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## Civil Procedure—Collateral Estoppel—The Evolution of Collateral Estoppel in Arkansas: Is Mutuality of Estoppel an Anachronism

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CIVIL PROCEDURE—COLLATERAL ESTOPPEL—THE EVOLUTION OF COLLATERAL ESTOPPEL IN ARKANSAS: IS MUTUALITY OF ESTOPPEL AN ANACHRONISM? *Davidson v. Lonoke Production Credit Association*, 695 F.2d 1115 (8th Cir. 1982).

Owen G. Glass, a farmer in Perry County, Arkansas, received a loan from the appellee Lonoke Production Credit Association. In return, the appellee was given a security interest in Glass' crops, equipment and proceeds. A financing statement containing a purported description of the two farms on which Mr. Glass' crops were to be grown was filed with the Perry County Circuit Clerk. Subsequent to this filing, one of Glass' creditors sought a writ of garnishment against a portion of the crops which had been stored in a local grain elevator. The writ was issued pursuant to an order in a state proceeding between Glass and the creditor. The appellee answered the garnishment petition alleging a security interest in the crops. The Pulaski County Circuit Court found that the crops had not been properly identified as being grown on the farms described in the financing statement and held that the security interest was therefore invalid. The Arkansas Supreme Court affirmed.<sup>1</sup>

Glass then filed a bankruptcy petition<sup>2</sup> and appellant, Charles Davidson, became trustee of the bankrupt estate. Again, the appellee claimed a security interest in the crops but this time the appellee sought the remainder of the crops, a portion of which the creditor had garnished in the prior state proceeding. The bankruptcy court held that the description of the farm and crops in the financing statement was sufficient to perfect a lien pursuant to section 9-402(1) of the Uniform Commercial Code.<sup>3</sup>

The appellant appealed to the Eighth Circuit Court of Appeals claiming that the appellee's alleged security interest was invalid because the identification in the financing statement was insufficient;

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1. *Lonoke Prod. Credit Ass'n v. Carnation*, No. 77-225 (Feb. 20, 1978). This case was not designated for publication.

2. It is not clear from the opinion whether the bankruptcy petition was filed subsequent to the state proceeding or whether the bankruptcy court allowed the state proceeding to continue.

3. According to ARK. STAT. ANN. § 85-9-402(1) (Supp. 1983), a financing statement is sufficient if it names the debtor and the secured party's address and gives a mailing address for the debtor. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown, the statement must also contain a description of the real estate concerned.

and that the appellee was collaterally estopped from relitigating his claim. Accepting appellant's collateral estoppel argument as dispositive, the court of appeals did not address the issue of the sufficiency of the crop description and held that the Lonoke Production Credit Association was barred from relitigating the issue as to its security interest. *Davidson v. Lonoke Production Credit Association*, 695 F.2d 1115 (8th Cir. 1982).

The application of collateral estoppel is an outgrowth of the generally accepted doctrine of mutuality of estoppel.<sup>4</sup> Under the doctrine of mutuality of estoppel,<sup>5</sup> parties and their privies must have been bound by a prior judgment on the merits in order to later invoke or be subjected to the preclusive effect of collateral estoppel.<sup>6</sup>

The development of collateral estoppel and mutuality of estoppel began with Roman Law<sup>7</sup> and was an outgrowth of the doctrine of *res judicata*<sup>8</sup> which applied only to the same parties in a previous action. At common law the rules of *res judicata* and mutuality of estoppel were formulated in the *Duchess of Kingston's Case*.<sup>9</sup> In this case Lord Chief Justice DeGrey wrote:

First, that the judgment of a court of concurrent jurisdiction directly upon the point is . . . conclusive between the same parties upon the same parties, upon the same matter directly in question in another court. Secondly, that the judgment of a court . . . directly upon the point is in like manner conclusive upon the same matter between the same parties coming incidentally in question

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4. RESTATEMENT (SECOND) OF JUDGMENTS § 17, comment c (1982) provides:

In a subsequent action between the parties the judgment generally is conclusive as to the issues raised in the subsequent action if those issues were actually litigated and determined in the prior action and if their determination was essential to the judgment. When the subsequent action is on a different claim, this effect of the judgment is sometimes designated a *collateral estoppel*.

