relief seems to be so limited by the courts themselves without the aid of a statute.[27] Most jurisdictions, however, grant decrees of annulment even when the proceeding is brought by the party who is legally disqualified from marrying again because of a pre-existing lawful union.[28] It is also significant to note that courts in other states have granted a decree of annulment to a petitioner where the factual situation was essentially the same as that in the *Ancrum* case.[29]

THE DOCTRINE OF RES JUDICATA IN NEW JERSEY—Both precedent and logic dictate the universal rule of the common law that a fact or question properly raised in a suit, and determined by a court of competent jurisdiction, is as between the parties to the action and their privies, conclusively settled thereby so long as the judgment remains unreversed.[1] Decisions so holding are legion.[2] As early as 1850 we find the New Jersey Court of Errors and Appeals affirming a judgment based upon a verdict reached by the application of this principle.[3] Other cases in New Jersey to the same effect are not scarce,[4] and the rule is as well established in equity as at law.[5]

The doctrine so frequently enunciated rests upon the broad ground of public policy emphasizing the desirability of peace and

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[27] Berry v. Berry, 130 App. Div. 53, 114 N.Y.S. 497 (1909); Tefft v. Tefft, 35 Ind. 44 (1871).

[28] Szlauzis v. Szlauzis, 255 Ill. 314, 99 N.E. 640 (1912); Lynch v. Lynch, 34 R. I. 261, 83 Atl. 83 (1912); Martin v. Martin, 54 W.Va. 301, 46 S.E. 120 (1903); Heflinger v. Heflinger, 136 Va. 281, 118 S.E. 316 (1923); Rogers v. Holmshaw, 3 Swabey & T. 509; 164 Eng. Rep. 1373 (1864). See 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, Sec. 722 (where this view is stated as the weight of authority).

[29] Pain v. Pain, 37 Mo. App. 110 (1889); Seacord v. Seacord, 139 Atl. 80 (Del. 1927). See Stokes v. Stokes, 198 N.Y. 301, 91 N.E. 793 (1910), *rev'g* 128 App. Div. 838, 113 N.Y.S. (1908).

[1] 34 C.J. 868-869 n. 59. citing over 500 cases.

[2] See *Supra* note 1.

[3] Ward v. Ward, 22 N.J.L. 699 (E&A 1850). In this case A sued B for raising a dam and causing A's land to be overflowed. In a prior suit B had sued A for breaking the dam, in which suit A had justified his actions, claiming B had raised the dam too high. Upon this issue the jury found for A, thereby establishing the justification. In the instant suit the trial court charged the jury as a matter of law to find that the dam was raised too high and this instruction was sustained by the Court of Errors and Appeals without an opinion. In the course of his charge to the jury, Mr. Chief Justice Green said, "I take the well settled rule to be this, that when a material traversable fact, directly in issue between two parties has been ascertained by the finding of a jury and judgment final has been rendered upon that verdict, and remains unreversed, that finding is conclusive between those parties, and it does not lie in the mouth of either afterwards to gainsay it." Page 707.

[4] Hancock v. Singer Manufacturing, 62 N.J.L. 289 (E. & A. 1898); Gyarfas v. Karpf, 83 N.J.L. 387 (Sup. 1912).

[5] Spingarn v. Spingarn, 8 N.J. Misc. 423, 150 Atl. 764 (Ch. 1931), and cases there cited. It has been suggested that the equity cases are not binding upon the law courts but in view of the logical basis of the doctrine, *infra,* there seems to be no reason for the distinction.

repose among litigants.[6] Whenever several parties have had an opportunity to litigate an issue in a court of competent jurisdiction it is only proper that they be bound by the judicial adjudication of that issue in all subsequent dealings with each other. And this must, in the last analysis, be the test of the application of the principle. They are bound where it is fair that they should be bound. Thus it is obvious that the parties must be the same and that the issue must be the same in both cases.[7] Whether any further requirement is necessary is problematical, the answer lying in a logical analysis of the problem in an endeavor to discover whether the parties have had fair opportunity and reason to litigate the issue thoroughly. As has been pointed out frequently, the principle is in reality the operation of an estoppel to controvert particular facts.[8]

