

# Civil Procedure: The Tempest Brews

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*The tempest brews in many inkpots. The reasoning in important cases appears to some scholars as lacking in depth or forthrightness, and to others as strong and clear. Some are concerned lest judges invoke so-called neutral principles that reach too ambitiously into the void of tomorrow. On the other hand . . . a judge should have at least the day after tomorrow in mind.†*

IN WHAT areas of the law will the genius of Roger Traynor have its greatest impact? To answer that question with confidence would require not only the gift of prophecy but also a versatility comparable to that which Chief Justice Traynor himself has achieved in a quarter-century of experience on one of our busiest courts of last resort. The reader can best form his own judgment after consulting the articles in this symposium and earlier appraisals of the Justice and his work-product.<sup>1</sup> My own hope is that his influence will be especially fruitful in the conflict of laws, where he has contributed much and can contribute much more when the opportunity arises.<sup>2</sup>

For this occasion I avoid the hazards of prophecy, specialization, and personal idiosyncrasy by concentrating on a single case, one in which time has already proved Justice Traynor's opinion for a unanimous court a classic of jurisprudence, an early attainment of his lifetime goal of substituting reason for unreason in the law.<sup>3</sup> In increasing order of specificity the subject is civil procedure,<sup>4</sup> judgments, *res judicata*, col-

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† Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615, 625 (1961).

<sup>1</sup> See, e.g., *Symposium*, 13 STAN. L. REV. 717-864 (1961).

<sup>2</sup> See Kay, *The Contributions of Roger J. Traynor—Conflict of Laws: Foreign Law as Datum*, *infra* this Symposium; Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719 (1961); Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959).

<sup>3</sup> As a second-year student at Boalt Hall, Traynor wrote a note excoriating the rule in *Dumpro's Case*, concluding: "It was originally without foundation and at the present time is universally condemned as entirely without reason or common sense to support it. If no law should survive the reasons upon which it is founded surely it should not be perpetuated if it is founded upon no reason at all." Comment, *Real Property: Landlord and Tenant: The Rule in Dumpro's Case*, 14 CALIF. L. REV. 328, 333 (1926). Justice Traynor has recalled the note with good-humored resignation concerning the odds against the success of academic—he cannot mean judicial—attempts to eradicate the weeds from the legal garden. Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615, 622 (1961); see also Traynor, *Unjustifiable Reliance*, 42 MINN. L. REV. 11, 14-15 (1957).

<sup>4</sup> Many of Traynor's conflict of laws opinions—those treating of jurisdiction and judgments—could with equal propriety be classified as procedural. See Currie, *supra* note 2,

lateral estoppel, the late but not lamented rule of mutuality, and, finally, some second thoughts concerning the limits, if any, that must attend the abandonment of that rule of unreason.

The case, of course, is *Bernhard v. Bank of America National Trust & Savings Association*.<sup>5</sup> In his final accounting Mr. Cook, executor for Mrs. Sather, made no mention of funds deposited in a bank account in the name of "Clara Sather by Charles O. Cook." For this reason Helen Bernhard and other beneficiaries under the will objected to the account, but the probate court ruled that the testatrix had made a gift of the fund to Mr. Cook. Thereafter, Bernhard, having qualified as administratrix with the will annexed, sued the bank on the theory that it had paid the money to Cook without authority. The bank pleaded the judgment of the probate court as *res judicata*, but Bernhard invoked the mutuality rule. Had the judgment of the probate court gone against Cook, it could not have bound the bank (because elementary considerations of due process preclude binding a party to a judgment in a case to which he was not a party or in which he was not fairly represented), and *therefore*—a classic nonsequitur—the judgment in favor of Cook could not be invoked by the bank against Bernhard, who was not only a party but in a sense the moving party in the prior proceeding. Notwithstanding the entrenchment of this curious rule in legal annals, the supreme court affirmed the superior court's ruling that the judgment of the probate court could be invoked to bar Bernhard's action against the bank.

The mutuality rule had been assailed by Jeremy Bentham more than a century earlier;<sup>6</sup> it had been regularly deplored by commentators; its force had been diminished by exceptions. The *Bernhard* case might easily have been brought within one of the established exceptions. Justice Traynor chose instead to extirpate the mutuality requirement and put it to the torch. No useful purpose would be served by recapitulating his reasoning here; it is familiar enough, and no brief quotation or paraphrase could do justice to the opinion itself.

Probably because we had a war on our hands at the time, this dramatic development in the law was little noticed when it appeared. The lone contemporary law-review commentary rationalized the result on the

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at 749-77. One of the most noteworthy of these is *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957), *appeal dismissed and cert. denied sub nom.* *Columbia Broadcasting System v. Atkinson*, 357 U.S. 569 (1958), discussed in Currie, *supra* note 2, at 772-77.

<sup>5</sup> 19 Cal. 2d 807, 122 P.2d 892 (1942).

<sup>6</sup> 3 BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 579-80 (1827), reprinted in 7 *WORKS OF JEREMY BENTHAM* 171 (Bowring ed. 1843). If purists object to my use of the word "curious" to describe the rule, my defense is that the adjective is Bentham's own; *but see id.* at 573-74 (7 BOWRING at 170 n.) indicating that responsibility for the text rests with his editor rather than with Bentham himself. *Cf.* Currie, *supra* note 2, at 762 n. 181.

ground that it could be justified by a rather obscure exception to the mutuality rule.<sup>7</sup> I was among those who belatedly expressed appreciation for the decision and recognized its historic significance, hailing it as "a triumph of judicial statesmanship."<sup>8</sup> I did so, however, with reservations. While there was nothing to be said in defense of the mutuality rule itself, and elation was the only appropriate theme for its obsequies, the rule had involved, perhaps fortuitously, certain incidental effects that seemed beneficial, and these might be sacrificed to the detriment of law and justice if the broad new criteria substituted by Justice Traynor were applied too literally in factual contexts differing from that of the *Bernhard* case. For immediate purposes it is sufficient to state the reservations as briefly as possible: to jettison the mutuality rule without some saving provision might lead to (1) anomalous results in multiple-claimant cases, such as those resulting from mass disasters, and (2) injustice in those cases in which, by reason of his opponent's astute employment of the initiative, the party against whom the former judgment is invoked did not in the former action have, in a realistic sense, a full and fair opportunity to defend.

My purpose is not to report that *Bernhard* has brought the citadels of mutuality tumbling down throughout the common-law world. Indeed, not all commentators are persuaded that such a result, even (apparently) with such reservations as mine, would be desirable;<sup>9</sup> and the cases in other jurisdictions that explicitly adopt California's repudiation of the mutuality rule are not, numerically, impressive.<sup>10</sup> This appears to be so, even though twenty-three years have passed, because the issue is not presented with any great frequency and because when it is presented it can often be disposed of, consistently with a rejection of mutuality, by resort to one of the established exceptions to the rule. What interests me is, I think, more significant than a long file of other courts engaged in following the leader. It is that in certain important cases in which the *Bernhard* decision has been followed, the wisdom of Justice Traynor has been vindicated in such a way as to make the reservations of an

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<sup>7</sup> Seavey, *Res Judicata with Reference to Persons Neither Parties Nor Privies*, 57 HARV. L. REV. 98 (1943). See also Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN L. REV. 281, 290 n.22 (1957); RESTATEMENT, JUDGMENTS § 110 (1942).

<sup>8</sup> Currie, *supra* note 7, at 285. See Currie, *supra* note 2, at 761-62.

<sup>9</sup> E.g., Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 308, 311 n.25 (1961).

