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Richard D. Catenacci

John W. Beatty

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RECENT DECISIONS

EVIDENCE — NEWSMAN'S PRIVILEGE — STATUTE HELD TO PREVENT FORCED DISCLOSURE OF DOCUMENTS AND OTHER MATERIALS. — The *Philadelphia Evening and Sunday Bulletin* printed an article on alleged corruption in city government, "Fitzpatrick's Secret Talk to the DA is Bared," in which it was reported that the District Attorney had refused to make public transcripts of the interrogations of John J. Fitzpatrick, Democratic ward leader and former sergeant at arms of the City Council, but that the *Bulletin* now had access to them.[1] Upon refusal of the City Editor and General Manager to obey a subpoena duces tecum and to produce tape recordings, written statements, memoranda of interviews and other tangible evidence documenting this article, the Court of Quarter Sessions of the County of Philadelphia found them guilty of contempt. This court ruled that the privilege established by statute protecting the newsman's "source of information"

> protects a newsman only against the compulsory disclosure of the *identity of persons* and does *not* protect him or them against the compulsory disclosure of *documents or other inanimate materials.*[2]

The judgment was appealed on the ground that the Pennsylvania newsman's privilege statute exempting disclosure of "the source" included in its protection documents and other materials. The Pennsylvania Supreme Court, accepting appellants' interpretation of the statute, *held:* the orders of the Court of Quarter Sessions reversed and vacated the sentences. *In the Matter of Taylor,* 412 Pa. 32, 193 A.2d 181 (1963).

The *Taylor* case not only affects newspapermen of Pennsylvania but in a larger sense the press throughout the country.[3] It is only the second reported case to interpret a newsman's privilege statute[4] and is the first to interpret the phrase "source of information" which is the criteria used in eleven[5] of the twelve statutes.[6]

For more than three centuries it has been recognized as a fundamental maxim that the public has a right to every man's evidence.[7] Incident to this right is the corresponding duty to make requisite sacrifices of time, labor, privacy and often of knowledge one would preferably keep to himself in view of the disagreeable consequences of disclosure.[8] "The policy of the law is to require disclosure of all information by witnesses in order that justice might prevail."[9] Diametrically opposed is the policy "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public;"[10] consequently, to any extent that a rule of law is permitted to inhibit newsmen in obtaining information from those who desire confidentiality, the flow of news is diminished and the public's right to know suffers.[11]

> If newspapers were limited to publishing only such news as had the source identified, the usefulness of the press would be immeasurably damaged. Anonymity for the public official, the government employee in lower

1 Philadelphia Sunday Bulletin, Dec. 30, 1962.

2 In re Matter of Taylor, 412 Pa. 32, 193 A.2d 181, 183 (1963) (Emphasis added).

3 This fact is illustrated by the interest of *amicus curiae* American Newspaper Publishers' Association with a membership representing more than ninety per cent of the total daily and Sunday circulation of newspapers published in this country.

4 The other is State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (Sup. Ct. 1943).

5 *But see:* MICH. STAT. ANN. tit. 28, § 945 (1) (1954).

6 ALA. CODE ANN. tit. 7 § 370 (1960); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1962); ARK. STAT. ANN. § 43-917 (Supp. 1961); CAL. CIV. PROC. CODE § 1881 (6) (Supp. 1962); IND. ANN. STAT. § 2-1733 (Supp. 1962); KY. REV. STAT. § 421.100 (1955); MD. ANN. CODE, art. 35, § 2 (1957); MICH. STAT. ANN. § 28-945 (1) (1954); MONT. REV. CODES ANN. tit. 93, ch. 601-2 (Supp. 1961); N.J. STAT. ANN. § 2A:84A-21 and 2A:84A-29 (Supp. 1962); OHIO REV. CODE ANN. § 2739.12 (1958); PA. STAT. ANN. tit. 28 § 330 (1958).

7 8 WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961).

8 *Id.* at 72.

9 People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415, 416 (1936).

10 Associated Press v. United States, 326 U.S. 1, 20 (1945).

11 Brief For American Newspaper Publishers' Association as Amicus Curiae p. 5.

> ranks and for the private citizen is, when promised by the reporter, frequently the only key whose publication is in the public interest.[12]

The law of privilege is constantly straining to reconcile such conflicting policies. Where other policy considerations were deemed of greater interest the legislatures and courts ameliorated the strict general rule of full disclosure. The common law extended the privilege to lawyer-client[13] and husband-wife[14] communications while most legislatures have added priest-penitent[15] and doctor-patient[16] to the list. The most recent extension has been to journalists and accountants. In determining the scope of any of these privileges as with making the initial grant policy considerations must be carefully balanced.