Despite the apparent simplicity of this principle its application has not been uniform. In *Bernhard* v. *Hoboken*[9] a chief of police was suing to recover certain back salary. In a prior suit between the same parties the question of the propriety of his alleged discharge on a particular date had been raised and decided in his favor. This same question was now raised again and it was held, "That the defendants had a right, notwithstanding the first judgment, to controvert, in the second trial, whether or not the resolution * * * was a lawful removal of the plaintiff from office. That that was a question of law not concluded as regarded other actions by the judgment in the first case; but that in the case on trial the defendants could contend, as a question of law, that the said resolution was a valid removal, and that consequently, from and after the 20th day of June, 1856, the plaintiff was not *de jure* chief of police." This case has been explained with approval by the Court

[6] Ward v. Ward, *supra* note 3; Paterson v. Baker, 51 N.J. Eq. 49, 26 Atl. 324 (Ch. 1893). In Ward v. Ward, the court said, "It rests upon the principle that there should be an end to litigation. Justice requires that every cause should be once fairly tried and when a fact has once been fairly and legally settled, it it should not be again disturbed, but that that controversy should be closed forever." Page 707.

And in Paterson v. Baker, the court said, "The doctrine under consideration is not a mere rule of procedure, limited in its operation, and only to be enforced in cases where a defeated suitor attempts to litigate anew a question once heard and decided against him, but a rule of justice, unlimited in its operation, which must be enforced whenever its enforcement is necessary for the protection and security of rights and for the preservation of the repose of society." Page 59.

[7] 2 FREEMAN ON JUDGMENTS, 1416 (5th Ed. 1925). Paterson v. Baker, *supra* note 6. "As I understand the principal established by the decisions, all that is required, in cases where the prior and subsequent litigations involve different things, to render the judgment in the first conclusive upon the parties in the subsequent, is that there shall be substantial identity in the subject matter of the two, and that must always be the case, as is obvious where the judgment in the first rests on a decision of the same question substantially which is presented for decision by the subsequent." Per Fleet V.C.

[8] Ward v. Ward, *supra,* note 3; Gyarfas v. Karpf, *supra,* note 4; Paterson v. Baker, *supra,* note 6.

[9] 27 N.J.L. 412, (Sup. 1859).

of Errors and Appeals,[10] as involving a pure question of public law as to which the application does not operate. However the decision seems unsound, particularly in view of the case of *Hancock* v. Singer Manufacturing Co.[11] which held that where the issue of the taxability of certain property was raised in a suit and decided adversely to the municipality, that the taxing body could not attempt to reopen this question by attempting to levy the same tax upon the same property for some subsequent year, no change in the legal situation occurring in the interim. This case involved a question of public taxation which seems to be at least as much a question of public law as that of the removal of a public officer. The case seems clearly sound and should be taken to overrule the *Bernhard* case.

In view of the "estoppel" nature of the principle one would expect the application thereof to be governed by the requirement normally governing the application of estoppels, one of which is that the estoppel must be mutually operative, if at all. One ordinarily can not reap the benefits of an estoppel unless in a reverse situation he would be required to bear its burdens. And the lack of mutuality seems a bar to the invoking of the doctrine.[12]

Nothwithstanding, and without considering, the substantial body of authority sustaining this proposition, a comparatively recent case seems to overlook it completely. In *Carter* v. *Public Service*[13] the plaintiff sued for an alleged assault upon her by an agent for the defendant. The latter set up in defense a judgment recovered by the agent against the plaintiff on a finding of fact that the plaintiff had committed the assault in question. The direction of a verdict in favor of the defendant by the trial court was affirmed by the Court of Errors and Appeals. The case is a vicious extension of the doctrine of *res judicata,* in complete disregard of

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[10] Water Commissioners v. Cramer, 61 N.J.L. 270, (E.&A. 1897).

