Michigan Law Review

Volume 73 | Issue 3

1975

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Michigan Law Review

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Collateral estoppel is an aspect of the doctrine of res judicata[1] that precludes relitigation of issues previously adjudicated. A judgment in a prior action may be held conclusive as to issues in a subsequent case, even though the later case technically involves a different cause of action.[2] The rule of collateral estoppel seeks to conserve

1. The term "res judicata" covers the general law of the finality and effect of prior judgments as influencing subsequent litigation. RESTATEMENT OF JUDGMENTS, Introductory Note § 41 (1942) [hereinafter RESTATEMENT]. Other doctrines under its general heading include merger, bar, and direct estoppel. Merger and bar preclude parties from relitigating the same cause of action. If a judgment was rendered for the plaintiff, his cause of action is merged in the judgment and he cannot thereafter bring another suit on the same cause of action. RESTATEMENT, *supra*, §§ 45(a), 47. *E.g.*, Dearden v. Hey, 304 Mass. 659, 24 N.E.2d 644 (1939). If a judgment is rendered on the merits against the plaintiff, the original cause of action is barred. RESTATEMENT, *supra*, §§ 45 (b), 48. *E.g.*, Thompson v. Washington Natl. Bank, 68 Wash. 42, 122 P. 606 (1912). Direct estoppel precludes the plaintiff from litigating the same issue that was litigated in a prior action. For example, if an action is dismissed for the nonjoinder of a third person as defendant and the plaintiff brings another action on the same cause of action, again without joining the third person, the necessity of joinder may not be relitigated. Where a judgment for the defendant is not based on the merits, however, the plaintiff is not barred from maintaining a subsequent action. RESTATEMENT, *supra*, §§ 45(d), 49.

2. RESTATEMENT, *supra* note 1, § 68(1). Collateral estoppel may apply to questions of law as well as fact, provided that both causes of action arise out of the same subject matter or transaction. RESTATEMENT, *supra*, § 70. *E.g.*, Tait v. Western Md. Ry. Co., 289 U.S. 620, 626 (1933); United States v. Moser, 266 U.S. 236, 241-42 (1924).

judicial energy,[3] promote confidence in the judicial system,[4] avoid litigant expense,[5] promote community peace and reliance on judgments,[6] and minimize inconsistent results.[7] Countervailing policy concerns are the right of each person to have his day in court,[8] the fear of increased litigation,[9] the danger of perpetuating error,[10] the need for flexibility,[11] and other considerations of fairness.[12] Whether a court will apply collateral estoppel in a certain case will often be determined by a weighing of these conflicting policies.[13]

If the facts in the second action parallel those of the first, but arise out of a succeeding transaction, collateral estoppel may not apply. RESTATEMENT, *supra*, § 70, comment *e*. *E.g.*, Commissioner v. Sunnen, 333 U.S. 591, 599-601 (1948).

A change in the law through judicial decision, *e.g.*, Blair v. Commissioner, 300 U.S. 5, 9 (1937), statute, *e.g.*, Boeing v. United States, 98 F. Supp. 581, 586 (Ct. Cl. 1951), or administrative regulation, *e.g.*, Continental Oil Co. v. Jones, 176 F.2d 519, 522 (10th Cir. 1949), may also limit the application of collateral estoppel. *See* text at notes 51-52 *infra*.

3. Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); *In re* Hitchings, 342 F.2d 80, 85 (D.C. Cir. 1965); Westgate-Sun Harbor Co. v. Watson, 206 F.2d 458, 462 (D.C. Cir. 1953); Warthen v. United States, 157 Ct. Cl. 798, 800 (1962); Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217, 219 (1954); von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 300 (1929).

4. Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180, 185 (1952); Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U. L.J. 29, 33-34 (1964).

5. Liddell v. Smith, 345 F.2d 491, 493 (7th Cir. 1965); Wallingsford v. Larcon Co., 237 F.2d 904, 906 (8th Cir. 1956); Hyman v. Regenstein, 222 F.2d 545, 549 (5th Cir. 1955); Van Dyke v. Kuhl, 171 F.2d 187, 188 (7th Cir. 1948); Warthen v. United States, 157 Ct. Cl. 798, 800 (1962).

6. United States v. Munsingwear, Inc., 340 U.S. 36, 38 (1950); Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); von Moschzisker, *supra* note 3, at 300.

7. *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 820 (1952) [hereinafter *Developments*]. The same general policy concerns pervade all aspects of res judicata. *See* Polasky, *supra* note 3, at 219; *Developments, supra*, at 820. Consequently, policy discussions that apply to one aspect of res judicata may be relevant for other aspects as well. *E.g.*, *Developments, supra*, at 840 n.161.

8. The right to a day in court is required under the due process clause. Hansberry v. Lee, 311 U.S. 32, 42 (1940); Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918). Courts, however, have discussed the right in general terms without mentioning constitutional buttresses. *E.g.*, United States v. Silliman, 167 F.2d 607, 614 (3d Cir. 1948).

9. Pelham Hall Co. v. Hassett, 147 F.2d 63, 68 (1st Cir. 1945); Moore & Currier, *Mutuality and Conclusiveness of Judgements*, 35 TUL. L. REV. 301, 309 (1961).

10. United States v. Stone & Downer Co., 274 U.S. 225, 236 (1927); Union Metal Mfg. Co., 4 B.T.A. 287, 288-89 (1925). It has been suggested that the problem of error perpetuation may be greater where complex legal issues are involved. Divine v. Commissioner, 500 F.2d 1041, 1048 (2d Cir. 1974). *Contra*, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 331-34 (1971); Evans & Robins, *Demise of Mutuality in Collateral Estoppel (The Second Round Patent Suit—The Not-So-Instant Replay)*, 24 OKLA. L. REV. 179, 205 (1971).

