. *See* Moore & Currier, *supra* note 73, at 309.

83. *See* Greenebaum, *supra* note 10, at 3.

84. *See, e.g.*, Fink v. Coates, 323 F. Supp. 988 (S.D.N.Y. 1971).

85. *See, e.g.*, E. Coke, *supra* note 42, at 352a-b.

86. For example, if an indemnitee, although not a party to the first action between a third party and the indemnitor, were not able to invoke the preclusive effect of the prior

tionship between parties to the initial and later suits forms the basis for estoppel[87] or when the ostensible nonparty had an interest in or took control of the first action.[88] Furthermore, courts willingly have manipulated the concept of privity[89] in an effort to circumvent the requirement of strict identity of parties. The first class of exceptions is the most obvious intuitively. When a relationship between parties imposes derivative liability on one party for the actions of the other, the exoneration of the one will estop the common plaintiff in a second action against the other. This exception applies "where the relation between the defendants in the two suits has been that of principal and agent, master and servant, or indemnitor and indemnitee."[90] Other applications include insurer and insured,[91] lessor and lessee,[92] and automobile owner and driver.[93] When the first suit is against the party primarily liable and he is exonerated, the injustice, not to mention the conceptual difficulty, of imposing derivative liability on him without the existence of primary liability, justifies the exception.[94] When the first action is against the party secondarily liable, the estoppel stems from the reluctance to subject the primary actor to inconsistent liabilities.[95]

Thus, in *Brobston v. Burgess*[96] plaintiff sued one of the political subdivisions of the City of Philadelphia for injuries he received when the automobile he was driving hit a streetcar track and the impact wrenched the steering wheel from his hands. Plaintiff alleged that the city had allowed the paving along the tracks to fall into disrepair. In a prior suit against the transit company, which had primary responsibility for maintaining the tracks and adjoin-

---

unsuccessful attempt to recover against the indemnitor, then a subsequent judgment against the indemnitee would create a dilemma: either the indemnitee would be denied his right to indemnity or the indemnitor would lose the benefit of the favorable outcome in the first suit. *See* Brobston v. Burgess, 290 Pa. 331, 138 A. 849 (1927).

87. *See infra* notes 90-98 and accompanying text.

88. *See infra* notes 99-106 and accompanying text.

89. *See infra* notes 107-12 and accompanying text.

90. Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 128 (1912).

91. *See* McCourt v. Algiers, 4 Wis. 2d 607, 91 N.W.2d 194 (1958).

92. *See* Portland Gold Mining Co. v. Stratton's Independence, Ltd., 158 F. 63 (8th Cir. 1907).

93. Good Health Dairy Prod. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937).

94. Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 128 (1912).

95. This second branch of the exception has not received universal acceptance. *See* RESTATEMENT OF JUDGMENTS § 96(2) comment j (1942). In recent years, however, courts have applied the exception more frequently. *See, e.g.*, Davis v. Perryman, 225 Ark. 963, 286 S.W.2d 844 (1956).

96. 290 Pa. 331, 138 A. 849 (1927).

ing street, a jury had failed to find that defendant was negligent in keeping the street in good repair. In the second trial, the court dismissed the action against the municipality based on the collateral estoppel effect of the facts proved in the first trial, and the Pennsylvania Supreme Court affirmed.[97] Although the supreme court acknowledged a lack of mutuality between the parties, it justified the estoppel "by the injustice that would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct action."[98]

When a nonparty actively assumes control of a lawsuit, an adverse result precludes him from bringing a later action.[99] He may benefit from an outcome favorable to the party he controlled[100] unless his participation in the suit was unknown to the opposing party. Likewise, the result of a suit will bind (and may benefit) an individual with sufficient interest in its outcome, irrespective of whether he is a named party.[101] Thus, the court in *Thompson v. Lassiter*[102] dismissed an action for property damage to plaintiff's automobile, which plaintiff's minor son was driving when he had an accident with the vehicles of defendant and a third party. The North Carolina Supreme Court affirmed the trial court's dismissal, based on the collateral estoppel effect of a prior finding that the son was contributorily negligent. The court reasoned that in the first suit between the other two drivers, in which one of them instituted a cross-claim against the son, the father

> took every action he could have taken if he had been a defendant himself. Furthermore, in his capacity as guardian ad litem for his son, in defending the cross-action he exercised complete control of his son's defense including the right of appeal. In doing so, he necessarily was defending the cross-action as much for his own protection as for that of his son.[103]

The result of a suit also will bind or benefit an unnamed "real party in interest" in a subsequent action. If a real party in interest in one suit becomes a named party in another proceeding against an opposing party, collateral estoppel will bind or benefit him as if

---

97. *Id.* at 341, 138 A. at 852.

98. *Id.* at 338, 138 A. at 851.