5. See RESTATEMENT OF JUDGMENTS § 93 (1942); F. JAMES, CIVIL PROCEDURE 584-88 (1965).

6. According to M. GREEN, BASIC CIVIL PROCEDURE 212 (1972), this premise is based on an idea of fairness in that every man is entitled to his day in court, and unless he has had that day, prior judgments are not binding on him.

7. See H. BROOM, A SELECTION OF LEGAL MAXIMS: CLASSIFIED AND ILLUSTRATED 222, 241 (4th ed. 1854).

8. See RESTATEMENT OF JUDGMENTS § 79 (1942). The Romans explained *res judicata* in the legal maxim of *Nemo Debit Bis Vexari Pro Una et Eadem Causa*, which means that a man shall not be twice vexed for one and the same cause. From this phrase the Romanic concepts *exceptio rei judicatae* (the subject matter of the action has been determined in a previous action) and *res judicata pro veritate accipitur* (a matter adjudged is taken for truth) developed into what is known today as *res judicata*. H. BROOM, *supra* note 7 at 222.

9. 20 St. Tr. 355 (H.L. 1776).

in another court for a different purpose.<sup>10</sup>

Judgments were also binding upon privies<sup>11</sup> to parties in a prior litigation.<sup>12</sup> The RESTATEMENT OF JUDGMENTS<sup>13</sup> defined the modern view of privity to include “[t]hose who control an action although not parties to it;<sup>14</sup> those whose interests are represented by a party to the action;<sup>15</sup> and successors in interest to those having derivative claims.”<sup>16</sup> Therefore, to say that a person had the benefit as a privy was a way of stating that under the circumstances and for the purpose of the case at hand, he was bound by and entitled to the benefits of all or some of the rules of *res judicata*, by way of merger, bar or collateral estoppel.<sup>17</sup>

The leading American case adhering to the mutuality rule was *Bigelow v. Old Dominion Copper Mining and Smelting Co.*,<sup>18</sup> which involved an action by a copper company to recover secret profits realized by Bigelow and his associate. Bigelow claimed that the copper company was barred from bringing the action because of a prior suit against his associate, which was adjudged adversely to the copper company. In concluding that joint tortfeasors were not privies so as to bar a subsequent suit against Bigelow, the Supreme Court proclaimed:

It is a principle of general elementary law that the estoppel of a judgment must be mutual. . . . There can be no estoppel arising out of a judgment, unless the same parties have had their day in court touching the matter litigated, and unless the judgment is equally available to both parties.<sup>19</sup>

Although mutuality of estoppel was pervasive in the United States during the *Bigelow* era, there were generally acknowledged exceptions.<sup>20</sup> The most recognized exception, derivative liability,<sup>21</sup>

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10. *Id.* at 538.

11. The *Restatement* has abandoned the term “privity” for language such as “representation” and “relationship”. RESTATEMENT (SECOND) OF JUDGMENTS, Introduction to Chapter 1 at 14.

12. See H. BROOM, *supra* note 7 at 227.

13. RESTATEMENT OF JUDGMENTS § 83, comment a (1942).

14. *Id.* at § 84, Illustration 1.

15. *Id.* at § 85, Illustration 5.

16. *Id.* at § 89, Illustration 1.

17. *Id.* at § 83, comment a.

18. 225 U.S. 111 (1912).

19. *Id.* at 127, 131.