11. Polasky, *supra* note 3, at 221; *Developments, supra* note 7, at 820.

12. *E.g.*, Title v. Immigration & Naturalization Serv., 322 F.2d 21, 24 (9th Cir. 1963).

13. Tipler v. E.I. duPont de Nemours & Co., 443 F.2d 125, 128 (6th Cir. 1971); Seven-Up Co. v. Bubble Up Corp., 312 F.2d 472, 477 (D.C. Cir. 1963); Spilker v. Hankin, 188 F.2d 35, 38-39 (C.C.P.A. 1951); Greenfield v. Mather, 32 Cal. 2d 23, 35, 194 P.2d 1, 8 (1948); Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54

The mutuality rule is a principle that is used to limit the application of collateral estoppel:[14] A judgment in a prior suit will bar relitigation of the same issue in a subsequent action only where *both* parties to the subsequent action, or their privies,[15] are bound by the prior judgment.[16] Although the mutuality rule is currently losing favor,[17] federal courts have continued to apply the rule rigidly in tax litigation.[18] This note will assume that the policy judgments behind the general movement away from the rule are sound, and examine the arguments advanced in support of maintaining the mutuality rule in federal tax litigation. It will be suggested that, once the trend away from mutuality in other areas is accepted, there

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GEO. L.J. 857, 858 (1966). For example, collateral estoppel will be applied only to issues that actually were litigated and determined in the previous action and that were essential. Yates v. United States, 354 U.S. 298, 337-38 (1957); Cromwell v. County of Sac, 94 U.S. 351, 354-55 (1876); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 10-15 (1942); RESTATEMENT, *supra* note 1, § 68, comment *m*. The court in The Evergreens v. Neeman, 141 F.2d 927, 928 (2d Cir.), *cert. denied*, 373 U.S. 720 (1944), distinguished between "ultimate" and "mediate" facts; only determinations of ultimate facts—"those facts, upon whose combined occurrence raises the duty, or right in question"—would be conclusive in subsequent actions. The policy behind this distinction is explored in Polasky, *supra* note 3, at 237-38; *Developments, supra* note 7, at 843.

For a catalog and discussion of other principles that may limit the application of collateral estoppel, see *Developments, supra*, at 840-50.

14. Various attempts to define the mutuality rule are summarized in Annot., 31 A.L.R.3d 1044, 1060 (1970) (footnotes omitted):

> The mutuality rule has been expressed by the courts in varying language. Thus, it has been stated that an estoppel by judgment is mutual if both litigants are concluded by the judgment, and that otherwise it binds neither. Expressed in another form, the estoppel effect of the judgment operates mutually if the person taking advantage of the judgment would have been bound by it had it gone the other way. It has also been said that the thrust of the mutuality rule is that since one not a party to the former action cannot be bound by the judgment therein, it necessarily follows that neither can he take advantage of it; that unless both parties are bound by the prior judgment, neither may use it against the other in a subsequent action; and that a party should not be able to plead res judicata of an issue unless the other party could have pleaded it against him had the judgment been the other way. The mutuality rule has also been expressed to the effect that nobody can take benefit by a verdict who would not have been prejudiced by it had it gone contrary.

15. For a discussion of the terms "parties" and "privies," see *Developments, supra* note 7, at 855-65.

16. 1 A. FREEMAN, JUDGMENTS § 407 (5th ed. E. Tuttle 1925); RESTATEMENT, *supra* note 1, § 93.

17. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 327 (1971). *See* text at notes 26-27 *infra*.

18. *E.g.*, Divine v. Commissioner, 500 F.2d 1041 (2d Cir. 1974); Charles M. Bernuth, 57 T.C. 225 (1971), *affd.*, 470 F.2d 710 (2d Cir. 1972); William A. Belcher, Jr., 24 CCH TAX CT. MEM. 1 (1965); Elsie Keil Mathisen, 22 T.C. 995 (1954). Other decisions have sustained the rule in dictum. *E.g.*, Walter Wilson Flora, 47 T.C. 410, 413 (1967); Ronald F. Weiszman, 31 CCH TAX CT. MEM. 1201 (1972), *affd.*, 483 F.2d 817 (10th Cir. 1973); Matt R. Kane, 30 CCH TAX CT. MEM. 943 (1971); Estate of Sol Goldenberg, 23 CCH TAX CT. MEM. 810 (1964), *affd.*, 66-1 CCH U.S.T.C. ¶ 9297 (9th Cir. 1966). *But see* Baily v. United States, 350 F. Supp. 1205, *affd. on rehearing*, 355 F. Supp. 325 (E.D. Pa. 1972); Sparks Nugget, Inc., 29 CCH TAX CT. MEM. 318 (1970).

are no convincing reasons for retaining the rule in tax cases involving the same tax year.

The mutuality rule has two components: First, a judgment cannot bind a stranger who has not had his day in court; second, strangers to a judgment cannot assert that judgment against parties to the previous action. The first proposition is required by the due process clauses of the fifth and fourteenth amendments of the Constitution, which guarantee all aggrieved parties a proper hearing in court.[19] The second proposition was long assumed to be a corollary of the first—if a person was not bound by a prior adjudication, he should not benefit from it:[20]

> The justification for this requirement has been said to be that a party may be unwilling to press his case to the utmost in a particular suit, and that it would penalize him to enable strangers to take advantage of his laxity; that an adversary system requires that a party to an action should [normally] risk the loss of rights or the creation of liabilities only with reference to his adversaries; or that a jury may often reach results inconsistent with the truth, and that such a mishap should not affect a losing party outside the particular litigation.[21]

Several courts began to diminish the importance of the second requirement by creating a broad exception to its application in derivative liability situations.[22] The major blow to the doctrine came in 1942, when the California Supreme Court, in the landmark case of *Bernhard v. Bank of America National Trust & Savings Association*,[23] explicitly rejected rigid mutuality as a strict requirement of collateral estoppel: "There is no compelling reason . . . for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation."[24]

