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Collateral Estoppel in Pennsylvania

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Comment

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I. Introduction

This comment reviews and evaluates the difficult subject of collateral estoppel in Pennsylvania. Its purpose is not to attempt to answer all questions arising in this intricate area of the law. The article seeks only to catalogue important Pennsylvania cases, comparing them to the trend in other jurisdictions, while pointing out apparent inconsistencies.[1]

Much of the difficulty in understanding when a prior adjudication may act as a bar to a later case, and whether that bar be partial or total, lies in the use and misuse of certain terminology. The discussion begins with an attempt to untangle the semanitcs involved, with an eye toward correct and precise usage throughout the article.

II. Res Judicata

A. *Definitions*

The term "res judicata" has two distinct and separate meanings. Res judicata, used in the general sense, embodies the entire area of the effect of a prior judgment on subsequent litigation. Implicit with the general definition are the fundamental concepts that give rise to such effects: (1) that those who have contested an issue shall be bound by that result;[2] and (2) that a litigant shall have only one day in court against another on the same cause of action.[3]

Res judicata is often used in a more concrete and precise context. It tells exactly when a former adjudication may act as an impediment to litigation of the present suit. Res judicata, in the precise sense, joined

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1. The format of this comment is borrowed from Rosenberg, *Collateral Estoppel in New York*, 44 St. John's L. Rev. 165 (1965). Rosenberg organized and discussed with unparalleled clarity a complex area of the law. Any attempt to improve on his approach would be senseless.

2. Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522, 525 (1931).

3. Brobston v. Darby Borough, 290 Pa. 331, 339, 138 A. 849, 851 (1927).

with collateral estoppel, produce what is loosely called "res judicata effect."

Much confusion arises due to the interchanging of the words and their definitions. Most harmful has been the careless use of res judicata and collateral estoppel as synonyms. Part of the problem can be blamed on the ambiguity of the words res judicata; the term "collateral estoppel" did not come on the scene until the publication of the first draft of the Restatement of Judgments.[4]

Within the confines of this article, res judicata, when used, will connote only its precise meaning, *i.e.*, those times when a prior adjudication acts as a total bar in a present suit. It will not embrace the aspect of collateral estoppel, *i.e.*, the doctrine concerned with the effect of a final judgment on subsequent litigation of a different cause of action involving some of the same issues determined in the inital action.[5]

B. *Requisites for Res Judicata*

For res judicata to be invoked in Pennsylvania, certain identities must be present in both the initial and subsequent suits. There must be (1) an identity of the thing sued for; (2) identity of the cause of action; (3) identity of person and parties to the action; and, (4) identity of the quality in the persons for or against whom the claim is made.[6]

Except for the identity of causes of action, there is little difficulty with any of the above principles. The cause of action concept ranks as one of the most difficult in the law to comprehend,[7] and its importance is paramount because a former judgment will not act as a total bar in a subsequent proceeding on a different cause of action.[8]

In Pennsylvania, causes of action are identical if the facts essential to maintenance in the first adjudication are the same as in the second.[9] Although the definition seems simple enough, the real difficulty lies in its application. To the practitioner, the test itself offers no substantial guidance and the pitfall lies in placing any real reliance on it. Many inconsistent findings arise because the factors that determine whether

4. Caterpillar Tractor Co. v. International Harvester Co., 120 F.2d 82, 84 n.4 (3d Cir. 1941).
5. *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 840 (1952).
6. American Surety Co. of N.Y. v. Dickson, 345 Pa. 328, 28 A.2d 316 (1942); Siegfried v. Boyd, 237 Pa. 55, 85 A. 72 (1912); Nevling v. Commercial Credit Co., 156 Pa. Super. 31, 39 A.2d 266 (1944).
7. Rosenberg, *supra* note 1, at 167.
8. Sheble v. Strong, 128 Pa. 315, 323, 18 A. 397, 399 (1889).
9. Nernst Lamp Co. v. Hill, 243 Pa. 448, 451, 90 A. 137, 138 (1914).

two causes of action are the same, "defy prescription."[10] "They [influencing factors] 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."[11] Besides the required presence of the four identities, one other crucial factor must be present before an earlier adjudication casts the res judicata effect on the second proceeding. No action becomes res judicata until it is settled by a final judgment.[12] Again a problem arises, as to what is a "final judgment." In Pennsylvania, the interpretation given this phrase is liberal, and the decisions of the Public Service Commission, though not a court of record, have been given res judicata effect.[13] Judgments of justices of the peace, unappealed, are res judicata as to matters within their jurisdiction,[14] while the same credence has been given to the judicial and quasi-judicial acts of public officers, performing within their province.[15] It must also be remembered that although a verdict has been rendered, res judicata effect is not applied until the final judgment is made, unless there is some type of acquiescence.[16]

C. *Effect of Res Judicata*

When a case has gone to judgment on the merits, and the cause of action arises in later litigation between the same parties or their privities, res judicata precludes attack upon any issue that was raised in the former suit, or that might have been raised.[17] However, res judicata does not extend to an incidental finding that might have arisen during the prior trial, which was not essential to the ultimate decision.[18]

In *McGunnegle v. Pittsburgh & Lake Erie R. R.*,[19] the doctrine that parties to a former trial are precluded from raising an issue that was or could have been raised there, if the causes of action are identical, was

10. Rosenberg, *supra* note 1, at 169.
11. *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).
12. Dougherty v. Lehigh Coal and Navigation Co., 202 Pa. 635, 638, 52 A. 18 (1902).
13. Pittsburgh and Lake Erie R.R. v. McKees Rocks Borough, 287 Pa. 311, 317, 135 A. 277, 229 (1926).
14. Gilboy v. Duryea Borough, 228 Pa. 252, 258-59, 77 A. 461, 463 (1910).
15. Dennison v. Payne, 293 F. 333, 341 (2d Cir. 1923).
16. Kannel v. Kennedy, 94 F.2d 487, 488 (3d Cir. 1937); Ludwig v. Greene, 88 Pa. Super. 137, 139 (1926).
17. Nernst Lamp Co. v. Hill, 243 Pa. 448, 451, 90 A. 137, 138 (1914).
18. Thal v. Krawitz, 365 Pa. 110, 113, 73 A.2d 376, 377-78 (1950); *In re* Lewis & Nelson's Appeal, 67 Pa. 153, 165 (1870).
19. 269 Pa. 404, 112 A. 553 (1921).

applied to the situation where the court failed to recognize all cognizable issues, and the injured party failed to appeal. The railroad was refused leave at a condemnation proceeding to withdraw a portion of land which was described in the bond. However, the judge later charged the jury not to consider the land sought to be withdrawn when deliberating on the question of damages.[20] There was no appeal.