99. Souffront v. La Compagnie des Sucreries, 217 U.S. 475 (1910).

100. *See, e.g.*, Pittsburgh Terminal Coal Corp. v. Williams, 70 F.2d 65 (3d Cir.), *cert. denied*, 293 U.S. 617 (1934).

101. King v. Grindstaff, 284 N.C. 348, 357, 200 S.E.2d 799, 806 (1973).

102. 246 N.C. 34, 97 S.E.2d 492 (1957).

103. *Id.* at 39-40, 97 S.E.2d at 497 (citations omitted). *But cf.* Kleibor v. Rogers, 265 N.C. 304, 144 S.E.2d 27 (1965) (second suit hy father allowed when first suit was by mother as next friend).

he were a named party in both suits. In *King v. Grindstaff*[104] the administrator of the estates of a father and son brought a wrongful death action against the owner and driver of a truck that had been in an accident which resulted in the deaths of both father and son. Prior to that suit, the mother and daughter, sole beneficiaries of the two estates, had recovered against the same parties for personal injuries suffered in the collision. The second court precluded relitigation of liability and the state supreme court affirmed, noting that "the courts will look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions raised as they may affect the real party or parties in interest."[105] It concluded that the real parties in interest to the wrongful death action in the second suit were the beneficiaries of the estate, not its administrator.[106]

Courts often manipulate the notion of privity to permit nonparties to preclude relitigation of issues that earlier lawsuits have determined. Although technically not an exception to mutuality, the privity concept assumes wondrous attributes of flexibility as courts attempt to apply their subjective sense of fairness to situations that do not fit neatly within the traditional requirements for preclusion.[107] Originally, application of the privity concept called for a factual inquiry into whether "mutual or successive relationship[s] to the same rights of property"[108] existed between a party and a nonparty. In its present usage, however, the concept "does not state a reason for either including or excluding a person from the binding effect of a prior judgment, but rather it represents a legal conclusion that the relationship . . . is sufficiently close to afford" preclusion.[109] *Aerojet-General Corp. v. Askew*[110] provides

---

104. 284 N.C. 348, 200 S.E.2d 799 (1973).

105. *Id.* at 357, 200 S.E.2d at 806.

106. *Id.* at 358, 200 S.E.2d at 806.

107. *See, e.g.*, Makariw v. Rinard, 222 F. Supp. 336 (E.D. Pa. 1963).

108. S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 523, at 656 (16th ed. 1899). *See also* 1B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.411[1], at 1255 (2d ed. 1982).

109. Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 45 (1964). The Restatement of Judgments has recognized this shift in meaning:

> Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties . . . . The statement that a person is bound by or has the benefit of a judgment as a privy is a short method of stating that under the circumstances and for the purpose of the case at hand he is bound by and entitled to the benefits of all or some of the rules of res judicata by way of merger, bar or collateral estoppel.

RESTATEMENT OF JUDGMENTS § 83 comment a (1942).

an example of this recent attitude. In *Aerojet* plaintiff successfully brought suit to obtain specific performance on a contract to purchase certain lands from the State of Florida. Dade County, Florida, then sued to purchase the property under the provisions of a state statute that would give it a prior right to purchase state-owned land. In an action to quiet title the court held that the result in the first suit precluded the county's invocation of its statutory right. The court found that because the state and county represented the same interests—that is, "people in Florida living in Dade County"[111]—the county "was sufficiently in privity with the [agency] such that its claims here are susceptible" to collateral estoppel.[112]

III. The Elimination of Mutuality

A. *Development of the Doctrine*

Commentators long have recognized the difference between the binding effect and the beneficial effect of a judgment on a stranger to an action.[113] In the first instance due process considerations prevent preclusion of the stranger without allowing him his day in court. The stranger may invoke the benefits of a prior judg-

---

110. 366 F. Supp. 901 (N.D. Fla. 1973), *aff'd*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908, *reh'g denied*, 423 U.S. 1026 (1975).

111. *Id.* at 910.

112. *Id.* at 911. One commentator has noted that this result is "unsupported by any recognized version of [the privity] concept." F. James & G. Hazard, *supra* note 23, § 11.31, at 599.

113. *See* J. Bentham, *Rationale of Judicial Evidence*, in 7 Works of Jeremy Bentham (Bowring ed. 1843); Comment, *Privity and Mutuality in the Doctrine of Res Judicata*, 35 Yale L.J. 607, 611 (1926). Authorities have quoted extensively Bentham's evaluation of the mutuality doctrine:

> Another curious rule is, that, as a judgment is not evidence *against* a stranger, the contrary judgment shall not be evidence *for* him. If the rule itself is a curious one, the reason given for it is still more so:—"Nobody can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary:" a maxim which one would suppose to have found its way from the gaming-table to the bench. If a party be benefited by one throw of the dice, he will, if the rules of fair play are observed, be prejudiced by another: but that the consequence should hold when applied to justice, is not equally clear. This rule of *mutuality* is destitute of even that semblance of reason, which there is for the rule concerning *res inter alios acta*. There is reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party; but there is no reason whatever for saying that he shall not lose his cause in consequence of the verdict in a proceeding to which he *was* a party, merely because his adversary was not. It is right enough that a verdict obtained by A against B should not bar the claim of a third party C; but that it should not be evidence in favour of C against B, seems the very height of absurdity.