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19. *See* note 8 *supra.*

20. Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912); Litchfield v. Goodnow's Admr., 123 U.S. 549 (1887); Graves v. Associated Transp., Inc., 344 F.2d 894, 896 (4th Cir. 1965); 1 A. FREEMAN, *supra* note 16, § 428. The second proposition is not in fact required by due process, since collateral estoppel would be applied only against one who did participate in the prior adjudication. *See* Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 330 (1971); Note, *Impacts of the Defensive and Offensive Assertion of Collateral Estoppel by a Non-Party*, 35 GEO. WASH. L. REV. 1010, 1014 n.31 (1967). Rather, the requirement has been supported by the "assumed unfairness" of binding one party to the prior judgment but not the other. RESTATEMENT, *supra* note 1, § 96, comment *a.*

21. *Developments, supra* note 7, at 862 (footnotes omitted).

22. Derivative liability situations include cases in which liability is based on the master-servant, principal-agent, or indemnitor-indemnitee relationships. *See* Note, *The Requirement of Mutuality in Estoppel by Judgement*, 29 ILL. L. REV. 93, 94 (1934); Annot., 31 A.L.R.3d 1044, 1065-66 (1970).

23. 19 Cal. 2d 807, 122 P.2d 892.

24. 19 Cal. 2d at 812, 122 P.2d at 894.

In place of the mutuality rule, the court outlined three requirements for the application of collateral estoppel: "Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"[25]

Since *Bernhard,* a continued trend "away from the rigid requirements of mutuality" has taken place in both the federal[26] and state courts.[27] The mutuality rule has largely been replaced by a particularized approach to the application of the doctrine of collateral estoppel.[28] In reviewing the facts of each case, the courts will consider competing policies and determine the equity of precluding one party from rearguing an issue that was resolved against that party in an earlier litigation.[29] For example, courts increasingly reject the mutuality rule where a "prior judgment [is] invoked defensively in a second action against a plaintiff bringing suit on an issue he litigated and lost as a plaintiff in a prior action."[30]

The mutuality rule, however, has been retained by most courts in tax cases.[31] In *Rogers v. Commissioner,*[32] for example, the court dealt with the dissolution of the joint venture Range-Liberty. Mrs. Rogers, the sole shareholder of Range, had personally cosigned with Range the initial venture agreement and had agreed to create an escrow security fund. Liberty, in buying out the interest of Range, contracted to pay Range and Mrs. Rogers separately. The Commissioner argued that the payments to Mrs. Rogers constituted

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25. 19 Cal. 2d at 813, 122 P.2d at 895.

26. 1B J. MOORE, FEDERAL PRACTICE 92 (Supp. 1973); Annot., 31 A.L.R.3d 1044, 1067 (1970).

27. Abolition was neither "instantaneous nor universal" in the state courts, but a trend away from the rule has become apparent. *See* Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 314, 326 (1971). *See also* Currie, *Civil Procedure: The Tempest Brews,* 53 CALIF. L. REV. 25, 38 (1965); Annot., 31 A.L.R.3d 1044, 1067 (1970).

28. Currie, *supra* note 27, at 32-33; Polasky, *supra* note 3, at 222; Note, *Collateral Estoppel: The Demise of Mutuality,* 52 CORNELL L.Q. 724, 725, 727-28 (1967). *E.g.,* Graves v. Associated Transp., Inc., 344 F.2d 894, 900 (4th Cir. 1965); Zdanok v. Glidden Co., 327 F.2d 944, 954-55 (2d Cir.), *cert. denied,* 377 U.S. 934 (1964).

29. "The rule of non-mutuality is not a general one but a limited one to be determined from the facts and circumstances in each case whether or not it should be applied." United States v. United Airlines, 216 F. Supp. 709, 726 (E.D. Wash. 1962), *affd.,* 335 F.2d 379 (9th Cir.), *cert. denied,* 379 U.S. 951 (1964). *See also* Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 327 (1971); Divine v. Commissioner, 500 F.2d 1041, 1048-50 (2d Cir. 1974); Zdanok v. Glidden Co., 327 F.2d 944, 953 (2d Cir.), *cert. denied,* 377 U.S. 934 (1964); Bruszewski v. United States, 181 F.2d 419, 421 (3d Cir.), *cert. denied,* 340 U.S. 865 (1950).

30. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 324 (1971) (footnote omitted).

31. *See* cases cited note 18 *supra.*

32. 180 F.2d 720 (3d Cir. 1950).

ordinary income to her as a distribution of proceeds from the sale of the assets of Range. The Third Circuit, reversing the Tax Court, held that Mrs. Rogers was entitled to capital gains treatment on the contract payments; she was a real party in interest, and the purchase contract represented a sale of her interest in the venture.[33] The identical transaction was relitigated in the Tax Court and appealed to the Second Circuit,[34] where the corporation, Range, was the respondent-taxpayer. The Tax Court refused to be bound by the Third Circuit's finding because the parties were not identical,[35] and again held that the contract with Mrs. Rogers represented payments made to Range and then distributed to Mrs. Rogers. Accordingly, the corporation was held to have received capital gain on the payments to Mrs. Rogers.[36] The Second Circuit affirmed the Tax Court's refusal to apply res judicata.[37] Consequently, both Mrs. Rogers and Range recognized capital gain from the Mrs. Rogers-Liberty contract. If the modern theory of collateral estoppel[38] had been applied, Range would have been able to bind the Commissioner—the initiating party in *Rogers*—to the resolution of the distribution issue in the Third Circuit. Similar applications of the mutuality rule continue to find expression in other tax cases.[39]

Such applications may be explained, if not justified, by a misapplication of precedent. Arguments concerning the appropriateness of collateral estoppel in tax cases have arisen most often in litigation involving similar transactions that take place in successive years.[40] Few cases have considered the application of the mutuality rule in other than the successive-year context.[41] Similarly, most

33. 180 F.2d at 723-24.