It has been the constant policy of newsmen to keep their sources of information confidential,[17] a principle which is embodied in the newsman's Code of Ethics.[18] Perhaps the raison d'etre of this policy is the public benefit in keeping open the channels of news; possibly, it arises out of a professional pride in keeping confidences.[19] It has even been suggested that it is impelled not by altruistic reasons but rather by economic survival in a highly competitive field.[20]

Several notorious cases in the early thirties[21] where reporters were held in contempt and imprisoned for refusal to divulge the names of persons who supplied information spotlighted the newsman's privilege question. The plight of these latter-day Peter Zengers, dramatized by the press, aroused public opinion against the judicial attempts to compel breaches of confidences. Many legislatures considered newsman's privilege legislation,[22] and in the eleven-year period between 1933 and 1943, ten of the privilege statutes now in force were passed.[23] To date the legislatures of twelve states[24] have determined that this valuable right in the free flow of news will be protected by extending to newsmen the privilege of protecting "the source"[25] of their information from judicial inquiry.

It is the determination of the *limits* of this privilege that concerned the court in the instant case. Three alternatives are presented to the *Taylor* court: (1) to strictly construe the statute as in *Donovan* as protecting only the identity of the person who supplied the information; (2) to protect the identities of all persons mentioned explicitly or identified implicitly, by allowing an editing of the information before it must be presented to the court (a suggestion made by the Court of the Quarter Sessions); (3) to grant an all-inclusive privilege, embracing both identities and complete documents.

The Supreme Court of Pennsylvania in an unprecedented pursual of the last-named course held the Act must

> be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature which has placed the gathering and the protection of the source of news as of greater importance to the public interest and

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12 N.Y. Times, Feb. 12, 1949, p. 16, col. 2 (editorial).
13 Berd v. Lovelace, Cary 62, 21 Eng. Rep. 33 (Ch. 1577).
14 Hopkins v. Grimshaw, 165 U.S. 342 (1897).
15 8 WIGMORE, EVIDENCE § 2395 note 1, at 873-76 (McNaughton rev. 1961) cites and summarizes statutes.
16 *Id.,* § 2380 note 5, at 819-27 lists statutes.
17 See Editor and Publisher, Sept. 1, 1934, p. 9.
18 N.Y. Times, Feb. 28, 1942, p. 1 col. 2.
19 Editor and Publisher, *supra* note 17.
20 Note, 36 VA. L. REV. 61 (1950).
21 See People *ex rel.* Mooney v. Sheriff, *supra* note 9, for unreported cases. See also Editor and Publisher Sept. 1, 1934, p. 9; 45 YALE L. J. 357 (1936).
22 Attempts have been made to date to enact such legislation in thirteen other states. See Article, 9 CLEV. MAR. L. REV. 313 (1960).
23 Alabama (1935), Arizona (1937), Arkansas (1936), California (1935), Indiana (1941), Kentucky (1936), Maryland (1896), Michigan (1949), Montana (1943), New Jersey (1933), Ohio (1941), Pennsylvania (1937). See *supra* note 6 for citations.
24 See statutes cited note 6 *supra.*
25 These words are used in all but the Michigan statute, *supra* note 5.

> of more value to the public welfare than the disclosure of the alleged crime or the alleged criminal.[26]

The court's liberal construction included a document or other inanimate object as "a source of information," within the meaning of the statute.[27] In arriving at an interpretation there was no legislative history to rely on.[28] The absence of precedent gave the court carte blanche in construing statutory language. Certainly there was no mandate to construe it liberally.

