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COLLATERAL ESTOPPEL IN NEW YORK

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I. INTRODUCTION AND SCOPE

This article reviews and evaluates significant aspects of the case law of collateral estoppel in New York, emphasizing unsettled issues and unsatisfactory decisions or lines of authority. Its purpose is to provide a basis for considering whether any of the problems discussed here call for legislative solution. The conclusion is that New York's situation does not require dramatic corrective measures, despite the fact that there are in the reported cases here and there some unfortunate decisions, some ill-chosen language and a considerable amount of misunderstanding of the concepts under review. As a point of departure it is assumed that we should avoid sweeping legislation that would completely blanket this traditional common-law subject matter; but that it would be realistic to consider the feasibility of dealing by statute with narrow segments of the problem. Bearing in mind the virtue of flexibility and the fact that other states have not attempted to codify the subject, one would of course resist simplistic legislative approaches.

This discussion begins with a survey of the differences between collateral estoppel and other phases of the concept of former adjudication, then comments upon the body of case law which lays down prerequisites for the application of estoppel effects, and treats the question of which persons are bound or helped by estoppels. Along the way are sprinkled observations designed to point up apparent flaws in the New York courts' treatment of facets of the subject.

II. TOTAL VS. PARTIAL RES JUDICATA

A. Essential Distinctions

In New York, as in other states, the doctrine of res judicata embraces a group of principles and rules developed by the courts to

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prescribe the effects that adjudications in earlier actions will have in later ones. Statutes do not impinge on the common law rules, except in very narrow and limited respects. Unlike stare decisis, which gives the force of precedent to a prior ruling on a point of law, res judicata applies primarily to issues of fact. Again unlike stare decisis, which applies broadly to parties and transactions having no relationship to the earlier case, it affects parties or claims having some direct link to the litigants formerly at bar.

At the core of res judicata is the idea that society's interests are better served by foreclosing repetitious litigation than by permitting litigants to show that the truth is otherwise than as found or assumed in a prior action. It has been said that courts respect the doctrine but do not like it.[1] When they invoke it, they speak as if it were remorseless; but they do not invoke it consistently. The New York courts appear to have done a poorer job with the problem than its admitted intricacies warrant.

A few further points regarding terminology and basic analysis warrant attention at the start. A former adjudication in a civil action may either totally preclude relitigation of *all* issues which later arise, or partially preclude them — that is, foreclose *some* but not all.

Collateral estoppel falls into the category of partial res judicata because its binding effect is limited to certain of the issues formerly in dispute, rather than extending to the entire controversy. However, in New York, it has been correctly said, "the courts frequently fail to distinguish the various aspects of former adjudication and tend to refer to 'res judicata' indiscriminately."[2] When the decisions do properly discriminate, they divide the concept of former adjudication into three chief aspects: (1) "merger," which occurs when the plaintiff recovers; thereupon his cause of action is said to be merged in the judgment and extinguished, replaced by a right to sue on the judgment; (2) "bar," which occurs when the defendant prevails on the merits and plaintiff is thereafter totally barred from suing on the same cause of action; and (3) "collateral estoppel," by which certain questions actually litigated and determined in one action are precluded from relitigation in a later action when the questions arise anew, even in a suit on a different cause of action.

Merger and bar result in ascribing total preclusive effect to the prior judgment and to all matters potentially in issue in the prior

1 Riordan v. Ferguson, 147 F.2d 983, 988 (2d Cir. 1945) (Clark, J., dissenting).

2 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5011.08 (1968), *citing, e.g.*, Goodman v. Goodman, 274 App. Div. 287, 83 N.Y.S.2d 62 (1st Dep't 1948).

action, whether or not actually presented. Collateral estoppel precludes relitigation only of the very questions that were previously submitted and determined. The classic statement of these concepts appears in the 1876 United States Supreme Court opinion in *Cromwell v. County of Sac*[3]:

> [T]here is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, precluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment.
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> . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

B. Requisites for Total Res Judicata

The New York cases very often recognize and accept the foregoing distinctions and rules: total res judicata by way of merger or bar comes into play if the former judgment (1) was based on the "same cause of action" or the "same claim" and (2) was rendered "on the merits."[4] What do those terms mean?

(1) *The "same cause of action."* The cause of action concept is one of the most difficult in the law. Suppose that *A* and *B* are involved

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3 94 U.S. 351, 352-53 (1876).

4 Smith v. Kirkpatrick, 305 N.Y. 66, 111 N.E.2d 209 (1953); Karameros v. Luther, 279 N.Y. 87, 17 N.E.2d 779 (1938); Schuylkill Fuel Corp. v. B & C Nieberg Realty Corp., 250 N.Y. 304, 165 N.E. 456 (1929).

in an automobile collision and *A* suffers damage to his car and injury to his person. Has *A* a single cause of action or two causes? In New York and a minority of other jurisdictions in the case supposed, the causes of action are deemed distinct, so that *seriatim* suits may be brought without the danger of merger, bar, or the related obstacle of splitting the cause of action.[5] No single definition of a cause of action emerges from the decisions because so many different analytical approaches are available. On occasion the courts focus on the plaintiff's legal interests, asking what "right" or "rights" of his were invaded. At other times they look at the defendant's conduct and conclude that there was but a single "wrong" or "wrongful act," and thus there can be but a single cause of action. At still other times the determining factor seems to be whether an identical type of relief was available or whether there were alternative remedies. Finally, some decisions appear to test the sameness of the cause of action by asking whether the same evidence is involved in both actions.

Smith v. Kirkpatrick[6] exemplifies the variety of approaches. Smith sued for breach of an employment contract by his alleged employer, who entered a general denial and pleaded the statute of frauds. Smith amended to assert two new claims in lieu of the original one, the first alleging an "informal" arrangement to conduct business together and the second an oral agreement of joint venture. After trial, defendant had judgment. Then Smith commenced an action against Kirkpatrick to recover in *quantum meruit* for the value of his services in the same arrangements. The Court of Appeals permitted the second suit to continue, rejecting a plea of res judicata based on the "sameness" of the causes of action:

> The two actions involve different "rights" and "wrongs." The requisite elements of proof and hence the evidence necessary to sustain recovery vary materially. The causes of action are different and distinct and the rights and interests established by the previous adjudication will not be impaired by a recovery, if that be the outcome, in *quantum meruit*.[7]

It is easy to see that the Court was not handcuffed by a rigid definition of "cause of action." The fluidity of its position was enhanced by reference to Judge Cardozo's famous statement in *Schuylkill Fuel Corp. v. B & C Nieberg Realty Corp.*:[8]

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5 *See, e.g.*, Reilly v. Sicilian Asphalt Paving Co., 170 N.Y. 40, 62 N.E. 772 (1902).
6 305 N.Y. 66, 111 N.E.2d 209 (1953).
7 *Id.* at 72, 111 N.E.2d at 212.
8 250 N.Y. 304, 306-07, 165 N.E. 456, 457 (1929) (emphasis added).

> A judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, *when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first* (Cromwell v. County of Sac, 94 U.S. 351; Reich v. Cochran . . .).

Those words from *Schuylkill* are repeatedly cited. They have done a good deal of mischief by giving the illusion that they offer some sort of test to determine whether a former and present action rest on the same cause for purposes of res judicata. Actually, the supposed test is circular. It makes sameness of the present and former causes of action hinge on whether "rights or interests" established by the former judgment would be "destroyed or impaired" in the present proceeding. But that depends in many cases on what the court now decides is the effect of the earlier judgment so far as creating rights or interests. The *Schuylkill* test gives the court no help at all in deciding whether a disputed right did or did not flow from the former judgment.

This problem of deciding when the cause of action is the same as a former one for res judicata purposes is one that courts in New York will have to continue to cope with, just as they must in other states. Detailed rules cannot settle it, for the factors that influence decision defy prescription. They include such complex considerations as the practical needs of administering justice conveniently and efficiently and the degree of favor or disfavor with which the law regards the type of claim made by the plaintiff.[9]

(2) *Judgment "on the merits."* Some aspects of this subject are clear at a glance, such as that a judgment in plaintiff's favor after a full trial contest is invariably "on the merits," and that a voluntary discontinuance by the plaintiff before answer does not normally produce a judgment on the merits whereas a dismissal after trial does. What of a judgment taken upon defendant's failure to appear or answer? The New York cases hold that total res judicata applies, with its consequences by way of merger and total preclusion.[10]

C. *Effects of Total Res Judicata*

When a case has gone to judgment on the merits and the same cause arises in a later action between the same parties or their privies,

[9] *See, e.g.*, Spilker v. Hankin, 188 F.2d 35, 39 (D.C. Cir. 1959); White v. Adler, 289 N.Y. 34, 43 N.E.2d 798 (1942).