34. American Range Lines, Inc., 17 T.C. 764 (1951), *affd.*, 200 F.2d 844 (2d Cir. 1952).

35. 17 T.C. at 771.

36. 17 T.C. at 771.

37. 200 F.2d at 845.

38. *See* text at note 30 *supra.*

39. *See* cases cited note 18 *supra.*

40. *See* cases collected in Annot., 130 A.L.R. 374, 376-77 (1941).

The Supreme Court explained the application of collateral estoppel to cases involving succeeding tax periods in Commissioner v. Sunnen, 333 U.S. 591, 598 (1948):

> Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit.

41. *But see* Divine v. Commissioner, 500 F.2d 1041 (2d Cir. 1974); Baily v. United States, 355 F. Supp. 325 (E.D. Pa. 1973).

A closely related question concerns the relationship of the three parties who might represent the government in a tax case: (1) the United States, (2) the Commissioner of Internal Revenue, or (3) a local tax collector. The mutuality problem generally was resolved by holding that all of these government representatives were in privity with scholarly discussions of collateral estoppel in federal tax litigation consider only multiple-period applications.[42] Unfortunately, both courts and commentators have assumed that because collateral estoppel is applied narrowly in the multiple-year context,[43] it should be applied narrowly with respect to all aspects of federal tax litigation.[44]

The Supreme Court first confronted the application of collateral estoppel to a tax case involving successive tax years in *Tait v. Western Maryland Railway Co.*[45] In that case, the Court had to determine the amount of amortization allowable on bond discounts. The taxpayer had successfully litigated the issue in an action concerning his 1918 and 1919 tax returns, but the government sought a new determination with respect to tax years 1920-1925. The government's main argument was that "a judgment in a suit concerning income tax for a given year cannot estop either of the parties in a later action touching liability for taxes of another year."[46] The Court responded: "As petitioner says, the scheme of the Revenue Acts is an imposition of tax for annual periods, and the exaction for one year is distinct from that for any other. But it does not follow that Congress in adopting this system meant to deprive the government and the taxpayer of relief from redundant litigation . . . ."[47] The Court reviewed the facts and the law involved in the two

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each other. Consequently, collateral estoppel could bind each of them as a result of initial litigation against one of them. Some decisions, however, held that suit against a collector was personal, and therefore privity between the United States and the collector did not exist. This problem was resolved by the adoption of Internal Revenue Code of 1939, § 3772(d) (now INT. REV. CODE OF 1954, § 7422(c)), which provides for the application of res judicata in such cases. *See* Griswold, *Res Judicata in Federal Tax Cases*, 46 YALE L.J. 1320, 1340-43 (1937); Annot., 130 A.L.R. 374, 382-84 (1941). Many tax cases have applied collateral estoppel against persons in privity with former litigants. *See, e.g.*, Hilton Lumber Co. v. Grissom, 70 F.2d 892 (4th Cir.), *cert. denied*, 293 U.S. 613 (1934); Seaboard Commercial Corp., 28 T.C. 1034 (1957); D. Bruce Forrester, 4 T.C. 907 (1945).

42. *See, e.g.*, Griswold, *supra* note 41, at 1327; Heckman, *Collateral Estoppel as the Answer to Multiple Litigation Problems in Federal Tax Law: Another View of Sunnen and The Evergreens*, 19 CASE W. RES. L. REV. 230 (1968); Raum, *The Sunnen Case and Res Judicata in Federal Tax Litigation*, 7 N.Y.U. INST. ON FED. TAX. 253 (1949); Note, *Collateral Estoppel as to Questions of Law in Federal Tax Cases*, 35 IOWA L. REV. 700 (1950).

43. *See, e.g.*, Trapp v. United States, 177 F.2d 1, 4 (10th Cir. 1949), *cert. denied*, 339 U.S. 913 (1950); Gillespie v. Commissioner, 151 F.2d 903, 906 (10th Cir. 1945), *cert. denied*, 328 U.S. 839 (1946); Journal-Tribune Publishing Co., 38 T.C. 733, 744-45 (1962); Griswold, *supra* note 41, at 1357; Note, *supra* note 42, at 711, 713.

44. *E.g.*, Parker v. Westover, 221 F.2d 603, 605 (9th Cir. 1955) (dictum); Polasky, *supra* note 3, at 235; Raum, *supra* note 42, at 262.

45. 289 U.S. 620 (1933).

46. 289 U.S. at 623.

47. 289 U.S. at 624.

actions, found them identical, and held that the government was estopped from relitigating the amortization issue.[48]

After *Tait,* several cases applied collateral estoppel in multiple tax-year litigation.[49] However, criticism of the *Tait* decision[50] led the Court to limit its scope. *Blair v. Commissioner*[51] soon established one of the major limitations on collateral estoppel in tax litigation: An intervening change in legal climate will render collateral estoppel inapplicable in subsequent proceedings.[52] The Court further limited *Tait* in *Commissioner v. Sunnen.*[53] The taxpayer argued that an earlier proceeding against him before the Board of Tax Appeals involving payments under a 1928 contract collaterally estopped the

48. 289 U.S. at 625-26.

49. *See* Wobber Bros. v. Commissioner, 31 B.T.A. 133 (1934); Portage Silica Co. v. Commissioner, 29 B.T.A. 881 (1934), *affd.*, 89 F.2d 958 (6th Cir.), *cert. denied*, 302 U.S. 711 (1937); Leininger v. Commissioner, 29 B.T.A. 874 (1934), *affd.*, 86 F.2d 791 (6th Cir. 1937).