While dictionaries[29] define *source* as one whom or that which supplied information, the courts[30] and law journals[31] have used the word synonymously with *person*. In fact the New York Law Revision Commission concluded that the only reason for granting the privilege is that protection of the *identity* of the informant is necessary to enable the newsman to obtain information for public dissemination.[32]

State v. Donovan[33] is the only other reported decision dealing with the interpretation of a newspaperman's privilege statute. As the New Jersey statute construed in *Donovan* is similar to the Pennsylvania statute one might expect the Pennsylvania court to give it serious consideration. Dictum in the majority opinion and the dissenting opinion in *Donovan* would have offered insight into the interpretation of "source." The dissenter construed the statute as "designed to avoid disclosure of the *name* of the person who supplied the information,"[34] while the majority opinion twice refers to "the author or source."[35] The court, however, feels the *Donovan* decision is inapposite because the New Jersey Supreme Court arrived at a restrictive interpretation by applying the rule that statutes in derogation of the common law must be strictly construed;[36] whereas the Pennsylvania Statutory Construction Act[37] provides that such rule will have no application to the laws of that state.[38]

In an unreported decision, *State v. Hamilton Owens*,[39] it was held that under the Maryland statute a newspaper reporter was privileged to decline to produce a document before the grand jury, but this court never defined "source."

While the extension of the privilege to employees of radio and television stations in 1959[40] evidences a legislative policy favorable to the extension of privilege, it seems that the phrase "source of information" was never intended by the legislature to grant such an all-inclusive privilege. It is submitted that the use of this particular phrase can more accurately be attributed to a parroting or pirating of the original Maryland statute than to a particular legislative intent to include documents and other inanimate objects within the statutory protection.

The mere fact that the communication was made in express confidence of a confidential relationship does not create a privilege. The "point of honor" has disappeared forever as a motive for recognizing a privilege.[41] The modern requisites for the establishment of privilege are embodied in Wigmore's classic formula:

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26 In re Matter of Taylor, *supra* note 2, at 186.

27 *Id.*, at 185-186. (Partly italicized in original.)

28 Brief For American Newspaper Publishers' Association as Amicus Curiae, p. 5.

29 MERRIAM-WEBSTER'S NEW INTERNATIONAL DICTIONARY, p. 2177 (3d ed. 1961); 10 OXFORD ENGLISH DICTIONARY, pp. 475-76 (1933).

30 State v. Donovan, *supra* note 4; Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956).

31 *E.g.*, *Indiana Legislation* — 1941, 17 IND. L. J. 162, 165 (1941); *Legislation*, 9 So. CAL. L. REV. 343 (1936).

32 NEW YORK LAW REVISION COMMISSION, Leg. Doc. No. 65(A), p. 27 (1949).

33 129 N.J.L. 478, 30 A.2d 421 (Sup. Ct. 1943).

34 *Id.* at 428 (Emphasis added).

35 *Id.* at 426.

36 *Ibid.*

37 Statutory Construction Act of May 28, 1937, PA. STAT. ANN. tit. 46 § 558 (1958).

38 In re Matter of Taylor, 412 Pa. 32, 193 A.2d 181 (1963).

39 No. 677 Misc. 1925, Circuit Court, Carroll County, Md., May 11, 1925.

40 PA. STAT. ANN., tit. 28, § 330 (1958).

41 See Duchess of Kingstons' Case, 20 How. St. Tr. 355, 586 (1776), Notable British Trials Series 256 (Melville ed. 1927).

> (1) The communications must originate in a *confidence* that they will not be disclosed. (2) The element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties. (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.* (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[42]

While a community might feel that a journalist privilege is beneficial and should be fostered, a re-evaluation must definitely follow a statutory interpretation which radically extends the privilege. Certainly when an unconditional privilege is granted as in the *Taylor* case compliance with the third and fourth Wigmorian requisites is questionable.

The legislature may have had reasons for using words which would include documents in the scope of the privilege. First, such documents on their face might reveal from whom they were obtained. Second, documents might disclose the names of other individuals who were sources of information obtained by newsmen.[43] Another possibility is that while the individual giving the information may not care about the disclosure of his own identity he might well wish to protect others whose names appear in the documents but whose identities have been assured him nondisclosure by the press.

If the courts (as the Court of Quarter Sessions of Philadelphia) permit the newsman to protect not only the name of the informant but also other identities included in, or subject to, disclosure by the documents which he has assured the informant would be protected, there is no reason for withholding the information itself. The information was conveyed to the newspaper for the purpose of publication. This alternative seems to be the farthest extension justified in reconciling the ambivalent policy considerations. Any further extension upsets the balance; the injury of disclosure is no longer greater than the benefit thereby gained.