[11] 62 N.J.L. 289 (E.&A. 1898). In the course of its opinion, the Court in this case said, "The attempt now to reopen questions which have been once adjudged by this court, by trying to enforce a subsequent tax of the same character should not be countenanced. It is contrary to the traditions of this Court; no precedent can be found for it from the foundation of this court to the present time." Page 340.

[12] Coney v. Harney, 53 N.J.L. 53, 20 Atl. 736, (Sup. Ct. 1890); 2 BLACK, JUDGMENTS 807 (2 Ed. 1902), citing numerous cases. In Coney v. Harney, the Court states, "An estoppel, even by the judgment of a court, must be mutual to be admissible in bar, and such a judgment will bind only those who are party or privy thereto. Here defendant was neither party nor privy. There was no mutuality, for had it been adjudicated that defendant had committed the adultery charged in the cross-petition, such adjudication manifestly could not have been set up against him. Under the rule referred to, he cannot set up the adjudication in his favor." Page 501. Black, *supra,* states the rule as follows, "On the principle that estoppels must be mutual, no person is entitled to take advantage of a former judgment or decree as decisive in his favor of a matter in controversy, unless, being a party or privy thereto, he would have been prejudiced by it had the decision been the other way."

[13] 100 N.J.L. 374, 126 Atl. 456, (E.&A. 1924).

the fundamental prerequisite of identity of parties. Under the reasoning of the court, the Public Service would be bound by a judgment against its agent on the issue of assault despite its lack of opportunity to partake in the trial of that issue. The case seems unsustainable on either precedent or logic.

While the term *res judicata,* as we have seen above, is frequently used to indicate an estoppel from controverting an issue theretofore determined by a court of competent jurisdiction, the same term is used to indicate a principle of the same genus but of an altogether different species. Thus cases are frequently found in which courts say that before a prior judgment can be *res judicata* in a subsequent suit, the causes of action must be identical.[14] These cases, however, deal with situations where the entire cause of action is claimed to be barred by a prior judgment and not with those in which a particular issue is alleged to be conclusively adjudicated. Few distinctions are of greater importance to the proper analysis of the cases.[15] It was probably a disregard thereof which

[14] Hoffmeier v. Trost, 83 N.J.L. 358 (Sup. 1912); Mershon v. Williams, 63 N.J.L. 398 (Sup. 1899).

[15] Cromwell v. County of Sac. 94 U.S. 351, 24 L. Ed. 195 (1877); 2 FREEMAN, JUDGMENTS, 1324 (5th Ed. 1925); 2 BLACK, JUDGMENTS, 767 (2d Ed. 1902). In Cromwell v. Sac, the United States Supreme Court, by Mr. Justice Field, said, "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, 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. Thus, for example; a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and

accounts for the opinion of *Smith* v. *Fisher Baking Co.*[16] a case which, more than any other, throws the present situation in New Jersey into a state of extreme confusion. Here the plaintiff sued to recover for damage done to her automobile as a result of a collision with an automobile owned by the defendant. The plaintiff's automobile, at the time of the accident, was operated by her servant, who prior to the time of the present suit, had brought an action to recover damages on account of personal injuries sustained by him in the same accident, in which suit a judgment was obtained by the defendant. The defendant, in the present action, sought to set up this judgment as *res judicata* of the issue of negligence. The trial court refused to sustain the defendant's contention, which action was affirmed by the Court of Errors and Appeals. The decision in this case is clearly sound inasmuch as the parties to the two suits were not the same. The opinion, however, does not go upon this simple and clearly correct ground, but after pointing out that the two actions are separate and distinct[17] the court states that the doctrine of *res judicata* can have no applicability. The opinion fails to consider all the prior authority within the State which we have been treating above. It is not unlikely that since it had erroneously extended the doctrine of *res judicata* to include the principal where a suit against his agent terminated favorably to him[18] the court felt it could not logically exclude the operation of the doctrine where the prior adjudication was unfavorable to the agent. And since it was obviously impossible to hold the principal bound by an adverse decision against his agent in a suit, in which he, the principal, was not a party, the court seized upon language in prior cases, which although totally inapplicable to the case at bar, enabled it to reach an obviously correct result. We thus have the not altogether unusual situation of a court confronted with a bad decision forced, as a logical consequence thereof, into a position even more indefensible.

