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or deemed it amended if the sole error had been the failure to allege corporate status.

The practitioner should note that, although the court reversed the order granting the motion, it did so with leave to renew the motion on proper papers. It appears that the court was motivated by the cumulative effect of the errors rather than by their individual importance.

Collateral Estoppel: Unavailable to party where issue in subsequent suit was similar but not identical to that previously determined.

While *res judicata* serves to prevent the relitigation of a particular *cause of action* where there has been a final judgment on the merits, collateral estoppel insures that *issues* previously litigated and determined will be conclusive in a subsequent suit involving different causes of action or parties.¹¹⁸ Both are doctrines of repose and, although closely related, are technically distinct. For example, if *A* sues *B* for negligence and recovers, the doctrine of *res judicata* will bar any subsequent suit by *A* against *B* on the same cause of action. However, if, in the subsequent suit, *A* sues *B* on a different cause of action, but one in which an issue is identical with one in the previous suit, *res judicata* would not apply. Here, the doctrine of collateral estoppel would be used to preclude a relitigation of the issue.

Previously, the courts generally imposed a requirement of mutuality upon one seeking to interpose the doctrine of collateral estoppel. "It is a principle of general elementary law that the estoppel of a judgment must be mutual."¹¹⁹ This connotes that the party seeking to invoke the estoppel must have been either a party or privy to the suit in which the judgment was rendered.¹²⁰ Subject to several exceptions,¹²¹ the rule of mutuality was adhered to by the New York courts until the case of *Israel v. Wood Dolson Co.*¹²² was decided in 1956.

In *Israel*, the Court of Appeals allowed a defendant who had not been a party to the prior action to assert the previous determination of an issue in a subsequent suit. Rather than merely establishing a new exception to the rule of mutuality the Court stated that:

(Sup. Ct. Albany County 1964); *Hewitt v. Maass*, 41 Misc. 2d 894, 246 N.Y.S.2d 670 (Sup. Ct. Suffolk County 1964).

¹¹⁸ *McKinney's Sess. Law News*, June 25, 1965, A-262.

¹¹⁹ *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912).

¹²⁰ See 1B MOORE, *FEDERAL PRACTICE*, ¶ 0.412[1], at 1801 (2d ed. 1965).

¹²¹ See *id.* at ¶ 0.412[3], at 1813.

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

Our holding here is not to be treated as adding another general class of cases to the list of 'exceptions' to the rule requiring mutuality of estoppel. It is merely the announcement of the underlying principle which is found in the cases classed as 'exceptions' to the mutuality rule. . . . [T]his court recognized that in determining the applicability of the doctrine of *res judicata*¹²³ as a defense, the test to be applied is that of 'identity of issues.'¹²⁴

Therefore, the courts need not rely upon the "exceptions" to the mutuality rule, but may apply the "identity of issues" test as the sole determinant of whether or not to impose collateral estoppel. Thus far, it appears that the courts of New York are not ready to apply the *Israel* doctrine to cases in which the estoppel is sought to be used affirmatively.¹²⁵

Opponents of the mutuality requirement believe that the only necessary limitation on the conclusive force of a judgment is that the person sought to be bound must have had his day in court. Therefore, if *A* obtains a judgment against *B* and subsequently attempts to use it against *X*, who was neither party nor privy to the previous litigation, *X* is not bound because he has not had his day in court. However, in subsequent litigation between *X* and *B*, *B* has had his day in court on the issue with *A* and there is no valid reason why *X* cannot use *A*'s judgment to preclude *B* from relitigating issues previously determined.¹²⁶

However, those favoring mutuality contend that although *B* has had his day in court with respect to *A* he has had no opportunity to be heard in opposition to *X* and, therefore, has been denied his opportunity to litigate.¹²⁷

The argument in favor of mutuality appears to ignore the underlying assumption in the anti-mutuality view, viz., that the issue in both cases is identical. They are identical in so far as the issue determined in the prior action is essential to the determination of the subsequent action. For example, if *X* and *Y*, passengers in a car driven by *A*, are injured as a result of the alleged negligence of driver *B*, a recovery by *X* against *B* would indicate that *Y* should also recover against *B* without a relitigation of *B*'s negligence. If there is any question as to the identity of the issues *Y* would not be permitted to employ collateral estoppel.¹²⁸

¹²³ Although the court used the term "res judicata" it is evident from the rest of the discussion that the doctrine of collateral estoppel is that to which it was referring.

¹²⁴ *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 120, 134 N.E.2d 97, 99-100, 151 N.Y.S.2d 1, 5 (1956).

¹²⁵ See Justice Halpern's concurring opinion in *Ordway v. White*, 14 App. Div. 2d 498, 217 N.Y.S.2d 334 (4th Dep't 1961).