50. *E.g.*, Special Committee on Federal Taxation of the American Bar Association, 61 A.B.A. ANN. REP. 821, 831 (1936):

> As a result of this decision, if the taxpayer secures a decision of a court, even though not the Supreme Court, with respect to a particular income tax question which recurs in later years, he becomes entitled to the benefit, or subject to the burden, of the decision, even though it is later determined in other cases that the decision is wrong. This causes a lack of uniformity in the application of the law among the taxpayers and this result does not seem to be required by any fundamental principle involved in the doctrine of *res adjudicata.* The year litigated is of course closed by the judgment, but there seems to be no reason why the taxpayer should be treated more or less favorably in a later year than the law as finally determined warrants, merely because he had litigation about some previous year's taxes. This point deserves further study to determine whether or not the principle of the *Tait v. Western Maryland Railway Company* decision as applied to subsequent years should be changed by legislation.

See also Griswold, *supra* note 41, at 1320.

51. 300 U.S. 5 (1937).

52. The Court in *Tait* noted that there had been no changes in the relevant revenue acts and treasury regulations between the two cases there at issue, and consequently collateral estoppel could be applied. 289 U.S. at 625-26. *Blair* involved an intervening state court decision, however, rather than a change in statutory law, and thus expanded the concerns expressed in *Tait* to encompass any change in legal climate. 300 U.S. at 9. *Blair* has been relied upon in many subsequent cases. *E.g.*, Corrigan v. Commissioner, 155 F.2d 164, 166 (6th Cir. 1946); Commissioner v. Arundel-Brooks Concrete Corp., 152 F.2d 225, 227 (4th Cir. 1945); Commissioner v. Security-First Natl. Bank, 148 F.2d 937, 940 (9th Cir. 1945); Pelham Hall Co. v. Hassett, 147 F.2d 63 (1st Cir. 1945).

The rationale for the *Blair* rule was summarized in Commissioner v. Sunnen, 333 U.S. 591, 599 (1948):

> A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion.

53. 333 U.S. 591 (1948).

Commissioner from relitigating the taxable status of later payments under that contract and under identical contracts that had been separately negotiated.[54] The Court could have rejected the application of collateral estoppel on the basis of *Blair*,[55] but chose instead to reconsider the "identical facts" requirement of *Tait* in deciding whether to apply collateral estoppel as to the separate contracts:

> Of course, where a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding even though the cause of action is different. . . . And if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue.[56]

Sunnen involved identical parties, and therefore does not bear directly on the mutuality rule. However, in dictum apparently gleaned from common-law collateral estoppel concepts,[57] the Court made clear that there would be no estoppel where the parties were different.[58]

Unfortunately, later decisions have relied upon the *Sunnen* dictum to deny the application of collateral estoppel in cases involving the same tax event and the same tax year.[59] For example, in *Harold S. Divine*[60] the Tax Court rejected a shareholder's argument that collateral estoppel be applied, even though a circuit court had previously held in favor of another shareholder of the same corporation on the same tax issue with regard to the same corporate transaction.[61] The court noted that "[i]n the cases which have come before this Court involving the question of mutuality we have voiced adherence to the mutuality principle, following the lead set

54. 333 U.S. at 596.

55. 333 U.S. at 600.

56. 333 U.S. at 601 (footnotes omitted).

57. 333 U.S. at 597-98.

58. 333 U.S. at 597-98.

59. *E.g.*, Harold S. Divine, 59 T.C. 152, 158 (1972), *revd. on other grounds*, 500 F.2d 1041 (2d Cir. 1974); William A. Belcher, Jr., 24 CCH TAX CT. MEM. 1, 12 (1965).

60. 59 T.C. 152 (1972), *revd. on other grounds*, 500 F.2d 1041 (2d Cir. 1974).

61. 59 T.C. at 158.

by the Supreme Court in *Commissioner* v. *Sunnen* . . . and *Tait* v. *Western Md. Ry. Co.* . . ."[62]

Relying on *Sunnen* and *Tait* to sustain the rigid rule of mutuality in tax litigation has two flaws. First, cases involving successive tax years are distinguishable from cases involving the same tax year. In *Sunnen,* the Court justified its strict approach to collateral estoppel by pointing to the potential that subsequent changes in facts or law would make a present determination obsolete or erroneous by the time it was applied in future litigation.[63] But the danger that the facts or law will shift over the years is not present in cases growing out of the same fact situation and concerning the tax liability of similarly situated parties for the same year. Second, *Sunnen* did not provide an explicit rationale for its dictum requiring mutuality. The *Sunnen* Court purported to apply common-law concepts,[64] but with the deterioration of those concepts in other areas,[65] the *Sunnen* mutuality rule must be questioned unless policy factors peculiar to tax litigation independently support its retention.

Although early cases largely ignored the justifications for the mutuality rule,[66] the recent case of *Divine v. Commissioner*[67] has suggested considerations that arguably justify the rule's continued vitality in tax cases. The Rapid American Corporation had made a cash distribution to its shareholders in 1961, and one of its shareholders had successfully argued in the Seventh Circuit that the distribution was a return of capital and not taxable. Divine, arguing in a later case for similar treatment with respect to the same distribution, asserted that the Seventh Circuit opinion bound the Commissioner to refrain from taxing the payments. Both the Second Circuit and the Tax Court rejected Divine's position, arguing that the use of collateral estoppel would hinder the uniform application of the tax laws[68] and inhibit the clarification of difficult provisions of the Internal Revenue Code.[69]

The Tax Court asserted that invoking collateral estoppel in *Divine* would lead to inconsistent application of the tax law in two situations. First, "an unwarranted distinction" between the treatment of shareholders of one corporation and that of "identically situated shareholders" of other corporations might result, "thereby disturbing the uniformity in the application of the tax laws."[70] Con-

62. 59 T.C. at 158.
63. *See* note 52 *supra.*
64. 333 U.S. at 597-98.
65. *See* text at notes 26-30 *supra.*
66. *E.g.,* Appeal of Charles L. Suhr, 4 B.T.A. 1198 (1926).
67. 500 F.2d 1041 (2d Cir. 1974), *revg.* 59 T.C. 152 (1972).
68. 500 F.2d at 1048; 59 T.C. at 159-60.
69. 500 F.2d at 1049-50; 59 T.C. at 159.
70. 59 T.C. at 160.

sistency in results, however, also would support the application of collateral estoppel, because estoppel would result in uniform treatment of all of the shareholders of the same corporation. If courts are forced to choose between imposing different treatment on shareholders of one corporation vis-à-vis shareholders of another corporation and imposing different treatment on shareholders of the same corporation, they should find the first alternative less objectionable. Dissimilar treatment among shareholders of different corporations may often be explained by subtle factual distinctions.[71] Such distinctions are less likely among shareholders in the same corporation, at least with respect to issues of corporate taxation.

