

# Comments

## *NONPARTIES AND PRECLUSION BY JUDGMENT: THE PRIVITY RULE RECONSIDERED*

The focus of this Comment is the binding effect of a judgment on a nonparty. The Comment deals with the policies underlying *res judicata* and the bearing those policies have on a determination to bind nonparties. Traditionally, courts have made this determination by reference to the privity standard. The Comment also examines some related procedural devices and the feasibility of an expanded privity concept based on adequate representation. A few particular relationships are considered: ancestor-heir, assignor-assignee, attorney-client, bailor-bailee, husband-wife, and principal-agent.

Generally, the Comment finds present resolutions to be unsatisfactory. A Proposed Rule involving mandatory intervention is presented; it is then contrasted with the available joinder devices; and its effect on the "mass accident" cases is examined.

### I

#### RES JUDICATA GENERALLY

The doctrine of *res judicata* forbids the relitigation of the same cause of action between the same parties or their privies.<sup>1</sup> Collateral estoppel forbids the relitigation of issues actually determined in a prior action between the same parties or their privies.<sup>2</sup> The same basic policy considerations underlie both *res judicata* and collateral estoppel,<sup>3</sup> and for the purposes of this Comment, "*res judicata*" can legitimately be used to refer to both.<sup>4</sup>

*Res judicata* is a principle of repose. Because the final resolution of disputes is a prerequisite to the existence of stable social institutions,<sup>5</sup>

<sup>1</sup>RESTATEMENT OF JUDGMENTS, § 83 & Introductory Note to ch. 3 at 158-59 (1942).

<sup>2</sup>See *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1876).

<sup>3</sup>Some commentators have suggested that since collateral estoppel may conceivably extend to actions remote from the original litigation, its application calls for special caution. Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217, 250 (1954); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 29 (1942); cf. *Evergreens v. Nunan*, 141 F. 2d 927 (2d Cir. 1944). This "special caution" which would amount to partial nonenforcement of the collateral estoppel rule may be justified because collateral estoppel is not as efficient in terminating litigation as *res judicata*. See Polasky *supra*; Comment, *Res Judicata in California*, 40 CALIF. L. REV. 412, 415 (1952). The principle is basically sound. For a suggestion that collateral estoppel should be limited to controversies foreseeable at the time of the first action, see *Evergreens v. Nunan supra*.

<sup>4</sup>Different labels used frequently are "claim preclusion" for *res judicata* and "issue preclusion" for collateral estoppel. See Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29, 29-30 (1964).

<sup>5</sup>Polasky, *supra* note 3, at 219-20; see von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 300 (1929).

there must be an end to litigation.<sup>6</sup> Conclusive determinations not only provide a basis for the planning of future conduct,<sup>7</sup> but also protect the individual litigant from repeated harassment at the hands of a contentious adversary.<sup>8</sup>

The prestige and efficiency of the courts are at stake as well. In addition to the intellectually and socially unnerving problem of inconsistent resolutions of the same dispute, the efficacy of judicial institutions depends in large part upon the respect accorded judicial determinations. Without finality, such determinations would assume the status of advisory opinions, and much of the law's utility as a stabilizing social influence would be lost.<sup>9</sup> An additional policy underlying *res judicata* is judicial economy. As dockets become crowded, the doctrine of *res judicata*, to the extent that it forbids redundant litigation, becomes especially attractive.<sup>10</sup>

Another point is the relationship between *res judicata* and fairness to the litigants.<sup>11</sup> The observation that "*res judicata* renders white that which is black, and straight that which is crooked"<sup>12</sup> implies that in

<sup>6</sup>G. BOWER, *THE DOCTRINE OF RES JUDICATA* 4 (1924).

<sup>7</sup>*See id.*

<sup>8</sup>Vestal, *supra* note 4, at 31, 34. The doctrine operates to the advantage of litigants with limited resources since it prevents a wealthy adversary from achieving victory by depleting the resources of his opponent. *See* Bower, *supra* note 6, at 4.

<sup>9</sup>2 H. BLACK, *A TREATISE ON THE LAW OF JUDGMENTS* § 500, at 759-60 (2d ed. 1902); Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54 *GEO. L.J.* 857, 858 (1966); Vestal, *supra* note 4, at 31, 33. At least one commentator has argued that *res judicata* is designed primarily for the benefit of society rather than the individual litigants. von Moschzisker, *supra* note 5, at 299, 316; *see* *Coca-Cola Co. v. Pepsi-Cola Co.*, 36 *Del.* 124, 130, 172 *A.* 260, 262 (1934). However, in reality the courts do not appear to act on that assumption. Not only may parties agree that a prior judgment will not have *res judicata* effect, but the defense of *res judicata* must be properly brought to the court's attention. 1B J. MOORE, *FEDERAL PRACTICE* ¶ 0.405[1], at 629 (2d ed. 1965).

<sup>10</sup>von Moschzisker, *supra* note 5. The personal injury plaintiff, disabled and without funds, who faces a three to five year period before his case comes to trial must often be tempted to settle for a low figure. To the extent *res judicata* operates to reduce this delay it is producing a socially desirable result.

Those who minimize judicial economy as a justification for *res judicata* do so from fear that emphasizing it will cause undue deemphasis of the interests of litigants. *See* Cleary, *Res Judicata Reexamined*, 57 *YALE L.J.* 339, 348 (1948); Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 *TUL. L. REV.* 301, 308 (1961). One commentator has suggested that preclusion motivated solely by judicial economy "approaches the theory that the individual exists for the state." Cleary, *supra*. *See also* F. JAMES, *CIVIL PROCEDURE* § 11.19, at 577 (1965) (no judicial economy where the stakes in the first action enlarge it to the point that it takes more time than two separate actions). However, there is no assurance that the suggested alternative, an increase in the number of judges, will solve the problem. *See* Cleary, *supra*.

<sup>11</sup>"One is tempted, however, to ask, whether justice be a thing worth having, or no? and if it be, at what time it is desirable that litigation should be at an end? after justice is done, or before?" Bentham, *The Rationale of Judicial Evidence*, in 6 *WORKS OF JEREMY BENTHAM* 1 (Bowring ed. 1843), at 7 *WORKS OF JEREMY BENTHAM* 172.

<sup>12</sup>*Jeter v. Hewitt*, 63 *U.S.* (22 *How.*) 352, 364 (1859).

applying the doctrine, the judiciary tends to disregard both the interests of individual litigants in having their claims adjudicated on the merits,<sup>13</sup> and the interest of society generally in fair procedure.<sup>14</sup> The balancing of certainty and predictability against justice and truth, a conflict as old as legal systems,<sup>15</sup> is dramatically demonstrated when a court applies the doctrine of *res judicata* in such a manner that it operates seemingly blind to the facts.<sup>16</sup> The solution to this dilemma—albeit not a fully satisfactory one—lies in rationalizing an occasional unsatisfactory result by recognizing that truth is a relative concept, and that justice can only prevail with a balancing of competing interests. A judicial system which permitted reexamination of prior judgments whenever justice seemed to demand it<sup>17</sup> would be severely handicapped for lack of the substantial benefits derived from adherence to the doctrine of *res judicata*.<sup>18</sup>

## II

### THE PRIVACY STANDARD

There is, of course, no difficulty in binding the parties to an action

<sup>13</sup>It is not clear to what extent a judgment, not subject to collateral attack, will be denied preclusive effect. The following cases denied the prior judgment preclusive effect. *State ex rel. White Pine Sash Co. v. Superior Court*, 145 Wash. 576, 261 P. 110 (1927) (court will or will not enforce *res judicata* rules as justice in the particular case requires); *Spilker v. Hankin*, 188 F.2d 35 (D.C. Cir. 1951) (*res judicata* must on occasion yield to other policies—case involved attorney's misrepresentation to client); *Greenfield v. Mather*, 32 Cal. 2d 23, 194 P.2d 1 (1948) (*res judicata* will not be used under special circumstances—here the court made an obvious factual error in the first action); *Adams v. Pearson*, 411 Ill. 431, 104 N.E.2d 267 (1952) (first judgment did not provide a satisfactory resolution of the dispute—policy considerations underlying *res judicata* were not present—*White Pine, supra*, rejected); see 1955 U. ILL. L. FORUM 627.

For a contrary view, see Justice (now Chief Justice) Traynor's dissent in *Greenfield v. Mather, supra* at 36, 194 P.2d at 9, where he argues that questioning the finality of judgments will result, over time, in more injustice than giving preclusive effect to erroneous judgments. Judge Clark, dissenting in *Riordan v. Ferguson*, 147 F.2d 983, 988 (2d Cir. 1945) argued that with modern procedural reforms there was less chance of a judgment being wrong and that this should inspire greater confidence in the principle of *res judicata*. However, even a strong supporter of *res judicata* has admitted that "situations may arise where the general welfare is best served by a relitigation of issues formerly decided." von Moschzisker, *supra* note 5, at 334.

For *res judicata* to be effective courts must generally opt for blind preclusion over a new search for the truth. To determine whether the prior judgment was erroneous would require an examination of all the facts, which is exactly what the doctrine of preclusion seeks to prevent.

<sup>14</sup>See note 9 *supra*.

<sup>15</sup>W. HOLDSWORTH, HISTORY OF ENGLISH LAW 251 (3d ed. rewritten 1927).

<sup>16</sup>See Cleary, *supra* note 10, at 339.

<sup>17</sup>See, e.g., *State ex rel. White Pine Sash Co. v. Superior Court*, 145 Wash. 576, 261 P. 110 (1927).

<sup>18</sup>See text accompanying notes 5-10 *supra*. In those cases where application of *res judicata* would not terminate a dispute, the policy objectives underlying the doctrine are not at stake. A court may then reexamine the facts without doing injury to the principle of *res judicata*. See *Adams v. Pearson*, 411 Ill. 431, 104 N.E.2d 267 (1952).

by a judgment in that action. They have had an opportunity to litigate their claims and the law entitles them to no more.<sup>19</sup> There is considerable disagreement, however, about the effect of a judgment on a nonparty.<sup>20</sup> If an agent is absolved in litigation, should his principal be able to assert that judgment against the same plaintiff suing for the same relief in another action?<sup>21</sup> If two or more claimants are seeking the same relief from the same individual, and the first claimant recovers, should the other claimants be able to assert that judgment to estop the defendant?<sup>22</sup>

Allowing "offensive use," the popular label for the assertion of a judgment by a nonparty in the latter situation,<sup>23</sup> puts the defendant in the posture of being able to lose on all the claims in one action, since any subsequent plaintiff could use an unfavorable judgment to estop him, but restricts him to winning one action at a time, since according to traditional theory due process requires that every claimant have his "day in court."<sup>24</sup> While allowing offensive use may result in some saving of judicial time,<sup>25</sup> in its present form it is unfair to the defendant, since in each action he stands to lose everything while having very little to gain.<sup>26</sup> The objectionable feature is not that the later claimants may use the judgment to estop the defendant but rather that they will not be correspondingly bound by the judgment if the defendant wins.<sup>27</sup>

Traditionally, the determination of who will be bound by a judgment has been made with reference to the privity standard: A party cannot assert a prior judgment against one who was not a party or in "privity" with a party to the prior action.<sup>28</sup> Although the existence of privity has been characterized as a question of fact,<sup>29</sup> the court, rather than the jury, will normally determine whether the requisite relationship is present.<sup>30</sup> However, there is no generally accepted definition of

<sup>19</sup>F. JAMES, CIVIL PROCEDURE § 11.24, at 585 (1965); 1B J. MOORE, FEDERAL PRACTICE ¶ 0.411[1], at 1251 (2d ed. 1965); RESTATEMENT OF JUDGMENTS § 79 (1942).

<sup>20</sup>Compare Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965), with Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961).

<sup>21</sup>See, e.g., F. JAMES, CIVIL PROCEDURE § 11.31, at 595-96 (1965).

<sup>22</sup>See authorities cited note 20 *supra*.

<sup>23</sup>See, e.g., Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1032-33 (1967).

<sup>24</sup>*Id.* at 1014.

<sup>25</sup>See F. JAMES, CIVIL PROCEDURE § 11.31, at 595 (1965).

<sup>26</sup>See text accompanying note 24 *supra*.

<sup>27</sup>See, e.g., 1B J. MOORE, FEDERAL PRACTICE ¶ 0.412[1], at 1812 (2d ed. 1965); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 288 (1957).

<sup>28</sup>See, e.g., *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 855 (1952).

<sup>29</sup>*Crane Boom Life Guard Co. v. Saf-T-Boom Corp.*, 362 F.2d 317 (8th Cir. 1966), *cert. denied*, 386 U.S. 908 (1967).

<sup>30</sup>The issue arises out of the pleadings or on motions upon which the court rules. Normally there

privity.<sup>31</sup> Conventionally, privity has been narrowly defined to include only "mutual or successive relationship[s] to the same rights of property."<sup>32</sup> More recently a judge, in an oft-quoted discussion, has described privity as "merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the *res adjudicata*."<sup>33</sup>

At least one court and one commentator have speculated that this broader concept of privity merely masks the abrogation of the mutuality rule,<sup>34</sup> which states that in order for a party to assert a prior judgment his position in the prior litigation must have been such that, had the judgment been adverse to him, he would have been bound.<sup>35</sup> By thus giving privity a broader definition more persons are able to use the prior judgment. Although this is an attractive explanation, if only because of its simplicity, it is more likely that this broader standard of privity is evolving in response to an unarticulated desire for a standard which advances the policies underlying the concept of *res judicata*.

is no dispute as to the facts. *See, e.g.,* *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942) (ruling on demurrer to affirmative defense); *McMenomy v. Ryden*, \_\_\_ Minn. \_\_\_, 148 N.W.2d 804 (1967) (summary judgment); *McFadden v. McFadden*, 239 Ore. 76, 396 P.2d 202 (1964) (ruling on motion for judgment notwithstanding the verdict). As a matter of relative competencies, it is clear that the judge should make the decision. *Cf. Weiner, The Civil Nonjury Trial and the Law—Fact Distinction*, 55 CALIF. L. REV. 1020 (1967); *Weiner, The Civil Jury Trial and the Law—Fact Distinction*, 54 CALIF. L. REV. 1867 (1966).

<sup>31</sup>Although at least two states have defined *res judicata* by statute, *see* GA. CODE ANN. § 110-501 (1959); LA. CIV. CODE ANN. art. 2286 (West 1952), no state has so defined privity.