J. Bentham, *supra* at 171 (emphasis in original).

ment to preclude a party to the action from relitigating it without creating a due process prohlem, however, since the common party already has had a chance to litigate the issue.[114] Although commentators often had noted the lack of a rational connection—other than an unjustified deference to symmetry—between the two situations,[115] Judge Traynor in *Bernhard v. Bank of America*[116] assumed the task of laying to rest "the glib and superficial requirement of mutuality of estoppel . . . by a triumph of judicial statesmanship."[117]

In *Bernhard* the initial suit arose as a dispute between the administrator and the beneficiaries of the will of Clara Sather over a certain account. Before her death Mrs. Sather had authorized Charles Cook to handle part of her business affairs. She had withdrawn some $4,000 from her savings account and directed Cook to deposit it in another account that he had opened without her authorization in the name of "Clara Sather by Charles O. Cook." Cook later withdrew the money from this account and put it to his own use. On Mrs. Sather's death Cook qualified as executor of her estate and eventually filed an account that made no mention of this money. The beneficiaries, including Bernhard, filed objections to the account for this reason, but the probate court found that Mrs. Sather had made Cook an inter vivos gift of the money. After Cook's resignation Bernhard became administratrix and filed a second suit against the bank alleging that Mrs. Sather never had authorized withdrawal of the funds. The trial court held that the probate court's findings precluded Bernhard from denying Cook's ownership of the money, and the California Supreme Court affirmed.

Although earlier opinions had criticized the mutuality requirement when a nonparty attempted to invoke the result of a prior action,[118] *Bernhard* was the first case that rejected specifically the requirement[119] without either relying on an alternate holding[120] or

---

114. *See* Bernhard v. Bank of Am., 19 Cal. 2d 807, 812, 122 P.2d 892, 894 (1942).

115. *See, e.g.*, J. BENTHAM, *supra* note 113, at 171.

116. 19 Cal. 2d 807, 122 P.2d 892 (1942).

117. Currie, *supra* note 21, at 285.

118. *See, e.g.*, Coca Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 A. 260 (1934); Taylor v. Sartorious, 130 Mo. App. 23, 108 S.W. 1089 (1908).

119. Bernhard v. Bank of Am., 19 Cal. 2d at 812-13, 122 P.2d at 895 ("No satisfactory rationalization has been advanced for the requirement of mutuality . . . . In the present case, therefore, . . . lack of privity or of mutuality of estoppel" does not prevent the defendant from alleging preclusion.).

120. *See, e.g.*, Coca Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 133, 172 A. 260, 263-64

bringing the case within one of the traditional exceptions to mutuality.[121] Judge Traynor applied a three-part test for determining when preclusion is appropriate: "Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"[122]

Other courts, led by the New York courts, began to follow the *Bernhard* doctrine. In *Israel v. Wood Dolson Co.*[123] plaintiff lost a breach of contract issue against one party, and the court precluded plaintiff's recovery against another party for inducing the first party to breach the contract. The court reasoned that

> [w]here a full opportunity has heen afforded to a party to the prior action and he has failed to prove his freedom from liability or to establish liability or culpability on the part of another, there is no reason for permitting him to retry th[o]se issues.
>
> . . . .
>
> [T]he fact that a party has not had his day in court on an issue *as against a particular litigant* is not decisive . . . .[124]

The court stressed that it was not adding "another general class of cases to the list of 'exceptions' " to mutuality, but rather was articulating an "underlying principle"—a previous full opportunity to litigate by the precluded party—that rendered a mutuality requirement unnecessary.[125] In *McCourt v. Algiers*[126] Wisconsin followed California and New York in rejecting the mutuality requirement when "countervailing reasons are present . . . [such as a] full opportunity to litigate" the issue previously in a voluntarily chosen forum.[127] The federal courts of appeal began to abandon mutuality during the 1950's.[128] The Supreme Court, however, did not address the issue until 1971.[129]

(1934) (faulty reply to demurrer).

121. *See, e.g.*, Taylor v. Sartorious, 130 Mo. App. 23, 40-41, 108 S.W. 1089, 1094 (1908) (indemnitor-indemnitee exception); Good Health Dairy Prod. Corp. v. Emery, 275 N.Y. 14, 17-18, 9 N.E.2d 758, 759 (1937) (master-servant exception).