[10] Schoelles v. Uhlendorf, 34 Misc. 2d 738, 228 N.Y.S.2d 1003 (Sup. Ct. Nassau County 1962), *aff'd*, 18 App. Div. 2d 913, 237 N.Y.S.2d 1013 (2d Dep't 1963); Searing v. Cohen, 191 Misc. 123, 76 N.Y.S.2d 771 (N.Y.C. Mun. Ct. 1948), *rev'd on other grounds*, 191 Misc. 1006, 80 N.Y.S.2d 44 (App. T. 1st Dep't 1948).

res judicata precludes attack upon a finding on any issue that was raised in the former suit, *or that might have been. Statter v. Statter*[11] shows that the doctrine can apply even when the litigants reverse roles as long as the cause of action is the same in the second court's view. First the husband obtained a judgment of separation against the wife for abandonment, without any issue having been made of the validity of the marriage. Later the wife brought an action for annulment, asserting that the marriage had been invalid from the beginning because the husband was at the time married to another. Applying res judicata, the Court of Appeals held that the validity of the marriage was not open to attack in the second suit because

> the causes of action are the same for the purposes of the rule and . . . accordingly relevant matters not raised in the separation action on the question of the marriage's validity are now precluded.[12]

One of the relevant matters not raised but nevertheless precluded was whether the marriage was valid. It is curious that the wife's cause of action, based on the premise that the marriage was a *nullity*, could be found the same as a cause of action premising its *validity*, but this merely illustrates the difficulty of determining which causes of action are the "same." The explanation for the Court's odd conclusion lies in the tangled reasoning the *Schuylkill* doctrine encourages, as can be seen from this statement from the *Statter* case:

> We see no real conflict between the rule of "collateral estoppel by judgment" urged by the wife and adopted by the court below, and the conclusion here reached. That principle revolves about a determination of which causes of action are the "same" and which are "different" (See Cromwell v. County of Sac, 94 U.S. 351, 352-353). But causes of action in this setting are not different by virtue merely of their form or the relief sought. If we apply the standard propounded in the Schuylkill case . . . causes of action are the same when the second judgment could result in an impairment of the one obtained in the first suit. It follows, however, that if the question or questions in the second action were material and necessarily involved in the first determination the threat of impairment must be present . . . . [A] judgment of nullity could not now be granted without thereby undermining the judgment of separation which rests upon the fact of marriage.[13]

The "impairment" test may be logical but it is far from reliable. The mere circumstance that failure to give conclusive effect to a matter

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11 2 N.Y.2d 668, 143 N.E.2d 10, 163 N.Y.S.2d 13 (1957).
12 *Id.* at 674, 143 N.E.2d at 13, 163 N.Y.S.2d at 18.
13 *Id.* at 674, 143 N.E.2d at 12, 163 N.Y.S.2d at 17-18.

involved in an earlier suit will permit a grossly inconsistent result in a second suit does not compel the second court to apply res judicata. For example, the employer in *Smith v. Kirkpatrick*[14] who had prevailed in the earlier action for breach of an employment contract made the quite reasonable point that to allow the plaintiff to recover the *quantum meruit* value of his services "seriously impaired" the employer's interests and rights as determined in the first suit — namely, to be free from the employee's claim for alleged services. Although the Court of Appeals reached a contrary conclusion, the real reason was probably not the slippery *Schuylkill* rationale, but because, as the Court also said, the "requisite elements of proof and hence the evidence . . . var[ied] materially" and the "two actions involve[d] different 'rights' and 'wrongs.' "[15]

Better analysis in the *Statter* case would have recognized that since the wife's claim for annulment was different from her husband's earlier case for separation, she should not have been precluded on the issue of the validity of the marriage because that issue had gone uncontested in the husband's action. Only partial preclusion could arise, not total res judicata, and thus the wife should not have been shut out on the validity issue. Unfortunately, this is a typical instance of the way the established distinction between total res judicata and collateral estoppel is overlooked by the New York courts, even though they pay lip service to it with much regularity.

III. Collateral Estoppel: Prerequisites

In recent years the New York courts have set a hectic pace in expanding the applicability of collateral estoppel. Despite this, the cases have generally accepted and adhered to several basic requirements. A former adjudication will be binding in subsequent litigation (upon certain persons, as outlined below) provided that the issue presented (a) is identical, (b) was actually litigated, (c) was essential to the determination and (d) was "ultimate" or "material" in the prior action and is also "ultimate" in the present suit. The requirements will be discussed in the order listed, with references now and then to decisions or viewpoints which appear to be mistaken or dubious.

1. Default Judgments

This requirement is self-evident. It would be irrational and unjust to bind a party by a former finding on an issue unless that very issue

[14] 305 N.Y. 66, 111 N.E.2d 209 (1953).
[15] *Id.* at 72, 111 N.E.2d at 212.

had been adjudicated. The whole premise of collateral estoppel is to preclude repetitious litigation of a specific issue. If the issue is different or material, the rule does not come into play.

The "identity" prerequisite is therefore closely tied to the requirement that the issue has been "actually litigated" before. But it has not presented quite as much difficulty.

In *People ex rel. Watchtower Bible & Tract Society v. Haring*,[16] the Society resisted the tax authority's claim of an estoppel fixing the nonexempt status of the Society based upon a prior tax proceeding. The court denied preclusive effect to the earlier finding of nonexempt use on the ground that the issue of present use of the Society's property was not identical with the issue of use determined in the earlier suit:

> It is elementary that the doctrine of collateral estoppel is not applicable unless the issue in the second proceeding is identical with that in the first. It necessarily follows from this principle that the doctrine of collateral estoppel cannot apply to a claim of charitable or religious exemption where the granting or denying of the exemption depends upon the actual use of the property at the time of the proposed assessment. An adjudication that the property was or was not used for a charitable or religious purpose during one year cannot constitute an adjudication as to whether it was used for such a purpose during another year. The issues are not the same.[17]

In a somewhat analogous case, it was held that the party claiming a change in circumstances had the burden of establishing the change; without such a showing, the assumption was that the issue as to property value was identical to the issue in the earlier action.[18]

The leading case on identity of issues is *Israel v. Wood Dolson Co.*[19] In the first action Israel, a real estate broker, sued another broker for a share of the sale commission. After trial his complaint was dismissed on the ground that the proof showed the plaintiff had not produced the buyer, Gross. In the second action Israel sued Gross for inducing the broker to breach the commission contract. The Court upheld the defendant's plea that Israel was precluded from proving that a breach had occurred:

> [I]n determining the applicability of the doctrine of *res judicata* as a defense, the test to be applied is that of "identity of issues."[20]

Israel v. Wood Dolson Co. is discussed more fully below; and the problem of identity of issues also recurs.

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16 286 App. Div. 676, 146 N.Y.S.2d 151 (3d Dep't 1955).

17 *Id.* at 680, 146 N.Y.S.2d at 156.

18 *In re* Fifth Madison Corp., 3 App. Div. 2d 430, 161 N.Y.S.2d 326 (1st Dep't 1957), *aff'd*, 4 N.Y.2d 932, 151 N.E.2d 357, 175 N.Y.S.2d 173 (1958).

19 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

20 *Id.* at 120, 134 N.E.2d at 100, 151 N.Y.S.2d at 5.

B. Issue Actually Litigated — Defaults, Consents and Admissions

To invoke collateral estoppel to preclude relitigation of an issue which qualifies as "ultimate" or "material," a party must establish three essentials, according to generally accepted doctrine: that the issue in question is identical with an issue in the prior action, that it was necessary to the earlier determination, and that it was "actually litigated."[21] Here the focus is on the last-mentioned requirement. Often there is no doubt whatever that it has been satisfied; as, for example, when the former suit proceeded to trial, conflicting evidence was adduced on the issue by both sides, and a specific finding was returned upholding one side.

However, there frequently is doubt on one or another of the questions of whether the point was placed in issue, submitted to the court and determined. What if the defendant in the former action failed to put in an answer and suffered a default; or having answered, admitted by silence the particular allegation under concern; or entered into a settlement before trial which resulted in a consent judgment? Starting from the position that proof of the truth should not lightly be precluded, some have urged that defaults, consents and admissions do not assure the same deliberate treatment of the issue that would result if it were "actually litigated." Therefore, the argument runs, they should not have the same far-reaching consequences. The response from the other camp is that if the first judgment necessarily rested on the existence of particular facts, they should be taken as established in later suits without regard to whether they were actually litigated.

New York decisions have not been notably lucid in responding to these questions. With regard to default judgments, both the reasoning and the results seem unjustifiable or unwise. With regard to consent judgments, the results are fairly defensible, but the language and analysis are muddled.

1. Default Judgments

We have seen that when the same parties find themselves involved in a second suit over the "same cause of action" previously asserted, total res judicata applies, even though the prior judgment was taken by default. The reasoning is that the cause of action has merged in the judgment and the result is that relitigation is foreclosed as to all issues that might have been asserted, as well as to those that actually were asserted. The fact that evidence was not presented on the silent issues does not impair the binding quality of the judgment as to them.