<sup>32</sup>1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 523, at 656 (16th ed. 1899). That is the definition generally given in the older treatises. *See, e.g.,* 1 A. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 438, at 962 (5th ed. 1925) [hereinafter cited as FREEMAN, JUDGMENTS]. For a modern authority who believes in the utility of the older definition, *see* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.411[1], at 1255 (2d ed. 1965).

The privity doctrine is not of modern origin. Holdsworth cites a 1575 case for the proposition that privies as well as parties will be bound by a judgment. 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 151 & n.1 (1926). Coke, writing in the early 17th century, stated that "privies in estate . . . shall be bound and take advantage of estoppels." 2 E. COKE, A COMMENTARY UPON LITTLETON § 352a (Butler ed. 1823).

<sup>33</sup>*Bruszewski v. United States*, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring), *cert. denied*, 340 U.S. 865 (1950). The commentators have concurred. *See* RESTATEMENT OF JUDGMENTS § 83, comment a at 390 (1942); *Vestal, Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 45 (1964); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 855-56 (1952). *Contra*, 1B J. MOORE, *supra* note 32.

<sup>34</sup>*Taylor v. Sartorius*, 130 Mo. App. 23, 40, 108 S.W. 1089, 1094 (1908); D. LOUISELL & G. HAZARD, CASES AND MATERIALS ON PLEADING AND PROCEDURE 591 (1962). The mutuality rule and its abrogation are beyond the scope of this Comment. For a general treatment of the subject *see* Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967).

<sup>35</sup>1B J. MOORE, FEDERAL PRACTICE ¶ 0.412[1], at 1801 (2d ed. 1965).

### A. Due Process Requirement

Any formulation of a privity standard must satisfy the requirements of due process as set out by the United States Supreme Court in *Hansberry v. Lee*,<sup>36</sup> a landmark case in the area of class actions. The nonparty must have "notice and [an] opportunity to be heard,"<sup>37</sup> the procedure must insure the protection of his interests,<sup>38</sup> and he must "in fact [be] adequately represented by parties who are present."<sup>39</sup> The adequacy of representation will be determined by the extent to which his interests are substantially identical to those of parties to the action.<sup>40</sup>

The facile statement that in order for a person to be bound he must have actually had his "day in court"<sup>41</sup> is not literally true.<sup>42</sup> Due process does not dictate a particular standard of representation for preclusion<sup>43</sup> but rather leaves it to the courts to develop standards based on a rational weighing of the interests involved.<sup>44</sup> Thus, in *McFadden v. McFadden*<sup>45</sup> the court held that where it "is satisfied that the first litigation provided substantial protection of the rights and interests of the person sought to be bound"<sup>46</sup> he will be precluded. The court's holding shifts the emphasis

<sup>36</sup>311 U.S. 32 (1940).

<sup>37</sup>*Id.* at 40. The opportunity to be heard does not mean that the person to be bound must control the action but only that he be able to participate. RESTATEMENT OF JUDGMENTS § 86, comment *h* at 426 (1942). In addition, an unborn heir in the virtual representation cases will not have notice. See text accompanying notes 60-64 *infra*.

<sup>38</sup>*Hansberry v. Lee*, 311 U.S. 32, 42 (1940).

<sup>39</sup>*Id.* at 43. "[A] selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Id.* at 45.

There are situations in which a person secondarily liable may bring into an action the person primarily liable. If the person primarily liable fails to defend, he will be bound by the judgment regardless of whether his interests were represented. This doctrine, known as vouching in, is a separate procedural device and not part of the privity standard. 1 B. J. MOORE, FEDERAL PRACTICE ¶ 0.405[9] (2d ed. 1965).

<sup>40</sup>*Hansberry v. Lee*, 311 U.S. 32, 45 (1940).

<sup>41</sup>*E.g.*, Note, *supra* note 34, at 1014.

<sup>42</sup>"[T]he gauging of when, in legal contemplation, he has had a day in court is a practical matter which searches reality and shuns form." *United States v. Dollar*, 100 F. Supp. 881, 886 (N.D. Cal. 1951), *rev'd on other grounds*, 196 F.2d 551 (9th Cir. 1952). See Moore & Currier, *supra* note 20, at 308, where the authors equate the requirement of a day in court with notice and opportunity to be heard. *Cf. Hochman v. Mortgage Fin. Corp.*, 289 Pa. 260, 137 A. 252 (1927) (criterion stated to be opportunity to appear and assert rights).

<sup>43</sup>"[T]he Fourteenth Amendment does not compel state courts . . . to adopt any particular rule for establishing the conclusiveness of judgments . . ." *Hansberry v. Lee*, 311 U.S. 32, 42 (1940).

<sup>44</sup>See authorities cited note 57 *infra*.

<sup>45</sup>239 Ore. 76, 396 P.2d 202 (1964). In the first action the personal representative of decedent-husband sued the defendant. In the second action the wife sued the defendant.

<sup>46</sup>*Id.* at 80, 396 P.2d at 204.

from a narrow technical rule based on a succession of property interests<sup>47</sup> to a broader standard which asks whether the rights of the litigant were substantially protected or adequately represented in the prior action.<sup>48</sup>

### B. *Related Procedural Devices*

Courts<sup>49</sup> and legislatures<sup>50</sup> have managed to devise rational solutions in other situations where the policy factors underlying *res judicata*<sup>51</sup> demand preclusion, but it is impossible for the person who will be bound to appear. Class actions<sup>52</sup> are an area where the standard of adequate representation has received much attention.<sup>53</sup> Those bound by the judgment need not control the litigation, but they must have an opportunity to participate in it.<sup>54</sup> To be bound, a member of the class must have notice,<sup>55</sup> and his interests must be adequately represented in the action.<sup>56</sup> The practical consideration of avoiding multiplicity of litigation justifies this result.<sup>57</sup> The same policy considerations underlie the doctrine of *res judicata*<sup>58</sup> and shape the privity standard.<sup>59</sup>

<sup>47</sup>See text accompanying note 32 *supra*.

<sup>48</sup>Other courts have made similar changes. See *Heaton v. Southern Ry.*, 119 F. Supp. 658 (W.D.S.C. 1954) (criterion is identity of interest); *McMenomy v. Ryden*, — Minn. —, 148 N.W.2d 804 (1967) (no generally accepted definition of privity—look to the purpose of the action and the representation of the nonparty); *Drainage Dist. No. 1 Reformed v. Matthews*, 361 Mo. 286, 234 S.W.2d 567 (1950) (identity of interest determines representation); *cf. Collum v. Hervey*, 176 Ark. 714, 3 S.W.2d 993 (1928); *Zaragoza v. Craven*, 33 Cal. 2d 315, 202 P.2d 73 (1949); *Jordan v. Stuart Creamery, Inc.*, 258 Iowa 1, 137 N.W.2d 259 (1965).

<sup>49</sup>Equity courts developed the doctrine of virtual representation. See authorities cited note 60 *infra*.

<sup>50</sup>Rulemaking bodies and legislatures have formulated standards for class actions. *E.g.*, FED. R. CIV. P. 23; CAL. CIV. PRO. CODE § 382 (West 1954).

<sup>51</sup>See text accompanying notes 5-10 *supra*.

<sup>52</sup>FED. R. CIV. P. 23 provides a modern, if not typical, scheme for the administration of class actions.

<sup>53</sup>See, *e.g.*, FED. R. CIV. P. 23(a)(4).

<sup>54</sup>RESTATEMENT OF JUDGMENTS § 86, comment *h* at 426 (1942).

<sup>55</sup>*E.g.*, *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); FED. R. CIV. P. 23(c)(2).

<sup>56</sup>See, *e.g.*, FED. R. CIV. P. 23(a)(4).

<sup>57</sup>"Due process of law means only that the interests of a person should be adequately represented; where it is not reasonably possible that he should be heard in person or by one selected by him or acting on his sole account, the requirement of reasonableness, which is at the basis of the rule of due process of law, is satisfied if his interests are in fact adequately represented." RESTATEMENT OF JUDGMENTS § 86, comment *b* at 416 (1942). See C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 63, at 397-98 (2d ed. 1947); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 859 (1952); Note, *Effect of Judgment in Prior Class Suit*, 49 YALE L.J. 1125 (1940).

<sup>58</sup>See text accompanying notes 5-10 *supra*.

<sup>59</sup>There is no reason why adequate representation without personal appearance or control of the action should not be sufficient for preclusion in appropriate cases, for example, where the husband has a purely derivative action arising from the wife's personal injuries. See text accompanying notes 149-73 *infra*.

“Virtual representation” is a doctrine formed in equity<sup>60</sup> which allows a judgment to bind unborn heirs whose interests are represented in the litigation.<sup>61</sup> Necessity and convenience justify the doctrine.<sup>62</sup> Certainty of title and marketability of property demand that the interests of unborn heirs be determined,<sup>63</sup> while substantial identity of interest between a party to the action and the unborn heir assures that the representation of the heir will be adequate.<sup>64</sup>

Class actions and the doctrine of virtual representation both illustrate the same point: Adequate representation in the prior litigation satisfies due process requirements, where policy factors weigh heavily for preclusion, even though the person to be bound did not personally appear in that litigation. Where there is notice<sup>65</sup> and adequate representation,<sup>66</sup> fair treatment is accorded the person to be bound. There is a saving in judicial time, avoidance of a multiplicity of actions, prevention of harassment of defendants, obviation of the possibility of inconsistent verdicts, and promotion of the final settlement of disputes as a basis for future action.<sup>67</sup> If, however, the interests of the nonparty are not adequately represented, he will not be bound.<sup>68</sup>

<sup>60</sup>Note, *Effect of Judgment in Prior Class Suit*, 49 YALE L.J. 1125 (1940). This doctrine is closely connected in origin with the class suit. See C. CLARK, *supra* note 57.

<sup>61</sup>*E.g.*, RESTATEMENT OF JUDGMENTS § 87 (1942).

<sup>62</sup>Compare *Kent v. Church of St. Michael*, 136 N.Y. 10, 32 N.E. 704 (1892) (a rule of convenience and almost of necessity) with *Garside v. Garside*, 80 Cal. App. 2d 318, 181 P.2d 665 (1947) (rule is one of necessity).

<sup>63</sup>RESTATEMENT OF JUDGMENTS § 87, comment *a* at 429 (1942).

<sup>64</sup>RESTATEMENT OF PROPERTY § 182, comment *a* at 730 (1936). There is a split of authority on whether the unborn heir must be represented by a member of the same class of heirs or merely by one whose interests would also be adversely affected. Compare RESTATEMENT OF PROPERTY § 184 (1936), with Annot., 120 A.L.R. 876, 880 (1939).

<sup>65</sup>Even notice is not an absolute prerequisite for due process. In the virtual representation cases it is impossible to notify an unborn heir. In other areas due process has been construed to require only the best notice *possible* under the circumstances. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

<sup>66</sup>Compare the relationship of husband and wife with that of principal and agent for an illustration of what does, and what does not, constitute adequate representation. See text accompanying notes 149-83 *infra*.

<sup>67</sup>Even if a person is not bound by a judgment, it may affect him by serving as a precedent for officials administering a statute, *Anderson v. City of Park Ridge*, 396 Ill. 235, 72 N.E.2d 210 (1947), or bind a court under the principle of stare decisis, *Stith v. Pinkert*, 217 Ark. 871, 234 S.W.2d 45 (1950), *appeal dismissed*, 341 U.S. 901 (1951); *Great N. Ry. v. Mustad*, 76 N.D. 84, 33 N.W.2d 436 (1948) (declaratory judgment). It is important to note that the doctrine of res judicata does not delineate all the possible effects of a judgment. However, those other effects are outside the scope of this Comment. See generally 1B J. MOORE, FEDERAL PRACTICE ¶ 0.401 (2d ed. 1965).

<sup>68</sup>See *Hansberry v. Lee*, 311 U.S. 32, 43 (1940).



## III

## AN ANALYSIS OF SELECTED AREAS OF PRESENT LAW

A. *Ancestor and Heir*

Cases involving ancestors and heirs illustrate the operation of the narrow traditional privity rule that only includes mutual or successive relationships to the same rights in property.<sup>69</sup> An heir is deemed in privity with his ancestor as to any property which he takes by succession from the ancestor.<sup>70</sup>

The traditional rule is correct as far as it goes. To allow a transfer of land to invalidate judgments would not only increase litigation, but title to land would be uncertain and consequently land would not be freely marketable.<sup>71</sup> In addition, the heir is protected since his relationship to the land and hence his interest in it will be substantially the same as his ancestor's. Therefore the interest of the heir will be adequately represented in the first action.

B. *Assignor and Assignee*

An assignee,<sup>72</sup> who takes an interest in land or chattels after the commencement of litigation concerning that property, is bound by a judgment against his assignor.<sup>73</sup> This result follows from the normal rule as to succession in interests to property and the narrow traditional definition of privity.<sup>74</sup> The assignor will be bound by a judgment against the assignee if the assignee retransfers his interest to the assignor

<sup>69</sup>See text accompanying note 32 *supra*; RESTATEMENT OF JUDGMENTS § 89 (1942). Of course, the litigation must have commenced before the transfer or succession. See RESTATEMENT OF JUDGMENTS § 89, comment *c* at 435 (1942).

<sup>70</sup>*Neagle v. Johnson*, 261 F. Supp. 634 (E.D. Mo. 1966); *Reynolds v. Lee*, 97 Ind. App. 460, 186 N.E. 337 (1933); FREEMAN, JUDGMENTS, *supra* note 32, § 491; 1B J. MOORE, FEDERAL PRACTICE ¶ 0.411[12], at 1665 (2d ed. 1965); RESTATEMENT OF JUDGMENTS § 89, comment *c* at 435 (1942).

An heir is not, however, in privity with his ancestor's executor. *Fouke v. Schenewerk*, 197 F.2d 234 (5th Cir. 1952); *Paschal v. Autry*, 256 N.C. 166, 123 S.E.2d 569 (1962). The apparent rationale for this result is that title to land vests in the heirs and not the executor. See *Paschal v. Autry*, 256 N.C. 166, 173, 123 S.E.2d 569, 574 (1962).