20. For a general analysis see 31 A.L.R.3d 1044 (1970). Most of these exceptions involved closely related people who were not technically parties. Such exceptions have involved husband and wife; parent and child; voucher and vouchee; insurer and insured; partner and co-partner; guardian and ward; trustor and trustee and beneficiaries; and in-

was premised on an idea of fairness and justice and proposed that one should not be able to relitigate the same issues against a person whose liability is dependent on another. According to the *Bigelow* court, "[a]n apparent exception to this rule of mutuality had been held to exist where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts, when sued by the same plaintiff."<sup>22</sup>

Some courts viewed mutuality of estoppel as an impediment to efficient and practical judicial administration.<sup>23</sup> Relying on such an idea, one court reasoned that:

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.<sup>24</sup>

After centuries of dominance, the principle of mutuality began a gradual downfall<sup>25</sup> culminating with the California case of *Bernhard v. Bank of America*.<sup>26</sup> Although there had been cases criticizing the rule of mutuality of estoppel,<sup>27</sup> none had ruled directly against it until *Bernhard*. In ruling that a prior probate decision barred relitigating the issue as to the status of money deposited in the Bank of America, the *Bernhard* court proclaimed that, "There is

demnitor, indemnitee and a third person. *Id.* at 1064-67. See also RESTATEMENT OF JUDGMENTS §§ 94-111 (1942).

21. See F. JAMES, CIVIL PROCEDURE 599 (1965); M. GREEN, *supra* note 6, at 215; Giedrewicz v. Donovan, 277 Mass. 563, 179 N.E. 246 (1932); Schimke v. Earley, 173 Ohio St. 521, 184 N.E.2d 209 (1962). The Supreme Court recognized this exception in *Bigelow* although it did not find such a situation in the case at bar. *Bigelow*, 225 U.S. at 127-28.

22. 225 U.S. at 127-28.

23. *E.g.*, Jenkins v. Atlantic Coast Line R., 89 S.C. 408, 412, 71 S.E. 1010, 1012 (quoting Logan v. Atlantic & Charlotte Airline R. Co., 82 S.C. 522, 64 S.E. 515 (1909)), the state's highest court said:

[I]n such cases on grounds of public policy, the principle of estoppel should be expanded, so as to embrace within the estoppel of a judgment persons who are not, strictly speaking, either parties or privies. It is rested upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public to one such opportunity.

24. *Coca-Cola Co. v. Pepsi-Cola Co.*, 172 A. 260, 263 (Del. Super. Ct. 1934); See also *Cohen v. Superior Oil Corp.* 16 F. Supp. 221, *aff'd*, 90 F.2d 810, *cert. denied*, 302 U.S. 726 (1937).

25. See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 284 n.6 (1957).

26. 19 Cal. 2d 807, 122 P.2d 892 (1942).

27. *E.g.*, *Coca-Cola*, 172 A. at 263; *Cohen*, 16 F. Supp. 221.

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."<sup>28</sup> The court declared:

In determining the validity of a plea of *res judicata*, three questions are pertinent: 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?<sup>29</sup>

After *Bernhard*, many jurisdictions gradually abandoned the mutuality rule either in whole or in part.<sup>30</sup> Furthermore, the courts abandoning mutuality either expressly or indirectly required a party or his privity to have a full and fair opportunity to litigate the issue in question in a prior proceeding.<sup>31</sup> This requirement of a full and fair opportunity to litigate was adopted by the RESTATEMENT (SECOND) OF JUDGMENTS.<sup>32</sup> In 1971, the U.S. Supreme Court also rejected the mutuality rule in *Blonder-Tongue Laboratories, Inc. v. University of Illinois*.<sup>33</sup> Justice White, writing for the Court, stated, "[U]ncritical acceptance of the principle of mutuality of estoppel . . . is today out of place."<sup>34</sup> Although this decision applied only to patent cases, the Supreme Court indicated that mutuality was an idea of the past.<sup>35</sup> Despite the Supreme Court's rejection of mutuality, not every jurisdiction was ready to denounce its application.