21 *See* RESTATEMENT OF JUDGMENTS § 68 (1942).

As earlier noted, this is the widely accepted doctrine of *Cromwell v. County of Sac*,[22] with only Judge Cardozo's *Schuylkill*[23] dictum and its New York progeny going a step beyond and applying the doctrine even when the cause of action in the later suit is not analytically the same by ordinary tests.

The *Restatement of Judgments* in section 47, comment *e*,[24] adopts the total res judicata rule for default judgments when the same claim or demand is made in the later suit, but not if a different cause of action is presented. In the latter case, collateral estoppel does not apply to the "might have been" issues. Comment *a* to section 68 declares:

> [W]here the subsequent action is based on a different cause of action from that upon which the prior action was based, the effect of the judgment is more limited. The judgment is conclusive between the parties in such a case as to questions actually litigated and determined by the judgment. It is not conclusive as to questions which might have been but were not litigated in the original action.[25]

Comment *f* deals explicitly with the case of a default by a defendant, declaring that his failure to appear or answer in one action is "not conclusive against [him] . . . in another action based upon a different cause of action."[26]

The New York decisions in the most common cases that arise are to the contrary.[27] They have indicated that defaults will not only preclude proof on issues that were alleged and were "material" or "essential" matters in the former suit, but that they will also foreclose matters that might have been raised and decided. Commentators have had understandable difficulty making sense of these cases, and have reached divergent interpretations. One observer summarizes them as teaching that "a defendant cannot default and pay the demanded sum without conclusively admitting every *material* allegation in the complaint."[28] On the other hand, Professors Weinstein, Korn and Miller, in their excellent treatise, observe:

> In spite of the fact that no issues are actually litigated, New York courts have provided some support for the dangerous doctrine that a default judgment is to be given collateral estoppel effect and

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22 94 U.S. 351 (1876).

23 250 N.Y. 304, 306-07, 165 N.E. 456, 457 (1929).

24 RESTATEMENT OF JUDGMENTS § 47, comment *e*, at 185 (1942).

25 *Id.* § 68, comment *a* at 294.

26 *Id.* comment *f* at 302.

27 Annot., 77 A.L.R.2d 1410, 1421 (1961).

28 *See* Note, *Collateral Estoppel by Judgment*, 52 COLUM. L. REV. 647, 654 (1952) (emphasis added).

> is to be considered conclusive between the parties with regard to all matters essential to sustain the judgment.[29]

Court of Appeals decisions tracing back nearly a century have continued to echo that view since it was laid down in two malpractice cases, *Gates v. Preston*[30] and *Blair v. Bartlett*.[31] In both cases the patient was held precluded from showing that the physician's services were harmful because he had defaulted in his doctor's earlier action for the fee.[32] In *Gates* the doctor had claimed $6.58; in *Blair*, $28. In the latter case, the Court of Appeals declared that

> an adjudication, made on the default [is] conclusive, in an action subsequently pending between the same parties, of the facts alleged, and which were required to be alleged, as the basis of the prior proceedings.[33]

Reich v. Cochran[34] shows that this analysis is not confined to malpractice cases. In an action to cancel a lease as usurious, the plaintiff was held collaterally estopped by his default judgment in the landlord's earlier summary proceeding for nonpayment of rent. The Court ruled that the earlier judgment on default was

> conclusive between the parties as to the existence and validity of the lease, the occupation by the tenant, . . . and also as to any other facts alleged in the petition or affidavit which are required to be alleged as a basis of the proceedings.[35]

Not content with that broad declaration, the Court of Appeals added that the earlier judgment

> comprehended and involved every question relating to the validity of the lease and the relation between the parties, and the estoppel of the judgment extends to them even though they were not litigated or considered in that proceeding.[36]

Even more sweeping language came a few years later in *Barber v. Kendall*,[37] which declared the plaintiff in the second action "bound not

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29 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5011.30 (1968).

30 41 N.Y. 113 (1869).

31 75 N.Y. 150 (1878).

32 Actually, neither case should have become a leading authority on this point, if the facts are closely observed. In *Gates*, the patient appeared in the first action and signed a written confession of judgment for the doctor's claim. In *Blair*, the res judicata effect of the former judgment was controlled by a statute which required that the patient's nonappearance in the physician's suit be deemed a denial, so that the doctor had to make full proof of the facts.

33 75 N.Y. at 153.

34 151 N.Y. 122, 45 N.E. 367 (1896).

35 *Id.* at 126, 45 N.E. at 368.

36 *Id.* at 127, 45 N.E. at 368.

37 158 N.Y. 401, 53 N.E. 1 (1899).

only by what was actually decided" but "by anything else embraced within the issues *and which could have been decided.*"[38] These are strong views, but passage of time has not softened them. A default judgment in New York binds *at least* as to facts essential to support the judgment and seemingly as to any other matters that might have been raised in the earlier action. Recent cases show how firmly the dogma is imbedded.[39]

Roberts v. Strauss[40] is noteworthy because it involved a suit for damages arising out of an automobile collision. In the earlier suit Roberts, as defendant, suffered a default judgment in a trifling amount. When he sued for his bodily injuries, he was held precluded by the finding necessarily made by implication in the earlier suit that he had been negligent. It is assumed that this issue has not often arisen in the *Roberts* context in New York, for there would certainly have been a major uproar by now if auto liability insurance carriers regularly permitted entry against an assured of default judgments for minor property damage to the other car, when the result would be to bar the assured's claim for serious injuries.

Criticisms of the rule attributing sweeping preclusive effect to default judgments are well taken. For example, it is unrealistic, unfair and unnecessary to require that a person with a major claim against a merchant, a doctor, or for that matter, a lawyer, must defend to the last extreme in an action on the unpaid bill or risk the loss of the serious claim arising out of the same transaction, by the operation of collateral estoppel. There are many reasons for sustaining a default judgment besides total concession that all allegations made (or — under some of the opinions — that *could have been* made) are well founded. Again it is *Cromwell v. County of Sac* that drives home the point:

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

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38 *Id.* at 405, 53 N.E. at 2 (emphasis added).

39 *See* Goldfarb v. Cronin, 35 Misc. 2d 126, 229 N.Y.S.2d 43 (Sup. Ct. Nassau County 1962); J. J. Miller Constr. Co. v. Berlanti Constr. Co., 197 N.Y.S.2d 818 (Sup. Ct. Westchester County 1960); Roberts v. Strauss, 108 N.Y.S.2d 733 (Sup. Ct. N.Y. County 1951); Adamik v. Adamik, 190 Misc. 851, 75 N.Y.S.2d 824 (Sup. Ct. Broome County 1948); Silver Dresses, Inc. v. Parker, 73 N.Y.S.2d 704 (Sup. Ct. N.Y. County 1947); Klein v. Federbush, 2 Misc. 2d 791, 150 N.Y.S.2d 115 (N.Y.C. Mun. Ct. 1956).

40 108 N.Y.S.2d 733 (Sup. Ct. N.Y. County 1951).

> precluded from contesting in a subsequent action other demands arising out of the same transaction. . . .[41]

The foregoing statement seems clearly correct. It is unfair and unwise to go as far as the New York decisions do in enforcing estoppels on the basis of earlier defaults. The consequence is to make a default so perilous that a well-advised defendant will be driven to litigate any petty claim asserted against him if there is the slightest prospect that a buried issue may be foreclosed in a subsequent suit. In the end this could frustrate the very purpose of res judicata to reduce contention and dispute. Instead of more litigation later, there will be more litigating now.

2. Consent Judgments

The New York cases do not reveal a serious problem of the type that arose years ago in Massachusetts with regard to settlements in automobile accident cases. In 1930 *Biggio v. Magee*[42] held that a consent judgment in *A*'s favor against *B* for personal injuries in an automobile accident negligence action implied findings that *B* had been negligent and *A* free from negligence, so as to preclude a later damage suit by *B* for his bodily injuries. In 1932 the legislature overruled *Biggio* and a parallel case, *Long v. MacDougall*,[43] by enacting the following provision:

> A judgment entered by agreement of the parties, the payment of which is secured in whole or in part by a motor vehicle liability bond or a motor vehicle liability policy, both as defined in section thirty-four A of chapter ninety, shall not operate as a bar to an action brought by a defendant in an action in which such judgment was entered, unless such agreement was signed by the defendant in person.[44]

Some years later in *Macheras v. Syrmopoulos*,[45] the Supreme Judicial Court again gave collateral estoppel effect to a consent judgment growing out of an automobile accident, this time to one settling a property damage claim. Again the legislature wasted no time in overruling the decision by enacting in 1947 that:

> In an action to recover damages for injuries to person or property, or for death, or consequential damages, so called, sustained by reason of a motor vehicle accident, a judgment entered by agreement

41 94 U.S. at 356.
42 272 Mass. 185, 172 N.E. 336 (1930).
43 273 Mass. 386, 173 N.E. 507 (1930).
44 Ch. 130, § 1 [1932] Mass. Acts.
45 319 Mass. 485, 66 N.E.2d 351 (1946).