<sup>71</sup>In Louisiana a forced heir is not bound by judgments against the ancestor if they would bar the heir's right to invalidate a simulated contract under which the land was purportedly sold. LA. CIV. CODE ANN. art. 2239 (West 1952); *Quinette v. Delhommer*, 247 La. 1121, 176 So. 2d 399 (1965). The purpose of this rule is to protect an heir from suddenly being case out, dependent on society. Note, 2 LA. L. REV. 387, 388-89 (1940). However, the heir's interest is not strong enough to balance the resulting instability and the Louisiana rule should not be generally adopted.

<sup>72</sup>This discussion will include only those aspects of the assignor-assignee relationship which best illustrate the problem of privity.

<sup>73</sup>RESTATEMENT OF JUDGMENTS § 89, comment *c* at 435 (1942).

<sup>74</sup>See text accompanying note 32 *supra*.

subsequent to the commencement of litigation,<sup>75</sup> since, in that instance, the assignor becomes the successor in interest.

The more interesting problem is determining when the privity standard is satisfied if a transfer occurs before the commencement of litigation. The traditional rule is that a predecessor in interest is not bound by a judgment against his assignee,<sup>76</sup> although the assignee will receive the *benefit* of a judgment for his assignor even though the transfer preceded the commencement of litigation.<sup>77</sup> Analytically, the determination in each case should be based on the extent to which each would represent the interests of the other in litigation, and what effect attaching preclusive qualities to the judgment might have on other salient policies in the area.<sup>78</sup> The cases break down into four rough categories based on their holdings: (1) Judgment against the assignee binds the assignor;<sup>79</sup> (2) judgment against the assignee does not bind the assignor;<sup>80</sup> (3) judgment against the assignor binds the assignee;<sup>81</sup> and (4) judgment against the assignor does not bind the assignee.<sup>82</sup>

In *Edward Petry and Company v. Greater Huntington Radio Corporation*<sup>83</sup> a sales representative sued both the assignor and the assignee of a business. Included in this business was a contract between the assignor and the sales representative. The actions were severed and the first action to be tried was against the assignee. In that action it was held that the assignee did not assume any obligation under the contract between the assignor and the sales representative. In the subsequent action between the sales representative and the assignor it was held that the assignor was bound by the finding that there was no assumption by the assignee.<sup>84</sup>

<sup>75</sup>*Lesser v. Migden*, 328 F.2d 47 (2d Cir. 1964); RESTATEMENT OF JUDGMENTS § 89, comment *k* at 442 (1942).

<sup>76</sup>RESTATEMENT OF JUDGMENTS § 89, comment *j* at 441 (1942).

<sup>77</sup>1B J. MOORE, FEDERAL PRACTICE ¶ 0.411[12], at 1666 (2d ed. 1965); *cf.* RESTATEMENT OF JUDGMENTS § 89, comment *i* at 440 (1942). This is the majority rule but there is some authority to the contrary. *See* J. MOORE, *supra* ¶ 0.411[1], at 1259.

<sup>78</sup>The court must weigh the desirability of speed of adjudication in summary proceedings where time of notice may be shortened, against the desirability of settling all claims in one action. *E.g.*, *Reichman v. Crane*, 3 Misc. 2d 731, 157 N.Y.S.2d 254 (1956) (tenant not bound by summary proceeding against his subtenant).

<sup>79</sup>An assignor will be bound by an assignee-obligor action where he warranted the validity of a note sued on and was notified of the action. *Personal Loan & Fin. Co. v. Kinnin*, — Tenn. App. —, 408 S.W.2d 662 (1966).

<sup>80</sup>*E.g.*, *Vasu v. Kohlers, Inc.*, 145 Ohio St. 321, 61 N.E.2d 707 (1945), *overruled on another point*, *Rush v. City of Maple Heights*, 167 Ohio St. 221, 147 N.E.2d 599 (1958).

<sup>81</sup>*E.g.*, *Spargur v. Dayton Power & Light Co.*, 152 N.E.2d 918 (C.P. Ohio 1958), *aff'd*, 109 Ohio App. 37, 163 N.E.2d 786 (1959).

<sup>82</sup>*E.g.*, *Graves v. Marshall*, 147 Kan. 37, 75 P.2d 271 (1938).

<sup>83</sup>245 F. Supp. 963 (S.D. W.Va. 1965).

<sup>84</sup>*Id.* at 969.

In *Vasu v. Kohlers, Incorporated*<sup>85</sup> the plaintiff had assigned his property damage claim to his insurer *prior* to the institution of suit. The assignee lost in his suit. The plaintiff subsequently recovered in his personal injury action. The court of appeals reversed on the basis that the plaintiff should have been estopped by the judgment against his assignee.<sup>86</sup> The Ohio Supreme Court reversed the court of appeals, holding that the plaintiff was only bound by the judgment against the assignee to the extent of the claim assigned.<sup>87</sup>

Both results seem incorrect. In *Petry* the interest of the assignor was not represented by the assignee—in fact it was to the advantage of the assignee for there to be a determination that he had not assumed any obligation under the contract. On the other hand, in *Vasu* it was in the interest of the assignee to show that the defendant was negligent and that the assignor was not negligent. Under a theory of privity based on adequate representation<sup>88</sup> the results should have been just the opposite. The above conclusion depends on two assumptions: First that the insurance company assignee in *Vasu* represented the interests of the assignor adequately; and second, that no prejudice resulted to the assignor's claim by having it prosecuted by the insurance company assignee. A court applying a rational privity standard would have to decide whether an insurance company assignee is going to put forth the same effort as a personal injury victim.<sup>89</sup> The other element, prejudice due to the nature of the plaintiff, is highly uncertain.<sup>90</sup> A court would have to weigh both factors.

In determining whether an assignee should be bound by a judgment against an assignor the considerations discussed above are relevant.<sup>91</sup> In *Spargur v. Dayton Power and Light Company*<sup>92</sup> the court faced the converse of *Vasu*. The assignor lost in an action on his personal injury claim. The question was whether the assignee-insurer's claim for

<sup>85</sup>145 Ohio St. 321, 61 N.E.2d 707 (1945).

<sup>86</sup>*Id.* at 711.

<sup>87</sup>*Id.* at 719. This is in accord with the narrow view of privity which makes privity dependent on the relationship to certain property. See text accompanying note 32 *supra*.

<sup>88</sup>See text accompanying notes 65-68 *supra*.

<sup>89</sup>One factor at least would be the relative size of the claims.

<sup>90</sup>There is some evidence that knowledge that an insurance company is the real party in interest makes no difference to a jury. Note, *Direct-Action Statutes: Their Operational and Conflict-of-Laws Problems*, 74 HARV. L. REV. 357, 358 (1960); Note, *The Liability Insurer as a Real Party In Interest: Proposed Amendments to the Minnesota Rules of Civil Procedure*, 41 MINN. L. REV. 784, 788-91 (1957).

<sup>91</sup>See text accompanying note 78 *supra*.

<sup>92</sup>152 N.E.2d 918 (C.P. Ohio 1958), *aff'd*, 109 Ohio App. 37, 163 N.E.2d 786 (1959). The facts given here are somewhat simplified.

property damage should be barred on the basis of the adverse judgment against the assignor. Since the assignment took place before the commencement of either suit, the assignee could not be bound on a narrow "succession in interests to property" theory.<sup>93</sup> Nevertheless, the court held that the assignee was bound by the determination adverse to the assignor.

Although the court's reasoning did not support this result,<sup>94</sup> it seems correct. Even more than in the *Vasu* situation,<sup>95</sup> there is every reason to believe that the assignor represented the interests of the assignee.<sup>96</sup> Both needed to establish the defendants' negligence. In addition, there could be no prejudice here on the basis of the nature of the plaintiff<sup>97</sup> since the assignor was the plaintiff in the first action.<sup>98</sup>

The assignor is bound by any judgment against the assignee when the assignment is for collection only.<sup>99</sup> An assignor does not normally have such a continuing interest in the property assigned,<sup>100</sup> and the assignee is acting in an explicitly representative capacity.<sup>101</sup> If his fee is contingent upon recovery, the assignee's interests will be the same as the assignor's. Hence the interests of the assignor will be adequately represented and he should be bound.

### C. Attorney and Client

In this section two questions will be examined: When is the attorney bound vis-a-vis a third party by a determination adverse<sup>102</sup> to his client,

<sup>93</sup>See RESTATEMENT OF JUDGMENTS § 89, comment *c* at 435 (1942).

<sup>94</sup>The court discussed privity in terms of a succession in interest subsequent to the commencement of litigation. It then stated that "the assignor may bind his assignee by his acts and if those acts amount to a final adjudication the assignee is estopped." *Spargur v. Dayton Power & Light Co.*, 152 N.E.2d 918, 925 (C.P. Ohio 1958), *aff'd*, 109 Ohio App. 37, 163 N.E.2d 786 (1959).

<sup>95</sup>See text accompanying notes 85-87 *supra*.

<sup>96</sup>In this case there appear to have been both heavy property damages and personal injuries. *Spargur v. Dayton Power & Light Co.*, 152 N.E.2d 918, 919 (C.P. Ohio 1958), *aff'd*, 109 Ohio App. 37, 163 N.E.2d 786 (1959).

<sup>97</sup>See note 90 *supra*.

<sup>98</sup>Conceivably the insurance company could argue that it would have obtained better counsel. This is highly unlikely in view of the serious personal injuries involved. If the first case was obviously mismanaged the court could consider this in determining whether or not there was adequate representation. In *Spargur*, however, the same attorney handled all the claims. *Spargur v. Dayton Power & Light Co.*, 152 N.E.2d 918, 919 (C.P. Ohio 1958), *aff'd*, 109 Ohio App. 37, 163 N.E.2d 786 (1959).

<sup>99</sup>*Gwynn v. Wilhelm*, 226 Ore. 606, 609, 360 P.2d 312, 313-14 (1961); *Hodson v. Union P. Ry.*, 14 Utah 402, 47 P. 859 (1897); 1 FREEMAN, JUDGMENTS, *supra* note 32, § 443, at 971.

<sup>100</sup>In many instances the assignor is merely a formal party. *Cf.* RESTATEMENT OF JUDGMENTS § 81 (1942).

<sup>101</sup>This is analogous to a trustee suing on behalf of a beneficiary or a guardian suing on behalf of a ward. *Cf. id.* § 85.

<sup>102</sup>The question of whether an attorney can use a judgment for his client defensively is outside

and under what conditions may an attorney, acting for his client, bind the client by a judgment. The former situation arises when an attorney handles a case under a contingent fee agreement;<sup>103</sup> the latter when an attorney participates in an action on the client's behalf although the client is not a party to the action, for example, by filing an amicus curiae brief.<sup>104</sup> A determination of what interests are represented should be sufficient for the purpose of deciding who is precluded by a particular judgment.<sup>105</sup> Since an attorney, whether or not he has a personal interest in the litigation, controls the suit, it makes sense that he should be bound by an adverse judgment.<sup>106</sup> He is obviously able to represent his own interests.<sup>107</sup>

An attorney who represents a client under a contingent fee agreement is bound by a judgment adverse to his client.<sup>108</sup> This rule was originally based on the attorney's interest in and control of the action.<sup>109</sup> More recently, a court has said that the attorney implicitly elects to be bound by the judgment.<sup>110</sup> The real justification for the rule is that the attorney's interests are represented, since his compensation is dependent on his client's recovery.<sup>111</sup>

The mere fact that two persons have the same attorney does not mean that they are in privity,<sup>112</sup> especially where there is no evidence that

the scope of this Comment. Under the mutuality rule if he is bound by it he should also be able to assert it. *Compare* *Davies v. Stumpf*, 262 App. Div. 499, 31 N.Y.S.2d 1000 (1941), *aff'd*, 288 N.Y. 702, 704, 43 N.E.2d 89, 90 (1942) (attorney not bound by prior judgment and hence cannot assert it) *with* *Brennan v. Grover*, — Colo. —, 404 P.2d 544 (1965), *cert. denied*, 383 U.S. 926 (1966) (attorney allowed to assert judgment defensively although he was not a party and had no interest in the litigation).

<sup>103</sup>*See, e.g.*, *Dow Chem. Co. v. Benton*, 163 Tex. 477, 357 S.W.2d 565 (1962).

<sup>104</sup>*See, e.g.*, *Stryker v. Goodnow's Adm'r*, 123 U.S. 527 (1887).

<sup>105</sup>*See* text accompanying notes 65-68 *supra*.

<sup>106</sup>*Cf.* RESTATEMENT OF JUDGMENTS § 84 (1942). Control of the action by a nonparty is an independent basis for preclusion, although there may be substantial identity of interests and hence adequate representation. *But cf.* D. LOUISELL & G. HAZARD, *CASES AND MATERIALS ON PLEADING AND PROCEDURE* 588 (1962) where control is characterized as a category of privity.

<sup>107</sup>*Vestal, Preclusion/Res Judicata Variables; Parties*, 50 IOWA L. REV. 27, 41 (1964). Whether he should where his interests conflict with those of his client is, of course, an entirely different question. *Cf.* Comment, *Loans to Clients for Living Expenses*, 55 CALIF. L. REV. 1419, 1445-47 (1967).

<sup>108</sup>*E.g.*, *Dow Chem. Co. v. Benton*, 163 Tex. 477, 357 S.W.2d 565 (1962); *Miller v. Dyess*, 137 Tex. 135, 151 S.W.2d 186, *cert. denied*, 314 U.S. 691 (1941). *See generally* Annot., 137 A.L.R. 586 (1942).

<sup>109</sup>*Cf.* *Sabine Hardwood Co. v. West Lumber Co.*, 248 F. 123 (5th Cir. 1918).

<sup>110</sup>*Dow Chem. Co. v. Benton*, 163 Tex. 477, 482, 357 S.W.2d 565, 568 (1962).

<sup>111</sup>Aside from contingent fee agreements, where the attorney is the real party in interest he will be bound by the judgment. *Parsons v. Urie*, 104 Md. 238, 64 A. 927 (1906) (attorney actually owned the property involved). *But cf. Ex parte Harvill*, — Tex. —, 415 S.W.2d 174 (1967) (interest of attorney was only as lessee).