<sup>10</sup> See *id.* at 304-05, Appendix to this Article, *infra*. There is no denying that the results so far disappoint reasonable expectations: "The rule of the *Bernhard* case is still the rule in only a minority of states, but there can be little doubt that the inadequacies of the mutuality rule and the sensible character of the *Bernhard* rule will sooner or later win a majority if not universal acceptance for it." HAYS, *MANUAL TO ACCOMPANY CASES AND MATERIALS ON CIVIL PROCEDURE* 127 (1948).

otherwise enthusiastic supporter of the decision seem unworthy, and Traynor has been revealed as one who possessed (though he has never flaunted it) a profound confidence in the willingness and ability of courts to take pains to see that justice is done in the individual case. My theme is that his decision, in the light of subsequent developments, should be instructive to those of lesser faith.

For present purposes, at least, the more important of my reservations is the second of the two that have been stated. It is quite possible that the party against whom the former judgment is pleaded did not in fact enjoy in the former action a full and fair opportunity to present his case, even though the technical requirements of due process for jurisdictional purposes were satisfied. Ideally, the court in each case would examine the circumstances of the former action to determine whether there had or had not been such an opportunity; if there had, the judgment would be treated as conclusive. I was skeptical, however, as to the willingness of the courts to engage in such particularism, and as to the practicability of such a course. Therefore, though recognizing its artificiality, I suggested a rule-of-thumb limitation on the scope of the *Bernhard* doctrine: the plea would not be allowed by one not a party to prior litigation against one who lacked the initiative in that litigation because of the likelihood that, lacking the initiative, he may have lacked a full and fair opportunity to present his case.<sup>11</sup>

It was Justice Traynor himself, I believe, who first shattered the notion that we could be content with a rule of thumb denying the plea against one who lacked the initiative in the former action, irrespective of the circumstances of the individual case.<sup>12</sup> Teitelbaum Furs, Inc. sought

<sup>11</sup> "[T]he second [suggested] limitation [on the criteria set forth in *Bernhard*] raises the ubiquitous and perennial problem of how particularistic the law can afford to be. Plainly, it is not always true that the party lacking the initiative lacks also a realistic opportunity to present his case fully and effectively. . . . So far as principle is concerned, it seems clearly preferable to allow the plea against a party to the prior action, even if he did not have the initiative, unless he can make an affirmative showing that his adversary's use of the initiative actually limited his presentation of his case. Experience indicates, however, that the law is distrustful of such particularism because of the administrative problems involved. It is probable that, if the courts adopt such a principle as this, they will proceed broadly on the assumption that the party who does not enjoy the initiative is likely to be limited in his opportunity to litigate the issue, and the rule will be that the plea may be asserted only against one who enjoyed the initiative in the former action. The subsequent discussion is based on this probability." Currie, *supra* note 7, at 309. See also *id.* at 303, 308, 313, 315, 317, 318, 319, 321, 322.

<sup>12</sup> *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962). *But cf.* the cases cited in 58 Cal. 2d at 606, 375 P.2d at 441, 25 Cal. Rptr. at 561. This case serves to undermine as well the prevailing rule that evidence of a prior criminal conviction is not generally admissible as evidence in a civil action for the purpose of proving defendant committed a specific act. 5 WIGMORE, EVIDENCE § 167-1a (1940); McCORMICK, EVIDENCE § 295 (1954); Hinton, *Judgment of Conviction; Effect on a Civil*

to recover on policies insuring against losses by robbery. The insurers invoked a prior judgment convicting Teitelbaum, *alter ego* of the corporation, of staging the robbery himself. Reversing the trial court, the supreme court ordered judgment for the defendants, holding the judgment in the prior criminal case conclusive. The plaintiffs had specifically urged upon the court the argument that one not a party to the prior proceeding should not be allowed to invoke the doctrine of collateral estoppel against one who did not have the initiative in that proceeding.<sup>13</sup> Justice Traynor spurned the rule of thumb:

Although plaintiffs' president did not have the initiative in his criminal trial, he was afforded a full opportunity to litigate the issue of his guilt with all the safeguards afforded the criminal defendant, and since he was charged with felonies punishable in the state prison . . . he had every motive to make as vigorous and effective a defense as possible.<sup>14</sup>

How often can an academic commentator rejoice when his proffered solutions of legal problems are rejected by the courts? I did rejoice. The decision, as Justice Traynor noted,<sup>15</sup> promoted the policies favoring stability of judgments and expeditious trials, and no injustice was done. In my own defense I can plead only that my rule of thumb was but a second choice; in an "ideal" world the courts would make a detailed inquiry into the circumstances of the former judgment to determine the fairness of allowing the plea of collateral estoppel. But what I failed to recognize was that dedicated judges like Justice Traynor would never accept the easy course of generalization as a substitute for the ideal of justice in the individual case.<sup>16</sup>

Recently another distinguished judge, Henry J. Friendly of the United States Court of Appeals for the Second Circuit, not only followed

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Case, 27 ILL. L. REV. 195 (1932); Cowen, *The Admissibility of Criminal Convictions in Subsequent Civil Proceedings*, 40 CALIF. L. REV. 225 (1952); COWEN & CARTER, *ESSAYS ON THE LAW OF EVIDENCE* c. VI (1956). It is important to note the dichotomy that is developing: use of the prior judgment collaterally in the civil action, or use merely as evidence in the civil action. Cf. *Connecticut Fire Ins. Co. v. Ferrara*, 277 F.2d 399 (8th Cir. 1960).

<sup>13</sup> 58 Cal. 2d 601, 606, 375 P.2d 439, 441, 25 Cal. Rptr. 559, 561 (1962).

<sup>14</sup> *Id.* at 606-07, 375 P.2d at 441, 25 Cal. Rptr. at 561.

<sup>15</sup> *Id.* at 606, 375 P.2d at 441, 25 Cal. Rptr. at 561.

<sup>16</sup> In a different context Chief Justice Traynor had previously made explicit the principle that the policy embodied in the doctrine of *res judicata* "must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case. . . . It is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case." *Jorgensen v. Jorgensen*, 32 Cal. 2d 13, 18-19, 193 P.2d 728, 732 (1948). If these remarks are technically to be classified as dicta, that is irrelevant for present purposes at least.

the *Bernhard* rejection of mutuality, but in so doing rejected also the reservation that the plea may not be invoked against a party lacking the initiative in the prior action—all this as a matter of federal as distinguished from state law.<sup>17</sup> Two actions, each by a group of employees against a common employer, sought to establish certain seniority rights under the same collective bargaining agreement. The first of these to be filed, known as the *Alexander* case, involved some 160 employees.<sup>18</sup> The second, known as the *Zdanok* case, was filed some two years later and involved only five employees.<sup>19</sup> But it was *Zdanok* that was first litigated while *Alexander* "remained quiescent," awaiting the completion of *Zdanok's* round trip to the United States Supreme Court.<sup>20</sup> The original *Zdanok* case resulted in a judgment on the merits for the plaintiff employees, giving them the asserted rights of seniority.<sup>21</sup> As soon as this decision had become final *Alexander*, in modified form, came before the same Federal district court in which *Zdanok* had been tried,<sup>22</sup> together with an effort by the defendant to reopen the decision in the *Zdanok* case

<sup>17</sup> *Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir. 1964) (consolidated with *Alexander v. Glidden, Co.*). "Since both the . . . actions present questions of federal law, we are free to follow our own conceptions as to the effect of the judgment in the former on the latter . . . and need not decide whether this would also be true if federal jurisdiction in either or both actions rested on diversity alone." *Id.* at 956.

In its rejection of the mutuality rule, *Bernhard* had already been followed in the Third Circuit, see *Bruszewski v. United States*, 181 F.2d 419, 421 (3d Cir. 1950) (Hastie, J.), and the Second Circuit had followed the Third, see *Adriaanse v. United States*, 184 F.2d 968 (2d Cir. 1950) (Augustus Hand, J.). Both of these admiralty cases, however, had allowed the plea against the party having the initiative in the former action, and thus did not present the question under discussion in the text. Even so, Judge Hastie observed in *Bruszewski* that the party against whom the plea was allowed had enjoyed "full opportunity . . . on his own election to prove the very matter which he now urges a second time. Thus, no unfairness results here from estoppel which is not mutual." 181 F.2d at 421. See also *id.* at 422. As a matter of historical interest it may be noted that Goodrich, J., concurring, was not prepared to abandon the mutuality rule even in the situation there presented. *Id.* at 423.