> of the parties without a hearing on the merits, shall not operate as a bar to an action brought by a defendant in the action in which such judgment was entered, unless such agreement was signed by the defendant in person.[46]

Presumably under the Massachusetts statutes the practice is for the named defendant in the first action to avoid signing the consent judgment and it cannot then be raised as a complete bar to his action. Whether it can be used as a collateral estoppel is conjectural.

In New York there is no evidence that any serious practical difficulties exist in the situation that *Biggio* typified. To put the common case, if *A* and *B*, each driving his own car, are hurt in a collision and *B*'s insurance company enters into a settlement with *A* for his injuries, *B* may still recover from *A*'s insurance company. *B* is not precluded under res judicata rules by his insurer's settlement, even if it impliedly admits *B*'s fault and *A*'s freedom from fault in a consent judgment, as long as there was no hearing and determination of the issues of negligence and contributory negligence. Presumably, if the parties to the settlement (including *B*) *intended* to bar his claim, that could be accomplished; but it would be in consequence of the parties' agreed intention and not in consequence of res judicata.

Research has not disclosed any case in New York involving an auto collision in which collateral estoppel was successfully invoked on the basis of a consent judgment in a former action arising out of the same accident.

Sanatar v. Hyder,[47] a case in the Supreme Court, Nassau County, in 1958, goes the other way: A New York widow sued for the wrongful death of her husband killed when his car collided in Florida with the defendant's truck, driven at the time by his son. The issue was whether the widow was precluded by a consent judgment in favor of the son in an action he had brought in Florida against the late Mr. Sanatar's estate and which his insurance company settled. In denying any preclusive effect to the consent judgment, Judge Hogan clearly reached the right result, for the issues of fact had not been "actually litigated" and a *sine qua non* for applicability of collateral estoppel was therefore plainly absent. Even more important, the Florida settlement had expressly provided that it was not to be construed as an admission of liability or to be pleaded in bar of any action brought by any party released. It would have been a clear violation of the intention of the parties to the Florida agreement underlying the consent judgment to

[46] MASS. GEN. LAWS ANN. Ch. 231, § 140A (1959).

[47] 17 Misc. 2d 286, 176 N.Y.S.2d 467 (Sup. Ct. Nassau County 1958).

give it preclusive effect in the widow's suit. For that compelling reason — any others aside — the rules of collateral estoppel should have been held irrelevant.

The main basis for thinking that a problem exists in New York is that several cases having nothing to do with automobile negligence situations have used general language that ascribes sweeping res judicata effects to consent judgments. As in *Sanatar*, the results in the cases may well be correct, but certain statements uttered in the opinions are regrettable. A leading example is *Canfield v. Elmer E. Harris & Co.*,[48] which held that the effect of a landlord's stipulation for judgment absolute in the Court of Appeals was to preclude her contesting in a later action an issue embraced in the former judgment. In its opinion the Court dropped several unfortunate phrases by way of *obiter*:

> [Plaintiff] submitted the whole controversy upon the result to be reached in this court . . . and her judgment in the County Court that defendant was a holdover tenant was decided to be wrong. The judgment in this court conclusively settling the issue is founded solely upon the consent of the party making the stipulation that a certain result should follow the decision of this court on questions of law presented to it by the record. . . . Its effect is similar to the results following a judgment taken by default . . . which has the same consequences as one based upon a verdict. The general rules governing judgments apply to those taken by consent or upon stipulation which, in the case of individuals and private corporations, constitute a bar to the same extent as other judgments. A judgment by confession stands in much the same position as one by stipulation or consent and is a conclusive adjudication of all matters embraced in it and a bar to any subsequent action on the same claim.[49]

Another case often cited is *Crouse v. McVickar*,[50] involving an effort in a will dispute to open a consent judgment for fraud. Its only claim to fame in the present discussion is a broad dictum that declared:

> A judgment by default is as conclusive as any other judgment, and a judgment rendered on the express stipulation of the parties can hardly be of less effect than one rendered on the failure of a party to appear.[51]

That sentence has been interpreted by a few lower courts as if it repealed for consent judgments the requirement of "actual litigation" of the issue as a prerequisite of collateralestoppel. Such a reading seems unwarranted.

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48 252 N.Y. 502, 170 N.E. 121 (1930).
49 *Id.* at 505, 170 N.E. at 122.
50 207 N.Y. 213, 100 N.E. 697 (1912).
51 *Id.* at 217-18, 100 N.E. at 697.

The most troublesome of the cases in this area is *Larme Estates v. Omnichrome Corp.*[52] In a former action in the city court a discharged employee had sued for salary to the date of discharge.[53] A settlement resulted and it was embodied in a consent judgment for the plaintiff for $500. In a later action by the same employee for salary from the discharge date to the end of the contract period, the plaintiff was allowed to plead collateral estoppel on the issue of the unjustifiability of the discharge. Perhaps the issue would have been precluded on a proper construction of the intention of the parties to the settlement agreement; but collateral estoppel was quite clearly not applicable, since the issue had not been actually litigated in the prior action. Quite uncalled for was the statement that

> [s]o far as the issues in the City Court action are concerned, the estoppel by this consent judgment as to matters involved and those which might have been litigated is as conclusive as if that judgment had been entered after a full trial.[54]

A more recent decision, *In re DeChiaro*,[55] gave preclusive effect to a fact concerning stock ownership that had arisen in a prior action which terminated in a consent judgment. The court correctly declared that

> the true criterion for determining the scope of an estoppel created by a consent judgment is the intention of the parties as gathered from all the circumstances, and, in particular, from the terms of the agreement upon which the judgment is based.[56]

However, the court went on to say: "There is no question . . . that in New York State a consent decree is just as conclusive and binding on the parties as one rendered after a contest."[57] Thus, the decision in part rested on a purported rule of res judicata law. This seems erroneous, for the rule requires that a fact have been actually litigated before collateral estoppel can attach, and there was no contest about the stock ownership in the earlier *DeChiaro* proceeding.

Particularly sound is the position taken by Professor Fleming James, Jr., that ascribing estoppel effect to consent judgments based on settlements of lawsuits by agreement will tend to retard amicable settlements, for the litigants will be fearful of binding themselves on issues

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52 250 App. Div. 538, 294 N.Y.S. 861 (1st Dep't), *aff'd*, 275 N.Y. 426, 10 N.E.2d 793 (1937).

53 For simplicity in identifying the litigants this discussion omits various assignments.

54 250 App. Div. at 540, 294 N.Y.S. at 863.

55 35 Misc. 2d 485, 230 N.Y.S.2d 604 (Sup. Ct. Nassau County 1962).

56 *Id.* at 487-88, 230 N.Y.S.2d at 608.

57 *Id.* at 486, 230 N.Y.S.2d at 607.

that cannot yet be seen.[58] He is correct to urge that only when an intention to be collaterally bound appears from the language of the agreement or is manifest from other positive evidence should an estoppel be raised. The rules of res judicata are not a proper basis for precluding facts that may have lurked in the background of consent judgments. This particularly is true in the typical automobile collision case, for the insurance company has the power to settle a claim against its insured without regard to the insured's interest in maintaining an action for injuries he sustained in the accident.[59]

If the contrary pronouncements made intermittently by the New York courts were taken at face in automobile negligence cases — as they apparently are not — or if they were applied more forcefully in other situations, the problem would call for a drastic remedy.

3. Admissions in Pleadings

While consistency with the position that default judgments may raise collateral estoppels might appear to require giving similar effect to matters admitted in pleadings, meager case authority in New York holds to the contrary. In *Rosenthal v. Equitable Life Assurance Society*,[60] the court declared that "the doctrine of estoppel is inapplicable" to an issue not litigated in a former action, although the complaint had raised it. The action was for the proceeds of various life insurance policies on the deceased insured. The company's partial defense was that the insured had misstated his age in the application, lowering it by four years. In a former suit the insured had claimed disability benefits based upon his then age, which he had alleged in the complaint and which the company did not dispute, since the controversy related to another point. After much litigation, the insured prevailed. In denying conclusive effect to the former judgment on the issue of age, the court declared:

> It will be observed, however, that in the case we are reviewing the age of the decedent was not placed in issue in the former action .... The age of the insured was not litigated and determined in the former action, and so the doctrine of estoppel is inapplicable.[61]

Professors Weinstein, Korn and Miller take this sensible position:

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[58] *See* James, *Consent Judgment as Collateral Estoppel*, 108 U. PA. L. REV. 173, 191 (1959).

[59] *Cf.* Emery v. Litchard, 137 Misc. 885, 245 N.Y.S. 209 (Sup. Ct. Wyoming County 1930). *But cf.* Kelleher v. Lozzi, 7 N.J. 17, 80 A.2d 196 (1951), *disapproved in* 51 COLUM. L. REV. 1062 (1951).