<sup>112</sup>*Dierks v. Walsh*, 203 Okla. 113, 115, 218 P.2d 920, 923 (1950). The fact that two persons

one person hired the attorney for the other or controlled the other's suit.<sup>113</sup> The fact that a person's attorney examined witnesses in the prior action<sup>114</sup> or that he actively participated in the trial<sup>115</sup> does not make him bound by the prior judgment. The filing of an amicus curiae brief will have no effect either.<sup>116</sup> Although the courts have given various reasons for these results,<sup>117</sup> the proper rationale is that participation on such bases does not guarantee adequate representation of the client's interests and as a result he should not be bound.<sup>118</sup>

#### D. Bailor and Bailee

A bailor and a bailee have concurrent rather than successive interests in property.<sup>119</sup> The bailor has a reversionary interest while the bailee has a possessory interest.<sup>120</sup> This section will concern the bailor-bailee relationship vis-a-vis third parties.<sup>121</sup>

Some commentators have taken a rather narrow approach on the extent to which a judgment against the bailor or bailee should bind the other.<sup>122</sup> This approach is essentially that "one is not concluded by a

have the same attorney may indicate that their interests are the same. *See, e.g.,* Cauefield v. Fidelity & Cas. Co., 378 F.2d 876 (5th Cir. 1967).

<sup>113</sup>*In re Richardson's Estate*, 250 Iowa 275, 289, 93 N.W.2d 777, 785 (1958).

<sup>114</sup>*Willsey v. Strawway*, 44 Misc. 2d 601, 255 N.Y.S.2d 224 (Sup. Ct. 1963), *aff'd*, 22 App. Div. 2d 973, 254 N.Y.S.2d 830 (1964).

<sup>115</sup>*United States v. United States Dist. Court*, 206 F.2d 303 (9th Cir. 1953). *But cf.* *Weinberg v. Fanning*, 208 Md. 567, 119 A.2d 383 (1956) (client bound by attorney's participation and admission of effect of judgment).

<sup>116</sup>*Stryker v. Goodnow's Adm'r*, 123 U.S. 527 (1887); *Cory Corp. v. Sauber*, 267 F.2d 802 (7th Cir. 1959), *rev'd per curiam on other grounds*, 363 U.S. 709 (1960) (lawsuit belongs to plaintiffs, not amicus curiae); *Brown-Crummer Inv. Co. v. Paulter*, 70 F.2d 184 (10th Cir. 1934) (since amicus curiae has no control, he is not bound); *Bowler v. Leonard*, 70 Nev. 370, 269 P.2d 833 (1954) (amicus curiae is too useful to turn it into a trap for the unwary); *Casey v. Male*, 63 N.J. Super. 255, 164 A.2d 374 (1960) (amicus curiae cannot control and hence should not be bound); 1B J. MOORE, FEDERAL PRACTICE ¶ 0.411[6] (2d ed. 1965); RESTATEMENT OF JUDGMENTS § 79, comment *j* at 359 (1942). *Contra*, *Roche v. Wagner*, 34 Misc. 2d 920, 229 N.Y.S.2d 594 (Sup. Ct. 1962), *aff'd sub nom*, *Niebling v. Wagner*, 18 App. Div. 2d 647, 235 N.Y.S.2d 325 (1962), *aff'd*, 12 N.Y.2d 314, 189 N.E.2d 805, 239 N.Y.S.2d 537 (1963).

<sup>117</sup>*See* authorities cited note 116 *supra*.

<sup>118</sup>*See* text accompanying notes 65-68 *supra*.

<sup>119</sup>1B J. MOORE, FEDERAL PRACTICE ¶ 0.411[12], (2d ed. 1965). "A bailment may be defined as a contract by which possession of personal property is temporarily transferred from the owner to another for the accomplishment of some special purpose." W. ELLIOTT, A TREATISE ON THE LAW OF BAILMENTS AND CARRIERS § 1, at 1 (2d ed. 1929).

<sup>120</sup>*See* G. PATON, BAILMENT IN THE COMMON LAW 33 (1952).

<sup>121</sup>As between the bailor and the bailee a special duty of care or no liability for negligence may be established by contract. G. PATON, *id.* at 36. Hence in many cases a determination in an action between a bailee or bailor and a third party will not be relevant in an action between a bailee and bailor.

<sup>122</sup>*See* FREEMAN, JUDGMENTS, *supra* note 32, § 482; 1B J. MOORE, FEDERAL PRACTICE ¶ 0.411[12], at 1673-74 & n.33 (2d ed. 1965); RESTATEMENT OF JUDGMENTS § 88 (1942). This

judgment for or against the other except as one claims through or under the other."<sup>123</sup> A somewhat broader approach would take into consideration whether one's interests were represented by the other in litigation, instead of restricting the preclusive effects to that property in which they have a mutual interest.<sup>124</sup>

That determination may depend on factors peculiar to the bailor-bailee relationship. For example, the negligence of a bailee is not imputed to the bailor.<sup>125</sup> The type of bailment involved, whether for a term or at will,<sup>126</sup> or for pay or gratuitously, may also be relevant in establishing the interests of the parties and hence whether one adequately represents the other.<sup>127</sup>

Either the bailee or the bailor may sue for injury to bailed property.<sup>128</sup> However, the bailee may recover for the whole loss whereas the bailor may recover only for the injury to his reversionary interest.<sup>129</sup> A "bailor at will" may bring an action for the entire injury since he may consider the bailment terminated when the bailed property is injured.<sup>130</sup>

Courts have advanced various reasons for giving the bailee the right to sue for the entire injury to the bailed property. A special interest in the bailed property,<sup>131</sup> simple possession,<sup>132</sup> and liability over to the bailor<sup>133</sup>

approach has apparently been attractive to the courts. *See, e.g.,* *Hornstein v. Kramer Bros. Freight Lines, Inc.*, 133 F.2d 143, 147 (3d Cir. 1943).

<sup>123</sup>FREEMAN, *supra* note 122.

<sup>124</sup>Freeman states that preclusion includes instances where one represents the interests of the other. However, that refers only to the situation where the bailee sued for the interests of both. *See* FREEMAN, JUDGMENTS *supra* note 32, § 482, at 1043-45.

<sup>125</sup>*E.g.,* *C.I.T. Corp. v. Hungerford*, 11 N.J. Misc. 897, 168 A. 791 (Dist. Ct. 1933); RESTATEMENT (SECOND) OF TORTS § 489 (1965). The bailor has not always been free of the bailee's negligence. *Gregory, The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services, Etc.*, 2 U. CHI. L. REV. 173, 174-75 (1935). Nor is it clear that he will remain free in the future. His status may be altered by statutes which make an owner liable for harm done to others by anyone driving his automobile. RESTATEMENT (SECOND) OF TORTS § 489, comment *b* at 546 (1965). *See, e.g.,* *Motorlease Corp. v. Mulrooney*, 13 N.J. Super. 556, 81 A.2d 25 (App. Div. 1951), *aff'd*, 9 N.J. 82, 86 A.2d 765 (1952).

<sup>126</sup>A bailee in pledge has a right to possession until the debt is paid whereas a bailee at will holds at the pleasure of the bailor. *G. PATON, supra* note 120, at 30.

<sup>127</sup>The interest of a bailee at will may be insufficient to guarantee adequate representation of the bailor's interests.

<sup>128</sup>*The W.C. Block*, 71 F.2d 682 (2d Cir.), *cert. denied*, 293 U.S. 579 (1934); FREEMAN, JUDGMENTS, *supra* note 32, § 482, at 1043; *F. JAMES, CIVIL PROCEDURE* § 11.29, at 592 (1965).

<sup>129</sup>*F. JAMES, supra* note 128, at 592-93. However, the bailor's suit cannot be barred by a judgment in a suit by the bailee commenced after the bailor's action. 2 H. BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 581, at 876 (2d ed. 1902).

<sup>130</sup>RESTATEMENT OF JUDGMENTS § 88, comment *b* at 431-32 (1942).

<sup>131</sup>*Hudson Transit Corp. v. Antonucci*, 137 N.J.L. 704, 61 A.2d 180 (Ct. Err. & App. 1948).

<sup>132</sup>*Associates Discount Corp. v. Gillineau*, 322 Mass. 490, 78 N.E.2d 192 (1948).

<sup>133</sup>*Pendleton v. Benner Line*, 246 U.S. 353 (1918); *Industrial Inv. Co. v. King*, 159 Miss. 491, 132 So. 333 (1931).

have all been suggested. One commentator argues that the bailee's cause of action should be limited to his own interest and that then there would be no reason to hold them in privity.<sup>134</sup> However, this argument overlooks the possibility that one will represent the interests of the other and that there should be preclusion. Whatever the underlying rationale, when the bailee does sue, unless he sues only to vindicate his own interest,<sup>135</sup> the bailor is bound by the result.<sup>136</sup>

In *Hudson Transit Corporation v. Antonucci*<sup>137</sup> the bailor of a bus sued a third party for damages to the bus. In a prior action for damage to his automobile, against the bailee of the bus, the third party was a successful plaintiff. The issue in the present action was whether the third party could assert the judgment in his favor in the prior action against the bailor-plaintiff in this action. The court held that he could not.<sup>138</sup>

The court apparently based its holding on the theory that the bailor's separate right of action to protect his reversionary interest could not be barred by a suit *against* the bailee.<sup>139</sup> This reasoning has not been universally accepted.<sup>140</sup> The important question is whether the bailee adequately represented the interests of the bailor. Since the bailee was defending himself from a possible judgment, he had every incentive to show that the third party was negligent.<sup>141</sup> The interests of the bailee and bailor were thus substantially identical, and their relationship existed

<sup>134</sup>1 B. J. MOORE, FEDERAL PRACTICE ¶ 0.411[12], at 1674 n.33 (2d ed. 1965).

<sup>135</sup>See, e.g., *Atchison, T. & S.F. Ry. v. United States*, 94 F. Supp. 677 (Ct. Cl. 1951).

<sup>136</sup>FREEMAN, JUDGMENTS, *supra* note 32, § 482, at 1044. There is some dispute over whether the mere rendition of judgment bars the bailor or satisfaction of the judgment is necessary. Compare W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 15, at 97-98 (3d ed. 1964) and RESTATEMENT OF JUDGMENTS § 88, comment *a* at 431 (1942), with *Eaton v. Schild*, 8 N.J. Misc. 245, 149 A. 637 (Dist. Ct. 1930). The better rule seems to be that the bailor's claim should not be barred until satisfaction of the judgment since the underlying rationale of the rule is that the bailor can recover his interest from the bailee. See F. JAMES, CIVIL PROCEDURE § 11.29, at 593 (1965). He cannot do this unless the bailee has something for him to recover. Alternatively the bailor's claim could be barred but he would be allowed to enforce the bailee's judgment.

<sup>137</sup>137 N.J.L. 704, 61 A.2d 180 (Ct. Err. & App. 1948). The facts given in the text are somewhat simplified.

<sup>138</sup>Bailor-plaintiff had recovered on a jury verdict below. The estoppel argument was the basis of the third party's appeal. *Id.* at 706, 61 A.2d at 182.

<sup>139</sup>See *id.* at 708-09, 61 A.2d at 183. Note that if the bailee had sued the third party, the bailor's action would have been barred. See text accompanying notes 135-36 *supra*.

<sup>140</sup>E.g., *Ladany v. Assad*, 91 Conn. 316, 99 A. 762 (1917). In *Ladany*, there was the same alignment of parties as in *Hudson*. The court held that if a bailor has knowledge that his bailee has been sued he must become a party to the action or defend it through his bailee. Whether he appears or not, he will be bound. See FREEMAN, JUDGMENTS, *supra* note 32, § 482, at 1045; cf. RESTATEMENT OF JUDGMENTS § 88, comment *d* at 432 (1942). But see *Peck v. Merchants' Transfer & Storage Co.*, 85 Kan. 126, 116 P. 365 (1911).

<sup>141</sup>Note that the common issue in the two actions is the negligence of the third party. The bailee's negligence would not be imputed to the bailor. See authorities cited note 125 *supra*.



prior to the litigation. Hence the third party should have been allowed to assert the prior judgment against the bailor.<sup>142</sup>

In those cases where the bailor sued the third party in the first action and recovered, courts have not allowed the defendant-bailee to use the judgment in the first action against the third party plaintiff in the second action.<sup>143</sup> One rationale advanced is that since privity is based on a common interest in the bailed property, privity should be limited to those situations where the common interest is involved.<sup>144</sup> Another rationale is that since the bailee's negligence could not have been imputed to the bailor in the first action,<sup>145</sup> the third party has not had a chance to show the bailee's negligence.<sup>146</sup> Both of these rationales ignore the fact that, although the bailee's contributory negligence has yet to be litigated, the third party's negligence was adjudicated. If the judgment had been adverse to the bailor, the bailee might be estopped in an action by the third party.<sup>147</sup> If the third party won in the first suit by the bailor and then was sued by the bailee, it is not clear whether the third party could assert the judgment in the first action in order to preclude the bailee.<sup>148</sup>

<sup>142</sup>One may question whether proving contributory negligence is the same as proving negligence. If it could be shown that it is more difficult to prove contributory negligence because of the court's dislike for the doctrine, then the interests of the bailor would not have been adequately represented in the first action since he (or his representative) would not have had a fair chance to show that the third party was negligent. In addition, there may be some instances where the interests of the bailor and bailee are adverse for reasons apart from their relationship. In those cases there should not be preclusion.

<sup>143</sup>*Hornstein v. Kramer Bros. Freight Lines, Inc.*, 133 F.2d 143 (3d Cir. 1943); *Fletcher v. Perry*, 104 Vt. 229, 158 A. 679 (1932).

<sup>144</sup>*Hornstein v. Kramer Bros. Freight Lines, Inc.*, 133 F.2d 143 (3d Cir. 1943).

<sup>145</sup>See authorities cited note 125 *supra*.

<sup>146</sup>*Fletcher v. Perry*, 104 Vt. 229, 158 A. 679 (1932).

<sup>147</sup>Compare *Hughes v. United Pipe Lines*, 119 N.Y. 423, 23 N.E. 1042 (1890), with RESTATEMENT OF JUDGMENTS § 88(3) (1942). In *Hughes* the prior action had determined that the bailor did not own a quantity of oil. Since the bailee's right was dependent on the bailor's and it had been adjudicated that the bailor had no right the bailee was not allowed to assert the right of the bailor. Although the court did not so state, presumably a bailment at will was involved. In that case the *Hughes* result would be in accord with RESTATEMENT OF JUDGMENTS § 88(2) (1942). The Restatement rule as to bailments for a term is that the bailor's action will have no effect on the bailee's claim. *Id.* at § 88(3). This rule is adopted in dicta in *Hornstein v. Kramer Bros. Freight Lines, Inc.*, 133 F.2d 143 (3d Cir. 1943).