Standing alone, the *Adriaanse* decision appears to be based not on rejection of the mutuality rule but on either the "indemnitor-indemnitee" or the "derivative liability" exception. See RESTATEMENT, JUDGMENTS §§ 96-97, 99 (1942). Yet in *Zdanok* Judge Friendly said that *Adriaanse* "followed" *Bruszewski*, 327 F.2d at 954, and the *Zdanok* decision itself removes this source of doubt as to where the Second Circuit stands.

<sup>18</sup> 327 F.2d at 957 (concurring opinion).

<sup>19</sup> *Ibid.*

<sup>20</sup> 327 F.2d at 947. *Zdanok* is best known for the ruling on the single issue decided by the Supreme Court, 370 U.S. 530 (1962) (concerning the participation of a judge of the Court of Claims), which is relevant to this discussion only to the limited extent indicated in Chief Judge Lumbard's concurring opinion. 327 F.2d at 957. For a history of this aspect of the case, see *id.* at 946-47 n.1.

<sup>21</sup> *Zdanok v. Glidden, Co.*, 288 F.2d 99 (2d Cir. 1961).

<sup>22</sup> *Alexander* had originally been filed in the state court and was not removed; but after the Supreme Court's disposition of *Zdanok* the state court action was dismissed and a new action was filed in the federal court. 327 F.2d at 947.

on the merits in the light of additional evidence. The court of appeals had no hesitation in invoking the "good sense" doctrine of the law of the case to bar reconsideration of the *Zdanok* decision.<sup>23</sup> Technically, however, that doctrine did not apply to *Alexander*, which presented rather the problem of collateral estoppel; and since preclusive effect for the *Zdanok* judgment was being urged by persons not parties to the *Zdanok* case the mutuality rule reared its unlovely head. Not only so, but the plea of estoppel was being urged against one who had not enjoyed the initiative in the prior action. The court had little difficulty in rejecting the mutuality requirement itself. After referring to earlier decisions in the Second and Third Circuits,<sup>24</sup> Judge Friendly said: "We see no purpose in multiplying citations since it is recognized that the widest breach in the citadel of mutuality was rammed by Justice Traynor's opinion in *Bernhard v. Bank of America*. . . ."<sup>25</sup>

Judge Friendly dealt gently with my suggested limitations of the *Bernhard* doctrine, glossing over the "initiative" reservation as a secondary alternative and concentrating instead on the vital question whether in the former action the defendant had a full and fair opportunity to litigate the issue effectively.<sup>26</sup> He did not hesitate to particularize:

Here Glidden's opportunity to litigate the *Zdanok* case was both full and fair. New York was an entirely reasonable forum for litigation of a contract made in New York with respect to residents of New York working in a New York plant; as between state and federal courts in New York, Glidden, in the *Zdanok* case, had the forum of its choice. . . . And Glidden cannot reasonably argue that it was unfairly surprised by the entry of the *Alexander* plaintiffs into the lists after judgment in *Zdanok* or that it would have defended more diligently if the two actions had been combined from the outset. The *Zdanok* litigation was prosecuted by Glidden with the utmost vigor, up to the Supreme Court of the United States. The *Alexander* action in the state court was known by everyone to be lurking in the wings. . . .<sup>27</sup>

The force of the decision as support for the present thesis—that the mutuality rule is deservedly dead, and that any reservations about the totality of its demise should rest on particularized inquiry rather than on rules of thumb—seems strengthened by the concurring opinion of Chief Judge Lumbard. He had dissented when *Zdanok* was originally decided in favor of the plaintiffs on the merits,<sup>28</sup> and made no secret of his con-

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<sup>23</sup> 327 F.2d at 952-53.

<sup>24</sup> See note 17 *supra*.

<sup>25</sup> 327 F.2d at 954.

<sup>26</sup> *Id.* at 955-56.

<sup>27</sup> *Id.* at 956.

<sup>28</sup> *Zdanok v. Glidden Co.*, 288 F.2d 99, 105 (2d Cir. 1961).

tinued disagreement with that decision, especially in the light of the additional evidence: "[I]t seems to me to be clear beyond the peradventure of a doubt that the defendant proffered the only tenable view of the collective bargaining agreement."<sup>29</sup> It must be difficult, indeed, for a judge to acquiesce in an extension of the principle of collateral estoppel when the result is to give broadened scope to a decision that he is convinced is clearly wrong; yet such is the force of the reasoning that overthrew the requirement of mutuality. Perhaps this is not quite true: but for the facts that *Alexander* had been filed first and that the parties had all treated *Zdanok* as a test case, Judge Lumbard would have been reluctant to apply the principle of collateral estoppel in the *Alexander* litigation.<sup>30</sup> On the other hand, the precise ground of his concurrence may be fairly taken, perhaps, as an indication that he is willing to go farther than most judges in the process of particularization, even though in that process he would not go so far as Justice Traynor and his school in departing from the mutuality requirement.

Although Judge Friendly made no great issue of it, the decision in the consolidated *Zdanok* (*Alexander*) litigation necessarily repudiated also my other reservation about abandonment of the mutuality requirement in so far as that reservation was stated as a rule of thumb—and, I regret to say, it was so stated:

If we are unwilling to treat the judgment against the [defendant] railroad as *res judicata* when it is the last of a series, all of which except the last were favorable to the railroad, it must follow that we should also be unwilling to treat an adverse judgment as conclusive even though it was rendered in the first action brought, and is the only one of record. Our aversion to the twenty-sixth judgment as a conclusive adjudication stems largely from the feeling that such a judgment in such a series must be an aberration, but we have no warrant for assuming that the aberrational judgment will not come as the first in the series. Indeed, on the basis of . . . considerations [suggesting that the first judgment might result from covert collaboration by the plaintiffs in prosecuting the first action under circumstances of maximum disadvantage to the defendant], the judgment first rendered will be the one least likely to represent an unprejudiced finding after a full and fair hearing.<sup>31</sup>

Not only is this position tainted with cynicism; it is generalization of a flagrant kind, and I am sorry that I ever let myself suppose that the courts would indulge in it. We have no readily ascertainable basis for assuming that the plaintiffs in *Zdanok* and *Alexander* exhausted the class

<sup>29</sup> 327 F.2d at 957 (concurring opinion).

<sup>30</sup> *Ibid*; see also *id.* at 953 n.13.

<sup>31</sup> Currie, *supra* note 7, at 289.



of employees similarly situated; therefore the threat of the "multiple-claimant anomaly" was potentially present. But again Judge Friendly turned naturally to the facts of the case instead of to easy and cynical generalization:

Although the plaintiffs are numerous, and could conceivably, by careful timing of their complaints, have subjected Glidden to such a series of actions as posed in Professor Currie's railroad case, such a course offers little advantage where the matter in issue is not a factual question of negligence subject to the varying appraisals of the facts by different juries, but the construction of a written contract by a judge. Needless to say, nothing in the result of *Zdanok* turned on personal sympathy or any other consideration relating specifically to those five plaintiffs as distinguished from the other employees.<sup>32</sup>

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<sup>32</sup> 327 F.2d at 956. Cf. Currie, *supra* note 7, at 321, where I attributed to one of my colleagues, Professor Phillip B. Kurland of the University of Chicago Law School, the suggestion that the problem under discussion might profitably be approached by separating jury cases from others.

