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ing individual privacy in varying degree.[45] A magistrate will be confronted with the issue of what probable cause standard to use when a request for a warrant does not fit neatly into the criminal search-administrative inspection dichotomy. *Camara* could be read to establish a whole spectrum of probable cause tests. Under this reading in each individual case a set of standards would be applicable based upon the degree of public interest involved. Although this certainly was not the result intended by the Court, its decision to establish the dual standard leaves the magistrate considerable discretion as to the type of probable cause test applicable to each warrant request.

Through a conscientious effort by the magistrates to maintain consistent restrictions upon the showing of probable cause and responsible attitudes by the municipal agencies in seeking out warrants only when necessitated by a refused entry, it is possible to foresee satisfactory results without depreciating the fourth amendment's overall protections under the *Camara* inspection warrant system. However, to avoid any potential abuse of the fourth amendment's guarantees because of *Camara*'s vague guidelines, further delineation of the exact extent and limitations of the new probable cause standard must be forthcoming.

Estoppel: Affirmative Use of a Judgment by a Nonparty

Plaintiff's truck, operated by his employee, collided with a car owned and operated by defendant. In a prior action, the employee recovered a judgment against the defendant for personal injuries incurred in the collision. In the present action, plaintiff-owner sued defendant for property damage to his truck. The plaintiff moved for summary judgment on the ground that defendant's negligence had been conclusively determined in the prior suit. The New York Court of Appeals granted the motion, *holding* that the requirement of mutuality of estoppel, under which a prior judgment may be asserted only by parties or privies thereto, would no longer prevail in New York. *B. R. DeWitt, Inc. v. Hall*, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

Mutuality of estoppel is related to the broader doctrines of

45. A few examples of everyday invasions of privacy for which a warrant might have to be sought if entry were refused are: a truant officer seeking out a tardy pupil, conservation agents investigating possible game and fish violations, census takers or government agents doing research and surveys, or even the meter readers from the gas and water companies.

res judicata and collateral estoppel. Res judicata requires that parties to an action not relitigate the same cause of action once there has been an adjudication on the merits.[1] Collateral estoppel is applicable to bar reconsideration of issues of fact or law which were resolved in the first action when the later action is based upon a different cause from that asserted in the first proceeding.[2] The difference between the two principles is that res judicata precludes a party from litigating all matters which *might* have been determined in the former action, while collateral estoppel operates only with respect to those issues *actually* raised and adjudicated in the prior action.[3] Thus, a party must show that the issues as to which the collateral estoppel is urged are identical with those raised and resolved in the first action.[4]

Mutuality of estoppel is an additional requirement for the assertion of a prior judgment as collateral estoppel. It demands that a party seeking to assert a favorable prior judgment must have been an actual participant in or privy[5] to the judgment such that he would have been bound by an adverse determina-

1. This doctrine is often subdivided into the principles of merger and bar. If the judgment is rendered in favor of the plaintiff, the cause of action is said to be merged into the judgment, and the plaintiff cannot thereafter maintain a suit upon the original cause of action. If the judgment is in favor of the defendant, the original cause of action is said to be extinguished or barred by the judgment. *See* RESTATEMENT OF JUDGMENTS § 68, comment *a* (1942).

2. Messing v. Barr Corp., 148 F. Supp. 58 (E.D.N.Y. 1957); RESTATEMENT OF JUDGMENTS § 68, comment *a* (1942); Note, *Collateral Estoppel in New York*, 36 N.Y.U.L. REV. 1158, 1160 (1961); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1012 (1967).

3. Cromwell v. County of Sac, 94 U.S. 351, 353 (1877); Erbe v. Lincoln Rochester Trust Co., 3 N.Y.2d 321, 327, 144 N.E.2d 78, 81, 165 N.Y.S.2d 107, 112 (1957); Ripley v. Storer, 309 N.Y. 506, 132 N.E.2d 87 (1956); Schuylkill Fuel Corp. v. B & C Nieberg Realty Corp., 250 N.Y. 304, 307, 165 N.E. 456, 457 (1929); Application of Harris, 276 App. Div. 990, 991, 96 N.Y.S.2d 88, 92 (1950), *aff'd*, 302 N.Y. 752, 98 N.E.2d 884 (1951); Town of Hempstead v. Goldblatt, 19 Misc. 2d 176, 180, 189 N.Y.S.2d 577, 582-83 (Sup. Ct. 1959).