<sup>148</sup>Compare *Malone Freight Lines, Inc. v. Johnson Motor Lines, Inc.*, 51 Del. 504, 148 A.2d 770 (1959) (cannot assert), with *Union Ins. Soc'y, Ltd. v. William Gluckin & Co.*, 353 F.2d 946 (2d Cir. 1965) (can assert). The cases are distinguishable. In *Malone* the first action was for damage to a truck and the second action for damage to the cargo. In *Union* the same goods were involved in both actions. In addition, *Union* involved a bailment at will and hence the bailment may be seen as terminated when the bailor brings his action. RESTATEMENT OF JUDGMENTS § 88, comment *b* at 431-32 (1942).

These technical distinctions based on interests in the property and the availability of contributory negligence as a defense, however, overlook the basic problem. Instead of directly examining the interests of the parties to the litigation the courts dwell on distinctions which, for the most part, are meaningless.

### E. Husband and Wife

The majority rule is that no privity arises from the marital relationship.<sup>149</sup> This means that if W (wife) is injured, sues and loses, H (husband) can still sue the same defendant for loss of his wife's services.<sup>150</sup> This anomalous doctrine, which allows a derivative claim to live when the primary claim is dead, has not survived unscathed.<sup>151</sup> One criticism concentrates on the anomaly described above.<sup>152</sup> Another points to the similarity of the facts and issues in the two actions and the fact that the other spouse is well aware of the course of the litigation.<sup>153</sup> However, the rule has been defended on the technical ground that the derivation took place prior to the commencement of litigation and hence, using the traditional definition,<sup>154</sup> the husband and wife are not in privity.<sup>155</sup>

Rational examination of the problems in this area must start with the question of identity of interests.<sup>156</sup> The fact that one action derives from another is significant, not because of technical rules based on succession in interests to property, but rather because there will be common questions of law and fact in the two actions. Given that, the relationship must be examined to insure that one party would adequately represent the other's interests.<sup>157</sup>

<sup>149</sup>2 H. BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 556 (2d ed. 1902); FREEMAN, JUDGMENTS, *supra* note 32, § 480; 1B J. MOORE, FEDERAL PRACTICE ¶ 0.411[11] (2d ed. 1965).

<sup>150</sup>*E.g.*, *Armstrong Furniture Co. v. Nickle*, 110 Ga. App. 686, 140 S.E.2d 72 (1964); *Sayre v. Davis*, 111 Ohio App. 471, 170 N.E.2d 276 (1960).

<sup>151</sup>*See* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.411[11], at 1662-63 (2d ed. 1965); Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 64 (1964).

<sup>152</sup>J. MOORE, *supra* note 151, ¶ 0.411[11], at 1662-63. He argues that if the derivative claim is tried first then the primary claim should not be barred.

<sup>153</sup>Vestal, *supra* note 151, at 64.

<sup>154</sup>*See* text accompanying note 32 *supra*.

<sup>155</sup>F. JAMES, CIVIL PROCEDURE § 11.30, at 594 (1965).

<sup>156</sup>*See* text accompanying notes 65-68 *supra*.

<sup>157</sup>The positions of the bailor and the bailee are somewhat different in litigation because the contributory negligence of the bailee is not imputed to the bailor. *See* authorities cited note 125 *supra*. However, one spouse will be precluded by the contributory negligence of the other spouse. *Sove v. Smith*, 355 F.2d 264 (6th Cir. 1966); *Chicago, B. & Q.R.R. v. Honey*, 63 F. 39 (8th Cir. 1894). This rule has been criticized by the commentators. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 119, at 914-16 (3d ed. 1964); Gregory, *The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services, Etc.*, 2 U. CHI. L. REV. 173 (1935); Gregory, *Vicarious*

Some jurisdictions have adopted the minority rule that an adverse judgment on the main claim bars a derivative action.<sup>158</sup> In at least one jurisdiction this occurred inadvertently, without conscious recognition of the rule's underlying rationale, in cases where there were inconsistent verdicts in consolidated actions.<sup>159</sup> In another case a court, stating that it was not going into the question of privity, simply held that the wife was estopped in her action for personal injuries on the basis of the unsuccessful prosecution of the husband's claim.<sup>160</sup> Other maverick decisions exist whose present vitality is impossible to gauge.<sup>161</sup> On the other hand, it seems to be established that if there is a recovery on the primary claim, the other spouse cannot use that judgment to estop the defendant in an action on the derivative claim.<sup>162</sup>

In some instances courts, although following the majority rule, have

*Responsibility and Contributory Negligence*, 41 YALE L.J. 831 (1932); James, *Imputed Contributory Negligence*, 14 LA. L. REV. 340 (1954).

<sup>158</sup>*Sisemore v. Neal*, 236 Ark. 574, 367 S.W.2d 417 (1963); *Kobman v. Ross*, 374 Mich. 678, 133 N.W.2d 195 (1965).

<sup>159</sup>In Michigan, the minority rule was clearly stated in *Kobman v. Ross*, 374 Mich. 678, 133 N.W.2d 195 (1965). That case in turn relied on *Bias v. Ausbury*, 369 Mich. 378, 120 N.W.2d 233 (1963), a consolidated action, where a new trial was granted when the jury found no cause of action for the son and yet gave a verdict for the father. *Bias* in turn relied on *Morrison v. Grass*, 314 Mich. 87, 22 N.W.2d 82 (1946) in which the opinion of Sharpe, J. (relied on in *Bias*) adopted the dissenting opinion on this point. *Id.* at 96, 22 N.W.2d at 86. The dissent relied on *Dewey v. Perkins*, 295 Mich. 611, 295 N.W. 333 (1940) another consolidated action where the court stated without citing authority that the husband's recovery is contingent upon the wife's recovery.

It is possible that the same thing occurred in New York and Arkansas although the law on this point is not clear in New York. Compare *Fischbach v. Auto Boys, Inc.*, 106 N.Y.S.2d 416 (Sup. Ct. 1951), *rev'd on other grounds*, 279 App. Div. 1035, 112 N.Y.S.2d 283 (1952) (wife barred in subsequent derivative action after verdict for defendant on primary claim), with *Jetter v. Brown*, 200 Misc. 718, 107 N.Y.S.2d 856 (Sup. Ct. 1951) (wife not barred in second action—not derivative claim but strongly implied that wife should have her day in court). *Fischbach* relied on *Maxson v. Tomek*, 244 App. Div. 604, 280 N.Y.S. 319 (1935) which was a consolidated action.

In *Sisemore v. Neal*, 236 Ark. 574, 367 S.W.2d 417 (1963) the court clearly stated the minority rule. They relied on *Fleming v. Cooper*, 225 Ark. 634, 284 S.W.2d 857 (1956) where the husband was acting with the wife's knowledge and under her control as her agent, and *Tollett v. Mashburn*, 183 F. Supp. 120 (W.D. Ark. 1960), *aff'd*, 291 F.2d 89 (8th Cir. 1961) which was a consolidated action.

<sup>160</sup>*Friedenthal v. Williams*, 271 F. Supp. 524 (E.D. La. 1967). Note that this was not even a derivative action. The court relied on *Cauefield v. Fidelity & Cas. Co.*, 378 F.2d 876 (5th Cir. 1967). See note 204 *infra*.

<sup>161</sup>*E.g.*, *Stephens v. Snyder*, 65 Ga. App. 36, 14 S.E.2d 687 (1941) (husband's derivative action barred—no discussion of privity or policy). In a later Georgia case the opposite rule is clearly stated and it is doubtful if *Stephens* is good law. See *Armstrong Furniture Co. v. Nickle*, 110 Ga. App. 686, 140 S.E.2d 72 (1964).

<sup>162</sup>*Marusic v. Union Elec. Co.*, 377 S.W.2d 454 (Mo. 1964); *Wolff v. Du Puis*, 233 Ore. 317, 378 P.2d 707 (1963); *Gilman v. Gilman*, 115 Vt. 49, 51 A.2d 46 (1947); see *Sove v. Smith*, 311 F.2d 5 (6th Cir. 1962) (not treated as derivative action). *Contra*, *Barbour v. Great Atl. & Pac. Tea Co.*, 143 F. Supp. 506 (E.D. Ill. 1956) (no discussion of privity or policy).

held spouses in privity on an independent basis.<sup>163</sup> When a wife takes property through her husband she is in privity with him as to that property.<sup>164</sup> In some cases the husband is said to represent the wife's interests in marital property.<sup>165</sup> A wife also will be bound by a judgment against her husband if she intervened in<sup>166</sup> or controlled<sup>167</sup> that litigation.

The Supreme Court of Oregon pointed out the problems in this area in *Wolff v. Du Puis*.<sup>168</sup> In the prior action the wife recovered for her personal injuries. In this action the husband sought damages for loss of consortium. The trial court directed a verdict in his favor which was reversed on the basis of a holding that there is no privity between husband and wife.<sup>169</sup>

[T]here can be no such privity between persons as to produce collateral estoppel unless the result can be defended on principles of fundamental fairness in the due-process sense. A trial in which one party contests his claim against another should be held to estop a third party only when it is realistic to say that the third party was fully protected in the first trial.<sup>170</sup>

The court felt that the two spouses had different interests and that because of this one would not necessarily protect the interests of the other.<sup>171</sup> Under the circumstances that was a dubious factual assumption.<sup>172</sup> The husband and wife sought to prove the same facts and there was no reason to assume any adversity of interest between them;

<sup>163</sup>It is unclear whether the derivative claim is barred under the majority rule if the primary claim is barred by some procedural defect. *Compare* *Signorile v. Sullivan*, 52 Misc. 2d 17, 274 N.Y.S.2d 639 (Sup. Ct. 1966) (wife's claim barred for failure to prosecute does not bar husband's derivative claim), *with* *Desjourdy v. Mesrobian*, 52 R.I. 146, 158 A. 719 (1932) (wife's claim barred by statute of limitations bars husband's claim since it must be based on an actionable injury to her).

<sup>164</sup>*Markel v. Phoenix Title & Trust Co.*, 100 Ariz. 53, 410 P.2d 662 (1966); *King v. United States Steel Co.*, 4 Pa. D. & C.2d 794 (C.P. 1952).

<sup>165</sup>*Collum v. Hervey*, 176 Ark. 714, 3 S.W.2d 993 (1928) (alternative holding); *Zaragosa v. Craven*, 33 Cal. 2d 315, 202 P.2d 73 (1949) (cause of action is community property and hence second suit for own injuries barred; *Nemeth v. Aluminum Cooking Utensil Co.*, 146 Cal. App. 2d 405, 304 P.2d 129 (1956) (same); *Carter v. Ricker*, 241 Ore. 342, 405 P.2d 854 (1965).

<sup>166</sup>*Veal v. City of St. Louis*, 365 Mo. 836, 289 S.W.2d 7 (1956).

<sup>167</sup>*Box v. Rundell*, 179 F.2d 626 (10th Cir. 1950); *Fleming v. Cooper*, 225 Ark. 634, 284 S.W.2d 857 (1956).

<sup>168</sup>233 Ore. 317, 378 P.2d 707 (1963). This is, incidentally, one of the few intelligent discussions of the problems in this area.

<sup>169</sup>The court held that the husband's cause of action is separate and independent, not derivative. *Id.* at 320, 378 P.2d at 709.

<sup>170</sup>*Id.* at 322, 378 P.2d at 710.

<sup>171</sup>*See id.* at 322-23, 378 P.2d at 710.

<sup>172</sup>For a contrary view on identity of interest of husband and wife, see *Bartlett v. Kansas City Pub. Serv. Co.*, 349 Mo. 13, 160 S.W.2d 740 (1942).

presumably their mutual fortunes depended on each other.<sup>173</sup> Regardless of the soundness of the court's holding on these particular facts, it recognized that protection of the nonparty's interests is the important concern.

#### F. *Principal and Agent*<sup>174</sup>

When an agent or principal is allowed, in a subsequent action, to use a prior judgment exonerating the other, it is not based on a privity relationship between the principal and agent. Rather the rule is based on the possibility of placing inconsistent demands on the agent.<sup>175</sup> A narrow version of this principle allows the principal to use a judgment for the agent but not vice-versa.<sup>176</sup> The broader version allows either to use a judgment for the other.<sup>177</sup> Even in a situation where the principal is sued and the agent, being primarily liable, is vouched in, it is not clear that the agent will be bound vis-a-vis the third party if he does not appear.<sup>178</sup> On the other hand the mere recovery, without satisfaction, of a judgment against the agent may bar a suit against the principal.<sup>179</sup>

The unanimous rule appears to be that the principal or agent will

<sup>173</sup>Contrast the relationship of principal and agent, text accompanying notes 174-83 *infra*, which also exists prior to the litigation.

<sup>174</sup>This section will only be concerned with situations where the principal is vicariously liable for the acts of his agent. This relationship might more properly be termed master and servant. *See* F. MECHEM, *OUTLINES OF THE LAW OF AGENCY* §§ 12-13 (4th ed. 1952). However, the courts have been loose in their choice of terminology and for the sake of clarity only the one set of terms will be used.

<sup>175</sup>If he is adjudged not liable but the principal has a right of indemnity from him and the principal is held liable, then the agent is in the position of owing indemnity for something for which he has been held not liable. *See* F. JAMES, *CIVIL PROCEDURE* § 11.32, at 598 (1965); 1B J. MOORE, *FEDERAL PRACTICE* ¶ 0.412[6], at 1830 (2d ed. 1965). The broad exception, see text accompanying note 177 *infra*, is justified generally on the relationship between the principal and agent and the prior adjudication of the issue. *Id.* ¶ 0.412[3], at 1817. One commentator feels that the broad exception is inconsistent with retention of the mutuality rule. *See* F. JAMES, *supra* § 11.33, at 598-99.

<sup>176</sup>*E.g.*, *Taylor v. Denton Hatchery, Inc.*, 251 N.C. 689, 111 S.E.2d 864 (1960); FREEMAN, *JUDGMENTS*, *supra* note 32, § 469, at 1031.

<sup>177</sup>*E.g.*, *Mooney v. Central Motor Lines, Inc.*, 222 F.2d 572 (6th Cir. 1955); *Henley v. Panhandle E. Pipeline Co.*, 138 F. Supp. 768 (W.D. Mo. 1956); 1B J. MOORE, *FEDERAL PRACTICE* ¶ 0.412[6], at 1829 (2d ed. 1965).