Although the plaintiffs in *Zdanok* presumably did not purport to represent the interests of other employees similarly situated, the situation inevitably brings to mind the class action concept, the closest analogy being what is now known as the "spurious" class action. See FED. R. CIV. P. 23(a)(3). I have previously made the following comment: "If the *Bernhard* doctrine applies to the . . . type of case [in which a judgment obtained by one of numerous potential plaintiffs may be pleaded by all the others against a party not having the initiative in the prior action], the utility of the class action provided by Federal Rule 23(a)(3) is destroyed. That procedure encourages claimants to file their claims in the pending action by offering them the benefit of the judgment if it is favorable, and thus tends to reduce the amount of litigation. Of course, those who join are bound by an unfavorable judgment. No claimant will follow this procedure if, without being bound by an unfavorable judgment, he can obtain the benefit of a favorable one." Currie, *supra* note 7, at 287-88 n.15. My present inclination is to reply: So what? But the problem is perhaps serious enough to merit more than such frivolous dismissal. First of all, the "spurious" class action as we know it will be abolished if the currently proposed amendment of Rule 23 becomes effective. For text of the proposed amendment, see JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 94-115 (March 1964). No class action will be maintainable without a court order authorizing that procedure. *Id.* at 97, Rule 23(c)(1). If the plaintiffs in a case of the *Zdanok* type seek to maintain it as a class action the court will consider certain enumerated factors. *Id.* at 96, Rule 23(b)(3). If the court authorizes the class action, the judgment will bind all members of the class except those who, upon notice, request exclusion. *Id.* at 97, Rule 23(c)(2). To the extent, therefore, that actions such as *Zdanok* are in the future maintained as class actions, such questions of res judicata and collateral estoppel will not arise—except in respect of those members of the class who have requested and been granted the privilege of exclusion. But cf. *id.* at 112. As to them I should think the appropriate principle of res judicata would be that they are also excluded from the right to invoke the judgment against the opposing party—or does this take me back to the "gaming-table" philosophy decried by Bentham? See Works cited at note 6 *supra*. Cf. the treatment of the present practice concerning the party who attempts to intervene in a spurious class action after a judgment favorable to his interests. *Id.* at 111. If, in the future, actions such as *Zdanok* do not purport to be class actions, problems of collateral estoppel will remain, but unembarrassed by the problem of the spurious class action. See the discussion in *id.*

Somewhat earlier, in a district court, Judge Pierson M. Hall had repudiated both of the suggested limitations on the *Bernhard* doctrine (regarded as rules of thumb) in a *jury* case.<sup>33</sup> In 1958 a United Air Lines passenger plane and a jet fighter collided over Nevada, killing all forty-two passengers and the five crew members of the private plane as well as the two Air Force pilots. Suits by survivors were filed in eleven different jurisdictions; we are concerned only with the actions brought by survivors of the passengers against the airline. Of these, twenty-four, brought in the Southern District of California, were consolidated for trial and resulted in a jury verdict for the plaintiffs on the issue of negligence;<sup>34</sup> in time, final judgments were entered on this verdict. Pending before Judge Hall were nine or ten of the remaining cases, filed in or transferred to<sup>35</sup> district courts in Nevada and Washington. At first the plaintiffs in these cases moved merely for transfer to the Southern District of California, contemplating trial of the issue of liability alone before the same jury that had heard the consolidated cases, and on the same evidence;<sup>36</sup> but later, perhaps inspired by Judge Hall's noncommittal reference to the principle of collateral estoppel,<sup>37</sup> they moved for summary judgment on the issue of liability on the ground that the California judgment was conclusive.<sup>38</sup>

Note that (1) these plaintiffs had not been parties to the proceeding in California, so that they could not have been bound by a judgment adverse to the plaintiffs in that proceeding; (2) the party against whom the California judgment was pleaded (United Air Lines) lacked the initiative in the former action; (3) there were numerous plaintiffs: the cases tried in California and those pending before Judge Hall did not exhaust the actual, to say nothing of the potential, number of claims arising from

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at 108 of test or model actions, consolidation, and other methods of expediting multiple litigation; *cf.* FED. R. Civ. P. 24 (intervention).

<sup>33</sup> *United States v. United Air Lines, Inc.*, 216 F. Supp. 709 (E.D. Wash., D. Nev. 1962), *aff'd* as to res judicata and mutuality *sub nom.* *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir. 1964). Judge Hall, of the Southern District of California, was sitting by assignment. In *United* the defendant did not proffer new evidence in the later actions, 216 F. Supp. at 728, a difference duly noted by Judge Friendly in *Zdanok*, 327 F.2d at 956; but the difference does not seem significant.

<sup>34</sup> Interesting procedural details concerning such matters as separation of the issues of liability and damages, trial of these issues by different juries, finality of the California judgment, and *res ipsa loquitur* cannot be discussed here but are to be found in the opinion. See *United States v. United Air Lines, Inc.*, 216 F. Supp. 709, 712-13, 717, 718-25 (E.D. Wash., D. Nev. 1962).

<sup>35</sup> As to the effect of transfer on the applicable state law, see *Van Dusen v. Barrack*, 376 U.S. 612 (1964); see also note 39 *infra*.

<sup>36</sup> 216 F. Supp. at 714.

<sup>37</sup> *Id.* at 716.

<sup>38</sup> *Id.* at 717.

the same collision; and (4) the former action had been tried to a jury. Thus the plea of collateral estoppel could not succeed (1) if the requirement of mutuality were followed; (2) if, discarding the mutuality rule, the court were to apply the "initiative" reservation as a rule of thumb; (3) if the court were to apply the "multiple-claimant-anomaly" reservation as a rule of thumb; nor (4) if the court were to retain the substance of the mutuality requirement for former judgments based on jury verdicts while departing from it in non-jury cases. Yet Judge Hall confidently and, I think, laudably held the former judgment conclusive:<sup>39</sup>

While there have been many cases decided in many jurisdictions on the point, none of them explored the matter as thoroughly or stated the principles involved with as much clarity as the California case of *Bernhard v. Bank of America* . . . , which has perhaps caused more comment than any other, so much so, that it is sometimes called the "Bernhard Doctrine."<sup>40</sup>

The obstacles to the plea of collateral estoppel that have just been enumerated were disposed of in the following manner:

First, the court rejected the mutuality rule, following the *Bernhard* case. Second, the court, instead of seizing upon (or even stating in my terminology) the fact that the airline had not enjoyed the initiative in the

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<sup>39</sup> In so doing, he applied state as distinguished from federal law. Contrast the Second Circuit's application of federal law in *Zdanok (Alexander)* (see note 17, *supra*); the difference is, of course, explainable on the ground that here, though not in *Zdanok*, the *Erie* doctrine was applicable. The state law applied was that of Nevada, pursuant to a general concession that the law of the state of the tort controlled. 216 F. Supp. at 726. Without, for the nonce, challenging this concession, one may raise this question: Assuming that the states in which the district court sat (*i.e.*, Washington and Nevada) agreed that the applicable "substantive" law was that of Nevada as the place of the tort, was not Nevada nevertheless required by the full faith and credit clause, U. S. CONST. art. IV, § 1, and the implementing statute, 28 U.S.C. § 1738 (1948), to give the federal California judgment the effect it had in the state of its rendition? In substance this is what Judge Hall did, since (as will be noted) he relied on the *Bernhard* case and on American case law generally in reaching his decision on the issue of collateral estoppel.

This is all to the good, since a critic inclined to carp might question whether the Nevada cases cited by Judge Hall support the proposition that that state had abandoned the mutuality rule. In *Bernard v. Metropolis Land Co.*, 40 Nev. 89, 160 Pac. 811 (1916), the plaintiff, against whom the former judgment was pleaded, had been (at least) a member of the class on whose behalf the former action had been brought, and the defendant invoking the prior judgment was the successor in title of the defendant in the former action. In *Edwards v. Jones*, 49 Nev. 342, 246 P. 688 (1926), the plea was invoked against one who was not, in the formal sense, a party to the prior action. Such a situation raises no question of mutuality at all, of course, but rather a question of due process of law. The court sustained the plea, holding that "as the community interests of the husband and wife were involved [in the prior action to which the husband was a party], she was *in legal effect* a party to the action," *Id.* at 352, 246 Pac. at 692; [Emphasis added.], so that the former judgment could be invoked against her.