122. Bernhard v. Bank of Am., 19 Cal. 2d at 813, 122 P.2d at 895.

123. 1 N.Y. 2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

124. *Id.* at 119, 134 N.E.2d at 99, 151 N.Y.S.2d at 4 (emphasis in original).

125. *Id.* at 120, 134 N.E.2d at 99, 151 N.Y.S.2d at 5.

126. 4 Wis. 2d 607, 91 N.W.2d 194 (1958).

127. *Id.* at 612, 91 N.W.2d at 197.

128. The Third Circuit was the first court of appeals to abandon mutuality in Bruszewski v. United States, 181 F.2d 419, 421 (3d Cir. 1950) (Hastie, J.). In the same year the Second Circuit followed with Adriaanse v. United States, 184 F.2d 968 (2d Cir. 1950) (A. Hand, J.). *See* Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964).

129. *See* Blonder-Tongue Labs., Inc., v. University of Ill. Found., 402 U.S. 313 (1971).

B. The Supreme Court Cases

The Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*[130] joined the growing number of jurisdictions[131] that had abandoned the mutuality requirement in situations in which a defendant attempted to preclude an issue that the plaintiff already had litigated and lost against another party.[132] *Blonder-Tongue* concerned an infringement claim against a patent that a court had declared invalid in an earlier action against another party. Citing the burden on judicial administration and the misallocation of resources that would result from relitigation of a decided issue,[133] the Court followed *Bernhard* and rejected a flat mutuality requirement.[134] The Court held, however, that an earlier judgment would not preclude a losing party from relitigating an issue if he could demonstrate that the first action failed to allow him a "fair opportunity procedurally, substantively, and evidentially to pursue his claim . . . ."[135]

Although *Blonder-Tongue* concerned a defensive assertion of preclusion,[136] eight years later in *Parklane Hosiery Co. v. Shore*[137] the Supreme Court extended its rejection of mutuality to offensive uses. In *Parklane,* which was a stockholders' derivative action, plaintiffs asserted the preclusive effect of a prior finding in a Securities and Exchange Commission (SEC) suit against Parklane that a proxy statement which the company issued was materially false and misleading. The Court permitted offensive use of collateral estoppel, but noted two differences from the doctrine's defensive application. Unlike defensive collateral estoppel, offensive use

---

130. *Id.*

131. By 1971 these jurisdictions included Alaska, California, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oregon, and Wisconsin. *See supra* cases cited note 8.

132. This attempt at preclusion by the defendant is known as defensive use of collateral estoppel. Offensive use of the doctrine occurs when a plaintiff seeks to prove part of his case by precluding an issue that the defendant already has litigated and lost. Fewer jurisdictions permit offensive use without mutuality than permit defensive use, but the United States Supreme Court has approved its application subject to the trial judge's discretion. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). *See infra* notes 137-44 and accompanying text. For a discussion of the difference between applying collateral estoppel in defensive and offensive situations, see Callen & Kadue, *supra* note 17; Note, *supra* note 10.

133. Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. at 328-29.

134. *Id.* at 349-50.

135. *Id.* at 333 (quoting Eisel v. Columbia Packing Co., 181 F. Supp. 298, 301 (D. Mass. 1960)).

136. 402 U.S. at 329-30.

137. 439 U.S. 322 (1979).

does not necessarily promote judicial economy, since it may encourage plaintiffs to forego joinder to benefit from a favorable outcome but not be precluded by an adverse one.[138] In addition use of offensive collateral estoppel may be unfair to the defendant if he chose not to devote substantial resources to his defense in the first action.[139] Despite these potential problem areas, the Court decided not to forbid all use of offensive collateral estoppel, but to give trial judges "broad discretion to determine when it should be applied."[140] In dicta the Court listed four instances in which offensive collateral estoppel might be unfair to a defendant. First, the Court noted that when the alleged damages in the first lawsuit are significantly less than the damages sought in the second action, the defendant may have had little incentive to defend the first suit vigorously.[141] Second, the Court recognized the possibility of creating Professor Currie's multiple claimant anomaly.[142] Third, it warned that procedural differences between the two suits, such as an inconvenient forum in the first action, might make offensive use inappropriate.[143] Last, the Court noted that "other reasons," including the ease with which the plaintiff could have joined in the initial suit, might result in unfair estoppel of the defendant in the second suit.[144]

VI. ANALYSIS

A. *The Policy Arguments*

Critics of the *Bernhard* doctrine advance three policy arguments as rationales for keeping the mutuality requirement.[145] First, they claim that considerations of fairness to the parties underlie the requirement.[146] Second, they contend that mutuality stems from the nature of an in personam judgment.[147] Last, they point to the fallibility of the litigation process.[148]

If by the first argument critics intend to identify fairness strictly with symmetry of estoppel, then Jeremy Bentham's gam-