In a later action by the landowner against the railroad for trespass on the land sought to have been withdrawn, *i.e.*, the same land that the judge told the jury not to consider when determining damages, the court dismissed the plaintiff's action on the basis of res judicata.[21] McGunnegle was precluded from raising this issue in a second trial, because the issue was dealt with, however inadequately, in the first action. An objection to the treatment by the trial judge of this issue, was something that *could have been raised* in the first adjudication. After conclusion of the prior trial, his only possible avenue to correct the judge's mistake was to appeal. Res judicata prevented another litigation.

Res judicata in the hands of a skilled practitioner presents no problem. But the attorney who carelessly throws together a lawsuit can later be overwhelmed by its effect. The key to favorable results is research, especially if the difficulty lies in the area of like causes of action.

III. Collateral Estoppel: Prerequisites

In the development and application of collateral estoppel, Pennsylvania courts have adhered to the general rule set forth in the Restatement of Judgments.[22] From this rule the courts have directly noted several basic requirements. Where the second action between the same parties (see discussion on parties below) is upon a different claim or demand, the judgment in the prior action operates as an estoppel in the second action only as to those matters in issue that (1) are identical; (2) were actually litigated; (3) were essential to the judgment (or decree, as the case may be); and, (4) were "material" to the adjudication. A

20. *Id.* at 408, 112 A. at 554.
21. *Id.* at 410, 112 A. at 554.
22. Restatement of Judgments § 68(1) (1942): "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action . . . ." *See* Thal v. Krawitz, 365 Pa. 110, 112, 73 A.2d 376, 377 (1950); Pilgrim Food Products Co. v. Filler Products, Inc., 393 Pa. 418, 421-22, 143 A.2d 47, 49 (1958). *See also* Girsh v. Girsh, 218 F. Supp. 888, 891 (E.D. Pa. 1963) (applying the law of Pennsylvania).

discussion of the application of these requirements by the Pennsylvania courts follows.

A. *Identity of Issues*

Clearly the doctrine of collateral estoppel does not apply unless the issue in the second proceeding is identical with that in the first. When the cause of action in the second suit is different from that in the first, collateral estoppel, not res judicata (complete bar) must be applied. But when the issue of the second suit is also different, collateral estoppel is not applied; there is no reason to preclude the issue from then being litigated.[23]

In *Larsen v. Larsen*,[24] the Pennsylvania Supreme Court determined that the plaintiff's (Mr. Larsen) prior action for divorce based upon indignities to the person did not necessarily bar the successful prosecution of his second suit brought on the grounds of desertion.[25] As long as the issue of desertion was not litigated in the prior action, there was no reason not to allow it to be litigated subsequently. The issue whether there were indignities to the person (Mr. Larsen) is not identical to the issue whether Mrs. Larsen deserted Mr. Larsen.[26]

A case often cited in Pennsylvania in which the issues were determined to be identical is *Pilgrim Food Products Company v. Filler Products*.[27] Pilgrim sued Filler in trespass to recover damages for the alleged fraud of Filler in claiming that it had the authority to license the use of a machine it delivered to Pilgrim.[28] In an earlier assumpsit action Filler had sued Pilgrim to recover the balance due under the contract for the use of the machine. Pilgrim's defense in this earlier suit was based in part on its belief that Filler did not have any legal right to license the machine. Filler received a directed verdict which was affirmed on appeal.[29] The court in the subsequent (trespass) proceeding determined that the issue of whether Filler had the authority to license the

23. Rosenberg, *supra* note 1, at 172.
24. 392 Pa. 709, 141 A.2d 353 (1958). Normally, the plaintiff would be prevented by res judicata from bringing this suit on the same cause of action—divorce. However, this principle does not apply to an action for divorce which is a proceeding in rem to affect a status.
25. *Id.* at 611, 141 A.2d at 354.
26. This case will be discussed more fully with regard to requirement (c): the matter must be essential to the judgment.
27. 393 Pa. 418, 143 A.2d 47 (1958).
28. *Id.* at 419, 143 A.2d at 48.
29. Filler Products, Inc. v. Corriere (Appeal of Pilgrim Food Products Company, Inc.), 381 Pa. 394, 113 A.2d 219 (1955).

machine had been litigated in the prior suit.[30] It was identical to and determinative of the issue of fraud now before the court.

The language and principles set forth in the *Pilgrim* case have been consistently adhered to by the Pennsylvania courts without any apparent difficulty.[31]

B. *Issues Actually Litigated—Default and Consent Judgments*

During a trial conflicting evidence is offered on an issue by both sides. The evidence must be illicited to establish or disprove either the plaintiff's case or that set up by the defendant. Where a question of fact is put in issue and is submitted for determination, and it is determined, the question of fact is "actually litigated," and the judgment is conclusive between the parties in a subsequent proceeding on a different cause of action.[32]

Frequently there is doubt as to whether a point or question was placed in issue, submitted to the court, and determined. Courts have reacted inconsistently with regard to judgments entered in default and consent judgments. It would appear that a default judgment (*i.e.*, defendant fails to submit an answer) should have no effect on subsequent litigation involving a different cause of action since no issues are actually litigated. Similarly, where no issues are litigated in an initial action which ends in a consent judgment, the judgment should be given no collateral estoppel effect. Pennsylvania cases hold to the contrary.

1. *Default Judgments*

The Restatement declares that a default judgment is not conclusive of issues in different actions since no issues are litigated.[33] Some courts hold that a default judgment finally determines issues pleaded by the complaint and necessary to the judgment.[34] Pennsylvania appears to extend the latter view.

Stradley v. Bath Portland Cement Company[35] is the primary case repeatedly referred to by the Pennsylvania courts. The case is ambiguous with regard to the doctrines of collateral estoppel and res judicata; it

30. 393 Pa. at 421, 143 A.2d at 49.
31. *See* Walker v. Ohio River Company, 428 Pa. 522, 239 A.2d 206 (1968); Ede v. Hahn, 192 Pa. Super. 534, 162 A.2d 89 (1960).
32. RESTATEMENT OF JUDGMENTS § 68, comment c at 296 (1942).
33. *Id.* comment f at 302.
34. *See, e.g.*, Woods v. Cannaday, 158 F.2d 184 (D.C. Cir. 1946); O'Hagan v. Kracke, 253 App. Div. 632, 3 N.Y.S.2d 401 (2d Dep't 1938). *Cf.* Riehle v. Margolies, 279 U.S. 218 (1929); Roberts v. Strauss, 108 N.Y.S.2d 733 (Sup. Ct. N.Y. County 1957).
35. 228 Pa. 108, 77 A. 242 (1910).