<sup>40</sup> 216 F. Supp. at 726.

former action, stressed that in the circumstances of this particular case it had in fact enjoyed an impeccably full and fair opportunity to make its defense:

The issue of liability of United Air Lines to the passengers on the plane was litigated to the hilt, by lawyers of the highest competence in their field, in the trial of the 24 cases in Los Angeles.... It would be a travesty upon [justice] ... to now require these plaintiffs who are survivors of passengers for hire on the United Air Lines plane to again re-litigate the issue of liability after it has been so thoroughly and consummately litigated in the trial court in ... Los Angeles.... The defendant has had its day in court on the issue of liability....<sup>41</sup>

Third, for essentially the same reasons, the court did not concern itself with any such limiting concept as the multiple-claimant anomaly. We have merely to permit ourselves to consider the actual circumstances of the case to appreciate the absurdity of any suggestion that the Los Angeles verdict was an "aberration," and certainly there was no collusive maneuvering by the plaintiffs to select an oppressive forum for a test case.<sup>42</sup>

Fourth, the court, so far from regarding the fact that the prior judgment was founded on a jury verdict as an obstacle, seems to have regarded it as an additional circumstance supporting the right of the plaintiffs to invoke the plea against the defendant.<sup>43</sup> Indeed, so long as we retain sufficient faith in the institution of trial by jury to retain it for civil cases at all, what warrant is there for mistrusting the verdict for purposes of collateral estoppel when there is no suggestion that there has been compromise or other impropriety?

In addition to its other virtues, such an application of *res judicata* principles rather obviously constitutes a powerful instrument for the expeditious and economical handling of massive litigation such as that resulting from major disasters and other events and transactions affecting large numbers of people.<sup>44</sup> I must confess that the utility of the principle

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<sup>41</sup> *Id.* at 728-29. The opinion and the findings of fact go into much more detail than can be quoted here in demonstrating the amplitude of the opportunity to litigate the issue in the former action—an opportunity of which the defendant took full advantage. See *id.* at 728, 730-31.

<sup>42</sup> See in this connection the sixth finding of fact, *Id.* at 730.

<sup>43</sup> "The defendant has had its day in court on the issue of liability *before a jury.*" *Id.* at 729. [Emphasis added.]

<sup>44</sup> The Judicial Conference of the United States is studying this problem through the Coordinating Committee on Multiple Litigation in the United States District Courts, a subcommittee of the Committee on Pre-Trial Procedure. See *REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES* 49, 102 (1963); Neal & Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A.J. 621 (1964).

of collateral estoppel for this purpose would be somewhat impaired if my views on choice of law were to prevail, since then the law of a single jurisdiction, such as Nevada where this collision occurred, would not necessarily control, and the issues in the various cases would therefore have a tendency not to be identical.<sup>45</sup> This consideration, however, does not impair my belief that the oversimplified traditional formulas for choice of law must be abandoned despite their tendency to make the practice of law and the administration of "justice" a fairly simple and routine affair in one of its most difficult branches.

#### CONCLUSION

Under the tests of time and subsequent developments, the *Bernhard* decision has proved its merit and the mettle of its author. The abrasive action of new factual configurations and of actual human controversies, disposed of in the common-law tradition by competent courts, far more than the commentaries of academicians, leaves the decision revealed for what it is, as it was written: a shining landmark of progress in justice and law administration. It has no need of reservations conceived and phrased as rules of thumb by those of little faith. It need be read subject to only one reservation—one that Justice Traynor unquestionably had in mind when he wrote, and one that should have been obvious to all who had doubts about the generality of the new criteria: No legal principle, perhaps least of all the principle of collateral estoppel, should ever be applied to work injustice.<sup>46</sup> In short, it must be said of Justice Traynor and the *Bernhard* case that he builded better than we knew.

This has been a small tribute to a great judge. In the space allotted I can add only a few words, and those I have chosen will be important to the reader only in so far as he may be disposed to seek in these appraisals evidence of personal bias; but they are important to me. In fairness to the reader so disposed and to myself, I cannot conclude without declaring, in addition to the esteem in which I hold him as a judge, my respect for Roger Traynor as a man and my affection for him as a friend.

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<sup>45</sup> Observe, however, that the laws of the various states that might be involved would tend to produce identical issues on such basic matters as negligence, though even as to the basis of liability some variety is to be expected. Thus far, however, the courts that have departed from traditional choice-of-law rules in mass accident cases have done so principally with respect to the issue of damages, which must be tried on a claim-by-claim basis in any event (as was done in the United Air Lines cases). See generally CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* c. 14 (1963); *Griffith v. United Airlines*, — Pa. —, 203 A.2d 796 (1964).

<sup>46</sup> See Currie, *supra* note 7, at 289 n.20 and related text; 320 n.83.

## APPENDIX

## THE BERNHARD DOCTRINE IN COURTS OUTSIDE CALIFORNIA

This does not purport to be a comprehensive inventory of post-*Bernhard* cases; it does include as many cases (other than those cited in the foregoing text) as time and space permit. California cases are omitted because, though a survey of *Bernhard's* ramifications would be interesting, that case clearly represents the law of California. Cases in federal courts are listed under "United States" if they apply federal law; if not, under the name of the state whose law is applied. Decisions of federal courts in California, determining the effect of a California judgment under the *Erie* doctrine and involving no conflict of laws problem, are similarly excluded, e.g., *MacDonnell v. Capital Co.*, 130 F.2d 311 (9th Cir. 1942) (*Bernhard* cited with approval, but no problem of mutuality since same parties in both actions); *Boulter v. Commercial Standard Ins. Co.*, 175 F.2d 763 (9th Cir. 1949) (*Bernhard* cited but only for the noncontroversial proposition that a prior judgment cannot be pleaded against one not a party to and not fairly represented in the prior action). On the other hand, one decision of a federal court in another circuit, considering the effect of the judgment of a federal court in California, is included:

CALIFORNIA: *Kern v. Hettinger*, 303 F.2d 333 (2d Cir. 1962). *Bernhard* was cited but neither applied nor rejected because it was not clear that the issues presented were decided by the prior judgment. *Id.* at 341.

COLORADO: *People v. Ohio Cas. Ins. Co.*, 232 F.2d 474 (10th Cir. 1956), presumably applying Colorado law though no Colorado cases are cited, cites and follows *Bernhard* in a closely parallel situation: Plaintiffs had asked probate court to revoke authority of administratrix on ground of fraudulent sale of assets to attorney for estate. In this action, the same plaintiffs (presumably against the attorney and his transferees) seek to impress a constructive trust. *Held*: the judgment of the probate court holding the sale legitimate and confirming it is conclusive.

DELAWARE: *Woodcock v. Udell*, 97 A.2d 878 (Del. Super. Ct. 1953). Agent, having sold property at auction under agreement providing 10 percent commission, unsuccessfully filed claim against vendor's trustee in bankruptcy for commission calculated on gross value without deduction of existing mortgage indebtedness although property was sold subject to mortgage. *Held*: agent is barred from asserting the same claim against others allegedly liable for the commission. *Bernhard* is not cited, but the decision is grounded on a Delaware case heavily relied on in *Bernhard*. Note that in the prior action the agent did not have freedom to choose his forum.

See also *Cohen v. Dana* under New York, *infra*.

ILLINOIS: *Barbour v. Great Atl. & Pac. Tea Co.*, 143 F. Supp. 506 (E.D. Ill. 1956), presumably applying Illinois law, holds husband, suing for loss of services and consortium, entitled to plead former judgment obtained by wife against same defendants for damages resulting from her personal injury. Note that the defendants lacked the initiative in the prior action.