4. *See, e.g.*, Portland Gold Mining Co. v. Stratton's Independence, 158 F. 63 (8th Cir. 1907); Bernhard v. Bank of America, 19 Cal. 2d 813, 122 P.2d 892 (1942); Good Health Dairy Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937).

5. A privy within this rule is one who claims an interest in the subject matter affected by the judgment *through* or *under* one of the parties, *e.g.*, by inheritance, succession, or purchase. This interest must have been acquired before the rendition of judgment. *See* Sargent v. New Haven Steamboat Co., 65 Conn. 116, 126, 31 A. 543, 547 (1894); Womach v. City of St. Joseph, 201 Mo. 467, 100 S.W. 443 (1907); Taylor v. Sartorious, 130 Mo. App. 23, 40, 108 S.W. 1089, 1094 (1908).

tion.[6] Similarly, a litigant, even if a party or privy to the first action, may assert that judgment only against one who was a party to the action.[7] However, the justification for these two conditions is not the same. A defendant who is a stranger to the prior action is not bound adversely by the decision because due process requires that he have his day in court on all the issues.[8] But where a stranger seeks to assert a prior judgment against one who was a party thereto, the due process objection loses its force, provided that the issues are identical, since the defendant has had his day in court. The courts, however, have traditionally prohibited such use, simply because it is thought to be unfair to hold an adversary to a judgment by which the stranger would not be bound had the decision gone the other way.[9]

The mutuality requirement of collateral estoppel is of ancient origin,[10] and has generally been enforced by the courts.[11] Although the recent trend[12] has been toward enlarging the

6. MacAffer v. Boston & M.R.R., 268 N.Y. 400, 197 N.E. 328 (1935); Potter v. Emerol Mfg. Co., 275 App. Div. 265, 89 N.Y.S.2d 68 (1949); RESTATEMENT OF JUDGMENTS § 41 (1942).

7. Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 A. 260 (1934); Elder v. New York & Pa. Motor Express, Inc., 284 N.Y. 350, 31 N.E.2d 188 (1940); Haverhill v. International Ry., 217 App. Div. 521, 217 N.Y.S. 522 (1926); 1 A. FREEMAN, JUDGMENTS § 428 (5th ed. 1925) [hereinafter cited as FREEMAN].

8. *See* cases cited *supra* note 7.

9. Haverhill v. International Ry., 217 App. Div. 521, 217 N.Y.S. 522 (1926); FREEMAN § 407, at 887; Note, *Collateral Estoppel in New York*, 36 N.Y.U.L. REV. 1158, 1165-66 (1961).

10. *See* CHAND, A TREATISE ON THE LAW OF RES JUDICATA 183 n.4 (1894).

11. Bigelow v. Old Dominion Cooper Mining & Smelting Co., 225 U.S. 111, 127 (1912); Sayre v. Crews, 184 F.2d 723 (5th Cir. 1950); Bomar v. Keyes, 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947); McVeigh v. McGurren, 117 F.2d 672 (7th Cir. 1940), *cert. denied*, 313 U.S. 573 (1941); Gilman v. Gilman, 115 Vt. 49, 51 A.2d 46 (1947); Employers' Liab. Assur. Corp. v. Taylor, 164 Va. 103, 178 S.E. 772 (1935); RESTATEMENT OF JUDGMENTS § 94, comment *a* (1942).

12. The trend has undoubtedly been encouraged by continuing criticism of the doctrine by commentators. Professor Currie viewed the principle as a "tinkling cymbal, an empty and fatuous formula productive of more harm than good." Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 322 (1957).

The debate over mutuality is found in numerous law review articles. Opposing the doctrine, see Currie, *supra* at 281; Note, *Collateral Estoppel*, 35 TEXAS L. REV. 137 (1956); Note, *Mutuality of Collateral Estoppel*, 27 VA. L. REV. 955 (1940).

For a defense of the mutuality rule see Moore & Currier, *Mutuality and the Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961); Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 303-304 (1929); Seavey, *Res Judicata with Reference to Persons Neither Parties Nor Privies—*

classes of persons who may take advantage of collateral estoppel,[13] the mutuality doctrine ordinarily has been modified only when strict adherence to the principle would clearly be unjust. Thus, an exception to the requirement of mutuality has been recognized in the derivative liability situation[14] to avoid the anomalous possibility of recovery against the party secondarily liable after the person primarily liable has been exonerated.[15] Some courts recognize another exception where a litigant seeks to use a prior judgment defensively against one who was a party to the first action.[16] So long as the issues are identical, the plaintiff has already had his day in court on this matter, and public policy demands that repetitious litigation be avoided in this instance.[17]

Two California Cases, 57 HARV. L. REV. 98, 105 (1943); Note, *Mutuality in Collateral Estoppel: Never the Twain Shall Meet*, 37 MISS. L.J. 244 (1966); Note, *Res Judicata*, 54 HARV. L. REV. 889 (1941); Comment, 35 YALE L.J. 607, 611 (1926).