provides an unclear rule as to how far default judgments can be taken. Yet it is cited by later cases for the general proposition that a default judgment is "as valid as a judgment entered after trial on the issues."[36]

In *Stradley*, the plaintiff alleged that he was employed by the defendant for a year at a fixed salary, payable in monthly installments. He sued for his first month's salary (specific performance of the contarct), setting forth the contract and its terms, and received judgment for want of an affidavit of defense by default.[37] After the defendant paid the judgment for the first month's salary, the plaintiff, in a second suit, sued for damages arising from a breach of the entire contract.[38] The court held that the first suit was res judicata as to the material issues common to both actions:

> [A] judgment by consent or by default raises an estoppel just in the same way as a judgment after the court has exercised a judicial discretion in the matter.[39]
>
> . . . .
>
> In legal effect, while it stands, a judgment by default . . . is the same as upon a verdict.[40]

It is at this point *Stradley* becomes ambiguous. The defendant pointed out that the first suit was on the contract for one month's salary, and the second for damages arising from a breach of the contract.[41] The court recognized that the legal theory upon which the two actions were grounded was not the same (different cause of actions), but said it made no difference in the application of the doctrine of res judicata—"to such material issuable facts as are common to both."[42]

This language indicates that the court wanted to give collateral estoppel effect to the default judgment and limit the effect to those issues necessary to the result, and not those which might have been litigated. But then the court went on to say that the first judgment settles everything involved in the right to recover, "not only matters that were raised, but those which might have been raised."[43]

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36. Roberts v. Gibson, 214 Pa. Super. 220, 225, 251 A.2d 799, 802 (1969).
37. 228 Pa. at 110, 77 A. at 242.
38. *Id.*
39. *Id.* at 113, 77 A. at 243, *citing* South American and Mexican Co. v. Bank of England, 1 Chan. 37, 44 (L.R. 1895).
40. *Id.* at 114, 77 A. at 244, *citing* Orr v. Mercer County Mutual Fire Insurance Company, 114 Pa. 387, 392, 6 A. 697, 699 (1886).
41. *Id.* at 118, 77 A. at 245.
42. *Id.*
43. *Id.* Note the use of the word "raised" as opposed to the word "litigated." Perhaps this suggests the court's adoption of an exception (with regard to default judgments) to the requirement that a matter to be precluded must be "actually litigated."

A later Pennsylvania case expressed that so long as a judgment is not reversed or appealed it may not be questioned in any other case; "and the circumstance that there was no legal contest in reaching the judgment does not impair its effect."[44] The effect was evidently a determination of the issues pleaded by the complaint and necessary to the judgment, including matters that might have been raised and decided.[45]

This view was echoed in a 1919 case, *Exler v. Wickes Brothers.*[46] The court, citing *Stradley*, affirmed the proposition that a judgment by default is as conclusive as one entered on a verdict. The court continued, "a suit [referring to the default action] determines not only what was, but what might have been litigated therein."[47]

By giving such sweeping preclusive effect to default judgments, Pennsylvania has realistically ignored the doctrine of collateral estoppel. The result is that all matters in a default action have been held binding in any subsequent litigation involving those same facts, even though the facts were never fully litigated. It is easy to see why such application has been condemned by commentators.[48]

2. *Consent Judgments*

Where a plaintiff and defendant settle a dispute and a court enters a judgment upon the parties' consent, the cases are in conflict.[49] The question is whether this consent judgment binds the parties upon facts which were in issue in the action which was settled. Some courts reason that a consent judgment implies no determination by the court of any issues in the case.[50] Another line of cases treat the consent judgment as implying a determination of the issues in the same way as would a judgment entered on a jury verdict.[51] It does not appear that the Pennsylvania Supreme Court has been confronted with the typical case where two parties were given a consent judgment and one of them, in a dif-

44. Devlin v Piechoski, 374 Pa. 639, 99 A.2d 346 (1953).

45. In *Stradley* the court assumed that the default judgment was properly entered, and all material issuable facts stated (averred) or implied in the declaration were well pleaded.

46. 263 Pa. 150, 106 A. 233 (1919).

47. *Id.* at 154, 106 A. at 234, *citing* Long v. Lebanon National Bank, 211 Pa. 165, 60 A. 556 (1905).

48. *E.g.*, Rosenberg, *supra* note 1; 5 J. WEINSTEIN, H. KORN, AND A. MILLER, NEW YORK CIVIL PRACTICE § 5011.30, at 50-109 (1969); *Developments in the Law—Res Judicata, supra* note 5, at 840.

49. James, *Consent Judgments As Collateral Estoppel,* 108 U. PA. L. REV. 173 (1959).

50. *Cf.* United States v. International Bld'g. Co., 345 U.S. 502 (1953); Fruehauf Trailer Co. v. Gilmore, 167 F.2d 324 (10th Cir. 1948); Daniel v. Adorno, 107 A.2d 700 (D.C. Mun. App. Ct. 1954).

51. *See* Biggio v. Magee, 272 Mass. 185, 172 N.E. 336 (1930); Kelleher v. Lozzi, 7 N.J. 17, 80 A.2d 196 (1951).

ferent cause of action, tries to raise the consent judgment to collaterally estop litigation of the issues involved in the consent action.[52]

There are a few Pennsylvania cases that speak of the effect of a consent judgment in a subsequent trial. The District Court for the Eastern District of Pennsylvania, in *Moore v. Deal*,[53] made an effort to state and apply Pennsylvania law. In *Moore*, the parties had previously stipulated to the entry of a judgment in favor of Deal against Moore arising out of an automobile collision.[54] When Moore then brought an action against Deal, although the question of liability had not been *actually litigated*, the court granted Deal a summary judgment.[55] The district court cited two Pennsylvania cases, *Zampetti v. Cavanaugh*[56] and *Baran v. Baran*,[57] for the proposition that judgments rendered by the consent of the parties are valid, final, and conclusive between the parties in a subsequent action on a different claim as to issues actually determined, although not actually litigated in the prior action.[58]

The language used by the Pennsylvania courts in the two cited cases appears to give complete res judicata effect to consent judgments. In *Zampetti*, the court noted that when a consent decree is issued there is no legal determination by the court of the matters in controversy.[59] The court then declared that the consent decree bound the parties "with the same force and effect as if a final decree has been rendered after a full hearing upon the merits,"[60] and followed with the statement: "The fact that without the consent of the parties the court might not have rendered the judgment does not affect its effect as res judicata."[61] *Zampetti* recognized that no matters were legally determined, but still gave a res judicata effect to the consent decree. Evidently Pennsylvania waives the requirement that a matter be *actually litigated* to invoke collateral estoppel in an action ending in a consent judgment.