<sup>178</sup>*Compare* F. JAMES, *CIVIL PROCEDURE* § 11.27, at 590 (1965), with 1B J. MOORE, *FEDERAL PRACTICE* ¶ 0.405[9], at 774 (2d ed. 1965). For a discussion of "vouching in," see note 39 *supra*.

<sup>179</sup>*See* *Granquist v. Crystal Springs Lumber Co.*, 190 Miss. 572, 1 So. 2d 216 (1941); *Betcher v. McChesney*, 255 Pa. 394, 100 A. 124 (1917); *Raymond v. Capobianco*, 107 Vt. 295, 178 A. 896 (1935), *overruled by* *Daniels v. Parker*, 119 Vt. 348, 126 A.2d 85 (1956). The modern trend seems to be that only satisfaction will bar a second action. *See, e.g.*, *Ivey v. Wiggins*, 271 Ala. 610, 126 So. 2d 469 (1961); *Bullock v. Crouch*, 243 N.C. 40, 89 S.E.2d 749 (1955); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 45, at 267 (3d ed. 1964); *cf.* *RESTATEMENT OF JUDGMENTS* § 96 (1942).

not be *bound* by a judgment against the other.<sup>180</sup> The justification for this rule is quite simple: Due to possible adversity of interests it is unfair to assume that one will adequately represent the other in litigation.<sup>181</sup> There is no close personal relationship<sup>182</sup> or overwhelming mutual interest<sup>183</sup> to insure adequate representation. Although preclusion may be appropriate in some instances, the court should carefully evaluate the possible adversity of interests.

#### IV

##### NONPARTIES BOUND: PRIVITY STANDARD NOT APPLIED

In class actions and under the doctrine of virtual representation<sup>184</sup> a nonparty may be bound on a basis other than privity.<sup>185</sup> As previously seen, both devices allow preclusion where there is adequate representation, and convenience, necessity, or avoidance of a multiplicity of actions demand such preclusive effect.<sup>186</sup> The class action device especially<sup>187</sup> is a compromise between the individual litigant's interest in presenting his claim separately and the interest of society in the efficient termination of disputes.<sup>188</sup> It should be noted also that, although class actions in the federal courts by rule,<sup>189</sup> and class actions in the state courts under the due process clause,<sup>190</sup> must embody adequate

<sup>180</sup>*E.g.*, *Rice v. Ringsby Truck Lines*, 302 F.2d 550 (7th Cir. 1962); *Sherwood v. Huber & Huber Motor Exp. Co.*, 286 Ky. 775, 151 S.W.2d 1007 (1941); *Dicarlo v. Scoglio*, 317 Mass. 773, 60 N.E.2d 762 (1945); *Gentry v. Farruggia*, 132 W. Va. 809, 53 S.E.2d 741 (1949). The only case found holding that there was privity was reversed on appeal. *Makariw v. Rinard*, 222 F. Supp. 336 (E.D. Pa. 1963), *rev'd*, 336 F.2d 333 (3d Cir. 1964).

Offensive use is not allowed either. *E.g.*, *Kayler v. Gallimore*, 269 N.C. 405, 152 S.E.2d 518 (1967); *Bullock v. Crouch*, 243 N.C. 40, 89 S.E.2d 749 (1955).

<sup>181</sup>This rationale was well stated in *Gentry v. Farruggia*, 132 W. Va. 809, 812, 53 S.E.2d 741, 743 (1949):

"It is plain that a rule which would rest privity of interest on the mere relationship of principal and agent would tempt collusion. For instance, an automobile collision results in injury to a master's machine amounting to \$100.00 and in his servant losing an arm. The master sues the owner of the other car, whom, for various reasons, he wishes to protect against suit by his servant, and, due to the intentional omission of evidence, there is a verdict in favor of the defendant."

<sup>182</sup>As, for example, husband and wife. See text accompanying notes 149-73 *supra*.

<sup>183</sup>As, for example, a bailee suing for his and his bailor's interests. See text accompanying notes 119-48 *supra*.

<sup>184</sup>See text accompanying notes 49-68 *supra*.

<sup>185</sup>Both devices are special instances of preclusion rather than deductions from the traditional privity rule. See text accompanying note 32 *supra*.

<sup>186</sup>See text accompanying notes 52-64 *supra*.

<sup>187</sup>In the virtual representation cases, the unborn beneficiary cannot present his claim. However, class actions compel the combined adjudication of individual claims. See, *e.g.*, FED. R. CIV. P. 23(c)(3).

<sup>188</sup>See text accompanying notes 5-10 *supra*.

<sup>189</sup>See, *e.g.*, FED. R. CIV. P. 23(a)(4).

<sup>190</sup>See *Hansberry v. Lee*, 311 U.S. 32, 43 (1940).

representation of the nonparty's interests, other compromises are possible.<sup>191</sup> The constitutionality of procedural devices depends on a rational weighing of the interests involved<sup>192</sup> and not a static concept of various forms of participation in litigation.<sup>193</sup>

Two recent federal cases bound nonparties who were not in privity with parties to the first action.<sup>194</sup> In *Cauefield v. Fidelity and Casualty Company*<sup>195</sup> the defendant had cleared the brush from an overgrown cemetery on his land. Displeased with the results of this operation, 41 relatives of those buried in the cemetery filed 26 separate desecration actions in the Louisiana courts.<sup>196</sup> The first such suit to come to trial resulted in a judgment for the defendants.<sup>197</sup> Cauefield and Lucas were among the 41 claimants. Both were witnesses at the first trial. Both had retained the same attorney who tried that first case. Their own action, however, had been removed to the federal court, and continued indefinitely pending the outcome of the state court litigation. Cauefield and Lucas conceded that the issues in their federal court action were identical to the issues tried in the prior state court action and that the evidence and testimony would not differ. In light of these facts the federal district court granted defendants' motion to dismiss on the basis of judicial estoppel.<sup>198</sup> The Fifth Circuit affirmed.<sup>199</sup>

In *Friedenthal v. Williams*<sup>200</sup> while the defendant was stopped on a highway, her car was struck in the rear by another auto. The impact forced her vehicle over the divider into the path of another automobile, resulting in a collision. The occupants of the other automobile, Mr. and

<sup>191</sup>See Proposed Rule *infra*.

<sup>192</sup>See authorities cited note 57 *supra*.

<sup>193</sup>See *Hansberry v. Lee*, 311 U.S. 32, 42 (1940).

<sup>194</sup>See generally Comment, *Res Judicata in the Federal Courts: Application of Federal or State Law: Possible Differences Between the Two*, 51 CORNELL L.Q. 96 (1965) on res judicata and the "Erie" problem.

<sup>195</sup>378 F.2d 876 (5th Cir. 1967).

<sup>196</sup>There are at least seven reported arising out of this litigation. *Cauefield v. Fidelity Cas. Co.*, 378 F.2d 876 (5th Cir. 1967); *Cauefield v. Fidelity & Cas. Co.*, 247 F. Supp. 851 (E.D. La. 1965); *Thomas v. Fidelity & Cas. Co.*, 237 La. 257, 111 So. 2d 105 (1959); *Hartford v. Mobley*, 233 La. 956, 98 So. 2d 250 (1957); *Thomas v. Fidelity & Cas. Co.*, 155 So. 2d 674 (La. Ct. App. 1963); *Thomas v. Southern Farm Bureau Cas. Ins. Co.*, 154 So. 2d 619 (La. Ct. App. 1963); *Thomas v. Gremillion*, 118 So. 2d 485 (La. Ct. App. 1960); *Thomas v. Mobley*, 118 So. 2d 476 (La. Ct. App. 1960).

<sup>197</sup>That judgment was affirmed on appeal. *Thomas v. Mobley*, 118 So. 2d 476 (La. Ct. App. 1960); *Thomas v. Gremillion*, 118 So. 2d 485 (La. Ct. App. 1960).

<sup>198</sup>*Cauefield v. Fidelity & Cas. Co.*, 247 F. Supp. 851 (E.D. La. 1965).

<sup>199</sup>*Cauefield v. Fidelity & Cas. Co.*, 378 F.2d 876 (5th Cir. 1967). The facts described in the text were taken from the decision cited in this footnote, the decision in note 198 *supra*, and also the opinion in *Thomas v. Mobley*, 118 So. 2d 476 (La. Ct. App. 1960).

<sup>200</sup>271 F. Supp. 524 (E.D. La. 1967).

Mrs. Friedenthal, brought identical negligence actions, Mr. Friedenthal suing in a Louisiana state court, and his wife filing the following day in the federal district court. In the state court action a jury decided that the defendant was not negligent. Subsequently, the federal district court in Mrs. Friedenthal's action granted the defendant's motion for summary judgment on the basis of judicial estoppel.<sup>201</sup>

Since the plaintiffs in the second actions in both of the above cases were not parties to the first actions, traditional doctrine would call for application of the privity standard to determine if they should be precluded.<sup>202</sup> Both courts relied<sup>203</sup> on decisions in which the person estopped *was* a party to the prior action.<sup>204</sup> Both courts felt that it would be "unjust" to allow the second action to be tried on the merits, but they failed to articulate the underlying legal principles.<sup>205</sup>

The court in *Friedenthal* might have based preclusion on the privity standard if it had analyzed the interests of the claimants. The husband and wife attempted to prove the same facts, and their close relationship and intertwined fortunes indicate that the husband adequately represented, in the first action, the interests of the wife. As previously indicated, due process only requires notice, which may be presumed here, adequate representation, and an opportunity to participate for preclusion.<sup>206</sup>

In *Cauefield*, however, there was no close relationship between the claimants. Their mutual interest consisted of a desire to recover from the same defendant for the same acts. To say that this relationship guarantees adequate representation of the nonparty's interests would test the limits of credibility. On the other hand, Lucas' and Cauefield's concession that the evidence and testimony would not differ from the first action, the fact that the issues were identical in both actions, and their cooperation with the other claimants, indicated by the use of the same lawyer,<sup>207</sup> call for a resolution of this entire dispute in one action.

<sup>201</sup>*Id.*

<sup>202</sup>See, e.g., *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 855 (1952).

<sup>203</sup>The district court in *Friedenthal* relied on *Cauefield*, 271 F. Supp. at 525.

<sup>204</sup>The decisions relied on in *Cauefield* deal with the situation in which the *plaintiff* is the same in both actions but there are different *defendants*. Those cases were based on a well known exception to the mutuality rule which allows a person who was not a party to a prior action but who would have been vicariously liable for the acts of the defendant to use a judgment obtained by the defendant. 378 F.2d at 878-79.

<sup>205</sup>See *Cauefield v. Fidelity & Cas. Co.*, 378 F.2d 876, 879 (5th Cir. 1967); *Friedenthal v. Williams*, 271 F. Supp. 524, 526 (E.D. La. 1967).

<sup>206</sup>See authorities cited notes 37-39 *supra*; *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 811, 122 P.2d 892, 894 (1942) (due process requires only notice and an opportunity to be heard).

<sup>207</sup>Merely having the same attorney is not, by itself, sufficient to create a privity relationship.



## V

## MANDATORY INTERVENTION RULE

Although judicial reappraisal could produce a privity standard based on notice and adequate representation,<sup>208</sup> it is worthwhile to explore a possible legislative<sup>209</sup> approach, the draft rule below,<sup>210</sup> which is broader in scope.

## ] 000 Mandatory Intervention

(a) (1) Where the claim of a nonparty is based on the same transaction, occurrence, or series of transactions as the claim of a party to an action; and

(2) the interests of the claimants are not adverse; and

(3) the nonparty has notice of the action; and

(4) joinder of both claims in the same action would result in a substantial saving of time and expense; then the nonparty will be bound by the judgment in the action.

(b) The rule of section (a) will not apply where the nonparty attempts to intervene and fails because

(1) intervention would cause substantial prejudice to the claim of either party; or

(2) intervention would deprive the court of jurisdiction over the

(3) the nonparty is unable to intervene under the relevant procedural rules regulating joinder; or

(4) the petition for intervention is dismissed pursuant to section

(c).

(c) If the nonparty attempts to intervene and the court determines that it is an inconvenient forum for the nonparty, the court may either

(1) transfer the action to another district; or

(2) dismiss the petition for intervention.

A. *Scope of the Proposed Rule*

“Claim” is used broadly in the Proposed Rule to include potential defenses and counterclaims as well as causes of action for affirmative

*See In re Richardson's Estate*, 250 Iowa 275, 93 N.W.2d 777 (1958).

<sup>208</sup>See text accompanying notes 65-68 *supra*.

<sup>209</sup>“[T]here is much to be said for the proposition that one trial is enough. Assuming the desirability of combining the two cases in one trial . . . the solution lies in a joinder procedure . . . . That matter, however, is one for the legislature.” *Wolff v. Du Puis*, 233 Ore. 317, 323, 378 P.2d 707, 710 (1963).

*See generally* on problems of procedural reform by court adopted rule or statute, Wright, *Procedural Reform: Its Limitations and its Future*, 1 GA. L. REV. 563 (1967).

<sup>210</sup>The draft is in the form of a federal rule. Some of the provisions would be inappropriate for a state statute, e.g., § (b)(2).

relief. There is no logical reason for distinguishing between nonparty potential defendants who have counterclaims and choose not to assert them, and nonparty potential defendants who have no affirmative claims at all.<sup>211</sup> A potentially defensive status does not entitle a litigant to any special treatment since the potential defendant may be the one who originally disturbed the status quo.<sup>212</sup>

The requirement that the claim of the person to be bound be based on the same transaction, occurrence, or series of transactions<sup>213</sup> as the claim of a party to the action is a necessary, but not a sufficient, condition for preclusion. Without this minimal connection between the claims there would be no chance of effecting a saving in judicial time since there would be no necessary overlap in the evidence presented.

A privity standard based on adequate representation requires substantial identity of interests between the claimants.<sup>214</sup> Among the factors to be considered in determining identity of interest are the claimants' preexisting relationships, continuing mutual interests, and probable litigation goals and motives.<sup>215</sup> On the basis of such considerations, the court should satisfy itself that the positions of the claimants are such that one will adequately represent the other.<sup>216</sup>

<sup>211</sup>See text accompanying notes 247-50 *infra*.

<sup>212</sup>The defendant may have performed the act personally or, as in the vicarious liability cases, he may have set in motion a series of events which resulted in the injury.