The Tax Court also argued that applying collateral estoppel on the basis of the previous Seventh Circuit opinion[72] would "be disrupting to the uniformity in the application of the law within the jurisdiction of any circuit court of appeals which might disagree with the Seventh Circuit's holding . . . , because Rapid's shareholders throughout the country would benefit from the collateral estoppel effects of [the Seventh Circuit's decision] regardless of the view taken by their own circuit."[73] However, uniformity in the application of a national tax law would be optimally achieved only if the law is applied with similar effect on a national scale.[74] Allowing the value of intra-circuit uniformity to outweigh the uniform national application of the tax law seems incongruous, for the federal tax law is designed to apply consistently on a national scale. Indeed, the application of collateral estoppel would enhance rather than hinder the uniform application of the tax law. Under the present structure, the taxpayer seeking to contest his tax liability may choose between refusing to pay his assessed taxes and arguing his case in the Tax Court[75] and paying his tax and suing for a refund in a federal district court[76] or in the Court of Claims.[77] Appeals

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71. *See, e.g.*, Charles M. Bernuth, 57 T.C. 225, 233 (1971).

72. The case referred to is Luckman v. Commissioner, 418 F.2d 381 (7th Cir. 1969), in which another shareholder of the same corporation had successfully litigated the same issue on the same facts against the Commissioner.

73. 59 T.C. at 159-60.

74. *See* Prewett v. Commissioner, 221 F.2d 250, 252 (8th Cir. 1955); Estate of William E. Edmonds, Jr., 16 T.C. 110, 117 (1951) (dictum); Nevitt, *Achieving Uniformity Among the 11 Courts of Last Resort*, 34 TAXES 311, 312 (1956).

75. INT. REV. CODE of 1954, § 6213(a).

76. INT. REV. CODE of 1954, § 7422; 28 U.S.C. § 1346(a)(1) (1970).

77. 28 U.S.C. § 1346(a)(1) (1970).

The system's inequities have often been criticized. *See* Griswold, *supra* note 41, at 1154-63; Traynor, *Administrative and Judicial Procedure for Federal Income, Estate, and Gift Taxes—a Criticism and a Proposal*, 38 COLUM. L. REV. 1393, 1406-11 (1938); Comment, *The Tax Court, the Court of Appeals and Pyramiding Judicial Review*, 9 STAN. L. REV. 827 (1957).

from the Tax Court[78] and from a district court[79] may be taken in the appropriate circuit court. As a result, when two circuits differ on a particular issue, the outcome of the litigation may depend on where the appeal from the Tax Court is taken or on which district court initially hears the proceeding. In multiple-shareholder and multiple-partner transactions that involve parties located in different circuits, similarly situated litigants could receive different tax treatment unless collateral estoppel were applied.[80]

A broader application of the doctrine of collateral estoppel would reduce the often-discussed[81] anomaly of the Tax Court's "Golsen rule." In an effort to promote uniformity by acting as a national spokesman, the Tax Court at one time refused to be bound by decisions of the various courts of appeals.[82] Typically, however, the taxpayer would appeal and the interpretation of the reviewing court of appeals would prevail.[83] Needless appeals were thus necessitated.[84] In *Jack E. Golsen*[85] the Tax Court finally agreed to follow a decision that was "squarely in point" and was decided by the court to which appeal lay.[86] Although the *Golsen* doctrine normally will result in the elimination of duplicative appeals, it may lead to anomalous results when two or more decisions of the Tax Court involving the same facts are appealable to two or more courts of appeals.[87] For example, two fifty-per cent shareholders of the same

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78. INT. REV. CODE of 1954, § 7482(a).

79. 28 U.S.C. § 1291 (1970).

80. *See, e.g.*, text at notes 88-92 *infra.*

81. *See, e.g.*, Note, *Status of a Controversy: The Tax Court, the Courts of Appeals, and Judicial Review*, 32 OHIO ST. L.J. 164, 167-69 (1971).

82. *E.g.*, Arthur L. Lawrence, 27 T.C. 713, 719-20 (1957), *affd.*, 258 F.2d 562 (9th Cir. 1958).

83. Norvel Jeff McLellan, 51 T.C. 462, 467 (1968) (Simpson, J., concurring).

84. Jack E. Golsen, 54 T.C. 742, 757 (1970), *affd.*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971); Comment, *Heresy in the Hierarchy: Tax Court Rejection of Court of Appeals Precedents*, 57 COLUM. L. REV. 717, 722-23 (1957); Note, *supra* note 81, at 167. The courts of appeals were highly critical of the Tax Court's disregard of their decisions. *See* 9 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 51.03, at 7 (1970).

85. 54 T.C. 742 (1970), *affd.*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971).

86. 54 T.C. at 757.