Furthermore, *Bernhard* left a question in the minds of most ob-

28. 19 Cal.2d at 809, 122 P.2d at 894.

29. *Id.* at 810, 122 P.2d at 895. See also *B. R. Dewitt, Inc. v. Hall*, 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967) (the New York Court of Appeals called mutuality of estoppel a "dead letter"). *Id.* at 147, 278 N.Y.S.2d at 601, 225 N.E.2d at 198.

30. See, e.g., *Zdanok v. Glidden Co., Durkee Famous Foods Div.*, 327 F.2d 944 (2d Cir. 1964), *cert. denied*, 377 U.S. 934 (1964); *Bruszewski v. United States*, 181 F.2d 419 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950); *Schwartz v. Public Admr.*, 24 N.Y.2d 65, 298 N.Y.S.2d 955, 246 N.E.2d 725 (1969); *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956). See also, 112 A.L.R. 401 (1938); Note, *The Requirement of Mutuality in Estoppel by Judgment*, 29 ILL. L. REV. 93 (1934); Note, *Effect of Servant's Recovery Against Third Party Upon Master's Subsequent Action Against Third Party*, 12 CORNELL L. Q. 92 (1927); Comment, *Privity and Mutuality in the Doctrine of Res Judicata*, 35 YALE L.J. (1926); 321 A.L.R.3d, *supra* note 20.

31. See 31 A.L.R.3d, *supra* note 20, at 1067. See *Allen v. McCurry*, 449 U.S. 90 (1980) (*Blonder-Tongue Laboratories Inc. v. Univ. of Illinois*, 402 U.S. 313 (1971)).

32. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

33. 402 U.S. 313 (1971).

34. *Id.* at 350.

35. See, e.g., *Standage Ventures Inc. v. State*, 114 Ariz. 480, 562 P.2d 360 (1977); *Lukacs v. Kluessner*, 154 Ind. App. 452, 290 N.E.2d 125 (1972); *Adamson v. Hill*, 202 Kan. 482, 449 P.2d 536 (1969).

servers as to the scope and effect of the ruling. The *Bernhard* court used broad language which seemingly indicated that both the defensive use and the offensive use of collateral estoppel could be utilized notwithstanding the lack of mutuality. The defensive use occurred when a defendant sought to prevent a plaintiff from asserting a claim which the plaintiff had previously litigated and lost against another defendant. The offensive use arose when the plaintiff sought to foreclose the defendant from relying on a defense which had been relied on unsuccessfully in an action with another party.<sup>36</sup> However, the scope of *Bernhard* was not clear and therefore many jurisdictions limited the application of the *Bernhard* rule.<sup>37</sup>

Despite the concern surrounding the offensive use of non-mutual collateral estoppel, a number of courts adopted its application.<sup>38</sup> For instance, in *B. R. DeWitt, Inc. v. Hall*,<sup>39</sup> the New York Court of Appeals applied the offensive use and pointed out that there is no reason to apply mutuality in the following circumstances:

- (1) The issues in the first and the subsequent proceeding were identical;
- (2) The defendant offered no reason for not being held to the determination in the first action;
- (3) It was unquestioned that the first action was defended with full vigor and opportunity to be heard; and
- (4) The plaintiff in the present action derived his right to recover from the plaintiff in the first action although they did not technically stand in the relationship of privity.<sup>40</sup>

Providing substantial credibility to the offensive use of collateral estoppel, the Supreme Court in 1979 announced its approval of nonmutual offensive collateral estoppel in *Parklane Hosiery Co.*,

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36. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4 (1979).