In neither *Zampetti* nor *Baran* did the courts speak of *issues actually*

52. In *Stradley v. Bath Portland Cement Co.*, 228 Pa. 108, 77 A. 242 (1910), although a default judgment case, the court, noting the similarity between English and United States decisions, cited language in *In South American and Mexican Company v. Bank of England*, 1 Chan. 37, 44 (L.R. 1895): "[A] judgment by consent is intended to put a stop to litigation between the parties just as much as is the judgment which results from the decision of the court after the matter has been fought out to the end."

53. 240 F. Supp. 1004 (E.D. Pa. 1965).

54. *Id.* at 1005.

55. *Id.* at 1007.

56. 406 Pa. 259, 176 A.2d 906 (1962).

57. 166 Pa. Super. 532, 72 A.2d 623 (1950).

58. 240 F. Supp. 1004, 1006 (E.D. Pa. 1956).

59. 406 Pa. at 265, 176 A.2d at 909.

60. *Id. citing* Baran v. Baran, 166 Pa. Super. 532, 537, 72 A.2d 623, 625 (1950).

61. 406 Pa. 259, 265, 176 A.2d 906, 909 (1962), Annot. 2 A.L.R. 2d 514, 528 (1948).

litigated for the purposes of collateral estoppel or res judicata.[62] The courts were concerned with establishing the *binding* effect of a consent decree or judgment. Yet the Pennsylvania district court in *Moore* interpreted the two cases, together with the general principle of the effect of final judgments in subsequent actions on a different claim, and concluded that issues actually determined in a prior action, be it a consent action or not, are concluded.[63] If *Moore* is followed, the effect will be to preclude facts that may lie hidden in the background of consent judgments. And, as in the facts of *Moore*, when parties consent, although there is no finding or concession that either party is negligent or free from negligence, they will be concluded on such issues as are *determined* by the consent judgment. When the parties to a consent judgment have not agreed to be bound in such a manner, the rules of collateral estoppel do not require that they should be. The Pennsylvania courts should take immediate steps to remedy this inconsistency.

C. *Essential to the Former Determination*

To give collateral estoppel effect to a matter in issue in a second suit, not only must the matter be identical to one raised in the former proceeding and actually litigated in it, but the matter must be essential to the judgment or necessarily included in it.[64] A common example of this requirement is seen by a situation involving contributory negligence. Suppose a judgment is rendered for a defendant on the basis of the plaintiff's contributory negligence. Assume also, that the defendant is found negligent by the trial court, sitting without a jury. Subsequently, if the defendant brings an action against the plaintiff, he is not precluded by the finding in the prior action that he was negligent; the judgment in that action turned on the finding that the plaintiff was contributorily negligent. The finding that the defendant was also negligent in the first action was unnecessary to the decision.[65]

In Pennsylvania, the problem is illustrated by the *Larsen*[66] case. The defendant, Mrs. Larsen, claimed that the judgment rendered against her husband in the earlier action for divorce on the ground of indig-

62. *See generally* United States v. International Bldg. Co., 345 U.S. 502, 506 (1953), where the Court declared that a consent judgment may involve a determination of questions of fact and law by the court. But, unless such a showing is made, the judgment is not effective for collateral estoppel purposes.

63. 240 F. Supp. 1004, 1006 (E.D. Pa. 1965).

64. *See* Girsh v. Girsh, 218 F. Supp. 888, 891 (E.D. Pa. 1963); Haefele v. Davis, 399 Pa. 504, 509, 160 A.2d 711, 713 (1960).

65. RESTATEMENT OF JUDGMENTS § 68, comment o, illustration 10 at 310 (1942).

66. Larsen v. Larsen, 392 Pa. 609, 141 A.2d 353 (1958). See note 24, *supra*.

nities created a collateral estoppel with regard to the act of desertion relied upon in the second proceeding.[67] Recognizing that the issues of fact which were actually litigated in the former action must also be essential to the judgment to be precluded from relitigation, the court rejected the defendant's contention. The court believed that the circumstances of the issue of desertion were but one link in the necessary chain of proof in the prior indignities suit. The jury in the first action could have believed the narration about the desertion and still felt there was not sufficient evidence to find indignities, and the dismissal of the first action would be proper.[68] The matter of desertion was not essential to the first judgment.

D. *Material to the Adjudication*

The Restatement declares that collateral estoppel is applicable only where the facts determined are in issue, but not to the determination of evidentiary facts.[69] Applying collateral estoppel to all matters, whether subsidiary or not, would greatly increase the possibility that an issue was wrongly determined.

Courts have expressed this principle using various terms but requiring basically the same elements.[70] Even the Pennsylvania courts have used different language to express this requirement that issues of fact must be *material* to the judgment to be concluded. A recent case phrased the issue by asking whether collateral estoppel precludes the relitigation of "material issues of fact."[71] Another Pennsylvania case phrased the requirement that "a judgment concludes, not only the technical fact in issue, but also every component fact necessarily involved in its determination."[72]

Courts tend to get hung up over the meaning of *material* or *fact in issue*.[73] Pennsylvania declares that before collateral estoppel effect can be given to a judgment in another suit:

67. *Id.* at 612, 141 A.2d at 355.
68. *Id.* at 613, 141 A.2d at 355.
69. RESTATEMENT OF JUDGMENTS, § 68, comment p, at 312 (1942).
70. Rosenberg, *supra* note 1, at 182, explains that New York cases call for an "ultimate" or "material" showing. Other courts have held that only "ultimate facts" as opposed to "mediate" or "evidentiary" facts are proved conclusively. *E.g.*, Paulos v. Janetakos, 46 N.M. 390, 129 P.2d 636 (1942). *See also* Annot., 142 A.L.R. 1243 (1943).
71. Walker v. Ohio River Company, 428 Pa. 552, 553, 239 A.2d 206, 208 (1968).
72. Rauwolf v. Glass, 184 Pa. 237, 240, 39 A. 79, 80 (1898). *See also* Schwan v. Kelly, 173 Pa. 65, 33 A. 1107 (1896), which held that any matter in issue which went to establish or disprove either the plaintiff's case or that set up by the defendant will be preceluded from litigation.
73. *See* Rosenberg, *supra* note 1, at 183, *discussing* Evergreens v. Nunan, 141 F.2d

> [I]t should appear either from the record, or aliunde [from elsewhere], that it must have rested on the precise question which it is sought again to agitate. Whether this is so or not may appear from the record itself, or it may be shown by evidence not inconsistent with the record.[74]

One of the tests Pennsylvania applies is whether the controverted matter appeared in the pleadings.[75]