*Tezak v. Cooper*, 24 Ill. App. 2d 356, 164 N.E.2d 493 (1960). In action against three vendors of intoxicants under Illinois "dram shop" act, summary judgment was rendered for one on basis of plaintiff's pretrial deposition indicating her willing participation in the drinking. *Held*: the other defendants

are entitled to the plea of *res judicata* under the "exception" to the mutuality rule established by *Bernhard* where a plaintiff seeks to retry against new defendants an issue on which he has lost in litigation with another. Concerning the fact that this was a single action rather than a series, *cf. Leipert v. Honold*, 39 Cal. 2d 462, 247 P.2d 324 (1952), discussed by the present author in 9 STAN. L. REV. 281, 296-300 (1957).

INDIANA: *Tobin v. McClellan*, 225 Ind. 335, 73 N.E.2d 679 (1947). *Bernhard* was rejected on ground that the requirement of mutuality is established law in Indiana, although an earlier decision disregarding the requirement is disregarded as authority. But query whether the issues in the two actions were identical. See *Id.* at 345, 73 N.E.2d at 683.

*Hegarty v. Curtis*, 121 Ind. App. 74, 95 N.E.2d 706 (1950). *Bernhard* was rejected except on an impossibly narrow interpretation (see *id.* at 86, 95 N.E.2d at 711); but query whether the issues in the two actions were the same. Assuming that they were, it would seem that the plea should have been allowed on any theory of *res judicata*, mutuality being irrelevant because the party asserting the plea appears to have been in privity with the prevailing party in the prior action.

KANSAS: *Hurley v. Southern Cal. Edison Co.*, 183 F.2d 125 (9th Cir. 1950). *Bernhard* was extensively discussed, but only for the proposition that a former judgment is not pleadable against one not a party to, nor in privity with a party to, the former action. Since the former judgment was rendered by a federal court in Kansas in a diversity case, in strictness the appropriate law to determine its effect is that of Kansas, but since the question is one of due process of law it transcends state lines.

*Henley v. Panhandle Eastern Pipeline Co.*, 138 F. Supp. 768 (W.D. Mo. 1956). Plaintiff sues owner of other vehicle involved in collision. *Held*: action is barred by Kansas state court judgment holding him responsible for death of driver of defendant's vehicle. The decision is grounded on the derivative-liability exception, but might equally be justified by the indemnity exception or the broad grounds of *Bernhard*. Note that the party against whom the plea is sustained lacked the initiative in the former action. Kansas and Missouri law are said to be in agreement on the result, but the law of Kansas as the state of rendition seems controlling.

KENTUCKY: *Sachs v. State Mut. Life Assur. Co.*, 82 F. Supp. 479 (W.D. Ky. 1949), applying Kentucky law under *Erie*, specifically rejects *Bernhard*, holding mutuality required. Plaintiff sues in her individual capacity to recover life insurance benefits for accidental death. *Held*: plaintiff is not barred by judgment against her in her capacity as administratrix in similar action against another insurer. The court had no difficulty in finding identity of parties-plaintiff and of the issues, and rested the decision solely on lack of mutuality. The decision seems reluctant: "Controlled, therefore, by *Erie Railroad Company v. Tompkins* . . . , this Court has no alternative save to apply the doctrine of *res judicata* as adjudicated by the courts of Kentucky." *Id.* at 483-84.

*Louisville Trust Co. v. Smith*, 192 F. Supp. 396 (W.D. Ky. 1961), *aff'd as to res judicata* holding 330 F.2d 483 (6th Cir. 1964). *Bernhard* was cited with approval but no problem of mutuality was presented: "The [*Bernhard*] rule would bar the defendant from asserting the claims set forth in her cross-complaint [even] if the present plaintiffs had not been parties to the original litigation, but

the fact is that they were parties to the original litigation and the claims asserted are therefore *res judicata*." 192 F. Supp. at 402.

MICHIGAN: *De Polo v. Greig*, 338 Mich. 703, 62 N.W.2d 441 (1954). An action is brought against president of corporation to recover price paid for stock not validated under state Blue Sky Law. *Held*: defendant is entitled to plead judgment of United States district court in corporate bankruptcy proceeding wherein identical claim had been disallowed, although defendant was not formally a party to the prior proceeding. *Bernhard* is cited as "among the leading cases" on the point. *Id.* at 710, 62 N.W.2d at 444. The court touches on the "initiative" argument by noting that the plaintiff had no opportunity to select the forum for his first assertion of the claim, having been compelled to resort to the court in which the bankruptcy proceeding was pending; the judgment of the bankruptcy court is nevertheless held conclusive.

MINNESOTA: *Gammel v. Ernst & Ernst*, 245 Minn. 249, 72 N.W.2d 364 (1955). *Bernhard* was cited and applied, although it was treated as establishing an "exception" to the mutuality rule where the party asserting the plea enjoyed the initiative in the prior action. Neither the indemnity exception nor the derivative-liability exception would sustain the decision. I am, of course, no longer content with this limited interpretation of *Bernhard*, as I was in 1957. See Currie, *supra* note 7, at 320.

MISSOURI: See *Henley v. Panhandle Eastern Pipeline Co.* under KANSAS, *supra*.

NEBRASKA: *Cover v. Platte Valley Pub. Power & Irr. Dist.*, 162 Neb. 146, 75 N.W.2d 661 (1956). Although this decision involves a problem of mutuality and resolves it consistently with the *Bernhard* doctrine, the problem is not analyzed in those terms and *Bernhard* is not cited. A different plaintiff previously obtained a judgment that a certain irrigation drain was negligently constructed, so as to entitle him to a mandatory injunction requiring corrective action. The drain was not corrected and that judgment is held conclusive when pleaded by this plaintiff in his action against the same defendant for damages caused by flooding. "Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving *one of the parties* now before it, the court has the right to . . . take judicial notice of its own proceedings and judgments in the former action. . . . To hold otherwise would be a travesty upon justice and permit a trifling with judgments duly rendered according to law." *Id.* at 153, 75 N.W.2d at 668 (Emphasis added.) Query: What if the former judgment had been rendered by a different trial court in Nebraska? What if the Nebraska judgment were pleaded as *res judicata* in another state, with reliance on the Full Faith and Credit Clause?

NEW HAMPSHIRE: See *Hinchey v. Sellers* under NEW YORK, *infra*.

NEW MEXICO: *Williams v. Miller*, 58 N.M. 472, 272 P.2d 676 (1954). An interesting opinion, amusingly written, cites *Bernhard* but refuses the plea of collateral estoppel for the sufficient reason that the finding was not necessary to the prior decision. In the prior action the corporate defendant had impleaded another pursuant to FED. R. Civ. P. 14, claiming indemnity in the event it should be found liable. The jury's finding that the third-party defendant was not negligent, after it had exonerated the defendant, was not only unnecessary as this case holds, but in making it the jury violated the clear instructions of



the court. In addition, the plaintiff in the prior action, aware of the proper limitation of the issues, could not have been expected to establish negligence on the part of the third-party defendant, and so had no fair opportunity to do so; and there being no diversity of citizenship between the plaintiff and the third-party defendant, the court probably had no jurisdiction to determine the question of liability as between them. *Cf.* RESTATEMENT, JUDGMENTS § 71 (1942).