13. Portland Gold Mining Co. v. Stratton's Independence, 158 F. 63 (8th Cir. 1907); King v. Stuart Motor Co., 52 F. Supp. 727 (N.D. Ga. 1943); Charles H. Duell, Inc. v. Metro-Goldwyn-Mayer Corp., 12 Cal. App. 397, 17 P.2d 781 (1932); Carter v. Public Serv. Gas Co., 100 N.J.L. 374, 126 A. 456 (Ct. Err. & App. 1924); Griffin v. McBrayer, 252 N.C. 54, 112 S.E.2d 748 (1960); Brobston v. Darby, 290 Pa. 331, 138 A. 849 (1927).

14. Portland Gold Mining Co. v. Stratton's Independence, 158 F. 63 (8th Cir. 1907); Good Health Dairy Prod. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937); RESTATEMENT OF JUDGMENTS §§ 96-99 (1942); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Non Party*, 35 GEO. WASH. L. REV. 1010, 1015 (1967).

15. If the losing plaintiff in the first action were allowed to recover from the indemnitee in the subsequent litigation, it would mean either that the second defendant would lose his right of indemnity, or that the indemnitor would be held liable to his indemnitee after he had been exonerated from liability on the same claim by a valid judgment. F. JAMES, CIVIL PROCEDURE § 11.32 (1965); *see also* RESTATEMENT OF JUDGMENTS § 96, comment *a* (1942).

16. Bernhard v. Bank of America, 19 Cal. 2d 813, 122 P.2d 892 (1942); Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 A. 260 (1934); Good Health Dairy Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937).

17. *See* Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 A. 260 (1934) where the Coca-Cola company sued a dealer in soft drinks, alleging that the dealer had substituted Pepsi-Cola for Coca-Cola. The court held that no substitution had taken place. In a subsequent action, Coca-Cola sought a reward offered by Pepsi-Cola for information leading to the detection of any dealer substituting Pepsi-Cola for any other soft drink. The dealer implicated by Coca-Cola's information was the same as the party exonerated in the first suit. Since the issues were identical in both suits and a recovery by the plaintiff in the second action would be anomalous, the court permitted the defendant to assert the prior judgment as collateral estoppel. The decision implicitly left open the question of whether mutuality would be abandoned in cases where collateral estoppel is asserted offensively. *See* Note, *The Impacts*

In *DeWitt*, the issue presented was identical to that in the prior action.[18] Therefore, the only objection to use of the first action as collateral estoppel was lack of mutuality of estoppel. The court pointed out that although the general rule in New York required mutuality except where the prior judgment was asserted defensively, it had permitted affirmative use of a prior judgment in certain instances.[19] The court could not find any policy reason or precedent forbidding offensive use of a prior judgment, on the ground that mutuality was lacking, in any case where the issues were identical. Furthermore, the court felt that the recognition of many exceptions to the rule had so undermined its vitality as to require its complete abandonment. It noted that the primary concern in recent collateral estoppel decisions was centered on whether the issues were identical and not any hypertechnical rule of mutuality. In light of these decisions, the court stated, the time had come to abrogate the doctrine of mutuality and make identity of issues the sole determining factor in passing upon a plea of collateral estoppel.

Despite its attempt to characterize its opinion as the culmination of a trend toward abandonment of mutuality, the court's holding is a significant departure from, and an overruling of, prior New York law. It is true that the trend in New York with respect to the mutuality doctrine has been to enlarge the class of persons who may assert collateral estoppel.[20] It is also true that in a few isolated instances, New York had permitted the offensive use of a prior judgment.[21] However, the cases[22] that

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of Defensive and Offensive Assertion of Collateral Estoppel by a Non Party, 35 GEO. WASH. L. REV. 1010, 1019 (1967).

18. 19 N.Y.2d at 143, 225 N.E.2d at 197, 278 N.Y.S.2d at 597 (1967).