The purpose of limiting collateral estoppel to *material* matters is to reduce the risk that the issues were wrongly determined.[76] Perhaps the best approach suggested to determine whether a matter is *material* in a lawsuit is:

> [W]hen it is clear from the record, pleadings or opinion that the determination of the fact in question was a necessary step in arriving at the final judgment, provided that at the time it was foreseeable that the fact might be of importance in future litigation.[77]

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

A. *Original Parties and Their Privities*

It is fundamental that the *same parties* and their *privities* are bound by a prior adjudication, if the elements of collateral estoppel are satisfied. The real problem arises in determining when two parties are in *privity.*

The definition of privity, given in *Central Pennsylvania Lumber Company v. Carter,*[78] was mutual or successive relationship to the right of property, title or estate. A more modern, general approach, states that privity involves a person so identified in interest with another that he represents the same legal right.[79]

An illustration will indicate the difficulty in applying this general definition to certain factual situations. A subsidiary of a parent company has been held to be sufficiently identified in interest with the parent company to the extent that it represented the same legal rights, and

927, 928 (2d Cir)., *cert. denied,* 323 U.S. 720 (1944); King v. Chase, 15 N.H. 9 (1844); People *ex rel.* McCanliss v. McCanliss, 255 N.Y. 456, 459-60, 175 N.E. 129, 130 (1931).

74. Haefele v. Davis, 399 Pa. 504, 508, 160 A.2d 711, 713 (1960), citing Head v. Meloney, 111 Pa. 99, 2 A. 195 (1886) which quotes Tams v. Lewis, 42 Pa. 402, 410 (1862).

75. Machen v. Budd Wheel Co. 294 Pa. 69, 84, 143 A. 482, 487 (1928).

76. Rosenberg, *supra* note 1, at 182.

77. *Developments in the Law—Res Judicata, supra* note 5, at 843.

78. 348 Pa. 429, 35 A.2d 282 (1944).

79. *See generally* 46 Am. Jur. 2d *Judgments* §§ 532-34 (1967).

therefore was bound by a judgment against the parent company. This was decided even though the subsidiary was not a party to the particular proceeding.[80] A president of a corporation, holder with his wife of 45% of its stock, however, was not so "identified in interest" with the corporation to be bound by a judgment against it for property damage.[81] The damage was to a vehicle driven by the president which collided with another automobile. The president, although he held managerial power and instructed the attorney to file an action on behalf of the corporation, was held not to be in privity with the corporation so as to make an adverse decision against the corporation a final judgment against him in his subsequent action against the same defendant for personal injuries sustained in the collision.[82]

Once again, only research of the cases, coupled with the rough outline provided by the definition, can assure any answers in this area.

B. *Strangers to the Former Judgment*

As troublesome as the concept of privity might be in certain situations, it is overshadowed by the difficulties arising when collateral estoppel is used by a stranger to the prior adjudication. The difficulties result not only from the complex legal principles involved, but also from the trend liberalizing the use of collateral estoppel as an effective tool by a stranger to the judgment. So encompassing has this trend been that many states have dismissed as unnecessary the former requirements imposed on strangers.[83]

Throughout the development of collateral estoppel and the present re-evaluation of the concepts involved, one principle, based on constitutional due process requirements, has remained constant. A person who was not a party or in privity with a party in the former action cannot be bound by a disadvantageous decision, because he has not had his day in court. A simple example clearly illustrates this concept. If A and B are passengers in a car driven by C which collides with one operated by D, a verdict exonerating D in an action instituted by A will not bind "B" in an action against D. "B" has not had his day in court.[84]

The fervent adherence to this principle can be highlighted by ex-

80. Van Brode Milling Co. v. Kellog, 113 F. Supp. 845, 847 (D.C. Del. 1953).
81. Wolf v. Paving Supply & Equipment Co., 154 A.2d 544 (1959).
82. *Id.* at 546.
83. *See* B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).
84. RESTATEMENT OF JUDGMENTS § 93, comment d, illustration 15 at 466 (1942).

amination of *Makariw v. Rinard*,[85] a federal district court case, applying Pennsylvania law. Rinard, the defendant, brought his recently purchased automobile back to YBH Sales & Service, Inc. He was requested to accompany Makariw, the plaintiff's decedent and a mechanic at YBH, on a road test. While Rinard was in the driver's seat, and Makariw alongside, the car struck a pothole, skidded into another car and then an embankment. Makariw was killed, and Rinard seriously injured. Rinard sued YBH contending that their employee, Makariw, was negligent, and that this negligence was the proximate cause of the accident. Rinard recovered. As defendant in an action instituted by Makariw, Rinard sought the use of collateral estoppel as to the questions of his and Makariw's negligence. Although Rinard's recovery against YBH was based on Makariw's conduct, the court held that the relation of employer and employee does not confer upon the employer any power to represent or bind the employee.[86] Therefore the present plaintiff was not a party to the former action. He was entitled to his own day in court where he could assert his claims, and present his own defenses.[87]

The consequence of this maxim "everyone should have his day in court" is the prohibition of the use of collateral estoppel against a stranger to a former judgment. This put a defendant faced with multiple suits out of the same accident in a disadvantageous position. He can not use an advantageous decision determined in Case I against a second plaintiff, because plaintiff II has not had his day in court. It is also unfair to allow reciprocal use against him of a disadvantageous decision, if this was the outcome of the prior action. From this logic arose the famous mutuality principle. "The general rule has always been that no party can take advantage of a judgment or a decree if he would not also have been concluded by it if the same judgment or decree had been against his interest. . . ."[88]

The requirement of mutuality in the collateral estoppel area is closely related to the requisite identity of parties, needed to invoke the doctrine of res judicata. In both areas, only parties to the former judgment or their privities may take advantage or be bound by the first adjudication. In fact, the early pronouncements of mutuality were lumped together with the identity of parties requirement for res judi-

85. 336 F.2d 333 (3d Cir. 1964).
86. *Id.* at 336.
87. *Id.* at 335, *citing* Pesce v. Brecher, 302 Mass. 211, 19 N.E.2d 36 (1939).
88. Helmig v. Rockwell Mfg. Co., 389 Pa. 21, 32, 131 A.2d 622, 627 (1957), *citing* Walker v. City of Philadelphia, 195 Pa. 168, 45 A. 657 (1900); and Chandler's Appeal, 100 Pa. 262 (1882).

cata. In Pennsylvania, *Chandler's Appeal*[89] was one of the first cases recognizing the mutuality of estoppel rule as a corollary of the res judicata requirement of identity of parties. For many years this doctrine was repeated, but in Pennsylvania, even among the early decisions, the cases seemed to recognize the harshness of such a blind application of the requirement. There is a distinct strain of fairness and good judgment in the application of collateral estoppel and the view was toward the actual purpose to be attained by the proper use of these doctrines.[90] With this in mind, certain exceptions to the stringent mutuality requirement began to arise.