The recent case of *Freitag* v. *Renshaw*[19] reiterates the general principles of the doctrine of estoppel by a judgment and applies it to a cause of action for personal injuries sustained in an automobile accident where a prior suit between the same parties for the property damage arising out of the same accident had been previously tried. The Court holds that under this set of facts the issue

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determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

"The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel."

[16] 105 N.J.L. 567 (E&A 1929).

[17] See Ochs v. Public Service Railway Co 81 N.J.L. 661 (E&A 1911).

[18] Carter v. Public Service, *supra,* note 13.

[19] 9 N.J. Misc. 1161 (Ct. of C. P. 1931) Per Hartshorne, J

of negligence must be deemed conclusively adjudicated by the prior decisions and that the parties must be bound thereby. Accordingly, since in the prior proceeding the plaintiff had been found guilty of negligence a motion to dismiss the complaint was granted. This case is refreshingly sound and it is only to be hoped that within the near future the Court of Errors and Appeals of this State will find occasion to explain the cases of *Smith* v. *Fisher Baking Co.*[20] and *Carter* v. *Public Service*[21] consistently with the firmly fixed and highly desirable rules heretofore announced by a multitude of decisions.

THE VENDEE'S LIEN—In two opinions[1] handed down in 1929 the Court of Errors and Appeals of New Jersey declared that a bill by a vendee under an executory contract, which alleged a breach of the contract and sought the return of the deposit money, presented a purely legal question not within the jurisdiction of equity. In February, 1930, the court held[2] that the additional fact that the bill prayed a lien for the amount paid still did not bring the case within equity's jurisdiction. Finally, on May 19, 1930, the court held[3] that a bill by a vendee which sought a decree rescinding the contract and fixing a lien upon the land for the return of the deposit money did not state a cause of action within the jurisdiction of equity.[4]

The opinions in the first three of these cases[5] were written by the same Justice.[6] The opinion in the last case[7] was "per curiam". After the decision in the last case there was a change in the personnel of the court[8] and then the case of *Richeimer* v. *Fischbein* came up.[9]

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[20] *Supra,* note 16.
[21] *Supra,* note 13.

[1] Bailey v. B. Holding Company, 104 N.J. Eq. 241 (January 14, 1929); Grunt v. Olsan, 104 N.J. Eq. 242 (January 14, 1929).
[2] Clark v. Badgely, 105 N.J. Eq. 534 (Feb. 3, 1930).
[3] Slomkowski v. Levitas, 106 N.J. Eq. 266.
[4] The court said:
"The action (sic) in the court below was to rescind the contract upon the ground that the vendors could not deliver a marketable title under the proper construction of the will of one Anna Van Winkle Todd and also because the buildings upon the lands were not entirely within the boundaries of the property contracted to be conveyed and the proceeding was for the further purpose of impressing a lien upon the lands for the down money paid by the vendees under their contract * * * the matter is controlled by the findings of this court in Bailey v. B. Holding Company, 104 N.J. Eq. 241, and Grunt v. Olsan, 104 N.J. Eq. 242."
[5] Bailey v. B. Holding Company, (*supra,* note 1); Grunt v. Olsan, (*supra,* note 1); Clark v. Badgely, (*supra,* note 2).
[6] Justice Charles C. Black.
[7] Slomkowski v. Levitas, (*supra,* note 3).
[8] Justice Peter F. Daly succeeded Justice Charles C. Black.
[9] 107 N.J. Eq. 493 (E. & A. 1931). The case was argued May 23, 1930