<sup>213</sup>This is the standard for *permissive* joinder under FED. R. CIV. P. 20.

<sup>214</sup>See *Hansberry v. Lee*, 311 U.S. 32 (1940); *McFadden v. McFadden*, 239 Ore. 76, 396 P.2d 202 (1964). Compare the relationship of husband and wife, text accompanying notes 149-73 *supra*, where there is normally identity of interests with the relationship of principal and agent, text accompanying notes 174-83 *supra*, where there is frequently adversity of interests.

<sup>215</sup>*Cf.* 5 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 1388, at 95 (3d ed. 1940).

Another suggestion is that the claims should be so related that had they in the normal course of events been settled, they would have been disposed of by a single agreement. *Cf.* D. LOUISELL & G. HAZARD, CASES AND MATERIALS ON PLEADING AND PROCEDURE 566 (1962).

<sup>216</sup>For examples of adverse and identical interests see *Edward Petry & Co. v. Greater Huntington Radio Corp.*, 245 F. Supp. 963 (S.D.W. Va. 1965) (interests of the claimants were completely adverse); *Vasu v. Kohlers, Inc.*, 145 Ohio St. 321, 61 N.E.2d 707 (1945) (interests of the claimants were identical). Both cases are discussed in the text accompanying notes 83-90 *supra*.

It is unsettled as to what constitutes inadequate representation under FED. R. CIV. P. 24. Compare *Alleghany Corp. v. Kirby*, 344 F.2d 571 (2d Cir. 1965), *petition for cert. dismissed*, 384 U.S. 28 (1966) (must show collusion, bad faith, or negligence) and *Stadin v. Union Elec. Co.*, 309 F.2d 912 (8th Cir. 1962), *cert. denied*, 373 U.S. 915 (1963) (court required showing of collusion, adverse interest, or failure of representative to fulfill duty, *with* *Ford Motor Co. v. Bisanz Bros.*, 249 F.2d 22 (8th Cir. 1957) (mere possibility of inadequate representation is sufficient).

“[W]hen the applicant is seeking to assert his own separate claim for relief against one of the parties, it is not really an issue at all. At the other extreme, when the applicant is making no claim of his own but is seeking to assert the same position as one who is already a party and whose interests precisely coincide with his, the issue of adequacy should be . . . limited to questions of competence, collusion, and bad faith. But between these poles lies a substantial area where the

The Proposed Rule, however, does not require that there be substantial identity of interest, but only that there not be adversity of interest.<sup>217</sup> Where there is no adversity, joinder is unlikely to prejudice either claim, and a substantial saving of time will result.

There will be situations in which a nonparty may fail to intervene in an action, but, meeting the requirements of section (a), will be bound by the judgment regardless of whether his interests are identical to those of a party. While this result fails to meet the adequate representation requirement of *Hansberry v. Lee*,<sup>218</sup> it is probably constitutionally permissible. The due process clause allows a weighing of interests,<sup>219</sup> and does not absolutely guarantee to each litigant his "day in court."<sup>220</sup> In addition, the nonparty will not be bound if he attempted to intervene and failed.<sup>221</sup> He is given an opportunity to participate in the action<sup>222</sup> in a convenient forum.<sup>223</sup> In light of the societal interest in the efficient disposition of disputes, it is not too harsh to require an individual to litigate his claim along with the related claims of others.

At least in the absence of adequate representation of the nonparty,<sup>224</sup> due process may require for preclusion that the court in the first action could have had personal jurisdiction over the nonparty.<sup>225</sup> However, under expanding concepts of personal jurisdiction,<sup>226</sup> it is likely that a

question of adequacy is closely tied to that of interest." Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 748 (1968).

<sup>217</sup>Proposed Rule § (a)(3) *supra*.

<sup>218</sup>311 U.S. 32, 43 (1940).

<sup>219</sup>RESTATEMENT OF JUDGMENTS § 86, comment *b* at 416 (1942).

<sup>220</sup>*See* authority cited note 43 *supra*; *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 811-12, 122 P.2d 892, 894 (1942); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 859 (1952).

<sup>221</sup>Proposed Rule § (b) *supra*.

<sup>222</sup>*Id.*

<sup>223</sup>Proposed Rule § (c) *supra*.

<sup>224</sup>Due process is accorded a person when he is bound by a judgment even though he was not personally served, as long as he was represented in the litigation. *See Vestal, The Constitution and Preclusion/Res Judicata*, 62 MICH. L. REV. 33, 50 (1963).

<sup>225</sup>*See* A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 27, at 88 (1962).

<sup>226</sup>*See, e.g., International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957). *But see Hanson v. Denckla*, 357 U.S. 235 (1958).

One commentator has suggested going considerably further: "It is submitted, then, that when plaintiff asserts a transitory cause of action against a nonresident defendant in plaintiff's home forum, due process should not be deemed violated if the forum exercises in personam jurisdiction over the defendant. And, it is submitted, that such jurisdiction should be deemed constitutionally appropriate even absent any other 'minimum contacts' existing between defendant and the forum state." Seidelson, *Jurisdiction Over Nonresident Defendants: Beyond "Minimum Contacts" and the Long-Arm Statutes*, 6 DUQUESNE L. REV. 221, 236 (1968).

nonparty will have sufficient contacts with the forum for such jurisdiction.<sup>227</sup>

Notice is essential under the Proposed Rule.<sup>228</sup> It is only fair to allow a person who will otherwise be bound by a judgment either to intervene or appear and object, perhaps requesting a prospective determination of any preclusive effects by means of a declaratory judgment.<sup>229</sup> He can hardly do either unless he is aware that the action is taking place. There are a number of ways of meeting this requirement. A party may guarantee that a nonparty has notice by giving it himself, or the court may notify the nonparty. In addition, notice may be presumed from the close relationship between a party and a nonparty.<sup>230</sup>

Since the primary objective of the rule is judicial economy, a substantial saving of time should result from its application. It is possible that adjudication of all related claims in one action would raise the stakes to such an extent that the one combined action would consume more time than two or more actions tried separately.<sup>231</sup> In addition, where the common questions are not substantial, there may not be sufficient overlap between the two claims to make the combined adjudication efficient. In those instances, the Proposed Rule would not apply.<sup>232</sup>

As was emphasized above, if substantial prejudice would result to either the party's or the nonparty's claim by adjudicating both in the same action, the Proposed Rule should not apply. This prejudice might

<sup>227</sup>This would be no problem in the federal courts which could, if authorized, constitutionally serve process nationwide. See Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 629 (1954); cf. 28 U.S.C. § 2361 (1964) (nationwide service of process under the Federal Interpleader Act).

<sup>228</sup>Although due process does not require actual notice in all situations, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), actual notice, if reasonably possible, is required under the Proposed Rule. There are situations where notice, at least at the time of the action, is impossible. In the virtual representation cases, an unborn heir cannot be notified; a potential successor in interest to property will not be known at the time of the action. However, the interest of the individual claimant in having an opportunity to appear should generally be preferred over the societal interest in rapid and complete disposition of disputes.

<sup>229</sup>See, e.g., 28 U.S.C. § 2201 (1964). While this procedure may seem offensive to the rule that a court conducting an action cannot determine its res judicata effect, it is similar to FED. R. CIV. P. 23(c)(3) (prospective determination of class members in class action). That provision is justified because it makes it less likely that questions of res judicata effect will be raised subsequent to the first action. *Advisory Committee's Note of 1966 to Rule 23*, in J. MOORE & H. FINK, FEDERAL PRACTICE RULES PAMPHLET 552 (1966).

<sup>230</sup>In some cases—e.g., a husband and wife living together—it will be safe to assume that each has notice of the other's claim.

<sup>231</sup>See F. JAMES, CIVIL PROCEDURE § 11.19, at 577 (1965).

<sup>232</sup>Proposed Rule § (a)(4) *supra*.

result from an unmanageably large action,<sup>233</sup> or the presence of a "target" party.<sup>234</sup>

In the federal courts, joinder of a person may deprive the court of jurisdiction over the subject matter by destroying diversity of citizenship.<sup>235</sup> In that instance the nonparty should not be bound, since he could not intervene.<sup>236</sup> The relevant procedural rules governing intervention vary with the jurisdiction,<sup>237</sup> and if the potential claimant attempts to intervene and cannot he should not be bound by the judgment.

<sup>233</sup>Severance provisions are available. *E.g.*, FED. R. CIV. P. 42(b); CAL. CIV. PRO. CODE § 1048 (West 1955).

<sup>234</sup>Intervention by an insurance company might be deemed prejudicial to another party's claim. However, there is some evidence that the presence of insurance companies makes no difference to juries. *See* authorities cited note 90 *supra*.

<sup>235</sup>*Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) requires that there be complete diversity of citizenship. *See* note 236 *infra*.

<sup>236</sup>Generally intervention as of right *e.g.*, FED. R. CIV. P. 24(a), will not destroy diversity jurisdiction but permissive intervention *e.g.*, FED. R. CIV. P. 24(b), will and requires independent jurisdictional grounds. *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 905-06 (1958). Since the interests of the party and the nonparty may be substantially identical, the court may decide that the nonparty is adequately represented and deny intervention as of right. *See* FED. R. CIV. P. 24(a); *Sam Fox Publ. Co. v. United States*, 366 U.S. 683 (1961) (if the representation is not adequate, the nonparty will not be bound; if it is adequate, the nonparty cannot intervene); Comment, *Intervention of Right in Class Actions: The Dilemma of Federal Rule of Civil Procedure 24(a)(2)*, 50 CALIF. L. REV. 89 (1962). Since in many cases there will be a close relationship between two claimants, which usually assures geographical proximity, it is unlikely that joinder of the nonparty will destroy the diversity in the action.

The rationale for not applying ancillary jurisdiction to permissive intervention is that the legal rights of the nonparty will not be affected by the outcome of the litigation. *See Developments in the Law—Multiparty Litigation in the Federal Courts, supra* at 906. One text suggests that ancillary jurisdiction is a product of a power in the courts to administer justice whole rather than piecemeal. H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 929 (1953). Therefore, the court in dealing with such a flexible concept should allow intervention under FED. R. CIV. P. 24(b) (permissive) without maintaining that it destroys subject matter jurisdiction. This would be especially true in dealing with a rule which encourages intervention.

Recently, a commentator has proposed an amendment to 28 U.S.C. § 1332 (1964) (diversity jurisdiction) which would make the citizenship of an intervener irrelevant for purposes of subject matter jurisdiction. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 763-64 (1968).

<sup>237</sup>*See* note 236 *supra*. *See, e.g.*, FED. R. CIV. P. 24; CAL. CIV. PRO. CODE § 387 (West 1954). Results may vary significantly under any one statute. *Compare Allen v. California Water & Tel. Co.*, 31 Cal. 2d 104, 197 P.2d 393 (1947) (city may not intervene in proceeding which may result in cutting off its water supply), *with San Bernardino v. Harsh Cal. Corp.*, 52 Cal. 2d 341, 340 P.2d 617 (1959) (United States allowed to intervene even though it would not be affected by *res judicata* or direct financial consequences).

Any jurisdiction adopting the Proposed Rule should, at least to the extent constitutionally permissible, modify its rules to allow intervention by nonparties where it is demanded by the Proposed Rule.

The court should determine if the forum is convenient for the nonparty<sup>238</sup> since if he chooses to intervene he will have no objection based on venue.<sup>239</sup> Intervention might be an unrealistic alternative where the nonparty is widely separated from the locus of the action.<sup>240</sup> If there is no convenient forum for all the persons involved, the court should dismiss the petition for intervention, thus relieving the nonparty of any preclusive effects,<sup>241</sup> rather than prejudice his claim by forcing him to litigate it under unfavorable circumstances.

### B. General Illustrations

#### 1. Potential Plaintiffs

Assume that H and W (husband and wife) each has a claim against M (motorist). W's claim is derivative, for loss of services.<sup>242</sup> W files an action against M. Under the Proposed Rule, H could either intervene in that action or stay out and be bound by the judgment. If W loses, H will be estopped from relitigating those issues actually determined.<sup>243</sup> Correspondingly, under the "mutuality rule,"<sup>244</sup> or under the modern doctrine of "offensive use,"<sup>245</sup> if W wins, H should be able to use that

<sup>238</sup>Proposed Rule § (c) *supra*. Under this provision the court should consider the same factors as it would under 28 U.S.C. § 1404(a) (forum non conveniens). See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The court should not, however, import the rule of *Hoffman v. Blaski*, 363 U.S. 335 (1960) (district to which action is transferred must be one in which the plaintiff could have originally brought the action). In Note, *Transfer of Civil Actions Under 28 U.S.C. § 1404(a)*, 36 IND. L.J. 344, 359 (1961) the author criticizes *Hoffman* because it restricts the scope of forum non conveniens, and hence limits its effectiveness.

<sup>239</sup>4 J. MOORE, FEDERAL PRACTICE ¶ 24.17, at 129 (2d ed. 1963); see *Alexander v. Hillman*, 296 U.S. 222, 240 (1935). He also has no objection based on personal jurisdiction since he submits himself to the court. If, on the other hand, the nonparty makes no attempt to intervene, he will be bound if the conditions of section (a) *supra* are satisfied.

<sup>240</sup>Normally there will be no problem of an inconvenient forum since the claimants will generally be from the same geographical area.

<sup>241</sup>Proposed Rule § (b)(4) *supra*.

<sup>242</sup>*E.g.*, *Fishbach v. Auto Boys, Inc.*, 106 N.Y.S.2d 416 (Sup. Ct. 1951), *rev'd*, 279 App. Div. 1035, 112 N.Y.S.2d 283 (1952).

Under existing law in most states W's action would have no effect on H's action. See authorities cited note 149 *supra*.

<sup>243</sup>"Bar" is the effect of a judgment for the defendant. It extinguishes the entire cause of action. F. JAMES, CIVIL PROCEDURE § 11.9, at 550 (1965). Since technically H has a separate cause of action here, his claim will not be barred. See *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 824 (1952). See generally 1B J. MOORE, FEDERAL PRACTICE ¶ 0.401 (2d ed. 1965).

<sup>244</sup>One who would not have been bound by a judgment, had it been adverse to him, may not invoke its preclusive effects in his favor. 1B J. MOORE, FEDERAL PRACTICE ¶ 0.411[1], at 1251-52 (2d ed. 1965). This rule is losing significance. See, e.g., *B. R. DeWitt, Inc. v. Hall*, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967); *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967).