19. In Liberty Mut. Ins. Co. v. Colon & Co., 260 N.Y. 305, 183 N.E. 506 (1932), plaintiff insurance company sued defendant for causing the death of plaintiff's insured's employee. The court permitted plaintiff to assert a prior judgment in which the widow of the deceased had recovered damages for wrongful death against the same defendant. *See also* United Mut. Fire Ins. Co. v. Saeli, 297 N.Y. 611, 75 N.E.2d 626 (1946).

20. *See generally* Good Health Dairy Prod. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937); Elder v. New York & Pa. Motor Express, Inc., 284 N.Y. 350, 31 N.E.2d 188 (1940); Note, *Collateral Estoppel in New York*, 36 N.Y.U.L. REV. 1158 (1961).

21. *See* note 20 *supra*.

22. Cummings v. Dresler, 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S. 2d 976 (1966); Peare v. Griggs, 8 N.Y.2d 44, 167 N.E.2d 734, 201 N.Y.S.2d 326 (1960); Hinchey v. Sellers, 7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 126 (1959); Stratter v. Stratter, 2 N.Y.2d 668, 143 N.E.2d 10, 163 N.Y.S.2d 13 (1958); United Mut. Fire Ins. Co. v. Saeli, 297 N.Y. 611, 75 N.E.2d 626 (1947); Good Health Dairy Prod. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937); Liberty Mut. Ins. Co. v. Colon & Co., 260 N.Y. 305, 183 N.E. 506 (1932).

the court chose to treat as bridging decisions do not represent a trend toward abandonment of the rule, but rather recognitions of the generally accepted exceptions to it. In fact, one case[23] relied on by the court to illustrate the "trend" had been characterized earlier as a case in which "no attempt was made . . . to use it [the prior judgment] to establish liability affirmatively."[24]

While the court's use of precedent is questionable, its conclusion that there is no policy justification for the mutuality rule is sound. The only possible basis for requiring that both parties must be privy to a prior judgment before it can be asserted by one against the other as collateral estoppel is due process.[25] But as the court pointed out,[26] if the issues in a later action are identical with those of an earlier one, and the defendant has litigated them fully, there is no violation of due process in allowing the assertion of a prior judgment against him by a nonparty to the earlier action. The defendant against whom the judgment is asserted has had his day in court on these issues.

In some situations, however, customary notions of fairness, if not due process, may be violated by permitting affirmative use of a prior judgment by a nonparty. For example, if one hundred and fifty stock purchasers, induced to purchase through a fraudulent prospectus, each sued a defendant corporation separately,[27] the defendant could not employ a favorable judgment in the first action against the other plaintiffs.[28] If, however, the twentieth plaintiff won his action, all future plaintiffs could assert the judgment as collateral estoppel in subsequent actions against the corporation, since the latter was a party to the earlier litigation. Thus, while the abandonment of the mutuality rule does not necessarily violate due process requirements, it may raise serious questions of fairness.[29]

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

24. Elder v. New York & Pa. Motor Express, Inc., 284 N.Y. 350, 352, 31 N.E.2d 188, 190 (1940).

25. Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 126, 172 A. 260, 262 (1934); RESTATEMENT OF JUDGMENTS § 96(1), comment *a* at 473-74 (1942).

26. 19 N.Y.2d at 145, 225 N.E.2d at 197, 278 N.Y.S.2d at 599 (1967).

27. A similar illustration is posed in Currie, *supra* note 12, at 281.

28. The result is the same even with the abandonment of mutuality, since the assertion of a judgment *against* a nonparty who has never had his day in court will constitute a violation of due process.

29. In Note, *Mutuality in Collateral Estoppel: Never the Twain Shall Meet*, 37 MISS. L.J. 244, 249-53 (1966), the author suggests a solution to the multiple claimant problem. The party against whom the judgment is asserted should be able to introduce evidence showing that

Also, any contention that the court's holding will decrease litigation is questionable. While *DeWitt* illustrates that in some instances abandonment of mutuality will decrease litigation, situations can arise where abrogation of the requirement may result in more rather than less litigation.[30] Individuals who normally would not initiate an action, perhaps because their claims are small and somewhat questionable, might be encouraged to do so if they could rely upon a prior favorable judgment obtained by someone else.[31]

Furthermore, the length and scope of a lawsuit will most likely increase due to the abandonment of the mutuality requirement. Even when the cost is high and the claim is relatively insignificant, a party will litigate to the utmost since an adverse judgment will be available to an indeterminate number of persons to assert collaterally against him. This problem is especially acute since while the court indicated that the defendant must have been afforded the opportunity to litigate with "full vigor" in the first action, it did not offer guidelines as to what would constitute "full vigor." Therefore the effect of default judgments and actions for minimal damages is not clear.[32]