37. *E.g.*, *Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois*, 402 U.S. 313 (1971); *Makris v. Murray*, 397 F.2d 74 (6th Cir. 1968); *Berner v. British Commonwealth Pac. Airlines Ltd.*, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); *Bruszewski v. United States*, 181 F.2d 419 (3d Cir. 1950), *cert. denied*, 340 U.S. 865 (1950); *Ham v. Aetna Life Ins. Co.*, 283 F. Supp. 153 (N.D. Okla. 1968); *Reardon v. Allen*, 88 N.J. Super. 560, 213 A.2d 26 (1965); *Albernaz v. Fall River*, 346 Mass. 336, 191 N.E.2d 771 (1963); *McAndrew v. Mularchuk*, 38 N.J. 156, 183 A.2d 74 (1962); *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956); *Gammel v. Ernst & Ernst*, 245 Minn. 249, 72 N.W.2d 364 (1955).

38. *E.g.*, *Provident Tradesmen Bank & Trust Co. v. Lumbermens Mut. Casualty Co.*, 411 F.2d 88 (3d Cir. 1969); *United States v. Webber*, 396 F.2d 381 (3d Cir. 1968); *Zdanok v. Glidden Co., Durkee Famous Food Division*, 327 F.2d 944 (2d Cir. 1964), *cert. denied*, 377 U.S. 934 (1964); *Maryland v. Capital Airlines Inc.*, 267 F. Supp. 298 (D. Md. 1967); *Desmond v. Kramer*, 96 N.J. Super. 96, 232 A.2d 470 (1967); *McCourt v. Algiers*, 4 Wis.2d 607, 91 N.W.2d 194 (1956).

39. 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967).

40. *Id.* at 148, 278 N.Y.S.2d at 601-02, 225 N.E.2d at 199.

*Inc. v. Shore*.<sup>41</sup> The Court recognized the potential unfairness of the offensive use of collateral estoppel, although they did not find an unfair situation in that case.<sup>42</sup> The Court emphasized that the defendant had a full and fair opportunity to litigate in the prior decision,<sup>43</sup> and further concluded that the best approach was to allow the trial court broad discretion in determining the applicability of the offensive use of collateral estoppel.<sup>44</sup> Moreover, the Court reasoned that when the plaintiff could have easily joined in the earlier action, or when the offensive use would be unfair<sup>45</sup> to a defendant, the trial judge as a general rule should not allow the use of offensive collateral estoppel.<sup>46</sup> The Court denounced the idea that the lack of mutuality of estoppel denied a person his right to a jury trial under the seventh amendment.<sup>47</sup> After the *Parklane Hosiery* decision, the idea of mutuality of estoppel reached its lowest point while both the defensive and offensive uses of collateral estoppel gained support. More importantly, the RESTATEMENT (SECOND) OF JUDGMENTS adopted the basic approach established by *Bernhard*, *Parkland Hosiery* and their progeny.<sup>48</sup> The RESTATEMENT further proposed that

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41. 439 U.S. 322 (1979).

42. *Id.* at 329. The Court delineated three potential pitfalls in the application of the offensive use of collateral estoppel:

First, offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does. . . . Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. . . . Thus offensive use will likely increase the total amount of litigation. . . .

[O]ffensive use . . . may be unfair to a defendant. If the defendant in the first action is sued for nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable. . . . Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is inconsistent with one or more previous judgments in favor of the defendant. . . . [A]nother type of situation where it might be unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.

*Id.* at 329-31.

43. *Id.* at 332.

44. *Id.* at 331.

45. *Id.*

46. *Id.*

47. *Id.* at 335. The seventh amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

48. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

there was no intrinsic difference between the offensive and defensive uses.<sup>49</sup>

The development of mutuality of estoppel in Arkansas followed a path similar to that in other jurisdictions. Historically, Arkansas espoused a commitment to the mutuality rule.<sup>50</sup> One of the earliest Arkansas cases advancing the doctrine of mutuality was *Treadwell v. Pitts*<sup>51</sup> in which the Arkansas Supreme Court declared that creditors were not estopped from relitigating the issue of fraud even though there had been an adverse judgment as to this issue in their prior attachment suit. According to the court, "[T]he principle is the same under the rule that estoppels must be mutual."<sup>52</sup> This rule, as in other jurisdictions, applied to privies as well as to parties in a prior litigation.<sup>53</sup> For instances, in *Bank of Mulberry v. Frazier*,<sup>54</sup> the Arkansas Supreme Court declared, "A judgment or decree is binding not only on parties, but privies."<sup>55</sup>