The Pennsylvania Supreme Court has held that the mere addition of another defendant in the second suit does not necessarily defeat the collateral estoppel effect. In *Slater v. Slater*[91] a bill in equity seeking cancellation of deeds presented the issue of the existence of a partnership between the plaintiff and one defendant at the time of purchase. The court stated that the prior decision in a suit by the plaintiff against the defendant for a partnership accounting, which determined the issue, was controlling against the additional defendant, joined because she held the contested property with the other defendant as tenants by the entireties.[92]

Another exception to the rule of mutuality exists where the liability of the defendant is altogether dependent upon the culpability of one in a prior suit, where the same plaintiff uses the same facts.[93] If defendant II's responsibility is dependent on the culpability of defendant I, who in a prior action by the same plaintiff for the same act has been judged not culpable, defendant II may have the benefit of that judgment as an estoppel, even though he would no have been bound by it had it been decided unfavorably.[94] In *Helmig v. Rockwell Manufacturing Company*,[95] Helmig brought an action in assumpsit for breach of contract. Rockwell prevailed. In a later action Helmig sued Rockwell and Bethlehem Steel Corporation in trespass alleging that they conspired to cancel the same contract which had been at issue in the first suit. The court held that res judicata barred the second suit against Rockwell.

89. 100 Pa. 262 (1882).
90. *See* Hochman v. Mortgage Finance Corp. of Pa., 289 Pa. 260, 263, 137 A. 252, 253 (1929).
91. 372 Pa. 519, 94 A.2d 750 (1953).
92. *Id.* at 522, 94 A.2d at 752.
93. Helmig v. Rockwell Mfg. Co., 389 Pa. 21, 32, 131 A.2d 622, 627 (1957), *citing* Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 127 (1912).
94. Brobston v. Darby Borough, 290 Pa. 331, 341, 138 A.849, 852 (1927).
95. 389 Pa. 21, 131 A.2d 622 (1957).

The court also found that the decision in case I exonerating Rockwell was dispositive of the case against Bethlehem. It would be anomolous to subject Bethlehem to suit as a co-conspirator when a prior decision conclusively decided that Rockwell did not wrongfully breach its contract with Helmig.

The third exception to Pennsylvania's mutuality requirement arises in the criminal area. Here the court has allowed the use of a criminal court verdict of guilty against the defendant for extortion in the plaintiff's civil suit to recover the money.[96] For our purposes, this case shows that a party has been allowed to take advantage of a judgment, even though he would not have been concluded by it if the decree had been unfavorable.

Outside of Pennsylvania, the modern trend is to discard, either partially or in toto, the mutuality requirement.[97] The remainder of this article focuses on the present position of the mutuality requirement in Pennsylvania. Since there is a scarcity of Pennsylvania cases, it will be necessary to resort to decisions in other jurisdictions in order to present the complete picture.

All states which have abandoned mutuality in the collateral estoppel area, whether wholly or in part, expressly or by implication, have one common requirement. A stranger to the judgment can invoke the doctrine only against one who was a party, or in privity with a party to the former judgment, and who had a full opportunity in the prior action to litigate the relevant issue.[98]

Those states which have lessened the mutuality requirement, although not abolishing it in toto, allow for the defensive use of a prior ruling by a stranger to that judgment. In an early Delaware decision, *Coca-Cola Company v. Pepsi-Cola Company*,[99] the court examined the mutuality requirement within the context of an attempted defensive use of a prior judgment by a stranger to that earlier proceeding. In suit I Coca-Cola charged certain stores with substitution of Pepsi-Cola for its product. It failed in substantiating that claim. In a later action, Coca-

96. Hurtt v. Stirone, 416 Pa. 493, 206 A.2d 624 (1965).
This illustrates a type of offensive use of collateral estoppel. It deals, at least partly, with the criminal area, and therefore is not within the scope of this article. It is advanced here merely to show one of the early exceptions to mutuality in Pennsylvania. For further discussion of the offensive use of collateral estoppel see the text accompanying note 105.

97. *See* B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

98. Zdanok v. Glidden Company, Durkee Famous Foods Division, 327 F.2d 944, 956 (2d Cir. 1964).

99. 36 Del. 124, 172 A. 260 (1934).

Cola attempted to collect on a reward offered by Pepsi-Cola for information leading to the detection of any dealer who substituted Pepsi-Cola for any other similarly priced drink. The information concerned the same distributors they had charged in the first action. Pepsi-Cola, as defendant, raised as a defense the adverse finding against Coca-Cola in the initial suit against the distributors. Recognizing that certain fundamental issues were identical in the two suits,[100] and that there was no privity between the defendants in the separate actions,[101] the court was squarely faced with the mutuality requirement. After distinguishing the situation in which due process requires all to have their day in court,[102] a factual situation not present here, the court used a public policy argument to eliminate the mutuality requirement in this particular case:

> The doctrine of res judicata [collateral estoppel] is primarily one of public policy and only secondarily of private benefit to individual litigants. It draws its strength not so much from the private advantage of the party seeking to invoke it, but its roots lie in the principle that public policy and welfare require a definite end to litigation when each of the parties has had a full, free and untrammelled opportunity of presenting all of the facts pertinent to the controversy.[103]

Coca-Cola was held to be bound by the adverse decision in the prior suit, even though a favorable finding could never have been used against Pepsi-Cola.

In some jurisdictions, the requirement of mutuality has been abolished completely. These states allow, not only the defensive use of a prior judgment by a stranger, but also the offensive use, *i.e.*, when a stranger to case I uses a determination from the judgment of case I against a party to that judgment in case II. Implicit within this offensive use is the concept that mutuality is a "dead letter."[104]

The leading case allowing the offensive use of the doctrine of collateral estoppel without requiring mutuality is *B. R. DeWitt, Incorporated v. Hall.*[105] The court held that a judgment recovered by the driver of a truck against the defendant for personal injuries arising from a col-

100. *Id.* at 127, 172 A. at 261.
101. *Id.* at 130, 172 A. at 263.
102. *Id.* at 130, 172 A. at 262.
103. *Id.*
104. 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).
105. 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

lision between the truck and defendant's jeep, precluded that same defendant, under the doctrine of collateral estoppel, from relitigating the issue of his negligence in a later suit instituted by the corporation who owned the truck, for damage to that truck.[106] The court cited the identity of issues, and the fact the first case was defended with full vigor as two of the reasons for granting the collateral estoppel effect to a stranger plaintiff.[107]