<sup>245</sup>See, e.g., *B. R. DeWitt, Inc. v. Hall*, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

judgment to estop M on those issues actually determined in the first action.<sup>246</sup>

## 2. *Potential Defendants*

Using the same hypothetical situation as above, assume that M sues H as driver of the car. Both H<sup>247</sup> and W<sup>248</sup> must litigate their claims in that action even if M's claim only involves property damage. The rule encourages litigation of as many related claims as is fairly possible in the same action. Even if W's posture is completely defensive as, for example, the registered owner of the vehicle,<sup>249</sup> she will be bound. Forcing a potential defendant rather than a potential plaintiff to intervene or be bound may seem unfair since a defendant is not asking for a change in the status quo. This argument loses its efficacy when one realizes that the potential defendant may have originally disturbed the status quo by injuring the plaintiff.<sup>250</sup>

### C. *Inadequacy of Other Devices*

Indispensable parties rules<sup>251</sup> attempt to insure that all the persons necessary for a complete disposition of a dispute are made parties to the action. They serve: "(1) the interests of the present defendant; (2) the interests of potential but absent plaintiffs and defendants; (3) the social interest in the orderly, expeditious administration of justice."<sup>252</sup> Under such rules, the burden is on the defendant to raise any defect,<sup>253</sup> which seems appropriate since he may benefit from correct joinder. However, the defendant is less likely than the plaintiff to know of additional related claimants. Since joinder devices are designed for the benefit of the public

<sup>246</sup>"Merger" is the effect of a judgment for the plaintiff. The cause of action is merged in the judgment and extinguished. F. JAMES, CIVIL PROCEDURE § 11.9, at 550 (1965). There would be no merger in the first judgment here since H has a separate cause of action. Merger and bar only apply when the *cause of action* is the same. *Id.*

<sup>247</sup>H might have to litigate his claim under a compulsory counterclaim rule or statute. *See, e.g.*, FED. R. CIV. P. 13; CAL. CIV. PRO. CODE § 439 (West 1954).

<sup>248</sup>Although W is a potential claimant on her derivative action, she might also be a potential defendant as, for example, the registered owner of the vehicle. *Cf.* CAL. VEHICLE CODE § 17150 (West Supp. 1967).

Under existing law in most states the suit against H would have no effect on W's claim. *See* authorities cited note 149 *supra*.

<sup>249</sup>*See* note 248 *supra*.

<sup>250</sup>*See* note 212 and accompanying text *supra*.

<sup>251</sup>*E.g.*, FED. R. CIV. P. 19; CAL. CIV. PRO. CODE § 389 (West Supp. 1966).

<sup>252</sup>Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 330 (1957). *See also* Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403, 403-07 (1965).

<sup>253</sup>*See* FED. R. CIV. P. 12(b). *But cf.* FED. R. CIV. P. 19(e). The court may raise the objection on its own motion on appeal. 3A J. MOORE, FEDERAL PRACTICE ¶ 19.05[2], at 2211-12 (2d ed. 1967).

as well as for individual litigants,<sup>254</sup> the burden should be put equally on the person most likely to effectuate the policy underlying the rule—the plaintiff.

Indispensable parties rules are also limited in their effectiveness by problems of venue and personal jurisdiction.<sup>255</sup> The Proposed Rule is more effective because a nonparty, if he chose to intervene, would have no objection on either of those bases.<sup>256</sup> It also allows the potential beneficiary to make the choice between intervening or remaining outside and being bound, while insuring that there will not be a multiplicity of actions.

Another device, the equitable bill of peace, also puts the burden on the defendant by requiring him to find and notify related plaintiffs.<sup>257</sup> Where there is one defendant and there are several plaintiffs whose claims have common questions of law and fact, the court may enjoin the separate actions and order that they all be prosecuted as one.<sup>258</sup> The avowed purpose of this device is to avoid a multiplicity of suits.<sup>259</sup> However, the courts disagree as to whether this device applies to legal as well as equitable claims.<sup>260</sup> Furthermore, being an equitable device, it may interfere with the right to a jury trial.<sup>261</sup>

#### D. *Effect of the Proposed Rule on Present Law*

Some changes which would be effected by the Proposed Rule have already been discussed<sup>262</sup> and a complete catalogue of the effects would be impractical here. A few comments on those areas of the current law previously analyzed<sup>263</sup> should suffice.

The Proposed Rule would not affect the procedural law as it applies to the relationship of ancestor and heir<sup>264</sup> since, by definition,<sup>265</sup> they are not contemporaneous beings. It would have no effect on the attorney-client relationship<sup>266</sup> either since the attorney is already a participant in

<sup>254</sup>Cf. authorities cited note 9 *supra*.

<sup>255</sup>Fink, *supra* note 252, at 436.

<sup>256</sup>See note 239 *supra* and accompanying text.

<sup>257</sup>See Blume, *Required Joinder of Claims*, 45 MICH. L. REV. 797, 807-08 (1947). See generally Chaffee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932).

<sup>258</sup>Blume, *supra* note 257, at 807-08.

<sup>259</sup>*Id.*

<sup>260</sup>*Id.*

<sup>261</sup>*Id.* at 812; cf. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); Vestal, *The Constitution and Preclusion—Res Judicata*, 62 MICH. L. REV. 33, 53-54 (1963).

<sup>262</sup>See text accompanying notes 242-50 *supra*.

<sup>263</sup>See text accompanying notes 69-183 *supra*.

<sup>264</sup>See text accompanying notes 69-71 *supra*.

<sup>265</sup>See E. SCOLES & E. HALBACH, *PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS* 3 (1965).

<sup>266</sup>See text accompanying notes 102-18 *supra*.



the litigation and, under the current law in most jurisdictions,<sup>267</sup> is bound by a judgment against his client.

The Proposed Rule would have a substantial effect on the procedural law as it applies to the assignor-assignee,<sup>268</sup> bailor-bailee,<sup>269</sup> husband-wife,<sup>270</sup> and principal-agent<sup>271</sup> relationships, by requiring in almost all instances in which both have claims arising from the same transaction,<sup>272</sup> that they be litigated together. The possible prejudice to a personal injury claim by joining it with a property damage claim which has been subrogated to an insurer<sup>273</sup> may be avoided if the court does not inform the jury of the insurance company's presence.<sup>274</sup> Also, the difficulty of gauging the significance of a finding of contributory negligence<sup>275</sup> in the bailment cases would be eliminated.

### E. Mass Accident Cases<sup>276</sup>

Multiple litigation arising out of mass injuries in a single accident is usually considered under the rubric of the abrogation of the "mutuality rule."<sup>277</sup> The principal objection to allowing subsequent plaintiffs the use

<sup>267</sup>See authorities cited notes 106, 108 *supra*.

<sup>268</sup>See text accompanying notes 72-101 *supra*.

<sup>269</sup>See text accompanying notes 119-48 *supra*. For a case where the necessity for intervention is shown dramatically, see *Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co.*, 238 N.C. 679, 79 S.E.2d 167 (1953), where the bailee-owner of a warehouse sued and lost, and then twenty separate actions were brought by various bailors who owned property destroyed in a warehouse fire.

<sup>270</sup>See text accompanying notes 149-73 *supra*. One court has suggested that the legislature should provide for joinder of the husband's and wife's claims. *Wolff v. Du Puis*, 233 Ore. 317, 323, 378 P.2d 707, 710 (1963). Two recent cases have held that a wife must join her cause of action for loss of consortium with the husband's action for personal injuries. *Deems v. Western Md. Ry.*, 247 Md. 95, 231 A.2d 514 (1967); *Moran v. Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 150 N.W.2d 137 (1967).

<sup>271</sup>See text accompanying notes 174-83 *supra*.

<sup>272</sup>The principal exception would be adversity of interests between the claimants. Proposed Rule § (a)(2) *supra*.

<sup>273</sup>But see authorities cited note 90 *supra*.

<sup>274</sup>This is the approach taken by the District Court for the Eastern District of Kentucky. Note, *Civil Procedure—Insurance Companies as Real Parties in Interest*, 46 KY. L.J. 252, 259 (1958).

<sup>275</sup>See note 142 *supra*.

<sup>276</sup>This Comment does not attempt to deal exhaustively with the literature surrounding these cases. The issue usually is whether a plaintiff may use a judgment won by another plaintiff in prior litigation to preclude the defendant in a subsequent case. See, e.g., *Price v. Atchison, T. & S.F. Ry.*, 164 Cal. App. 2d 400, 330 P.2d 933 (1958); *Nevarov v. Caldwell*, 161 Cal. App. 2d 762, 327 P.2d 111 (1958). The problem has engendered considerable comment. See, e.g., F. JAMES, *CIVIL PROCEDURE* § 11.3 (1965); 1B J. MOORE, *FEDERAL PRACTICE* ¶ 0.412[1] (2d ed. 1965); Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961); Seavey, *Res Judicata with Reference to Persons Neither Parties Nor Privies—Two California Cases*, 57 HARV. L. REV. 98 (1943).

<sup>277</sup>For a discussion of the mutuality rule see note 244 *supra*.

of a judgment against the defendant in a prior action, to estop the defendant in their own action, has been that it is unfair to the defendant.<sup>278</sup> He can win only one action at a time, whereas if he loses one, he also loses any subsequent action.<sup>279</sup> However, under the Proposed Rule, all the plaintiffs would be bound by the first judgment as well.

Assume an accident in which 50 persons are injured.<sup>280</sup> They all file individual suits against the defendant. In the first action tried it is determined that the defendant is not liable because he was not negligent. The question, then is whether the other 49 claimants are precluded on the issue of negligence.<sup>281</sup>

In determining whether the Proposed Rule should apply, the crucial issues would be ability to intervene,<sup>282</sup> saving of judicial time,<sup>283</sup> and possible adversity of interests among the claimants.<sup>284</sup> Under the circumstances, the other claimants should have the right to intervene.<sup>285</sup> A recent case, *Atlantis Development Corporation v. United States*,<sup>286</sup> allowed intervention<sup>287</sup> when the court determined that the disposition of the action might impair the pending claim due to the operation of stare decisis. In addition, one court may be influenced by another court's determination on the same facts. That possibility is certainly present in the mass accident cases where the legal principles and facts in each case are likely to be identical.<sup>288</sup>

One commentator has suggested that if the first judgment is going to be determinative of all the claims, the stakes will be so high that the

<sup>278</sup>See authorities cited note 27 *supra*.

<sup>279</sup>See text accompanying notes 23-27 *supra*.

<sup>280</sup>See, e.g., *Desmond v. Kramer*, 96 N.J. Super. 96, 232 A.2d 470 (1967), a case involving a bus accident in which at least 14 persons were injured.

<sup>281</sup>Without the Proposed Rule the other claimants could not be bound because of the due process requirement that every man is entitled to his "day in court." See *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 812, 122 P.2d 892, 894 (1942). There is no privity among the claimants because their interests are not substantially identical. See text accompanying notes 291-92 *infra*.

<sup>282</sup>Proposed Rule § (b)(3) *supra*.

<sup>283</sup>Proposed Rule § (a)(4) *supra*.

<sup>284</sup>Proposed Rule § (a)(2) *supra*; § (b)(1) (prejudice) and § (c) (inconvenient forum) might also be relevant.

<sup>285</sup>The following analysis assumes that the present intervention rules are preserved. A proposed amendment to 28 U.S.C. § 1332 (1964) would make the citizenship of interveners irrelevant for diversity purposes. See *Shapiro*, *supra* note 236, at 763-64. See also note 236 & authorities cited therein.

<sup>286</sup>379 F.2d 818 (5th Cir. 1967).

<sup>287</sup>FED. R. CIV. P. 24(a) allows intervention as of right by a nonparty where "the disposition of the action may as a practical matter impair or impede his ability to protect . . . [his] interest." *Kozak v. Wells*, 278 F.2d 104 (8th Cir. 1960), decided under the preamendment rule, allowed intervention where the judgment would not be "strictly res judicata" as to the intervener. *Id.* at 110.

<sup>288</sup>See 1B J. MOORE, FEDERAL PRACTICE ¶ 0.401, at 11 (2d ed. 1965).

first action will become disproportionately enlarged and will consume more judicial time than trying the actions separately.<sup>289</sup> However unlikely that is when there are 49 other claims, it may be a factor if there are only two or three others.<sup>290</sup> With 49 additional claimants, even if they all chose to intervene in the first action, there would be a substantial saving of time.

Although there is not an identity of interests among the claimants which would *guarantee* adequate protection and representation<sup>291</sup>—their only common interest being recovery against a common defendant—in the normal mass accident case there would be no reason to assume<sup>292</sup> an adversity of interests either, and hence the Proposed Rule should apply.

#### CONCLUSION

Sooner or later litigation must come to an end. The stability of social institutions, the ordered lives of individual litigants, and the prestige and efficiency of the courts depend on the final termination of disputes.

Privity—that standard which determines who, other than the parties, will be bound by a judgment—has been traditionally dependent on relationships imported from real property law. These serve neither the policies underlying *res judicata* nor the societal interest in fair procedure. A standard, however, which determines the binding effect of prior judgments on the basis of adequate representation defined in terms of substantial identity of interest between the party and the nonparty, would be fair, would promote the policies underlying *res judicata*, and would avoid the intellectually and socially unnerving problem of inconsistent verdicts.

Legislative reform is particularly desirable in this area and adoption of a mandatory intervention rule, such as that proposed above, could compel the litigation of all related claims in one action. This revision would reach the same problems as a privity standard based on adequate representation and, in addition, eliminate the advantage for subsequent claimants of remaining outside the first action.

Each particular relationship must be examined in terms of the interests of persons involved and the salient policies in the area.

<sup>289</sup>F. JAMES, CIVIL PROCEDURE § 11.19, at 577 (1965). See also 1B J. MOORE, FEDERAL PRACTICE ¶ 0.412[1], at 1810 (2d ed. 1965).

<sup>290</sup>Cf. *B. R. DeWitt, Inc. v. Hall*, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

<sup>291</sup>This would be required to hold the claimants in privity. See *Hansberry v. Lee*, 311 U.S. 32, 43 (1940).

<sup>292</sup>Whether there is adversity of interests is a question for the court. There may be cases in which the interests of the various claimants are such that joinder of the claims would be prejudicial.

However, emphasis on due process fairness instead of artificial technical rules will inevitably yield more rational, efficient, and just results.

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