¹²⁶ 1B MOORE, *op. cit. supra* note 120, ¶ 0.412[1], at 1808.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*; see Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

In *Cummings v. Dresher*,¹²⁹ an interesting factual situation was presented for the investigation of the relative merits of these points of view. Here, *A*, *B*, and *X* were involved in an automobile accident. *X*, a passenger in the car *A* was driving, and *A* brought separate suits which were tried jointly against *B* in federal court. *A* was denied recovery because of his contributory negligence. The jury also concluded, albeit gratuitously, that *B* was negligent. *X* recovered in his action against *B* when the jury found *B* negligent. Subsequently, *B* commenced an action against *A* in the New York Supreme Court on facts arising from the same accident. The Appellate Division, Third Department, held that *A* could not assert the defense of collateral estoppel against *B* since, in the action of *A* against *B* the jury's finding as to *B*'s negligence was "gratuitous" and, in the action by *X* against *B*, the factors required for a passenger to recover against another car "are not the same as those required by the driver of his car."¹³⁰

The court's reasoning in regard to the jury's "gratuitous" holding in the prior litigation seems to be on firm ground. Since the jury had found that *A* was contributorily negligent, it need never have reached the question of *B*'s alleged negligence. This thesis is amply supported by the authorities.¹³¹

The court's position on the second point appears to rest upon more tenuous ground. The *Israel* case, in effect, seems to abolish mutuality as a requirement for the defensive assertion of collateral estoppel¹³² and substitutes therefore the identity of issues test.

The court in *Cummings* seemed to be of the opinion that the issue involved in the prior litigation was not the same as the one involved herein. It is difficult to perceive, without help by way of example from the court, a situation in which the driver of a car would be negligent as to the passenger of another car and not be concurrently negligent as to the driver.

A differentiation of issues can be drawn in the *Cummings* case, but it would appear to be based solely upon technical grounds and not to address itself to the practicalities of the situation. If *X* (passenger), sues *B* (driver of the other car), the issues are essentially: 1) *X*'s freedom from contributory negligence; and 2) *B*'s negligence. However, if *B* sues *A* (*X*'s driver) the issues are: 1) *B*'s freedom from contributory negligence; and 2) *A*'s negligence. Thus, it is apparent that the issues, although technically and defini-

¹²⁹ 24 App. Div. 2d 912, 264 N.Y.S.2d 430 (3d Dep't 1965), *affirming* 43 Misc. 2d 556, 251 N.Y.S.2d 598 (Sup. Ct. Schenectady County 1964).

¹³⁰ *Id.* at 913, 264 N.Y.S.2d at 431.

¹³¹ *Purpora v. Coney Island Dairy Prods. Corp.*, 262 App. Div. 908, 28 N.Y.S.2d 1008 (2d Dep't 1941).

¹³² *Civoru v. National Broadcasting Co.*, 261 F.2d 716, 718 (2d Cir. 1958).

tionally distinct,¹³³ are substantially the same. Practically speaking, *B*'s negligence in the first action would most assuredly be his contributory negligence in the second. Since the issue in the two cases is essentially the same, it would seem that the court should have allowed *A* to assert the defense of collateral estoppel. In addition, this view might be further supported by taking into account the jury's gratuitous holding as to *B*'s negligence. Although as the cases indicate, this would not, in and of itself, be a basis for the employment of collateral estoppel, it does lend support for the use of estoppel in this case. Since the modern liberal procedures on counterclaims will assure a day in court, the use of collateral estoppel in situations such as the one described might have the benefit of consolidating suits and reducing congested court calendars.

On the other hand, it is important to note certain practical considerations which might have adversely motivated the court. If the defense of collateral estoppel had been permitted herein, it is quite possible that injustices might result in numerous other situations. For example, if a bus containing forty passengers were to crash, injuring them, a suit by one passenger which was decided in favor of the bus company would automatically preclude the other thirty-nine. Thus, it is possible to envision the possibility of collusive suits. Moreover, an unreasonable burden might be placed upon those who decided to wait and to investigate the nature and extent of their injuries. Although these practical considerations probably influenced the court, the alternative conclusion, viz., the application of collateral estoppel and the prevention of repetitious litigation, seems preferable.

The practitioner should note, however, that although this case does not apply the mutuality requirement that was abolished in *Israel*, it does reveal that the courts will probably closely scrutinize and investigate the issues involved in light of the practical consequences of permitting collateral estoppel.

ARTICLE 41 — TRIAL BY A JURY

CPLR 4102: Motion to frame issues for jury trial abolished.

In *Brown v. Brown*,¹³⁴ a divorce action, petitioner utilized CPA procedure in an attempt to obtain a jury trial by applying to the court for an order framing the issues.¹³⁵ In refusing to grant petitioner's application, the court noted that application for an order formulating the issues to be tried by a jury was a cumbersome procedure which has been abolished in the CPLR.

¹³³ See PROSSER, TORTS § 64, at 427-30 (3d ed. 1964).

¹³⁴ 47 Misc. 2d 1046, 263 N.Y.S.2d 717 (Sup. Ct. N.Y. County 1965).

¹³⁵ CPA § 429.