The American Bar Association's Committee on the Improvement of the Law of Evidence[44] proposed that the correct tendency would be the narrowing of the scope of existing privileges. Significantly neither the Model Code of Evidence adopted in 1942 nor the Uniform Rules of Evidence approved in 1953 recognize this privilege.[45] In lieu of adequate supervision of the newspaper profession,[46] even staunch advocates of the privilege are reticent to make it too broad or general.[47] As every privilege is a roadblock in the search for truth, the extension of privilege must be cautiously limited to prevent serious obstacles in the path of justice. Thus the *Taylor* case appears to be an unnecessary and unwarranted extension which under the banner of a free and unfettered press may have even distorted "the legislative purpose of the free flow of news by giving newsmen the license to prevent news from ever reaching the public."[48]

Richard D. Catenacci

RES JUDICATA — COLLATERAL ESTOPPEL — DEFENDANT IS ESTOPPED TO RELITIGATE AN ISSUE DECIDED ADVERSELY TO HIM IN PRIOR ACTION, AS AGAINST PLAINTIFF NOT A PARTY TO THE PRIOR ACTION. — A group of five employees brought suit under Sec. 301 of the Labor Management Relations Act[1] against the Glidden Co. to establish their seniority rights, under a collective bargaining con-

42 8 WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961).
43 Brief for Appellants, Robert L. Taylor and Earl Selby, p. 5.
44 8 WIGMORE, EVIDENCE § 2286 (McNaughton rev. 1961).
45 *Id.* at 536-7.
46 See *Gallup, Further Consideration of a Privilege For Newsmen,* 14 ALBANY L. REV. 16 (1950).
47 NEW YORK LAW REVISION COMMISSION, *supra* note 32.
48 In re Matter of Taylor, *supra* note 38 (Dissenting opinion).

1 29 U.S.C. § 185.

tract, at a removed plant site. The issue was decided adversely to the Glidden Co.[2] Subsequently, a second group of approximately 160 employees, situated identically to the original five, sought to take advantage of the earlier determination by seeking similar relief. The U.S. Court of Appeals for the Second Circuit *held:* that the Glidden Co. was estopped to relitigate the interpretation of the collective bargaining agreement where it had been afforded a full hearing on that issue in the prior action, despite the company's offer to introduce new evidence relevant to construction of the contract. The fact that these plaintiffs were not parties to the original suit was held to be immaterial. *Zdanok* v. *Glidden Co.,* 327 F.2d 944 (2d Cir. 1964).

With this decision the Second Circuit has significantly expanded the number and types of situations in which persons may take advantage of determinations made in prior litigation to which they were not a party, added a new dimension to the law of collateral estoppel, and struck a severe blow at the by now somewhat anachronistic common law requirement of mutuality of estoppel.

The common statement of the doctrine of collateral estoppel is that when ". . . 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. . . ."[3] Res judicata is a more general rule by which a final judgment on the merits becomes conclusive between the parties in a subsequent suit on the same cause of action ". . . not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."[4] In the present case the question was one of collateral estoppel since it involved use of a prior determination in a *different* cause of action.[5]

The traditional and orthodox limitation on the reach of collateral estoppel is that it is available as a basis of a claim or a defense only as between the parties to the original action, or persons who are in privity with those parties.[6] It was thought rather unsporting to allow a person to take advantage of a judgment without having exposed himself to the risk of an adverse ruling had the case gone the other way.[7] This judicial feeling has been enshrined in one of those marvelously terse legal platitudes: "estoppels must be mutual."[8] The single generally recognized exception to this rule requiring mutuality and identity of parties involves situations in which the liability of one person is wholly dependent on the liability of another. Such relationships as indemnitor-indemnitee and master-servant typically fall within the dispensation.[9] The exemption is necessary to prevent the judicial embarrassment which would doubtless result from inconsistent decisions holding, for example, a master liable for his servant's negligence after the servant had been absolved. Thus, where there exists a relation with a possible liability over, the party so related can make use of a prior judgment in a different cause of action without having been himself a party to the action. However, no such relationship was present between the two groups of employees in the *Zdanok* case.

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2 Zdanok v. Glidden Co., 288 F.2d 99 (2d Cir. 1961).