87. . . . [I]t frequently happens that a decision of the Tax Court is appealable to two or even more Courts of Appeals. A few examples will illustrate. A corporation, having stockholders scattered over the United States, makes a distribution to all. The Commissioner holds it taxable as a dividend from accumulated earnings. The stockholders join in a trial before the Tax Court which decides the issue as to all petitioning stockholders, contrary to a decision of Court of Appeals A, which reversed a prior Tax Court decision, but perhaps in line with an affirming decision of Court of Appeals B. . . . If it had rendered a separate different decision for those stockholders in Circuit A, what amount of accumulated earnings would remain for future distribution?

corporation went before the Tax Court in companion cases, *Doehring v. Commissioner*[88] and *Puckett v. Commissioner*,[89] to determine whether the corporation's subchapter S status[90] had been terminated. In *Doehring*, appeal was to the Eighth Circuit and the government prevailed. In *Puckett*, appeal was to the Fifth Circuit, which had enunciated a different interpretation of the law in a previous decision,[91] and the taxpayer prevailed under the *Golsen* doctrine. As a result, co-owners of the same corporation took the same issue and the same facts to the same forum and received different treatment. Application of collateral estoppel, unfettered by the mutuality rule, would minimize the anomaly.[92] Although collateral estoppel may have little salutary effect in simultaneous cases such as *Doehring* and *Puckett*,[93] the doctrine could be applied to successive cases dealing with similarly situated taxpayers to bind the Tax Court and the reviewing circuit in the second proceeding to the resolutions reached earlier. The Tax Court still must face the *Golsen* issue—whether to defer to the settled law of the reviewing circuit—in the first proceeding, but co-owners of the same corporation in subsequent suits on the same issue would not receive different treatment.

Another characteristic of tax litigation advanced by the *Divine* court to justify the application of the mutuality rule is the need for clarification of the Internal Revenue Code.[94] The court, apparently contradicting its own argument on the need for uniformity in applying the tax law,[95] argued that the application of collateral estoppel in tax litigation would reduce the development of circuit court conflicts and thus lessen the likelihood of subsequent Supreme Court review, which is necessary to clarify the law.[96]

This argument has several weaknesses. First, although inter-

Arthur L. Lawrence, 27 T.C. 713, 718-19 (1957), *affd.*, 258 F.2d 562 (9th Cir. 1958). The court's hypothetical case closely parallels the facts in *Divine*. *See* text at notes 67-69 *supra*.

88. 33 CCH TAX CT. MEM. 1035 (1974).

89. 33 CCH TAX CT. MEM. 1038 (1974).

90. *See* INT. REV. CODE of 1954, § 1372(e)(5).

91. House v. Commissioner, 453 F.2d 982 (5th Cir. 1972).

92. Collateral estoppel will not always apply in such situations, however. For example, if the government wins the first suit, subsequent actions may be brought by other shareholders since their right to be heard in court is guaranteed by due process. *See* note 8 *supra*.

93. Even in simultaneous suits, however, one party may argue for a rehearing of his case on the basis of the resolution of the companion case. *Cf.* Baily v. United States, 350 F. Supp. 1205, *affd. on rehearing*, 355 F. Supp. 325 (E.D. Pa. 1973).

94. 500 F.2d at 1049-50; 59 T.C. at 159.

95. *See* 500 F.2d at 1048; 59 T.C. at 159-60.

96. 500 F.2d at 1049-50, 59 T.C. at 159.

circuit conflict is a ground for the grant of certiorari,[97] it does not guarantee review.[98] Supreme Court Rule 19 states that review on a writ of certiorari is not a matter of right, and the Court traditionally has been reluctant to hear tax cases.[99] Refusals of certiorari are therefore likely results in cases of inter-circuit conflict, and will cause confusion rather than clarification.[100] Second, the litigants in the conflicting cases may be unwilling to seek review in the Supreme Court. The added delay[101] and expense may be prohibitive,[102] and in many cases the contested tax liability may be too small to justify the appeal.[103] Conflict resolution may therefore be delayed until a willing taxpayer will support the appeal. Third, the mutuality rule restricts the application of collateral estoppel with regard to factual as well as legal issues. Allowing district courts and the Tax Court to reexamine strictly factual questions will not create conflicts that give rise to Supreme Court review and clarification of the tax law; only conflicts over legal issues can cause the desired result. Fourth, the elimination of the mutuality rule would not eliminate circuit-

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97. The most common method of review of courts of appeals decisions is by the statutory writ of certiorari. Such review is discretionary. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 106, at 476-77 (1970). Review also may be had in specialized instances by appeal. 28 U.S.C. § 1252 (1970). Finally, the courts of appeals may certify new or difficult questions of law to the Supreme Court, 28 U.S.C. 1254(3) (1970), although this procedure has rarely been used. 9 J. MERTENS, *supra* note 84, § 51.20, at 41 (1970).

98. 9 J. MERTENS, *supra* note 84, § 51.20, at 39 n.95; Comment, *Denial of Certiorari Despite a Conflict*, 66 HARV. L. REV. 465, 472 (1963).

In Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950), the Court denied certiorari despite an apparent conflict with a previous Supreme Court decision. Justice Frankfurter's opinion discussed the denial of certiorari:

> A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result . . . . Narrowly technical reasons may lead to denials. . . . A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.

338 U.S. at 917-18.

99. 9 J. MERTENS, *supra* note 84, § 51.20, at 38 n.94; Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753, 786-87 n.145 (1944).

100. *See* Traynor & Surrey, *New Roads Toward the Settlement of Federal Income, Estate, and Gift Tax Controversies*, 7 LAW & CONTEMP. PROB. 336, 350 (1940).

101. *See* R. MAGILL, THE IMPACT OF FEDERAL TAXES 209 (1943).

102. *See* Griswold, *supra* note 41, at 1156. *Cf.* Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 338 (1971), where the court discussed the same problem with respect to patent litigation: "[P]rospective defendants will often decide that paying royalties under a license or other settlement is preferable to the costly burden of challenging the patent."