138. *Id.* at 329-30; *see infra* text at note 165.
139. 439 U.S. at 330-31; *see infra* text at notes 141-44.
140. 439 U.S. at 331 (footnote omitted).
141. *Id.* at 330.
142. *Id. See supra* notes 76-79 and accompanying text.
143. 439 U.S. at 331 & n.15.
144. *Id.* at 331.
145. *See supra* notes 68-84 and accompanying text.
146. *See supra* notes 69-71 and accompanying text.
147. *See supra* notes 72-73 and accompanying text.
148. *See supra* notes 74-84 and accompanying text.

ing-table analogy[149] serves as sufficient refutation. A bald appeal to symmetry for its own sake is an inadequate justification for mutuality. If, on the other hand, mutuality proponents contend that elimination of the requirement unfairly subjects the bound party to a disproportionately greater risk of liability, then the argument deserves more careful consideration. Of course, the problem arises only in a small fraction of nonmutual collateral estoppel cases, since it applies only to situations of offensive assertion.[150] In these cases, setting aside theory for a moment, the first trial has considerable practical effect on subsequent litigation. It acts as a test case[151] and likely will affect both settlement discussions and trial strategy in future actions irrespective of mutuality considerations. The outcome, however, should prejudice unfairly the bound defendant, whatever his *risk*, only if the first trial reaches a "wrong" result in some manner that the defendant cannot articulate to the subsequent court. If the initial result is correct, then the risk of disproportionately great liability is not a problem in subsequent suits. The defendant would incur the same liability from several separate suits that reach the same "correct" result. Since unfairness occurs only when the initial outcome is "incorrect," the Supreme Court has given trial courts broad discretion not to apply preclusion. Courts willingly have exercised this discretion[152] when they have found it appropriate. Of course, a bound litigant may fail to meet his burden of showing prejudice in the earlier suit. A miscarriage of justice of this kind always is possible since the judicial system necessarily has imperfections. These defects, however, do not arise solely in nonmutuality cases, but are just as likely to occur in cases in which the litigants are identical to parties in a later suit. The proferred remedy—the mutuality requirement—provides no means of distinguishing correctly decided cases from erroneously decided ones. The mutuality requirement arbitrarily withholds preclusive effect for reasons unrelated to the source of the problem. A better method would be either to correct the institutional deficiencies that allowed the initial error or to accept an

149. *See supra* note 113.

150. *See supra* note 132.

151. *See, e.g., In re* Air Crash Disaster, 350 F. Supp. 757, 767 (S.D. Ohio 1972) ("It was obvious that plaintiff's counsel . . . was litigating his most favorable case in an attempt to test the liability and monetary responsibility of [defendant]."), *rev'd, on other grounds sub nom.* Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973).

152. *See, e.g.*, Bahler v. Fletcher, 257 Or. 1, 10-20, 474 P.2d 329, 334-39 (1970).

imperfect system.[153]

The second argument for preserving the mutuality requirement relies upon the inherent nature of an in personam judgment and is irrelevant for two reasons. First, the appropriate inquiry is whether the result of preclusion—providing only "one full and fair opportunity for judicial resolution of the same issue"[154]—unduly burdens the common party who may not relitigate, not whether, in some abstract sense, it violates in personam principles that categorically limit the extension of a judgment.[155] More importantly, however, reliance on the in personam character of a judgment to critique collateral estoppel confuses the nature of estoppel with that of res judicata.[156] The preclusive effect of estoppel in this situation proceeds not from the judgment, which binds only parties to it, but from the facts themselves, which derived from the affirmative acts of the parties. The facts established in the initial suit precluded the bound party in the second suit from taking a particular position or cooperating in a particular result that contradicted the earlier determinations.[157] Collateral estoppel per se does not impose liability; it "only tends to narrow the area of conflict in the second action"[158] by precluding the denial of facts already established.[159] Although legal relationships as the judgment defines them may change—or may be limited appropriately by in personam principles—the underlying facts have a more obdurate existence. In the absence of evidence that the earlier litigation provided less than a full and fair opportunity for discovery of these facts, little reason exists not to accord them continued validity in subsequent suits.

Public policy demands an end to litigation, both to give certainty and predictability to human affairs and to settle private disputes.[160] At the same time, because any legal system necessarily contains a potential for error, courts and scholars must balance the possibility of an incorrect determination in a particular case against the general goal of precluding relitigation. Opponents of the *Bernhard* doctrine contend that the mutuality requirement

153. *See* Callen & Kadue, *supra* note 17, at 764.

154. Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 328 (1971).

155. *See supra* notes 72-73 and accompanying text; Moore & Currier, *supra* note 73, at 301-02.

156. *See supra* notes 41-51 and accompanying text.

157. *See supra* notes 25-51 and accompanying text.

158. Polasky, *supra* note 20, at 220.

159. *See supra* text accompanying notes 30-31 & 49.