Arkansas also has adhered to the generally recognized exception of derivative liability.<sup>56</sup> Probably the leading Arkansas case following the principle of derivative liability is *Davis v. Perryman*.<sup>57</sup> *Davis* involved a suit brought against an employer after a prior suit

49. *Id.*, Reporter's note, at 299-300. *But compare*, *United States v. Mendoza*, 104 S.Ct. 568 (1984) which denied the use of offensive collateral estoppel by a private party against the United States government, *with* *United States v. Stauffer Chemical Co.*, 104 S.Ct. 575 (1984), which approved the use of defensive collateral estoppel against the government.

50. *See, e.g.*, *Ripley v. Kelly*, 209 Ark. 389, 190 S.W.2d 526 (1945); *Collum v. Hervey*, 176 Ark. 714, 3 S.W.2d 993 (1928); *Avera v. Rice*, 64 Ark. 330, 42 S.W. 409 (1897); *Bell v. Wilson*, 52 Ark. 171, 12 S.W. 328 (1889); *Toby v. Brown*, 11 Ark. (5 Eng.) 308 (1850).

51. 64 Ark. 447, 43 S.W.142 (1897).

52. *Id.* at 450, 43 S.W.at 144.

53. *Crane Boom Life Guard Co., v. Saf-T-Boom Corp.*, 362 F.2d 317 (8th Cir. 1966), *cert. denied*, 386 U.S. 908 (1966); *C. & L. Rural Elec. Co-op Corp. v. Kincaid*, 221 Ark. 450, 256 S.W.2d 337 (1953); *Kirby v. Milum*, 218 Ark. 106, 234 S.W.2d 518 (1950); *Bank of Mulberry v. Frazier*, 178 Ark. 28, 9 S.W.2d 793 (1928); *Eldred v. Johnson*, 75 Ark. 1, 86 S.W. 670 (1905).

54. 178 Ark. 28, 9 S.W.2d 793 (1928).

55. *Id.* at 35, 9 S.W.2d at 795.

56. *See* *Ted Saum & Co. v. Swaffar*, 237 Ark. 971, 377 S.W.2d 606 (1964). *See, e.g.*, *Fleming v. Cooper*, 225 Ark. 634, 284 S.W.2d 857 (1955) (wife was bound by prior judgment against husband who acted as her agent and manager in a lease agreement and also wife and husband were found to be in privity); *Hunt v. Quarles*, 174 Ark. 342, 295 S.W. 44 (1927) (court ruled that prior judgment finding that appellant, a subcontractor, could not recover against a Phillips County drainage district for breach of contract barred an action against the appellee since the contract between appellant and appellee became a part of a contract between appellee and the drainage district which made the latter liable for any expenses to the former); *Lashbrooke v. Cole*, 124 Ark. 48, 186 S.W. 317 (1916) (appellant was deemed to have the right to plead the discharge of his co-surety as grounds for his release from liability). *See also* RESTATEMENT OF JUDGMENTS §§ 94-111 (1942).