[60] 254 App. Div. 205, 4 N.Y.S.2d 202 (2d Dep't 1938).

[61] *Id.* at 207, 4 N.Y.S.2d at 204.

"The result reached in the admission cases is quite proper and should be followed in the area of default judgments."[62]

C. Essential to the Former Determination: Which Issues Are Precluded from Relitigation?

Even if an issue which arises in the present suit is identical to one raised in a former suit between the same parties and even if it was actually litigated in the former action, it is not given preclusive effect unless it was "necessarily determined" in the first action. A common example of this problem is provided by an automobile personal injury case in which the court, sitting without a jury, expressly finds that there can be no recovery because even though defendant was negligent, plaintiff was contributorily negligent. In a later suit by the former defendant for his injuries, the finding that he was negligent is not given effect because it was not "necessary" or "essential" to the earlier judgment; that is, it did not contribute to or support the judgment. This point can be generalized: issues found *against* the prevailing party are not precluded from relitigation.[63]

As a corollary, if the determination made on each of several issues in the former suit was essential to the judgment, all issues are precluded from further contest.[64] Uncertainty regarding which of several grounds was determinative impairs the force of the estoppel, for as the Court of Appeals has asserted:

> [W]here a judgment may have proceeded upon either or any of two or more different and distinct facts, the party desiring to avail himself of the judgment as conclusive evidence upon some particular fact, must show affirmatively that it went upon that fact, or else the question is open for a new contention.[65]

"Ultimate" or "material." In addition to requiring the party asserting collateral estoppel to show that the issue was essential to the former judgment, many New York cases have declared that he must show that it was "ultimate" or "material" in both the former suit and in the present suit. The purpose of the limitation to "ultimate" matters is clear enough — to restrict the conclusive effect of a prior action based on a different cause of action to fully contested issues, thus minimizing the risk that they were wrongly determined.[66] As usual,

62 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5011.30 (1968). *See also* Note, *supra* note 28, at 655-56.

63 *See* Karameros v. Luther, 279 N.Y. 87, 17 N.E.2d 779 (1938); Purpora v. Coney Island Dairy Prod. Corp., 262 App. Div. 908, 28 N.Y.S.2d 1008 (2d Dep't 1941); Note, *supra* note 28, at 660-61; 36 N.Y.U.L. REV. 522 (1961).

64 Salav v. Ross, 155 N.Y.S.2d 841 (Sup. Ct. Queens County 1956).

65 Lewis v. Ocean Nav. & Pier Co., 125 N.Y. 341, 348, 26 N.E. 301, 303 (1891).

66 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5011.29 (1968).

the rub is to give useful meaning to the word "ultimate." In *King v. Chase*,[67] a much-cited decision, the New Hampshire court advanced a distinction based on whether the matter was truly in issue or only incidentally controverted. Later cases drew the line thus suggested between matters that had to be *pleaded* to state a cause of action (in theory, making them "ultimate" or "material") and those that were mere items to be *proved* ("evidentiary"). Judge Cardozo gave support to the distinction by declaring in *People ex rel. McCanliss v. McCanliss*: "Findings of evidentiary facts though germane to the proceeding in which they have been made, are not always conclusive in another as part of the thing adjudged. . . ."[68] Judge Learned Hand uttered the most famous definition of all, namely, that "ultimate" facts for estoppel purposes are those "upon whose combined occurrence the law raises the duty, or the right, in question" and "evidentiary" facts are those from which the existence of an "ultimate" fact can be inferred.[69]

Attempts to draw lines between an "evidentiary" fact or "mediate datum" (as Judge Hand put it) and "ultimate" issues have not been conspicuously successful. The first difficulty — and it is a formidable one — is to get agreement on exactly which issues are "ultimate" to a cause of action; but even when there is agreement, and even when the second cause of action contains the same "ultimate" issue, couched in the same words, it may rest upon different underlying facts or on different inferences from identical facts.

Hinchey v. Sellers[70] exposed some of the inadequacies of the attempted distinction between ultimate and evidentiary issues. The suit was for wrongful deaths in an automobile collision. In a former suit in New Hampshire against the car owners' insurer the plaintiffs had lost on the ground that the car had been driven at the time without the "permission" of the assureds within the intendment of that term in the liability policy. The meaning of the word "permission" was derived from Pennsylvania law, which governed the policy. Absence of permission rested upon an express finding by the trial court that when one Petell asked the son Sellers (one of the assureds) for the loan of the car, the latter said that "he would not lend him the car if O'Rourke was going with him." Then, contrary to Petell's assurances, O'Rourke was at the wheel of the car at the time of the fatal accident.

In a subsequent wrongful death action against the owners in New York, the question was whether the defendants were liable under

[67] 15 N.H. 9 (1844).

[68] 255 N.Y. 456, 459-60, 175 N.E. 129, 130 (1931).

[69] The Evergreens v. Nunan, 141 F.2d 927, 928 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944). *See also* RESTATEMENT OF JUDGMENTS § 68, comment *p*, at 312 (Supp. 1948).

[70] 7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959).

section 59 of the New York Vehicle and Traffic Law,[71] an issue which turned upon whether O'Rourke had driven with "permission" within the meaning of that statute. Obviously, the definition of permission is not identical in the Pennsylvania insurance policy and in the New York statute, because its meaning in the second context must be derived from differing policies and purposes. The New York Court of Appeals agreed that the ultimate issue was not the same in the two actions, but nevertheless ascribed collateral estoppel effect to the New Hampshire judgment, saying:

> While we agree with the Appellate Division that the ultimate legal issue involved in the instant case is not the same as the ultimate legal issue involved in the New Hampshire action, we disagree with its application of the collateral estoppel doctrine. It was found as the fact in the New Hampshire action that "the limitation upon the permission given in this case was that the car should not be used at all if O'Rourke was a passenger." This was not a fragmentary finding of an evidentiary fact, as the Appellate Division implied, but was a finding essential to the judgment, from which the resolution of the ultimate legal issue necessarily followed. It is perfectly clear from the record of the New Hampshire proceedings that the quoted factual finding was a necessary step in arriving at the final judgment, and, as Judge Learned Hand noted in *Evergreens v. Nuna* [sic] (141 F.2d 927, 928, cert. denied 323 U.S. 720), "It is of course well settled law that a fact, once decided in an earlier suit, is conclusively established between the parties [or their privies] in any later suit, provided it was necessary to the result in the first suit." (See, also, *People ex rel. McCanliss v. McCanliss*, 255 N.Y. 456, 459-460.)[72]

To make the estoppel effect of the former judgment turn on whether the finding in the first action of withheld consent was a "necessary step" or "necessary to the result," as the quotation declares, is transparently incorrect. It overlooks the settled rule that, *in addition* to being necessary, the precluded issue must be both identical and ultimate. But the Court was bemused by the coincidence that the "operative facts relating to 'permission' " were "exactly the same" in the two actions.[73] Does that mean that if there is identity in any underlying facts upon which the ultimate issue turns in the second action, collateral estoppel will apply to those facts? If so, the *Hinchey* case might be thought to repeal the requirement that an issue must be ultimate for the estoppel to apply; or else, that there is an exception to the rule

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[71] N.Y. VEH. & TRAF. LAW § 59 (McKinney 1960).

[72] 7 N.Y.2d at 293, 165 N.E.2d at 159, 197 N.Y.S.2d at 133.

[73] *Id.* at 294, 165 N.E.2d at 159, 197 N.Y.S.2d at 133.

in a case in which different ultimate issues are completely dependent upon a single underlying fact.

Clearly, the Court of Appeals reached the correct outcome in *Hinchey*, but its language could have been more carefully chosen. As pointed out by Professors Weinstein, Korn and Miller:

> A test that attempts to distinguish "ultimate" from "evidentiary" facts, is reminiscent of the semantic struggles under code pleading . . . and its value in the area of collateral estoppel is extremely dubious. The main problem is whether the issue of fact in the first case was so central to the dispute that we can be reasonably sure all parties had sufficient motive to litigate it fully and whether we can tell with certainty what was found by the first court.[74]

Since the tests of notice and certainty appear in the Court's view to have been passed in *Hinchey* and the risk of a wrong determination was minimized, collateral estoppel was rightly applied to the fact finding that Sellers withheld consent, and preclusion was properly imposed.

Two further points might be suggested: (1) The tests prescribed in the preceding quotation should apply not only to issues of "fact," but also to mixed questions of law and fact, such as the principal case clearly exemplifies; and (2) the collateral estoppel effect of the New Hampshire judgment should have been tested by the law of that state. Under the distinction made in *King v. Chase*,[75] it is possible an opposite result would have been called for in *Hinchey*.

This problem seems to be neither widespread enough nor urgent enough to require immediate legislation. In *Hinchey* the Court of Appeals did show, when it said that "plaintiffs had a full and complete opportunity to be heard" on the essential facts in New Hampshire, that it was not deciding the case on verbalistic distinctions, but on more basic considerations. In future cases, it no doubt will underline the correct criteria and clarify its reasoning.