103. "Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of litigation, and his own situation at the time." Cromwell v. County of Sac, 94 U.S. 351, 356 (1876).

court conflicts. The circuit courts would continue to disagree on interpretations of various provisions of the tax code. They would be bound by each others' decisions only in so far as those decisions concerned similarly situated taxpayers disputing the incidents of the same tax event in the same tax year as the case before them. Thus, while clarification of the tax law is an important policy consideration, the continued vitality of the mutuality rule is of questionable significance in achieving that goal.

Finally, it might be argued that to employ collateral estoppel in tax litigation without applying the mutuality rule would limit the ability of the Internal Revenue Service (IRS) to collect the national revenue. A Director in one jurisdiction could be bound by litigation instituted and completed (and perhaps mishandled) by a Director in another jurisdiction.[104] As a result, the second Director's attempts at settlement, as well as subsequent litigation, may be significantly influenced by a circuit court's treatment of a similarly situated taxpayer in another jurisdiction.[105] In large corporate transactions, for example, an early loss to one shareholder would bind the Commissioner in all of his dealings with other shareholders. Flexibility, however, should be required only when IRS Directors confront different factual circumstances. The IRS has a duty of consistency toward identically situated taxpayers,[106] and that duty should not be ignored simply to allow the IRS to have more than one chance to win important cases.

In sum, the application of the mutuality rule in tax cases cannot be explained by policy considerations unique to tax litigation. Absent such considerations, the general policy factors that have resulted in the abolition of the mutuality rule in most nontax cases apply with equal force to federal tax litigation. The need for judicial

104. There are seven Internal Revenue Regions in the United States, each containing several Internal Revenue Districts. While regional commissioners are responsible for policy and program execution, the District Director's office is the one with which the taxpayer usually deals. For further discussion of the organization of the Internal Revenue Service, see B. BITTKER & L. STONE, FEDERAL INCOME, ESTATE AND GIFT TAXATION 910 (1972).

105. *Cf. Hearings on Treasury-Post Office Dept. Appropriations for 1957 Before the Subcomm. of the Comm. on Appropriations*, 84th Cong., 2d Sess. 463 (1957), reprinted in 8 CCH STAND. FED. TAX REP. ¶ 5876.017, at 66,205-10 (1975) (statement by the chief counsel of the Internal Revenue Service arguing against binding the Service to court of appeals decisions).

106. . . . [T]he Commissioner has a duty of consistency toward similarly situated taxpayers; he cannot properly concede capital gains treatment in one case and, without adequate explanation, dispute it in another having seemingly identical facts which is pending at the same time. . . . That the Commissioner's seeming inconsistency may have arisen from the right hand's ignorance of the posture of the left is little solace to taxpayers who are entitled to a non-discriminatory administration of the tax laws by him, much less to a taxpayer . . . who is disadvantaged by the discrimination in its case.

Sirbo Holdings, Inc. v. Commissioner, 476 F.2d 981, 987-88 (2d Cir. 1973). *See also* Commissioner v. Chase Manhattan Bank, 259 F.2d 231, 237 (5th Cir. 1958).

economy should never outweigh the availability of access to the courts to resolve legal conflicts,[107] but when the Commissioner has one full and fair opportunity to press his claim, and loses, the importance of conserving judicial time assumes great weight in subsequent cases raising the same issue.[108] Forcing taxpayers to relitigate leads to a "significant waste of time, expenses, and manpower."[109] Furthermore, inconsistent treatment of identically situated taxpayers reflects adversely on the stability and rationality of the tax system.[110]

The general trend toward reviewing the facts of each particular case, weighing competing policies, and determining the equity of applying collateral estoppel[111] should be extended to federal tax litigation. However, the Second Circuit and the Tax Court, as recently as 1974, have sustained the mutuality rule in federal tax cases,[112] and the rule has been rejected only by the Eastern District of Pennsylvania in *Baily v. United States*.[113] On its initial hearing, the Pennsylvania court stated: "Since the plaintiff has had a 'full and fair opportunity to try the factual issue' presently before this Court, we conclude that no significant harm would result by the invocation of collateral estoppel, absent mutuality."[114] The government moved to amend the judgment on rehearing, on the basis of the Tax Court's decision in *Divine*,[115] but the Pennsylvania court refused to follow the *Divine* guidance. Although the *Baily* court is alone in its viewpoint, its approach of considering the fairness of applying collateral estoppel in the context of the facts of the case before it[116] should be the practice of the future if the policy judgments of *Bernhard* are accepted.[117]

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107. The relative importance of judicial economy in this context was expressed in Heckman, *supra* note 42, at 234: "Collateral estoppel should apply to as many issues as possible to eliminate repetitive litigation. On the other hand, the doctrine should be applied narrowly enough to ensure each party a fair hearing on all issues."

108. Bruszewski v. United States, 181 F.2d 419, 421 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950).

109. Baily v. United States, 350 F. Supp. 1205, 1210 (E.D. Pa. 1972).

110. *See* Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971); Zdanok v. Glidden Co., 327 F.2d 944, 953 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964).

111. "In the present state of evolution of the doctrine of collateral estoppel its invocation has seemed to depend on the existence of circumstantial assurances of the fairness of applying it in the particular case. It is not approached with the inflexibility and the insistence on the dominance of principle that generally characterizes the application of the doctrine of res judicata . . . ." Agrashell, Inc. v. Bernand Sirotta Co., 281 F. Supp. 704, 707 (E.D.N.Y. 1968). *See also* text at notes 23-29 *supra*.

112. *See* Divine v. Commissioner, 49 T.C. 152 (1972), *affd.*, 500 F.2d 1041 (2d Cir. 1974).

113. 350 F. Supp. 1205, *affd. on rehearing*, 355 F. Supp. 325 (1973).

114. 350 F. Supp. at 1209.

115. *See* text at notes 59-62 *supra*.

116. 350 F. Supp. at 1210.

117. *See* text at notes 23-29 *supra*.