57. 225 Ark. 963, 286 S.W.2d 844 (1956).

established the lack of negligence on the part of the employee, Perryman, while in the scope of his employment. Justice McFaddin wrote:

[We] hold that the plaintiff, after a prior unsuccessful damage action against the master or servant for alleged negligence of the servant, is barred from maintaining a subsequent action involving the same mishap when it was and is conceded in both actions that the servant was at the time acting within the scope of his employment and the only questions are negligence and contributory negligence.<sup>58</sup>

Even though Arkansas recognized the exceptions, the state's courts have adhered to the application of mutuality, and despite the ruling in *Bernhard* and the general trend away from mutuality, Arkansas has not abandoned the mutuality rule.<sup>59</sup>

Several Arkansas decisions that have discussed mutuality have emphasized that there must be a full and fair opportunity to litigate an issue in a prior suit.<sup>60</sup> However, these decisions dealt with collateral estoppel only in dicta.<sup>61</sup> Although these decisions alluded to the judicial necessity to end litigation, they relied on reasons other than collateral estoppel to deny relitigation of an issue or cause of action.<sup>62</sup>

In *Davidson*<sup>63</sup> the Eighth Circuit Court of Appeals analyzed the preclusive effect of collateral estoppel and the requirement of mutuality between parties. Noting the lack of Arkansas law pertaining to collateral estoppel and the mutuality rule, the court of appeals focused on the general development of the concepts. Notwithstanding the lack of clear guidance on collateral estoppel, the court decided the case as it believed the Arkansas appellate courts would have. Justice Arnold, writing for the court, analyzed the mutuality rule in light of *Bernhard*, *Parklane Hosiery* and the RESTATEMENT (SEC-

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58. *Id.* at 970, 286 S.W.2d at 848. See also *Eva Russell v. Nekoosa Papers, Inc.*, 261 Ark. 79, 547 S.W.2d 409 (1977).

59. See, e.g., *Crane Boom Life Guard Co. v. Saf-T Boom Corp.*, 362 F.2d 317 (8th Cir. 1966), *cert. denied*, 386 U.S. 908 (1966); *Larcon Co. v. Wallingsford*, 136 F. Supp. 602 (W.D. Ark. 1955), *aff'd*, 237 F.2d 904 (8th Cir. 1956); *Bentrup v. Hoke*, 245 Ark. 572, 433 S.W.2d 139 (1968).

60. See *Wells v. Heath*, 269 Ark. 473, 602 S.W.2d 665 (1980), *appeal after remand*, 622 S.W.2d 163 (1980); *Ted Saum & Co. v. Swaffar*, 237 Ark. 971, 377 S.W.2d 606 (1964); *Rose v. Jacobs*, 231 Ark. 286, 329 S.W.2d 170 (1959); *Davis v. Perryman*, 225 Ark. 963, 286 S.W.2d 844 (1956).

61. See cases cited *supra* note 60.

62. See cases cited *supra* note 60. Therefore, notwithstanding *Davidson*, until there is a case without the exceptions, the doctrine of mutuality of estoppel remains in Arkansas.

63. 695 F.2d 1115 (8th Cir. 1982).

OND) OF JUDGMENTS. Although the court recognized the general adherence to mutuality by the Arkansas courts,<sup>64</sup> the absence of meaningful litigation in the area of collateral estoppel provided an incentive for the Eighth Circuit to examine the present status of Arkansas' mutuality rule.<sup>65</sup>

In the court's opinion, *Bernhard* and *Parklane Hosiery* effectively stifled the mutuality rule.<sup>66</sup> In *Bernhard*<sup>67</sup> the mutuality rule was replaced with three basic questions<sup>68</sup> which focused on the availability of a full and fair opportunity to litigate an issue in a prior proceeding. Accordingly, the court of appeals concluded that these questions were answered affirmatively and that the prior state proceeding had afforded a full and fair opportunity to Lonoke Production Credit Association.<sup>69</sup> Also, the court of appeals emphasized that the *Bernhard* rationale was extended further by *Parklane Hosiery*.<sup>70</sup> Again, the requirement of a full and fair opportunity to litigate in a prior proceeding was recommended.<sup>71</sup> Although concerns<sup>72</sup> were voiced about the offensive use of nonmutual collateral estoppel, the court emphasized that offensive use was similar to defensive use.<sup>73</sup>

In analyzing Arkansas law, the court cited cases<sup>74</sup> which rejected a strict application of mutuality. Although these cases did not address the mutuality rule directly, they did suggest that Arkansas courts are more concerned with the full and fair opportunity rationale established in *Bernhard* and *Parklane Hosiery*<sup>75</sup> than with whether or not parties or their privies were involved in a prior action. Furthermore, given the fact that the RESTATEMENT (SECOND) OF JUDGMENTS incorporated the rationale of *Bernhard* and *Parkland Hosiery*, the court of appeals believed that Arkansas would fol-

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64. *Id.* at 1117, 1120.