IV. Persons Affected by Collateral Estoppel: Parties, Privies and Others

A. Original Parties and Their Privies

In New York *strangers* to a litigation may in a growing variety of circumstances use its findings to their advantage. The same is true for parties to the prior litigation, but unlike strangers, parties are bound by adverse findings. So are persons in "privity" with parties.

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74 5 Weinstein, Korn & Miller, New York Civil Practice ¶ 5011.29 (1968).
75 15 N.H. 9 (1844).

The simple definition of privity, given in *Haverhill v. International Railway*,[76] was "mutual or successive relationships to the same rights of property." This was shorthand for the traditional definition: "one who claims an interest in the subject-matter affected [by the judgment] *through* or *under* one of the parties," *i.e.*, either by inheritance, succession or purchase.[77] As time passed, the definition broadened still further to include also a person who controlled the conduct of the prior suit or who was represented in it. The more modern definition finds privity when a person is "[s]o identified in interest with another that he represents the same legal right."[78] While the definition is question-begging, it is better than one that spuriously suggests precision where none is possible.

An example of the privity doctrine at work is found in the holding that when all shareholders of a corporation are parties to an action, its results are binding in a second action upon the corporation as well as the individuals.[79]

Attempts to devise wide and embracing definitions of privity have produced a good deal of circular reasoning. Judge Goodrich was undoubtedly correct when he said that privity "is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata."[80] A more helpful approach might be to divide the cases into typical categories, each with its own rules developed from the decisions.[81] This would require a separate and extensive study.

B. Strangers to the Former Judgment

The use by a person of collateral estoppel arising out of a judgment to which he was not a party is the most active problem today in

[76] 217 App. Div. 521, 522, 217 N.Y.S. 522-23 (4th Dep't 1926), *aff'd*, 244 N.Y. 582, 155 N.E. 905 (1927).

[77] Cox, *Res Adjudicata: Who Entitled to Plead;* 9 VA. L. REG. (n.s.) 241, 242-43 (1923).

[78] 30A AM. JUR. *Judgments* § 399 (1958).

[79] *See In re* Shea, 309 N.Y. 605, 132 N.E.2d 864 (1956); McNamara v. Powell, 256 App. Div. 554, 11 N.Y.S.2d 491 (4th Dep't 1939) (corporation precluded from litigating a cause of action regarding patent infringement which had been decided adversely to its sole stockholder); S. H. Kress & Co. v. LPN 1st Ave. Corp., 37 Misc. 2d 570, 235 N.Y.S.2d 339 (Sup. Ct. N.Y. County 1962); Cohen v. Lewis, 31 Misc. 2d 689, 221 N.Y.S.2d 884 (Sup. Ct. N.Y. County 1961).

[80] Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir. 1950).

[81] Privity by representation would be illustrated by such New York cases as Campbell v. Nassau County, 274 App. Div. 929, 83 N.Y.S.2d 511 (2d Dep't 1948); Brewster v. First Trust & Deposit Co., 26 Misc. 2d 882, 206 N.Y.S.2d 5 (Sup. Ct. Onondaga County 1960); Cable v. Raftery, 65 N.Y.S.2d 513 (Sup. Ct. Westchester County 1945); Lyman v. Billy Rose Exposition Spectacles, Inc., 179 Misc. 512, 39 N.Y.S.2d 752 (Sup. Ct. N.Y. County 1943), *rev'd on other grounds*, 267 App. Div. 532, 47 N.Y.S.2d 266 (1st Dep't 1944); *In re* Sullivan's Will, 123 N.Y.S.2d 159 (Sur. Ct. Kings County 1953) (class action). *But cf. In re* Sullivan, 289 N.Y. 323, 45 N.E.2d 819 (1942), holding suit by a representative in his individual capacity not binding on those he represents.

the field of res judicata. In the past generation there has been a doctrinal development greatly expanding the situations in which collateral estoppel is available to a stranger to the judgment; and the end is not yet in sight.

Two rules — one with constitutional due process overtones and the other without — frame the problem. The first is that a person who was neither a party nor in privity with a party to a former action cannot be bound to his disadvantage by the resulting judgment because he did not have his day in court. The rationale of the rule was expressed by the United States Supreme Court in *Postal Telegraph Cable Co. v. Newport*:[82]

> The opportunity to be heard is an essential requisite of due process in judicial proceedings. . . . And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard . . . so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

In New York, *Neenan v. Woodside Astoria Transportation Co.*[83] is the prototype case for the application of the rule that strangers cannot be bound by collateral estoppel. In a prior action arising from an automobile collision with a bus, the auto driver, Huppman, sued the bus company and recovered a judgment on findings that the bus driver had been negligent and Huppman not. Then Mrs. Neenan, a passenger, sued Huppman and he pleaded the judgment exonerating him as a defense, urging an estoppel on the issue of his negligence. The Court of Appeals rejected his contention, declaring that the former judgment "was not *res judicata* as to the passenger, Mary Neenan, as she was not a party to that action" and was therefore "free to prove that Huppman was . . . negligent."[84] Obviously, the result was to open the door to inconsistent findings on the issue of Huppman's negligence, but that is a cost of due process.[85]

The consequence of the *Postal Telegraph* and *Neenan* rule is to foreclose absolutely the use of collateral estoppel against a stranger. This led logically to the "mutuality" principle which asserted that it was unfair to allow a stranger to use an earlier action's favorable findings when there could be no reciprocal use against him of unfavorable

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82 247 U.S. 464, 476 (1918).

83 261 N.Y. 159, 184 N.E. 744 (1933).

84 *Id.* at 161, 184 N.E. at 745.

85 *See also* Commissioners of State Ins. Fund v. Low, 3 N.Y.2d 590, 148 N.E.2d 136, 170 N.Y.S.2d 795 (1958).

findings. The history of the mutuality doctrine had been one of steady erosion by a series of exceptions created by case law.

> The basic thrust of the exceptions [was] to bypass mutuality when the particular issue or issues involved [had] been adequately litigated and it would [have been] fair to subject a particular litigant to the prior determination even though his adversary in the second action was not a formal party to the first action and [was] not bound by its result.[86]

After a slow, fitful process of case-by-case erosion had seriously undermined the mutuality edifice, the Court of Appeals, in 1967, toppled it completely in *B.R. DeWitt, Inc. v. Hall*,[87] pronouncing mutuality a "dead letter" and "inoperative." Today a stranger to a former suit may use its collateral estoppel effects not only as a shield, but as a sword, in a widening variety of circumstances. A retrospective view of these developments may help to gauge their strength and probable directions.

Most of the leading New York cases have involved motor vehicle collisions which produced suits and counter-suits for personal injury and property damage. A significant exception is *Israel v. Wood Dolson Co.*,[88] a commercial case in which a stranger to the first round of litigation was allowed to use a favorable finding to defeat the claim of a real estate broker who had previously brought suit against another party and had lost on the crucial issue. The Court reasoned that since Israel, in his first suit, had failed to prove that his contract had been breached, the present defendant could use the finding to defeat Israel's charge of inducement. The *Israel* decision was understood to mean that when a party sues as plaintiff in successive actions, the defendant in the later proceeding may preclude him from relitigating an issue previously determined adversely to the plaintiff.[89] It was immaterial that there was no mutuality and that the present defendant would not have been bound if the first action had gone the opposite way. The Court reasoned that a party who chose the time and forum to litigate an issue, as Israel had done, could be counted on to exert his maximum efforts to win. The public interest in preventing repetitious litigation justifies barring him from a second contest of the same issue, even

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86 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5011.38 (1968).

87 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

88 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956). For a discussion of this case, see text accompanying notes 19-20.

89 *See* Friedman v. Park Lane Motors, Inc., 18 App. Div. 2d 262, 238 N.Y.S.2d 973 (1st Dep't 1963); *cf.* Drier v. Randforce Amusement Corp., 17 Misc. 2d 389, 185 N.Y.S.2d 628 (Sup. Ct. Bronx County 1959).

though his second adversary would not have been similarly bound by a contrary result.

These considerations might have led New York courts to forthright adoption of the "successive plaintiff" exception to the mutuality doctrine save for the confusing effect of a line of automobile-caused personal injury cases. Years before the *Israel* decision, the New York courts had followed a different line of reasoning to allow *C*, the absent owner of a vehicle, to plead collateral estoppel defensively. They had done so under an exception to the mutuality principle that they thought applied only to "derivative liability" situations.