The abolition of the mutuality rule leaves two considerations for determining whether a plea of collateral estoppel should be permitted: whether the issues are identical in both actions, and whether the issues were litigated with full vigor by defendant in the first action. Proper resolution of the identity of issues question is especially important because now a defendant may be deprived of his day in court both as to the issues and as to his new adversary. Under prior law the defendant at least had an opportunity to face each adversary once. Yet *DeWitt* provides no guidelines for determining whether the issues are identical even though the New York courts have found this question difficult to resolve in the past.[33]

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he in fact did not litigate his claim fully in the prior suit. Under this view, the jury and not the judge would decide whether the plea is permissible. *See also* Note, *Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Non Party*, 35 GEO. WASH. L. REV. 1010, 1036 (1967).

30. *See* Moore & Currier, *supra* note 12, at 309.

31. *Id.*; Note, *Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Non Party*, 35 GEO. WASH. L. REV. 1010, 1033 (1967).

32. Professor James points out that most consent and default judgments are given no collateral estoppel effect. F. JAMES, CIVIL PROCEDURE § 11.31, at 596 n.6 (1965). *But see* Burke v. Hayden, 2 Misc. 2d 1040, 158 N.Y.S.2d 81 (Sup. Ct. 1956), where a prior default judgment granting reinstatement in day labor work was held conclusive on the issue of whether the initial appointment to the job was valid.

33. *See* People *ex rel.* Watchtower Bible & Tract Soc'y, Inc. v.

Courts, of course, have had to determine which issues are identical even when use of collateral estoppel demanded mutuality. But, since the parties were the same in both cases, and the same transaction was usually involved, the issues were relatively well-defined. Now that a prior judgment may be used by an indeterminate number of persons, the plea will be used more often, with less likelihood of clear identity of issues. Unfortunately, formulation of a detailed test of identity for application in all cases is probably not feasible due to the variety of contexts in which a plea of collateral estoppel may be raised. Moreover, general tests, while at first glance appealing, have proven unworkable in practice.[34] Due to the danger of an abuse of due process if the issues are not precisely identical in both actions, a particularized comparison of the issues and the contexts in which they arose will be necessary.[35]

The holding in the instant case further complicates the task of a judge faced with a plea of collateral estoppel by requiring that the defendant have litigated the issues in the prior action with "full vigor." Although the court provided no indication of what it meant by this phrase, it would seem to require at least

Haring, 286 App. Div. 676, 146 N.Y.S.2d 151 (1955) (court held that a prior judgment determining the issue that land was not devoted to nontaxable use was distinct from the issue of present use); McQuade v. Maidman, 207 Misc. 364, 137 N.Y.S.2d 910 (Sup. Ct. 1955). *But cf.* Murray, Inc. v. Fifth Madison Corp., 3 App. Div. 2d 430, 161 N.Y.S.2d 326 (1957), *aff'd mem.*, 4 N.Y.2d 932, 151 N.E.2d 357, 175 N.Y.S.2d 173 (1958). A prior determination of the relative values of space was held to be conclusive absent proof of changed circumstances.

34. Judge Learned Hand suggested that collateral estoppel "be limited to future controversies which could be thought reasonably in prospect when the first suit was tried." *See* Evergreens v. Nunan, 141 F.2d 927, 929 (2d Cir. 1944), *discussed in* Note, *Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Non Party*, 35 GEO. WASH. L. REV. 1010, 1053 (1967). A recent law review comment offered the following test: Collateral estoppel should be limited "to a finding of fact actually recognized by the parties as important and by the trier of fact as necessary to the first judgment, if its significance for future litigation was then reasonably foreseeable." Comment, 74 HARV. L. REV. 421, 423 (1960). Such vague and indefinite tests offer no aid to a court in deciding upon a particular plea of collateral estoppel.

35. A difference in the contexts in which apparently identical issues arise may be so significant that the issues are in fact not the same. The following hypothetical situation illustrates this: wife sues husband for separate maintenance on the ground that husband has a dangerous temper, offering evidence of husband's temper by proving that husband struck a neighbor's child. After a judgment in favor of the wife is rendered, the neighbor's child sues the husband for assault and battery. It is submitted that the difference in the contexts in the two cases requires that the earlier judgment not be afforded collateral estoppel effect.