The impact of the allowance of the offensive use of collateral estoppel by a stranger to the former judgment is devastating. The advantages given to the plaintiff in mass tort cases, *i.e.*, an airplane crash, can be readily observed. Although a favorable disposition for the defendant airline can have no effect on a subsequent plaintiff's suit (because they did not have their day in court), once any plaintiff establishes negligence, the rest of the plaintiffs can "ride in on the coat tails" of that finding.[108] So great is the impact that some states allow the defensive use of collateral estoppel while forbidding the potent offensive weapon.[109]

Those states which permit the offensive use of collateral estoppel are aware of the harshness of such a rule on the same defendant in both suits. Where the mutuality requirement was once instituted to assure fairness, now the courts who have abolished the stringent requirement, have developed various standards that must be present before collateral estoppel can be invoked notwithstanding a lack of mutuality or privity. The courts consider whether the party adversely affected by collateral estoppel has had a fair opportunity to litigate the relevant issue,[110] and whether the first case was litigated strenuously and with vigor.[111] Other questions like whether an adequate defense was precluded by economic considerations,[112] and whether anomolous results will be created by abandonment of mutuality[113] are also relevant considerations before the court will approve of a stranger's use of a prior judgment.

The question remains, "Where does Pennsylvania stand in this rapidly fluctuating area?" As stated before, the cases in the collateral estoppel and mutuality sphere in this jurisdiction are sparse. Although

106. *Id.* at 146, 225 N.E.2d at 199, 287 N.Y.S.2d at 601-02.
107. *Id.*
108. Maryland v. Capital Airlines, Inc., 267 F. Supp. 298, 303-04 (D. Md. 1967).
109. *See* Adamson v. Hill, 202 Kan. 482, 449 P.2d 536 (1969); Albernaz v. Fall River, 346 Mass. 336, 191 N.E.2d 771 (1963).
110. Bruszewski v. United States, 181 F.2d 419, 421 (3d Cir. 1950).
111. Zdanok v. Glidden Company, Durkee Famous Foods Division, 327 F.2d 944, 956 (2d Cir. 1964).
112. Mackris v. Murray, 397 F.2d 74, 81 (6th Cir. 1968).
113. Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532, 540 (2d Cir. 1965).

Pennsylvania's initial entry into the efficacy of the mutuality requirement began slowly and orderly, the whole area has been thrown into turmoil.

In a 1966 case, *Posternak v. American Casualty Company*,[114] the Pennsylvania Supreme Court considered the defensive use of collateral estoppel and the mutuality requirement. The plaintiff in this assumpsit action was the owner of a building which had been recently destroyed by fire. Posternak claimed that he was insured by four policies of insurance, two issued by American Insurance Company of New Jersey, and two issued by American Casualty Company of Reading. After the two companies refused his claims, he instituted action against the New Jersey company in the Federal District Court for the Eastern District of Pennsylvania, and a separate action against the Reading-based company in the Court of Common Pleas, Philadelphia County.[115]

Both companies raised similar defenses, alleging that Perrin, the common broker for both policies, was not a licensed broker at the time, and that Perrin obtained the policies through fraudulent misrepresentations. It was also alleged that the policies were issued subsequent to the date of the fire.[116]

The action against American of New Jersey in the federal court came to trial first, with a final verdict in favor of American. The Reading company filed a petition requesting leave to amend its answer, seeking to invoke collateral estoppel. The trial court denied the motion, and on appeal the Supreme Court of Pennsylvania reversed.[117] Considering the question of mutuality of estoppel, the court stated that the Pennsylvania position is not so rigid and inflexible that it will defeat the right to assert collateral estoppel defensively in the amendment to the pleadings.[118] The court cited a long-recognized exception to the mutuality rule,[119] but declined to advance any concrete decision concerning the defensive use of collateral estoppel by a stranger, due to the unclear record of the initial proceeding.[120] Lacking in the record was the evidence as to what issues were decided in favor of the defendant New Jersey company in the earlier federal case. This was considered essential in any determination of whether the doctrine of collateral estoppel

114. 421 Pa. 21, 218 A.2d 350 (1966).
115. *Id.* at 23, 218 A.2d at 351.
116. *Id.*
117. *Id.* at 26, 218 A.2d at 352.
118. *Id.* at 25, 218 A.2d at 352.
119. *Id.*
120. *Id.* at 26, 218 A.2d at 352.

should be applied.[121] Although there is nothing conclusive in the decision as far as abandonment of mutuality, it is clear that the Pennsylvania Supreme Court does not consider the mutuality requirement sacred.

Armed with *Posternak* as the only relevant Pennsylvania precedent, and this certainty of questionable value, the Court of Appeals for the Third Circuit tackled the problem of the offensive use of collateral estoppel in Pennsylvania in *Provident Tradesmens Bank & Trust Company v. Lumbermens Mutual Casualty Company.*[122] A passenger car was loaned by the owner insured, Dutcher, to the driver Cionci. While Cionci was driving, the car collided with a truck driven by Smith. Killed in the crash were Cionci, Smith and Lynch, a passenger of Cionci. Harris, another passenger of Cionci, was injured.

The estate of Lynch, deceased passenger, brought an action for declaratory judgment against Dutcher's insurer Lumbermen and the estate of the driver Cionci, challenging Lumbermen's denial of coverage for the liability of Cionci's estate.[123] The denial claim was based on the contention that Cionci had deviated from the authorized use. The injured passenger Harris, and the truck driver's (Smith) estate were joined as plaintiffs, on motion by Lumbermen. The district court trial judge excluded against the Lynch and Smith estates any testimony of the insured, Dutcher, under the Pennsylvania Dead Man's Act, regarding the terms on which he loaned the car to its driver, Cionci.[124] The judge did allow such testimony concerning the surviving passenger, Harris. This dispute between Harris and Lumbermen, on whether Cionci had deviated from Dutcher's authorized use of the car, was submitted to the jury, which found in favor of Harris. The trial judge directed verdicts in favor of the Lynch and Smith estates because with Dutcher's testimony excluded, there was no evidence to rebut the presumption of authorized use, raised under Pennsylvania law.[125] On the insurer's appeal, the court of appeals held, *inter alia*, that Dutcher was an indispensable party under rule 19 of the Federal Rules of Civil Procedure, and that the district court could not decide the claims.[126] The Supreme Court rejected this reasoning, and remanded the case.[127]

121. *Id.*
122. 411 F.2d 88 (3d Cir. 1969).
123. *Id.* at 90.
124. *Id.*
125. *Id.*
126. Provident Tradesmens Bank & Trust Co. v. Lumbermens Mutual Casualty Co., 128, 365 F.2d 802 (3d Cir. 1966).
127. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