3 RESTATEMENT, JUDGMENTS § 68 (1942).

4 Cromwell v. County of Sac, 94 U.S. 351, 352 (1876). See also Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955).

5 It seems that each employee has a separate and independent cause of action on the collective bargaining contract. See Smith v. Evening News Assn., 371 U.S. 195 (1962).

6 RESTATEMENT, JUDGMENTS § 93 (1942). See also Gilman v. Gilman, 115 Vt. 49, 51 A.2d 46 (1947).

7 See 1 FREEMAN, JUDGMENTS § 407, at 889 (5th ed. 1925).

8 *Id.* at 890. See also Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 127 (1912); Pittston Co. v. O'Hara, 191 Va. 886, 63 S.E. 2d 34 (1951).

9 See, *e.g.,* Davis v. Perryman, 225 Ark. 963, 286 S.W.2d 844 (1956); Myhra v. Park, 193 Minn. 290, 258 N.W. 515 (1935); Good Health Dairy Products Co. v. Emery, 275 N.Y. 14, 9 N.E. 2d 758 (1937).

There seems to be a growing dissatisfaction with the rule of mutuality of estoppel and the ungenerous exceptions so reluctantly allowed. One of the first opinions to articulate this discontent grew out of a suit against a retailer for substitution of Pepsi-Cola for Coca-Cola.[10] The Coca-Cola Co. lost, the court having found that there had been no substitution. The defeated but undaunted plaintiff then sued the Pepsi-Cola Co. on the basis of the same alleged substitution. The court apparently felt that this procedure placed far too great a strain on the fiber of Delaware's jurisprudence.

> [W]e are of the opinion that a plaintiff who deliberately selects his forum and there unsuccessfully presents his proofs, is bound by such adverse judgment in a second suit involving all the identical issues already decided. The requirement of mutuality must yield to public policy. To hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to re-open and re-try all the old issues each time he can obtain a new adversary not in privity with his former one.[11]

Several years after the *Coca-Cola* case, a root and branch attack on the rule of mutuality of estoppel was made in *Bernhard* v. *Bank of America*.[12] Following this lead a number of other courts have re-examined and limited the old rule to one extent or another.[13] By now the trend is tolerably clear, but this is not to say that it has been without its detractors.

> The rule of collateral estoppel may be described as a compromise between the interest of the litigant in pressing his claim and the interest of the public in bringing an end to one man's litigation. . . . But the rule does not go so far as to make the finding in one man's case in a personal action a conclusion of ultimate truth. A law suit is not a laboratory experiment for the discovery of physical laws of universal application but a means of settling a dispute between litigants. That which is settled as a fact between them . . . binds only the parties themselves and those who are in such relation to the parties as to be considered in privity with them.[14]

What are some of the fundamental factors which must be considered in evaluating the apparent direction of the newer cases, and more particularly the *Zdanok* case? When is it proper to allow a person to take advantage of a determination made in earlier adjudication on a different cause of action where the parties are no longer identical? It has been observed that due process will prohibit use of a prior determination to conclude a person who was neither party nor privy to the prior action and who for that reason has not had his day in court.

> The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided. . . . He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. . . . There is no compelling reason, however, for requiring

10 Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 Atl. 260 (1934).

11 *Id.* at 263.

12 Bernhard v. Bank of America Nat. Trust and Savings Assn., 19 Cal. 2d 807, 122 P.2d 892 (1942). Subsequently, the California Court of Appeals interpreted the Bernhard case as limited to its facts and not permitting offensive use of a prior judgment. Nevarov v. Caldwell, 161 Cal. App. 2d 744, 327 P.2d 111 (1958). It is suggested that this case reached the correct result but for the wrong reason. A father and son were both injured in an auto accident with the defendant. The son, who was a passenger, sued the defendant and won on the basis of defendant's negligence. In a later suit against the same defendant, the plaintiff father was not permitted to rely on the earlier determination of negligence. The case should not have been decided on the basis of "offensive use" of the prior determination, but rather should have turned on the fact that the issues in the two cases were not identical. The first suit did not establish the fact that the father was free from contributory negligence which would bar recovery by the father in the second action. The son could sue either of two concurrently negligent parties without concluding the parties as between themselves.

13 See, *e.g.*, Hawley v. Davenport, R.I. & N.W. Ry., 242 Iowa 17, 45 N.W. 2d 513 (1951); Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W. 2d 364 (1955); Israel v. Wood Dolson Co., 1 N.Y. 2d 116, 134 N.E. 2d 97, 151 N.Y. Supp. 2d 1 (1956).