160. *See, e.g.*, Polasky, *supra* note 20, at 219-22.

strikes this balance appropriately by limiting reliance on a possibly deficient or erroneous result.[161] The fallacy of this argument is obvious, for the same rationale would limit preclusion when mutuality exists. Requiring mutuality, without more, does not increase the reliability of a former adjudication. The imperfection in the prior litigation is completely independent of the identity of the parties in the later suit. Certain types of situations[162] do contain a greater possibility for unfairness if the court allows preclusion, but because not every instance realizes this potential, denial of estoppel to the entire class of nonmutual cases is too broad a remedy.[163]

The preferred approach is to require articulation of the specific reason why preclusion is inappropriate under the particular circumstances. For instance, in cases of offensive use of collateral estoppel[164] the disincentive for joinder potentially is unfair to the common defendant and burdensome on the court system since it promotes multiple suits based only on tactical considerations. The United States Supreme Court has noted that

> [s]ince a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. Thus offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action.[165]

In giving trial courts wide discretion to permit or deny preclusion by nonparties, the Supreme Court stressed that the ease with which a subsequent plaintiff could have joined a prior action, and the degree to which preclusion would reward a plaintiff for his de-

---

161. Greenebaum, *supra* note 10, at 2.

162. For a description of circumstances in which preclusion may be unfair, see *supra* text accompanying notes 141-44.

163. Rejecting the argument that the possibility of an erroneous determination should limit the preclusive effect of a prior decision, one court reasoned that

> the very notion of collateral estoppel demands and assumes a certain confidence in the integrity of the end result of our adjudicative process. There is no foundation in either experience or policy for accepting the suggestion that a decision rendered after a full and fair presentation of the evidence and issues should be considered either substantially suspect or infected with variables indicating the question might be decided differently in another go-around.

State Farm Fire & Cas. Co. v. Century Home Components, Inc., 275 Or. 97, 106-07, 550 P.2d 1185, 1190 (1976).

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

165. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979) (citations and footnote omitted).

lay, are relevant factors in the court's determination.[166]

In litigation with multiple claimants, although the potential for inconsistent verdicts always exists, the proper procedure is to wait until the possibility becomes an actuality[167] before inquiring into the surrounding circumstances. In fact, courts in jurisdictions that permit offensive use of nonmutual preclusion have been reluctant to give prior inconsistent verdicts preclusive effect.[168] For example, in *State Farm Fire & Casualty Co. v. Century Home Components, Inc.*,[169] the fourth in a series of related suits that arose out of losses incurred in a fire, plaintiff attempted to preclude the common defendant from relitigating the issue of its liability, which two of the three previous actions had established. The court at first refused to deny preclusion based on a "hypothetical possibility" of error, but it noted that

> we are not free to disregard incongruous results when they are looking us in the eye. If the circumstances are such that our confidence in the integrity of the determination is severely undermined, or that the result would likely be different in a second trial, it would work an injustice to deny the litigant another chance.[170]

Refusing to decide which of the inconsistent results was better, the court declined to apply collateral estoppel.[171]

Courts have been willing to scrutinize closely the factual settings of multiple claimant cases for factors that limited full litigation in the initial suit.[172] In *Berner v. British Commonwealth Pacific Airlines*[173] the court examined the tactical motivations of the defendant airline in prior litigation to determine whether to deny the result preclusive effect. The airline had won its initial suit, but

---

166. *Id.* at 331.

167. Evidence indicates that the wait may be a relatively long one. "[I]nconsistent verdicts are rarely encountered. Our research has disclosed only one case where inconsistent determinations by separate trial courts were asserted as a reason for denying collateral estoppel." State Farm Fire & Cas. Co. v. Century Home Components, Inc., 275 Or. 97, 109, 550 P.2d 1185, 1191 (1976).

168. *See, e.g.*, State Farm Fire & Cas. Co. v. Century Home Components, Inc., 275 Or. 97, 550 P.2d 1185 (1976) (inconsistency in results of three trials prevents preclusive effect in 13 other cases).

169. *Id.*

170. *Id.* at 108, 550 P.2d at 1190.

171. *Id.* at 114, 550 P.2d at 1194.

172. Berner v. British Commonwealth Pac. Airlines, 346 F.2d 532 (2d Cir. 1965) (preclusion denied because no incentive to fully litigate first suit), *cert. denied*, 382 U.S. 983 (1966); United States v. United Air Lines, 216 F. Supp. 709 (E.D. Wash. 1962) (preclusion allowed because first suit resolved 24 of 31 total claims), *aff'd sub nom.* United Air Lines, v. Wiener, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964).