The court of appeals, on remand, rejected any attempt by Lumbermen to contest the issue of deviation from permissive use against the estates of Smith and Lynch, regardless of whom was right concerning the exclusion of Dutcher's testimony against the two decedents. Lumbermen argued that the district court judge was incorrect in excluding Dutcher's deviation testimony against the two estates by use of the Pennsylvania Dead Man's Act, even though the testimony had been entered against Harris, and Lumbermen had received an adverse decision. They sought introduction so they might relitigate the issue so far as concerned the estates of Smith and Lynch. Without the Dutcher testimony, there was no evidence on deviation, and the Pennsylvania presumption of permissive scope would insure a verdict on that issue for the decedents. Their only hope was relitigation and a possible finding inconsistent with that decided in the *Harris* action. Schematically the *Lumberman* case breaks down as such:

Smith (truck driver-deceased)
Lynch (car passenger-deceased)
Harris (car passenger-injured)
} v. Lumbermen (Dutcher's insurer)
Cionci (car driver)

Harris v. Lumbermen { testimony allowed
Harris wins

Smith and Lynch v. Lumbermen { testimony excluded
Smith and Lynch win

Lumbermen's position was based on mutuality. Since the insurer would not have been able to assert against the two estates a favorable judgment on the surviving passenger's claim—because the estates were not parties nor privities to the surviving passenger's claim—the insurer should not be bound as to the estates by an unfavorable judgment.

After citing *Bruszewski v. United States*,[128] the first of a line of federal cases rejecting mutuality, the court turned to the relevant Pennsylvania cases, the applicable law in this diversity case. However, there was no Pennsylvania decision in this area, and all the court had for guidance was *Posternak v. American Casualty Company*[129] and its language that

128. 181 F.2d 419 (3d Cir. 1950).
129. 421 Pa. 21, 218 A.2d 350 (1966).

the mere mention of mutuality would not defeat the right to assert collateral estoppel.[130]

With this as their only guidance, the federal court abolished the mutuality requirement, and held that Pennsylvania courts would permit the offensive use of collateral estoppel by a stranger to the prior judgment.[131]

To question or criticize this decision—one that declares Pennsylvania to be among the most liberally positioned states in this critical area—would be useless. The court had no real precedent, and perhaps its revolutionary decision, if followed, will spare Pennsylvania the long and timely process of evolution which other jurisdictions had to endure in order to rid themselves of the stringent mutuality requirement. The real spotlight should be placed on the language that must be considered crucial in light of continued abandonment of mutuality—"We, therefore, entertain no doubt that the Pennsylvania courts would recognize collateral estoppel in a case such as this, where the actual circumstances remove any uncertainty whether Lumbermens, against whom estoppel is asserted, had a full and fair opportunity to try the factual issue. . . ."[132]

A party to a prior litigation was once overly protected from any use of that litigation by a stranger to the prior proceeding by a fortress called mutuality. Now, apparently, that party has been stripped of this protection with the permitted offensive use of collateral estoppel by a stranger to the initial action. Another evolutionary process has begun. Its concern is how to determine if the party to the initial proceeding, against whom the estoppel is asserted, had a full and fair opportunity to litigate the factual issue.[133] This is the protection a prior litigant now has. It is not a fortress, but its confines seem adequate. If this can be assured, mutuality is truly a "dead letter."[134]

C. *Persons Bound by a Former Adjudication—Co-defendants*

In *Kimmel v. Yankee Lines*,[135] the Court of Appeals for the Third Circuit in applying Pennsylvania law, held that a verdict against two

130. *Id.* at 25, 218 A.2d at 352.
131. 411 F.2d 88, 95 (3d Cir. 1969).
132. *Id.*
133. For a discussion of the far reaching effects of collateral estoppel and the precautions that should be taken, *see* Talcott, Inc., v. Allahabad Bank, Ltd., 444 F.2d 451 (5th Cir. 1971).
134. 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).
135. 224 F.2d 644 (3d Cir. 1955).

joint defendants in a prior negligence suit, did not foreclose the negligence issue as to the co-defendants in a later action between themselves. Due to the lack of Pennsylvania precedent, the court relied heavily on § 82 of the Restatement of Judgments which says: "The rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings, as to their rights inter se upon matters which they did not litigate, or have an opportnuity to litigate, between themselves."[136] In the court's opinion, the two co-defendants in this case were not true adversaries, and collateral estoppel could not be a defense against a plaintiff who had been a losing co-defendant in a former action.[137]

The court distinguished this case from *Simodejka v. Williams*,[138] a suit which arose under Pennsylvania's third-party practice rule. The third-party rule declares that where a defendant in a damage action brings in an additional defendant, the defendant and additional de-defendant are adverse parties.[139] Combining the *Kimmel* and *Simodejka* cases with the Restatement language, it appears that in Pennsylvania, a co-defendant will not be bound by the findings in a prior adjudication as to the other defendant, but that an additional defendant will be.

As tenuous as this distinction may seem, the *Lumbermen* decision makes it even more precarious. If the mutuality requirement is truly abolished in Pennsylvania, is it decisive that a party has not had his day in court as against a particular litigant, or should the only question be whether the parties had a full and fair opportunity to litigate the precise issue in both cases before the collateral estoppel doctrine is invoked? The answer to this question and others will be found in future cases.

V. Conclusion

A review of the case law in Pennsylvania on collateral estoppel indicates that in this area the courts have maintained a consistency that is unpredictable. The cases speak in general terms of what is required in order to invoke the doctrine. When it appears that a situation falls within the ambit of the doctrine, Pennsylvania has made exceptions (*i.e.*, mutuality), or simply indicated by application that an element of col-

136. Restatement of Judgments § 82 (1942).
137. 224 F.2d 644, 645-46 (3d Cir. 1955).
138. 360 Pa. 332, 62 A.2d 17 (1948).
139. Pa. R. Civ. P. 2255.

lateral estoppel is not required in order to raise the rule (*i.e.*, default and consent judgment).

As pointed out, Pennsylvania case law is sparse concerning certain areas of collateral estoppel. It is possible that the courts haven't had the opportunity to express any uniform administration of the rules. The courts have been flexible in their limited attempts to apply collateral estoppel. As in New York, they seem to be concerned with fairness and justice[140] rather than uniformity or concreteness.

In Pennsylvania it is important in the next few years to develop a predictable, uniform set of rules consistent with the trend of considering equitable principles. Implicit within these rules should be a focus on realistic litigation factors rather than technical data. If this can be done, a most complex area of the law may become responsive to the modern concept of justice.

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140. Rosenberg, *supra* note 1, at 195.