14 Hornstein v. Kramer Bros. Freight Lines, 133 F.2d 143, 145 (3rd Cir. 1943).

> that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.[15]

Stated another way this means that the maximum constitutionally permissible scope of the collateral estoppel doctrine is that a prior determination of any issue may be available for use *by* one not a party, but only as *against* a party to the original action. Aside from this basic constitutional limitation, however, there are several policies which militate in favor of liberalization of rules governing availability of earlier determinations in subsequent actions. The first is the desire to bring an end to repetitious litigation and to finally dispose of controversies. The second is a felt need to have consistent treatment of identical questions. That is, likes should be treated alike. It would be difficult to justify a position which would allow a different construction of the contract in *Zdanok* for the second group of employees simply because they were not parties to the original suit. It is also of questionable propriety to force the later litigants to go through the expensive ritual of another trial to reaffirm an issue already thoroughly adjudicated. But, notwithstanding whatever could be said in defense of a system which would permit such multiple and potentially inconsistent relitigation, it does not appear that there is any basic unfairness in prohibiting it.

There are two principal objections to allowing the rule of collateral estoppel to run its constitutional cable's length and thus fill the area circumscribed by due process.[16] The first has to do with those situations in which, for tactical or economic reasons, a party has not pressed his claim or presented his defenses with all the vigor that he might wish to employ in a later action. It would seem unreasonable to conclude a party from ever re-opening a question, as against a new party, when the first judgment was not actually or fully contested. Such a holding would tend to force litigants to put forth maximum efforts in actions which they might otherwise be willing to concede, whenever there is a likelihood of subsequent suits involving the same issue. This difficulty is overcome by the simple expedient of limiting the availability of the earlier determination to those cases in which the party to be concluded has had a full and fair hearing on the merits of the issue.[17] The Restatement of Judgments, for example, restricts collateral estoppel to questions which have been "actually litigated and determined."[18]

The second of these objections is not so easily disposed of. The problem arises when a person is faced with the possibility of a large number of suits, all of which grow out of the same transaction, event, or occurrence, and all of which will turn on the same issue. The oft cited example is the train wreck which results in suits by one hundred passengers. Suppose that in the first suit there is a finding that the railroad was not negligent. To hold that the remaining ninety-nine plaintiffs are bound by this judgment would fly in the face of due process requirements. But what if there were a finding of negligence in the first suit; should the railroad be concluded in the subsequent ninety-nine actions? An even more anomalous case would be one in which the railroad prevailed in the first forty-nine suits but lost the fiftieth because of a sympathetic jury. Are the next fifty plaintiffs to be allowed to rely on that one judgment? If there is no way to distinguish and isolate the "railroad" cases, then the dispensation of *Bernhard* and *Zdanok* champions a foredoomed cause. But, it is suggested that there are legitimate and

15 Bernhard v. Bank of America Nat. Trust & Savings Assn., 19 Cal. 2d 807, 122 P.2d 892, 894 (1942).

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

17 The burden of persuasion that the issue in question was not fully or adequately contested in the prior action ought be placed on the original party against whom the plea is raised. A default judgment is a prima facie showing of a lack of hearing. In the *Zdanok* case the court made it clear that the Glidden Co. had a full hearing in the first suit. Zdanok v. Glidden Co., 327 F.2d 944, 956 (2d Cir. 1964).

18 RESTATEMENT, JUDGMENTS § 68 (1942).

critical distinctions, and that abrogation of the "mutuality of estoppel" rule does not necessarily entail acceptance of the "railroad" cases.

The classic article in this field[19] undertakes to analyze the availability of prior determinations to non-parties in terms of whether the party against whom the plea is asserted was plaintiff or defendant in the first action, which position he occupied in the subsequent action, and whether the plea of estoppel is asserted in an offensive or defensive mode. Using this rather mechanical technique in an effort to distinguish the "railroad" cases, the author concludes that "while the plea may be asserted by a defendant against one who was a plaintiff in the prior action, it may not be asserted by a plaintiff against one who was a defendant in the prior action."[20] This was a fair distillation of the cases up to that time, which, almost without exception, involved a disappointed plaintiff who had found a new defendant. However, it is squarely incompatible with *Zdanok,* which in turn, is indistinguishable (using this technique) from the "railroad" situation. That is, both are assertions of estoppel by a plaintiff against a defendant who was also the defendant in the original suit. This procedure having failed, what other grounds are available on which to base a distinction?