173. 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

the Second Circuit reversed on appeal. On retrial the jury found the airline liable but returned a damage award of $35,000 instead of the $500,000 for which plaintiff had prayed. The court reasoned that the discrepancy between the two amounts was so great that defendant would bave considered the result a victory and accepted it rather than incur the risk and expense of an appeal and possible retrial.[174] Thus, the court held that failure to appeal a $35,000 judgment should not preclude the airline from relitigating its liability in a subsequent suit for $7 million.[175]

In *United States v. United Air Lines*,[176] however, the court permitted preclusion, but only after considering a list of factors that could have changed the outcome had one of them been present. It pointed out that in the original fifteen-week trial, during which the court consolidated twenty-four cases, the parties had litigated the issues exhaustively, having engaged in "exceedingly extensive" discovery.[177] Furthermore, the court noted that defendant had admitted that it would offer no "new, different, or additional evidence" in the nine cases remaining for trial.[178] Concluding that "[i]t would be a travesty upon [the concept of justice] to now require these plaintiffs . . . to again re-litigate the issue of liability after it has been so thoroughly and consummately litigated . . . ,"[179] the court allowed nonmutual estoppel "in the interest of justice."[180]

B. Continuity of Results

In a sense, opponents of the *Bernhard* doctrine have placed themselves in a dilemma. On the one hand, they have argued that the doctrine will create injustice and will extend the scope of collateral estoppel beyond its proper bounds.[181] On the other hand, commentators have made a considerable effort to bring those cases that have eliminated the mutuality requirement within a traditional exception to mutuality.[182] *Bernhard*, for example, "fall[s]

---

174. *Id.* at 540-41.

175. *Id.*

176. 216 F. Supp. 709 (E.D. Wash. 1962), *aff'd sub nom.* United Air Lines v. Weiner, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964).

177. 216 F. Supp. at 712.

178. *Id.* at 728.

179. *Id.*

180. *Id.* at 729.

181. *See, e.g.*, Moore & Currier, *supra* note 73.

182. *See* Greenebaum, *supra* note 10; Moore & Currier, *supra* note 73; Overton, *supra* note 10; Note, *supra* note 10.

easily within the 'related non-common parties'" exception;[183] *Blonder-Tongue* is "based on substantive nonjudgments law rather than collateral estoppel;"[184] and *Israel v. Wood Dolson Co.*[185] concerns a "vendor-vendee relationship . . . [that] might well be regarded as a sufficient legal relationship to bring . . . [it] within the broad general exception to the mutuality requirement."[186] These attempts by commentators to present the decisions in such a light that one would conclude readily that the "supposed trend away from mutuality is probably more apparent than real,"[187] coupled with a parallel trend among courts to expand greatly the privity rationale,[188] undercut the contention that abandoning mutuality is a radical departure from accepted practice.

This second trend—the expansion of the notion of privity as a rationale for preclusion—has become an increasingly popular method by which courts may give lip service to the notion of mutuality, yet allow estoppel in those cases in which relitigation would have little utility and the bound party has exercised fully his due process right to a full opportunity to contest the issue. For example, in *Waitkus v. Pomeroy*[189] two passengers in an automobile that collided with another vehicle brought separate suits for personal injuries against the drivers of both autos. In the initial suit the first passenger recovered against one driver, but the court found the other driver nonnegligent. The second driver pled this result as estoppel in the later suit that the other passenger brought against him. The Colorado Court of Appeals precluded relitigation of the second driver's negligence, finding that the two passengers were in privity.[190]

Commentators have noted that in certain circumstances courts willingly invoke the notion of privity as a justification for permit-

---

183. Greenebaum, *supra* note 10, at 18 n.69.

184. Overton, *supra* note 10, at 941 (holder of patent must choose at his peril which infringer to sue first).

185. 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956).

186. Moore & Currier, *supra* note 73, at 320.

187. Greenebaum, *supra* note 10, at 1.

188. *See, e.g.*, Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485, 1494 n.66 (1974); *supra* notes 107-12 and accompanying text.

189. 31 Colo. App. 396, 506 P.2d 392 (1972), *rev'd on other grounds*, 183 Colo. 344, 517 P.2d 396 (1973).

190. 31 Colo. App. at 405-06, 506 P.2d at 397-98. A United States district court in Florida reached a similar result in Aerojet-Gen. Corp. v. Askew, 366 F. Supp. 901 (N. D. Fla. 1973), *aff'd*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975). *See supra* text accompanying notes 110-12.

ting collateral estoppel out of fairness to the parties.[191] Although the results of these equitable judicial actions may be commendable, the ad hoc approach that courts have taken converts the privity requirement into a vague concept of such amorphous dimensions that it has no utility in predicting when preclusion will apply. Allowing nonmutual collateral estoppel—altering little the outcome of judicial efforts to reconcile procedural form with substantive justice—will serve this goal better, and, at the same time, will provide more definite and reliable guidelines for determining the circumstances in which courts will, or will not, permit a plea of collateral estoppel.