In *Good Health Dairy Products Corp. v. Emery*,[90] collateral estoppel was allowed even though the circumstances did not involve a persistent, unsuccessful plaintiff. William Emery, driving his mother's car, had been in an accident with the dairy's truck and consequently sued the dairy and its driver for personal injuries. William prevailed, establishing negligence on the part of the dairy and its driver and freedom from negligence on his own part. Meanwhile the dairy and its driver had sued Mrs. Emery, who was not a party to the former action. The Court of Appeals allowed her to use collateral estoppel, declaring:

> It is true that Mary C. Emery, not being a party to the earlier actions, and not having had a chance to litigate her rights and liabilities, is not bound by the judgments entered therein, but, on the other hand, that is not a valid ground for allowing the plaintiffs to litigate anew the precise questions which were decided against them in a case in which they were parties.[91]

The Court was aware that allowing an estoppel would seriously weaken the mutuality principle, but it persisted:

> Although normally it is necessary that mutuality of estoppel exist, an exception is at times made where the party *against* whom the plea is raised was a party to the prior action and "had full opportunity to litigate the issue of its responsibility. . . ." Under such circumstances the judgment is held to be conclusive upon those who were parties to the action in which the judgment was rendered. Where a full opportunity has been 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 re-try these issues.[92]

Since *Good Health* did not involve a "successive plaintiff" situation, some thought it heralded the end of the mutuality requirement,

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[90] 275 N.Y. 14, 9 N.E.2d 758 (1937).
[91] *Id.* at 19, 9 N.E.2d at 760.
[92] *Id.* at 18, 9 N.E.2d at 759.

or at least a broad expansion of the availability of collateral estoppel.[93] Indeed, *DeWitt* declared twenty years later that *Good Health* "did much to undermine, if not destroy, the doctrine of mutuality."[94] However, only three years after the *Good Health* decision, Judge Finch, its author, limited its impact by explaining that it was dictated by the necessity of avoiding an absurd or anomalous inconsistency:

> In the *Good Health* case the liability of the owner was dependent upon a recovery from the person from whom the liability was derived. . . . If, despite the fact that the driver . . . had been found by the jury free from negligence, we had allowed a recovery against the owner, then the latter could have recovered over against the driver, surely an extraordinary result.[95]

The effort to limit *Good Health* and its doctrine either to derivative liability or successive plaintiff situations was unavailing. Indeed, it received a major setback in *Bishop v. Downs*.[96] The Downs' car, operated by one Scroger, had collided with a car owned and operated by Bishop. Downs sued for property damage and recovered. Bishop then sued for personal injuries, naming Scroger as a defendant. Although no anomaly was in prospect (since, even if Bishop recovered from Scroger, the latter, as driver, would not have had an indemnity right against Downs, the exonerated owner), the court allowed Scroger to set up the former judgment as collateral estoppel:

> The ultimate issue to be determined, namely the plaintiff's negligence, has been resolved and bars any possibility of recovery by plaintiff. "One who has had his day in court should not be permitted to litigate the question anew." (Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 18; also see, Hinchey v. Sellers, 7 N.Y.2d 287). . . . As operator of Downs' automobile, Scroger has the right to take advantage of the principle of *res judicata* as a defense. (See Israel v. Wood Dolson Co., 1 N.Y.2d 116; cf. Manard v. Hardware Mut. Cas. Co., 12 A.D.2d 29.)[97]

The Court of Appeals soon stumbled to an analogous conclusion, permitting the use of estoppel to defeat a claim that posed no danger of an anomalous result and that did not present the successive plaintiff pattern. *Cummings v. Dresher*,[98] while not ideally articulated, aligned

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93 *See* Elder v. New York & Pennsylvania Motor Express, Inc., 284 N.Y. 350, 353, 31 N.E.2d 188, 189 (1940).

94 19 N.Y.2d at 145, 225 N.E.2d at 197, 278 N.Y.S.2d at 599.

95 Elder v. New York & Pennsylvania Motor Express, Inc., 284 N.Y. 350, 353, 31 N.E.2d 188, 189 (1940).

96 18 App. Div. 2d 1127, 239 N.Y.S.2d 529 (4th Dep't 1963).

97 *Id.* at 1127, 239 N.Y.S.2d at 530. Subject, of course, to the other prerequisites such as that the issue was "actually litigated," *etc.*

98 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966).

the Court on the side of upholding a stranger's defensive use of estoppel against first suit parties who were formerly defendants.[99]

But when the stranger came into the second action as plaintiff and attempted to use a prior finding offensively, the New York courts resisted strenuously. Their battle cry was "mutuality," and *Elder v. New York & Pennsylvania Motor Express, Inc.*,[100] decided in 1940, emerged as the leading case. Elder was the driver of a United truck which collided with a truck owned by Pennsylvania (Penn). United subsequently sued Penn for property damage and in an independent action Penn counter-sued. These actions were consolidated and both were decided in favor of United. Elder then sued Penn, but was not allowed to use the former judgments offensively, since the Court declared that

> [t]he proposed abrogation of the rule of mutuality would seem to lead to a complete abrogation of the rule, even if the new exception now urged upon us should be confined to that class of cases where the defendant has been the plaintiff in the prior action.[101]

Elder held back the assault on mutuality for many years, though occasional skirmishes were lost. Two of these came in 1947 and both allowed offensive use of estoppel. *United Mutual Fire Insurance Co. v. Saeli*[102] was a complicated automobile collision case in which the Court of Appeals passively permitted a stranger to assert collateral estoppel as a plaintiff against an adversary found negligent in a prior action.[103] A more forthright instance was *Kinney v. State*,[104] which

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99 In the prior action Henry, a passenger in the Dresher car, sued both Cummings' driver and Martin, the owner of the other car, and won. Then Cummings sued the driver of the Dresher car and he was allowed to invoke collateral estoppel against the Cummings erstwhile defendants. The Court of Appeals majority was apparently confused by the fact that in the first action driver Bernard Dresher had sued along with Henry as a plaintiff and had lost. The jury (by a quirk) reported in the first suit that the Cummings' driver had been "guilty of negligence" but that Bernard Dresher had also been negligent. That, however, could not have produced an estoppel. *See, e.g.*, Cambria v. Jeffery, 307 Mass. 49, 29 N.E.2d 555 (1940).

100 284 N.Y. 350, 31 N.E.2d 188 (1940). *See also* Quatroche v. Consolidated Edison, 11 App. Div. 2d 665, 201 N.Y.S.2d 520 (1st Dep't 1960); Haverhill v. International Ry., 217 App. Div. 521, 217 N.Y.S. 522 (4th Dep't 1926), *aff'd mem.*, 244 N.Y. 582, 155 N.E. 905 (1927). Both latter cases involved a recurrent issue: in a two-car collision, *A*, driver of one car, sues the other driver, *B*, and prevails on issues of negligence. May a passenger, *C*, take advantage by estoppel of the finding that *B* was negligent? The cited cases said *no*, relying on mutuality. *But cf.* B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

101 284 N.Y. at 354, 31 N.E.2d at 190.

102 272 App. Div. 951, 71 N.Y.S.2d 696 (4th Dep't), *aff'd mem.*, 297 N.Y. 611, 75 N.E.2d 626 (1947).

103 This is not evident on the face of the decision. At one time offensive collateral estoppel was rare enough to inspire heroic and subtle analyses of obscure examples. *See* M. ROSENBERG & J. WEINSTEIN, ELEMENTS OF CIVIL PROCEDURE 976 n.2 (1962).

104 191 Misc. 128, 75 N.Y.S.2d 784 (Ct. Cl. 1947).

arose when a car owned by one Foley collided with another vehicle at a state highway intersection. Occupants of the Foley car sued the State of New York, claiming that the accident resulted from improper maintenance of a traffic signal at the intersection. The Foley passengers recovered on a finding that the State had been negligent in allowing the red bulb in the traffic signal to remain out for twenty-one hours. In the subsequent action the occupants of the second car, as plaintiffs against the State, were allowed to set up by collateral estoppel the finding as to the neglected bulb.

By 1964 the climate for offensive collateral estoppel had improved so markedly that the United States Court of Appeals for the Second Circuit, in a case involving job seniority, abandoned the prevailing view that the offensive use of collateral estoppel was to be automatically rejected. The court held that the second suit defendant would be foreclosed from contesting again a question it had enjoyed full and fair opportunity to litigate in an earlier suit by other parties.[105]

Finally, the New York Court of Appeals delivered the *coup de grace* to the mutuality doctrine in *B. R. DeWitt, Inc. v. Hall*.[106] Hall's jeep and DeWitt's cement-mix truck had collided. Subsequently, Farnum, the truck's operator, sued Hall for personal injuries and obtained judgment on a jury verdict of $5,000. DeWitt then sued for $8,250 damage to the truck and won a lower court summary judgment on its plea of res judicata as to liability. Four judges of the Court of Appeals could find no reason preventing offensive use of collateral estoppel and therefore pronounced that the principle of mutuality was dead (killed, apparently, by the "trend of our decisions"). They went on to name the circumstances which make an offensive use of estoppel appropriate:

> In this case, where the issues, as framed by the pleadings, were no broader and no different than those raised in the first lawsuit; where the defendant here offers no reason for not holding him to the determination in the first action; where it is unquestioned (and probably unquestionable) that the first action was defended with full vigor and opportunity to be heard; and where the plaintiff in the present action, the owner of the vehicle, derives his right to recovery from the plaintiff in the first action, the operator of said vehicle, although they do not technically stand in the relationship of privity, there is no reason either in policy or precedent to hold that the judgment in the *Farnum* case is not conclusive in the present action.[107]

105 Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964).
106 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).
107 *Id.* at 148, 225 N.E.2d at 199, 278 N.Y.S.2d at 601-02.