Perhaps the most basic and pervasive idea is that collateral estoppel can be thought of as a part of the arsenal of equitable remedies which never need be used if they will tend to work an injustice or substantially prejudice one of the parties. But the crucial consideration is the *subject matter* of the prior determination. That is, was it a question of law or one of fact; and, if one of fact, was it a type of fact capable of fairly objective ascertainment or was it rather of a subjective nature? The fact of substitution in the *Coca-Cola* case would, according to this proposed standard, qualify as an "objective" fact, whereas the fact of negligence or due care in the "railroad" cases would be classified as "subjective" fact. Subjective facts are those which, like negligence, contain many elements not reducible to clear formulas and which hinge largely on opinion judgments about which reasonable fact-finders might reasonably differ. Determinations of questions of law and objectively ascertainable fact, on the other hand, ought not change simply because of a change in parties. It is recognized that the law-fact dichotomy is not always clear, but this is only to say that there will be difficult cases and differences of opinion. It is also undeniable that a trial is not a laboratory for determination of ultimate truth, but this ideal is more nearly attainable for some types of questions than for others. For example, the pivotal issue in the *Zdanok* case (interpretation of a contract) was close to being a question of law. But even if thought of as one of fact, it is not of a kind dependent on the peculiar infirmities which inhere in determinations of such highly subjective facts as negligence or due care. Closely allied to these considerations is the inquiry as to whether the initial determination was made by judge or jury. Perhaps the latter could justifiably be afforded less conclusiveness for purposes of collateral estoppel than the former, particularly if the subject matter is highly subjective fact. Using these suggested distinctions, the "railroad" cases can be easily isolated from *Zdanok* or *Bernhard* and its progeny. Other rationalizations of the *Zdanok* decision could be made, such as an analogy to a class action in which all members of the class are bound by and may take the benefit of an adjudication of the rights of the class,[21] or by an expansion of the concept of "privity" to include all members of a class. But these explanations will ultimately prove too narrow to suffice, in that situations structurally like *Zdanok* can readily be imagined in which the successive plaintiffs were not members of any single class but in which the use of collateral estoppel would be fully justified. Class action and privity explanations will also fail to distinguish the "railroad" cases.

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19 Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 STAN. L. REV. 281 (1957).
20 *Id.* at 294.
21 See Hansberry v. Lee, 311 U.S. 32 (1940); Gart v. Cole, 263 F.2d 244 (2d Cir. 1959).

Thus, the test to decide when a prior decision should be made available to a litigant who was not a party or privy to the prior action should be: whenever the subject matter of the original determination which is to be asserted as an estoppel against one of the original parties is such as can reasonably be said to be of a type capable of fairly objective ascertainment and which ought not to be open to re-examination simply because of a change in parties; where there is no basic unfairness to any party in allowing the plea; and where there was a full and fair hearing on the merits in the original action, then the new party should be permitted to take advantage of the original determination as against one of the original parties regardless of the orientation of such parties as plaintiff or defendant and notwithstanding the offensive or defensive mode of raising the plea. Admittedly, this test does not possess the mechanical simplicity of the earlier rule, but it is suggested that it will do far better service in explaining the current trend of the case law.

In conclusion, *Zdanok* v. *Glidden Co.* is a significant extension of the rules which allow use of determinations made in prior actions by persons who were not parties to the earlier action. It is the first clear judicial statement that the plea of estoppel may be available even to a plaintiff for use against one who was a defendant in the original action.[22] The case holds, in effect, that "the fact that a party has not had his day in court on an issue *as against a particular litigant* is not decisive . . ."[23] in deciding whether a plea of collateral estoppel is applicable. It is a cogent opinion and will very probably be followed by other courts.

John W. Beatty

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22 Statements in earlier leading cases often went beyond what was required by the facts. See, *e.g.*, Bernhard v. Bank of America Nat. Trust & Savings Assn., 19 Cal.2d 807, 122 P.2d 892 (1942); Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y. Supp. 2d 1 (1956).

23 Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 99, 151 N.Y. Supp. 2d 1 (1956).