C. *Shifting the Burden of Persuasion*

The practical effect of the *Bernhard* doctrine on the application of collateral estoppel is to shift the burden of justifying an exception to the rule in a nonmutual preclusion situation. With the mutuality requirement, the party asserting preclusion must demonstrate that one of the traditional exceptions is applicable, or that the nonparty's relationship to the original party is sufficiently close to bring him within the notion of privity. The risk of nonpersuasion, therefore, falls on the party seeking to end litigation and conserve the resources of the court. In this situation the standard for applying collateral estoppel—whether the relation between the stranger and a party to the initial action is sufficiently close—is irrelevant to the substantive merits of the issue for which the party is seeking preclusion. That is, the test gives no indication whether the original determination of the issue was correct. Thus, a necessarily mechanical application of the mutuality standard in a penumbral case increases the burden on litigants and the court system without concomitantly increasing the reliability of the result.

Under the *Bernhard* doctrine, however, the burden is on the party against whom the preclusion would operate to show that he did not have a full and fair opportunity to litigate the issue previously.[192] In this case the risk of nonpersuasion falls on the party seeking to relitigate to show specifically why he should receive an-

---

191. *See* F. JAMES & G. HAZARD, *supra* note 23, at 599; M. GREENE, BASIC CIVIL PROCEDURE 214 (1972); Vestal, *supra* note 109, at 45; Note, *supra* note 188, at 1494 n.66. For example, Professor Greene notes that "the course which most courts pursued [has been to make] ad hoc exceptions [to mutuality] where fairness seemed to demand it." M. GREENE, *supra*, at 216.

192. *See* State Farm Fire & Cas. Co. v. Century Home Components, Inc., 275 Or. 97, 105, 550 P.2d 1185, 1189 (1976).

other opportunity to obtain a more favorable result. Here, the standard for preclusion—whether the common party had a full opportunity to litigate in the previous suit—provides a much closer connection to the issue itself. Thus, if the precluded party cannot show an inadequate opportunity to litigate, the prior litigation probably reached an appropriate determination of the issue.[193] Therefore, shifting the burden of proving exceptional circumstances not only better achieves the policy goals of collateral estoppel, but also serves as a check on the accuracy of the issue's determination in the initial litigation.

V. CONCLUSION

The modern trend in American procedural jurisprudence has been away from a formalistic, gamesmanship approach to the litigation process and toward a system based upon principles of fairness and efficiency in resolving conflicts without unjustifiable expense and delay. No system of procedural rules alone, however, can guarantee in every case a result that corresponds with absolute truth or fundamental concepts of justice. Any system that is sufficiently sophisticated to deal adequately with the complexity and variety of modern American legal relationships is necessarily incomplete since the proper procedural method of handling all possible factual situations is impossible to anticipate. Thus, a rule of decision that receives universal application sometimes will waste resources and produce substantive injustice.

The facts of a particular case provide substance to the procedural rules applied to that case, and thus give life to the legal system. The facts supply the rationale for choosing one principle over another. A court must have the flexibility to apply a rule of decision, or not, according to whether it will accomplish, or is consistent with, the underlying policy goals as the facts of that particular case define them. Although an unjust result still theoretically is possible, the courts' flexibility in choosing not to apply a principle

193. An "appropriate" determination does not necessarily imply that the result is absolutely correct, but rather that no reason appears for doubting it.

> [T]he unsubstantiated and conjectural possibility that a party might receive a favorable judgment somewhere down the road is an insufficient reason for refusing to apply collateral estoppel. . . . "[T]he prior judgment is treated as conclusive, not because it is actually conclusive evidence of the ultimate truth as to those issues necessarily determined, hut because of the public interest in the finality of judgments and in the efficient administration of justice."

Id. at 107, 550 P.2d at 1190 (quoting *In re* Gygi, 273 Or. 443, 448-49, 541 P.2d 1392, 1395 (1975)).

if the facts present an actual danger of injustice will enhance public confidence in the result and in the legal system as a whole.

The traditional mutuality requirement is an absolute principle that inflexibly denies preclusion unless the parties meet certain technical requirements that are unrelated to the merits of the suit. The *Bernhard* doctrine, on the other hand, gives appropriate emphasis to the facts presented in a legal dispute. Rooted firmly in the common-law tradition, the doctrine provides a general finality principle that is adaptable to exceptional cases in which relitigation is appropriate. Over the past forty years courts have demonstrated a consistent willingness and capability to administer the *Bernhard* standard without disadvantaging either party to the lawsuit. The net effect of the *Bernhard* doctrine—shifting the burden of persuading a court that preclusion is appropriate—better reflects the underlying policy rationales of collateral estoppel while also providing some review of the prior determination. Allowing courts to deny preclusion when a party articulates an actual reason to suspect the previous litigation result, but permit it when the earlier action fully explored and determined the issue in question, better conserves legal resources, engenders public confidence in judicial dispute resolution, and provides the parties with a full and adequate forum to vindicate those legal rights that the proven facts have shown to exist.

WILLIAM SAM BYASSEE