65. *Id.* at 1117.

66. *Id.* at 1119.

67. 19 Cal.2d 807, 122 P.2d 892 (1942).

68. *See supra* text accompanying note 32.

69. *Davidson*, 695 F.2d at 1115, 1121.

70. *Id.* at 1118. In *Parklane Hosiery* the Supreme Court approved the defensive use and expanded nonmutual collateral estoppel to include the offensive use. 439 U.S. at 329-31.

71. 695 F.2d at 1118-19.

72. *Parklane Hosiery*, 439 U.S. at 332.

73. *Davidson*, 695 F.2d at 1121.

74. 695 F.2d at 1120 (citing *Ted Saum & Co. v. Swaffar*, 237 Ark. 971, 377 S.W.2d 606 (1964)); *Rose v. Jacobs*, 231 Ark. 286, 329 S.W.2d 170 (1959); *Davis v. Perryman*, 225 Ark. 963, 286 S.W.2d 844 (1956)).

75. *Davidson*, 695 F.2d at 1120.

low the RESTATEMENT'S approach.<sup>76</sup>

For the foregoing reasons, the court of appeals delivered a major blow to mutuality of estoppel in Arkansas. In essence the *Davidson* court found that Lonoke Production Credit Association had a full and fair opportunity to litigate the crop description issue in the prior state proceeding, and therefore was estopped from further litigation. In addition, the court approved the offensive use as well as the defensive use of nonmutual collateral estoppel, giving full support to nonmutual issue preclusion and its objectives.

The *Davidson* decision follows the majority view in the area of issue preclusion. Although the Eighth Circuit Court of Appeals speculated about how the Arkansas courts would hold, this decision enunciates an enlightened view that has spread across the country. Given the deep-rooted application of res judicata and collateral estoppel, it is likely that the idea of mutuality is on the road to extinction<sup>77</sup> since the eradication of mutuality fosters the purpose and goals of collateral estoppel.<sup>78</sup>

However, courts must be cautious in the application of non-mutual collateral estoppel especially when it is used offensively. A judicious application of collateral estoppel is necessary in order to avoid the concerns addressed by the Supreme Court in *Parklane Hosiery*.<sup>79</sup> This can be done by focusing on the guidelines set out in *Bernhard*,<sup>80</sup> *Parkland Hosiery*<sup>81</sup> and the RESTATEMENT OF JUDGMENTS.<sup>82</sup> It is the writer's opinion that mutuality of estoppel must fall. To allow its continuance would place a burden on our system of justice which cannot be supported.

*Ronald Carl Wilson*

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76. *Id.* at 1121.

77. For a list of states adhering to mutuality, see Frans, *Non-mutual Issue Preclusion in Kansas*, 30 KAN. L. REV. 443 n.30 (1982). See also Gibson, *Civil Procedure—Abandonment of the Mutuality Requirement*, 22 ARK. L. REV. 491 (1968). This article proposes that given the right case, Arkansas courts could abandon the mutuality rule. *Id.* at 500.

78. These goals have been generally: (1) finality of judgments; (2) judicial economy; (3) protection of litigants from unnecessary and repetitive litigation; and (4) the protection of judicial integrity by avoiding inconsistent results.

79. 439 U.S. 322, 329-31 (1979).

80. 19 Cal. 2d 807, 122 P.2d 892 (1942).

81. 439 U.S. 322 (1979).

82. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