NEW YORK: *Riordan v. Ferguson*, 147 F.2d 983 (2d Cir. 1945). A plea of res judicata is disposed of on the ground that the former judgment was in effect nullified by a settlement agreement pending appeal. The case is noteworthy primarily for the dissenting opinion of the late Judge Charles E. Clark. Rejecting the majority's interpretation of the effect of the settlement, he argued that the indemnity exception to the mutuality rule applied. While this was all that was necessary under the applicable New York law, he went farther and searchingly reviewed the problem of mutuality, in effect arguing for the principles of *Bernhard* (cited in *id.* at 991). At the outset he stated what may be the fundamental reason why the *Bernhard* doctrine has not spread like wildfire (*cf.* text following note 10, *supra*): "The defense of res judicata is universally respected, but actually not very well liked. The obvious public interest against protracted retrials of matters already fairly settled and the private interest in relying on the protection of final judgments requires some obeisance to the defense in principle, but tenderness for a supplicating litigant stays the judicial hand from its forthright application." *Id.* at 988. He went on to deplore this tendency to tenderness, especially in so far as it is based on increasingly groundless fears that the former judgment may have been the product of procedural mistake. Another interesting aspect of the dissent is its showing that, despite the orthodox statement of the indemnity exception (as embodied in the *Restatement* and assumed throughout this article), the courts tend to allow the plea whether it was the indemnitor or the indemnitee who was exonerated by the former judgment. *Id.* at 992-93.

On remand, the defendant pleaded a different judgment as res judicata (the one first pleaded was rendered in an action brought by *Philso Estates*; the second was rendered in an action brought by one *Foss* in which the plaintiff in the instant case was a counter-claimant; both held that the mortgage sought to be foreclosed by the present plaintiff had been paid). The *Foss* judgment had not been nullified by any settlement, hence Judge Rifkind was faced with the question not reached by the majority of the Court of Appeals. The result he reached was consistent with that called for by Judge Clark in his dissent (recall that Judge Clark treated the judgment in the *Philso Estates* case as res judicata notwithstanding the settlement agreement). He held the judgment in the *Foss* case conclusive against the present plaintiff, who was a party to that case, notwithstanding that the defendant invoking the former judgment was not a party. He cited *Bernhard*, two New York cases, and cases from other jurisdictions. *Riordan v. Ferguson*, 80 F. Supp. 973 (S.D.N.Y. 1948). Note that without further investigation we cannot determine whether the party against whom the former judgment was held conclusive had the initiative in the prior action or not: if his counterclaim was voluntary, he had; if it was compulsory, he did not.

*Cohen v. Dana*, 275 App. Div. 723, 87 N.Y.S.2d 614, *aff'd*, 300 N.Y. 608,

90 N.E.2d 65 (1949). Stockholder's derivative action is barred by judgment in action by plaintiff in Delaware in which, the corporation being the sole defendant and the same facts being pleaded, the court held plaintiff's allegations unproved and refused to appoint a receiver. The precise ground of decision does not appear, but may be the derivative-liability exception. New York cases are relied on although the judgment pleaded was rendered by a Delaware court.

*Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956). Judgment for defendant in action for breach of contract, establishing, as between the parties to the contract, that there was no breach, is held pleadable in bar of action by same plaintiff against a new defendant charged with inducing breach. Although the case falls squarely within the *Restatement's* "derivative liability" exception (RESTATEMENT, JUDGMENTS § 99, comment *a*, illustration 1 (1942)), the court says: "Our holding here is not to be treated as adding another general class of cases to the list of 'exceptions' to the rule requiring mutuality of estoppel. It is merely the announcement of the underlying principle which is found in the cases classed as 'exceptions' to the mutuality rule" (1 N.Y.2d at 120, 151 N.Y.S.2d at 5, 134 N.E.2d at 99). The court emphasizes the identity of issues (*ibid.*) and full opportunity of the party against whom the plea is asserted to try the issue in the former action (*id.* at 119, 151 N.Y.S.2d at 4, 134 N.E.2d at 99). Although *Bernhard* is not cited, this appears to be acceptance of the doctrine in substance.

*Civoru v. National Broadcasting Co.*, 261 F.2d 716 (2d Cir. 1958), is an action for accounting of profits from exploitation of radio play. A former judgment in favor of the individual defendant, a collaborator in the play's creation, was pleaded. On whether the former judgment could be invoked by the corporate defendant, which had acquired its rights prior to the former action and thus could not be in privity with the individual defendant, the court said: "Whatever doubts may have survived the decision of the Court of Appeals of New York in *Good Health Dairy Products Corp. of Rochester v. Emery*... have now been definitively laid in *Israel v. Wood Dolson Co.*... The old doctrine no longer obtains that estoppels must be mutual except in those situations that had formerly been specified. Just what remains of the necessity for mutuality it is hard to say, but the Court of Appeals appears to have held that, when a party has been defeated in a claim because one of its elements was decided against him, he must accept as conclusive the decision as to that element, when it arises as a constituent of a claim against another obligor.... Having had her day in court against [the individual defendant] and lost, the plaintiff may not try out the same issue against the National Broadcasting Company." *Id.* at 718-19.

*Hinchey v. Sellers*, 7 N.Y.2d 287, 197 N.Y.S. 129, 165 N.E.2d 156 (1959). Plea of collateral estoppel by defendants, not parties to prior action, is allowed against plaintiffs in both actions, on basis of the indemnity exception. In the prior New Hampshire action plaintiffs had sued driver of car and owner's insurer; the court held that the insurer was not liable because the driver was not operating the car with consent of the owners. Here the same plaintiffs sue the owners, who plead the former judgment as *res judicata*; the plea is allowed because the former judgment exonerated the indemnitor (insurer). This seems to be an extension of the indemnity exception, though consistent, perhaps, with its "anomaly" rationale, which typically applies where one for whose *conduct*

the party invoking the plea would be responsible, and who would be required to indemnify that party, has been exonerated by the former judgment. When the "indemnitor" is merely the liability insurer of the party invoking the plea it seems that it is the broad principle of *Bernhard* rather than the indemnity exception that justifies the plea—unless the court is prepared to treat the party and his liability insurer as substantially identical parties not simply "privies" by virtue of the indemnity factor.

*Gart v. Cole*, 263 F.2d 244 (2d Cir. 1959), *cert. denied*, 359 U.S. 978 (1959). In an action attacking the validity of an urban renewal project, plaintiffs were all members of classes represented in former action, and defendants, with the exception of two government officials, were defendants in that action. The issue being the same, the court held, per Clark, J., that the new defendants are entitled to the plea of res judicata: "These appellees [defendants] have once successfully litigated this issue to a final judgment. In these circumstances there can be no doubt that the New York courts would not permit this relitigation of the same issue." *Id.* at 249.

*Ordway v. White*, 217 N.Y.S.2d 334, 14 App. Div. 2d 498 (1961). This is one of a series of cases on the question whether a judgment against joint tortfeasors, co-defendants in an action by an injured third person, is binding on them in later litigation in which they attempt to fix responsibility on each other. No question of mutuality is presented since all parties to the second action were parties to the first; the question is whether, not having been "adversaries" in the prior action, they should be bound by the judgment. Since in the mutuality cases the parties were, of course, not adversaries in the former proceeding, the problems are considered similar. Thus stated, the similarity may seem to be superficial, but if, as seems probable, the critical question in both types of cases is whether the party against whom the plea is asserted had a full and fair opportunity to try the issue in the former proceeding, the similarity is fundamental. At all events, the *Ordway* case holds, over a strong dissent by the late Justice Halpern, who invoked the *Bernhard* doctrine, that the former judgment does not bind the co-defendants because they were not adversaries. Justice Halpern adopted a particularistic approach to the question whether the co-defendants in fact had a full and fair opportunity to litigate their respective responsibilities. In at least two recent cases lower New York courts have interpreted *Israel v. Wood Dolson Co.*, *supra*, as confirming Justice Halpern's analysis and making the former judgment conclusive. *Moran v. Lehman*, 157 N.Y.S.2d 684, 7 Misc. 2d 994 (Mun.Ct. 1956); *Light v. Quinn*, 189 N.Y.S.2d 94, 17 Misc. 2d 1085 (County Ct. 1959). See *Gunter v. Winders*, under NORTH CAROLINA, *infra*.