The essence of this passage is elusive. It seems to suggest that three defenses are open to the loser of the first suit if he intends to avoid collateral estoppel in the second: non-identity of the issues, lack of a full and fair hearing on them and absence of a "derivative" right in the plaintiff. Of these, it would appear that only the second has any merit.

For the dissenters, Judge Breitel wasted no tears on the demise of mutuality as an "absolute" test, but he argued vigorously that practical disadvantages related to insurance arrangements would attend an excessively free-wheeling utilization of collateral estoppel on offense in traffic cases. While Judge Breitel may be correct, it seems more likely that the *DeWitt* case will not scramble relationships between insurer and insured as much as *Schwartz v. Public Administrator*,[108] discussed below. The main impact of *DeWitt* will be in mass tort cases — bus, railway or airplane disasters, for example — and perhaps in commercial multi-claimant cases to which its reasoning may extend. If injured passengers in a bus collision sue *seriatim*, the bus company's successful defense against the negligence claim of the first, second or another passenger cannot exonerate it; but as soon as one adverse finding is rendered on the issue of negligence, the company's defense presumably falls in the remaining suits.

The reverberations of *B.R. DeWitt, Inc. v. Hall* are already being felt in the lower courts.[109] Defendants may try to strike back with preventive class actions against potential claimants, but it is doubtful that this maneuver will succeed in the present state of the law of res judicata in class actions, wherein only the presence of common questions serves to define the class. Whether the legislature will have to act depends on how the case law develops.

C. *Persons Bound by a Former Adjudication — Codefendants*

In 1931 the New York Court of Appeals, in *Glaser v. Huette*,[110] affirmed without opinion a decision that a former adjudication did not bar relitigation by present adversaries of an issue decided when they were coparties not in opposition to one another. The classic case was a suit by passenger *P* against drivers *D*-1 and *D*-2, with judgment going against both; followed by *D*-1's suit against *D*-2. Despite the spreading

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108 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

109 O'Connell v. Williams, 280 F. Supp. 182 (S.D.N.Y. 1967); Guarino v. Mine Safety Appliance Co., 31 App. Div. 2d 255, 297 N.Y.S.2d 639 (2d Dep't 1969); Bartolone v. Niagara Car & Truck Rentals, Inc., 29 App. Div. 2d 869, 288 N.Y.S.2d 312 (2d Dep't 1968); Card v. Budini, 29 App. Div. 2d 35, 285 N.Y.S.2d 734 (3d Dep't 1967); Cobbs v. Thomas, 55 Misc. 2d 800, 286 N.Y.S.2d 943 (Sup. Ct. Dutchess County 1968).

110 256 N.Y. 686, 177 N.E. 193, *aff'g* 232 App. Div. 119, 249 N.Y.S. 374 (1st Dep't 1931).

availability of collateral estoppel in favor of persons who were not even parties (let alone adversaries) in the first action, the *Glaser* rule withstood attacks in the Court of Appeals. As recently as 1962, in *Minkoff v. Brenner*,[111] the Court again affirmed without opinion a decision rejecting res judicata as a defense against a plaintiff who had been a losing codefendant in a former action.

This is not to say that the *Glaser* doctrine enjoyed uniform acceptance by the lower courts in New York. Somehow they found a way to allow erstwhile coparties to invoke collateral estoppel against each other.[112] The most cogent attack on the rule came in a concurring opinion by the late Justice Halpern in *Ordway v. White*.[113] He reasoned that *Israel v. Wood Dolson Co.* had undermined the *Glaser* doctrine by allowing a *stranger* to a former action to use collateral estoppel and declaring that "the fact that a party has not had his day in court on an issue *as against a particular litigant* is not decisive in determining whether the defense of *res judicata* is applicable."[114]

Judge Halpern urged that the doctrine of collateral estoppel is not confined to former adversaries, but that even if it were, the codefendants in an automobile negligence case satisfy that requirement because of their right to enforce contribution against each other and because the question of "active" versus "passive" negligence is alive between them. His views foreshadowed the 1969 decision in *Schwartz v. Public Administrator*,[115] which specifically overruled *Glaser* and *Minkoff*, relying pointedly on the just-quoted language from *Israel v. Wood Dolson Co.* In *Schwartz* the majority embraced the "full and fair opportunity" and the "identity of issue" requirements as the sole prerequisites for invoking collateral estoppel. Bowing to the need for a "prompt and non-repetitious judicial system," the Court congratulated itself on finding an "utterly fair" solution that would "reduce the number of inconsistent results which are always a blemish on the judicial system,"[116]

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111 10 N.Y.2d 1030, 180 N.E.2d 434, 225 N.Y.S.2d 47 (1962). *See also* Grande v. Torello, 12 App. Div. 2d 937, 210 N.Y.S.2d 562 (2d Dep't 1961); Friedman v. Salvati, 11 App. Div. 2d 104, 201 N.Y.S.2d 709 (1st Dep't 1960); Comment, *Collateral Estoppel and the Joint Defendant*, 24 ALBANY L. REV. 136 (1960).

112 Grande v. Torello, 12 App. Div. 2d 937, 210 N.Y.S.2d 562 (2d Dep't 1961); Friedman v. Salvati, 11 App. Div. 2d 104, 201 N.Y.S.2d 709 (1st Dep't 1960); Bennett v. Mitchell, 2 Misc. 2d 116, 151 N.Y.S.2d 574 (Sup. Ct. Livingston County 1956); Moyle v. Cronin, 18 Misc. 2d 465, 189 N.Y.S.2d 96 (Broome County Ct. 1959); Light v. Quinn, 17 Misc. 2d 1083, 189 N.Y.S.2d 94 (Broome County Ct. 1959); James v. Saul, 17 Misc. 2d 371, 184 N.Y.S.2d 934 (N.Y.C. Mun. Ct. 1958); Moran v. Lehman, 7 Misc. 2d 994, 157 N.Y.S.2d 684 (N.Y.C. Mun. Ct. 1956).

113 14 App. Div. 2d 498, 217 N.Y.S.2d 334 (4th Dep't 1961).

114 *Id.* at 500, 217 N.Y.S.2d at 338, *quoting* 1 N.Y.2d at 119, 134 N.E.2d at 99, 151 N.Y.S.2d at 4 (emphasis in original).

115 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

116 *Id.* at 74, 246 N.E.2d at 730, 298 N.Y.S.2d at 962.

and would fight court congestion and delay by inducing "a single trial of all claims growing out of the same accident."[117] All these bounties of fairness, economy and expedition will come about because of the disappearance of the *Glaser* rule, and "New York law will have arrived at a modern and stable statement of the law of *res judicata*."[118]

Some cynics may wonder whether Judge Keating's recipe for happy courts is too good to be true, and I am one of them. *Schwartz* has merely rediscovered a form of compulsory counterclaim, which less than a decade ago was rejected by the draftsmen of New York's Civil Practice Law and Rules on the ground that it would upset delicate relationships and balances in automobile liability insurance and litigation. Judge Keating foresees no major hardship in the prospect that injured drivers' rights *inter sese* will be decided in the shadows of the blameless passengers' claims, and as reflections of them. No doubt it is too soon to cry havoc over the *Schwartz* decision, much less to call for corrective legislation. Judge Keating may be right; but the coparty aspect of the automobile negligence res judicata problem will clearly bear watching over the next few years.

Conclusion

This review of the case law in New York on res judicta and collateral estoppel leaves the impression that in this area the courts more often than not apply the settled "rules" as if they comprised equitable principles. Fairness and justice in the particular case frequently seem more persuasive to the court than the need for uniform administration of announced rules. That great flexibility prevail in the administration of collateral estoppel concepts is probably desirable as a general matter. Across-the-board legislation that merely confirmed the flexible approach would be superfluous. A codification that rejected flexibility would be unwise.

However, there are enough significant flaws in the corpus of the case law of collateral estoppel to point to the need for further attention to the subject. An approach worth exploring is preparation of a series of studies in greater depth than here of specific topics that have been unsatisfactorily handled in the decided cases — consent and default judgments, for example — in order to determine the feasibility of dealing with them in a concrete way. Perhaps narrow statutory provisions like those treating the kindred subject of election of remedies in former Civil Practice Act sections 112-a to 112-h offer a useful model.

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[117] *Id.*, 246 N.E.2d at 731, 298 N.Y.S.2d at 962.

[118] *Id.* at 69, 246 N.E.2d at 727, 298 N.Y.S.2d at 958.