NORTH CAROLINA: *Crosland-Cullen Co. v. Crosland*, 249 N.C. 167, 105 S.E.2d 655 (1958). *Bernhard* was cited with approval and applied where corporation, having failed in federal court action against insurer to establish invalidity of assignment of insurance policy to wife of insured president, attempted to recover from widow the amount paid her by insurer. The facts are analytically similar to *Bernhard* except that the indemnity exception is inapplicable here as an alternative rationale.

*Gunter v. Winders*, 253 N.C. 782, 117 S.E.2d 787 (1961). See *Ordway v. White*, under NEW YORK, *supra*. Overruling prior decisions, the court holds that a former judgment against co-defendants is not conclusive as between them

unless their rights and liabilities *inter sese* were put in issue by their pleadings. See Note, 1961 DUKE L.J. 167 for a discussion of the problem.

*Taylor v. Taylor*, 257 N.C. 130, 125 S.E.2d 373 (1962), is similar to and six months earlier than the *Teitelbaum Furs* case, *supra* note 12, although *Bernhard* is not cited. Husband, suing for divorce on ground of two years' voluntary separation, is barred by judgment convicting him of abandonment. Since wife's cross-action for alimony without divorce was voluntarily dismissed, the case does not decide whether she could have used the conviction as a ground for affirmative relief against him. "The conclusion reached is that plaintiff's . . . conviction bars his right to obtain an absolute divorce on the facts alleged in his complaint." *Id.* at 136, 125 S.E.2d at 377. Previous divorce cases cited in the opinion were to the same effect; but as to the generality of the principle cf. *Durham Bank & Trust Co. v. Pollard*, 256 N.C. 77, 123 S.E.2d 104 (1961).

OHIO: *Connelly v. Balkwill*, 174 F. Supp. 49 (N.D. Ohio 1959), *aff'd*, 279 F.2d 685 (6th Cir. 1960). Judgment rendered in favor of two defendants in Ohio action charging fraud in sale of corporate stock. *Held*: pleadable by additional defendants against original plaintiffs or their successors in interest in subsequent federal action charging fraud in violation of Securities Exchange Act, the issues being identical. Presumably Ohio law was applicable on the question of mutuality though reliance is placed solely on cases from other jurisdictions—notably on *Bernhard*. See 174 F. Supp. at 63.

*Davis v. McKinnon & Moody*, 266 F.2d 870 (6th Cir. 1959). Judgment in supplemental proceeding against liability insurer of tortfeasor holds policy properly cancelled for nonpayment of premiums. *Held*: judgment is a bar to subsequent action by same plaintiff against agent of insurer alleging fraudulent conspiracy to induce cancellation of policy. Though the situation verges on the "derivative liability" exception (RESTATEMENT, JUDGMENTS § 99 (1942)), the decision is placed squarely on the *Bernhard* rejection of the mutuality rule. Although Ohio law presumably applies, the question is discussed only in terms of the common law and the *Bernhard* case.

*Schimke v. Earley*, 173 Ohio St. 521, 184 N.E.2d 209 (1962). Plaintiff, injured in a collision, sued the owners of two trucks involved. A directed verdict was given defendants on the ground that no negligence on the part of the drivers had been established. In this action she sues the drivers, who pleaded the former judgment. *Held*: as to one driver, the plea was good, as he was in "privity" with his employer; as to the other, the plea was not good, since at the time of the collision he was employed not by the defendant named as his employer in the former action but by another, and hence he was not in privity with a party to the former action. As Judge Taft points out in a concurring opinion, the plea of the first driver is good for reasons other than those given by the majority. The driver, not having been a party to the action against his employer, could not have been bound by a judgment adverse to the employer; hence it is inaccurate to say that he was in privity with the employer. Therefore, *prima facie*, the mutuality rule (if it is sound law) is applicable. The indemnity exception as usually stated does not apply, since here it was the indemnitee (employer) who was first exonerated, and no anomaly would result from holding the indemnitor (employee) liable (*but see Riordan v. Ferguson* under New York, *supra*; and *Bernhard*, 19 Cal.2d at 813, 122 P.2d at 895. Only the broad principle of *Bernhard* (cited by Judge Taft, 184 N.E.2d at 212,

173 Ohio St. 525) sustains the result. As to the second driver, the decision seems in conflict with the *Bernhard* doctrine: in the prior action plaintiff had failed to prove the driver negligent, believing him to be the employee of X; what does it matter that he turns out to have been the non-negligent employee of Y?

RHODE ISLAND: *Harding v. Carr*, 79 R.I. 32, 83 A.2d 79 (1951). Although *Bernhard* is not cited and other reasons are given, plea of collateral estoppel is sustained against party having initiative in prior action for essentially the reasons stated in *Bernhard*. An interesting feature is the suggestion that there is a kind of party "identity" between the owner of an automobile and his liability insurer. Cf. *Hinchey v. Sellers* under NEW YORK, *supra*.

WISCONSIN: *Gorski v. Commercial Ins. Co.*, 206 F. Supp. 11 (E.D. Wis. 1962). Action is brought by passenger for injuries sustained in a two-car collision against the driver of the other car, who impleaded the host driver. Plaintiff invokes judgment in action by one driver against the other in which a counterclaim was filed and both drivers were held guilty of causal negligence. *Held*: applying Wisconsin law and citing *Bernhard*, the plea was good despite lack of mutuality. Note that this is not the problem presented when a co-defendant seeks to plead the former judgment in an action brought by the third party (cf. *Ordway v. White* under NEW YORK, *supra*), but it emphasizes the similarity of the mutuality and the "non-adversary" cases.

UNITED STATES: *United States v. Willard Tablet Co.*, 141 F.2d 141 (7th Cir. 1944). "The doctrine of res judicata is not dependent upon mutuality of estoppel by judgment, as is contended by the government." *Id.* at 144. But apparently no question of mutuality was raised (cf. *id.* at 143), the parties in the two actions having been in substance the same.

*Laffoon v. Waterman S.S. Corp.*, 111 F. Supp. 923 (S.D.N.Y. 1953). This is another of the cases in which injured workmen have successively sued the general managing agent of a vessel and the United States as owner for personal injuries (see note 17 *supra*). This decision might be rested on the narrow ground of the indemnity exception, the indemnitor (United States by contract) having been exonerated in the former action; but the opinion has broader overtones (*id.* at 929-30).

*Gibson v. United States*, 211 F.2d 425 (3d Cir. 1954). To the same effect as *Bruszewski v. United States*, note 17 *supra*.

*United Banana Co. v. United Fruit Co.*, 172 F. Supp. 580 (D. Conn. 1959). In an action by Connecticut plaintiffs against United Fruit for violation of antitrust laws, the statute of limitations is pleaded. *Held*: Defendant is estopped to deny its absence from the state, thereby tolling the statute, by a prior federal judgment based on a special jury verdict finding such absence. "It does not matter that these plaintiffs were not parties to the former suit, for United Fruit, against whom the decision is applied, was a party there and actively litigated the merits of the case. The res judicata effect of that determination is not undercut by the slowly dying theory of mutuality of estoppel." 172 F. Supp. at 588. The *Bernhard* case, among others, was cited.

*United States v. Alaska*, 197 F. Supp. 834 (D. Alaska 1961). *Bernhard* was cited but not applied because issues not identical.

*General Heating Eng'r Co. v. District of Columbia*, 301 F.2d 549 (D.C. Cir. 1962). Plea of res judicata is denied on ground of lack of identity of

issues. In dissent, Wilbur K. Miller, C.J., cited *Bernhard*, but no problem of mutuality was involved, all parties to the second action having been parties to the first.

In re *California Lumber Corp.*, 227 F. Supp. 63 (S.D. Cal. 1964). After twice refusing to do so, referee in bankruptcy granted trustee's petition for injunction against state court proceedings. *Held*: the prior adjudications made the matter res judicata, citing *Bernhard*. But no question of mutuality was raised; indeed, the relevant principle seems to have been the law of the case rather than res judicata.