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Gailyn L. Larsen

University of Nebraska College of Law, glarsen@larsenco.net

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MUTUALITY OF ESTOPPEL: ITS STATUS IN NEBRASKA

I. INTRODUCTION

The binding effect of a judgment is said to be based upon the principle that justice and expediency demand that a person who has had his "day in court" should not be permitted to relitigate the same issues in a subsequent action.¹ However, a general rule existing concurrently with this principle has been that a person is not entitled to claim the benefits of an adjudication of any matter decided in an action to which he was not a party or privy to a party.² These benefits have often been denied for the sole reason that such a person would not have been bound by a judgment in that action adverse to his interest³ and that granting such a wind-fall would violate the principle that "estoppels must be mutual."⁴ As a result, a person who has already had his "day in court" and lost is given the opportunity to relitigate the same issues with a different opponent who is denied the right to rely on the former action.

This troublesome inconsistency has led several courts to repudiate the concept that issues determined in one suit cannot be taken as conclusively established in a subsequent action unless both parties were mutually bound by the former judgment. As such, they have allowed a litigant to assert the findings of a previous action regardless of the fact that the person was not a party or privy to a party in that action and could not have been bound by an unfavorable judgment. The decisions presented below represent a widespread dissatisfaction with the rule of mutuality, and these will be discussed briefly before examining the approach taken by the Nebraska courts.

II. ABANDONMENT OF THE RULE

Judicial innovations often lead to uncertainty, and the extent to which the rule of mutuality can be disregarded in determining the effect of prior judgments remains open to question. The requirement of mutuality was abandoned without reservation by the

¹ See *Schroeder v. 171.74 Acres of Land, More or Less*, 318 F.2d 311 (8th Cir. 1963).

² RESTATEMENT, JUDGMENTS § 93 (1942). See generally *id.* §§ 93-111.

³ See, e.g., *Elder v. New York & Pennsylvania Motor Express, Inc.*, 284 N.Y. 350, 31 N.E.2d 188 (1940).

⁴ 1 FREEMAN, JUDGMENTS § 407, at 890 (5th ed. 1925).

court in the leading case of *Bernhard v. Bank of America*.⁵ The defendant was there allowed to assert a decision made in a suit to which he was neither a party nor privy to a party against a complainant who had previously litigated the issue. Justice Traynor proclaimed that an inquiry into whether a person is bound by a former determination depends solely on an affirmative answer to three pertinent questions which were:

Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party *against whom* the plea is asserted a party or in privity with a party to the prior adjudication?⁶

The test clearly abolishes the traditional requirement of identity of parties and extends the binding effect of a judgment by stating that it can be used by anyone *against* a party who has already litigated the issue in question.

Although the *Bernhard* decision was hailed a judicial triumph,⁷ it was also suggested that the doctrine set forth should be limited to use by defendants while continuing to require each plaintiff to litigate his own case.⁸ The reason for this belief is centered around incidents such as train accidents which force a defendant to face multiple claimants who have allegedly suffered injury. If the rule in the *Bernhard* case were applied in such a situation, one adverse judgment would be binding on the defendant as to all remaining litigants who perhaps had abstained from presenting their claim until a favorable judgment was rendered. Those who remained inactive could not be bound by a judgment for the defendant since they would not have been a party to the adjudication. A result of this type is deemed unfair since an aberrational verdict might appear at any time that would bind the defendant in subsequent actions without regard to the fact that he may have successfully defended several identical claims.⁹

It is also feared that repeated application of such a rule would lead to "loaded" test cases in which the prospective plaintiffs might conspire to present their most appealing litigant at a time, under conditions, and in a forum most favorable to all of them. On the other hand, a defendant does not possess a comparable strategic

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

⁶ *Id.* at 813, 122 P.2d at 895. (Emphasis added.)

⁷ The classic article which discusses the *Bernhard* case and the likelihood that the rule set forth should not be applied in all situations is: Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

⁸ *Id.* at 294.

⁹ *Id.* at 285.

advantage, and no harm is seen in preventing a plaintiff from merely switching defendants to retry identical issues after they have already been decided.¹⁰

Notwithstanding the above view, a few courts have allowed a plaintiff the benefits of a judgment in a prior action to which he was not a party when it was certain that the defendant has already had a full and fair hearing on a particular issue.¹¹ In *Zdanok v. Glidden Co.*,¹² a group of employees were granted relief pursuant to a collective bargaining agreement on the basis of a prior determination¹³ involving different plaintiffs but the same issues. However, the court drew a distinction between a case dealing with judicial construction of a contract and one requiring a jury determination of negligence. The basis for this distinction is that the former is inherently susceptible to an objective decision whereas the latter is subject to the varying appraisals of the facts by different juries.¹⁴

The court in *United States v. United Air Lines, Inc.*¹⁵ apparently disregarded the proposed defensive limitation to the *Bernhard* doctrine and even surpassed the limited offensive application represented by the *Zdanok* decision. There, summary judgment on the issue of liability was granted to the heirs and representatives

¹⁰ *Id.* at 300.

¹¹ Professor Currie has even discarded his reasons for limiting the *Bernhard* Doctrine by stating that "[n]ot only is this position tainted with cynicism; it is generalization of a flagrant kind, and I am sorry that I ever let myself suppose that the courts would indulge in it." Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 32 (1965).

¹² 327 F.2d 944 (2d Cir. 1964), *cert. denied*, 377 U.S. 934 (1964).

¹³ *Zdanok v. Glidden Co.*, 288 F.2d 99 (2d Cir. 1961), *aff'd*, 370 U.S. 530 (1962).

¹⁴ *Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir. 1964), is noted in 39 NOTRE DAME LAW. 492 (1964). The author there used the court's distinction between different types of actions to devise a rule that "whenever the subject matter of the original determination which is to be asserted as an estoppel against one of the original parties is such as can reasonably be said to be of a type capable of fairly objective ascertainment and which ought not to be open to re-examination simply because of a change in parties; where there is no basic unfairness to any party in allowing the plea; and where there was a full and fair hearing on the merits in the original action, then the new party should be permitted to take advantage of the original determination as against one of the original parties regardless of the orientation of such parties as plaintiff or defendant and notwithstanding the offensive mode of raising the plea . . ." *Id.* at 497.

¹⁵ 216 F. Supp. 709 (N.D. Nev. 1962), *aff'd*, 335 F.2d 379 (9th Cir. 1964), *petition for cert. dismissed*, 379 U.S. 951 (1964).

of several deceased victims of an airplane crash after a jury in another jurisdiction had found that the tragedy was caused by the defendant's negligence. The court expressed its approval of abandoning the rule of mutuality along with the firm belief that no injustice was done to the defendant.¹⁶

Repercussions will inevitably result from the total repudiation of a concept which permeates much of the law of judgments, and there is still support for maintaining the rule subject to certain recognized exceptions.¹⁷ A reasonable prediction is that in most jurisdictions "the mutuality rule may be increasingly modified or abandoned but that this is likely to be done gradually and with care. . . ."¹⁸ At any rate, the existing case law in Nebraska must be studied to determine where the state stands with regard to this predicted development.

III. NEBRASKA LAW

There is no controversy surrounding the general rule that a judgment does not bind a person who was not a party to the action.¹⁹ An established exception binds those in privity with the

¹⁶ The court expressed its confidence by saying that "the issue of liability of United Air Lines to the passengers on the plane was litigated to the hilt, by lawyers of the highest competence in their field . . ." *Id.* at 728. This statement indicates that this court as well as the court in *Zdanok* was concerned about the same type of problem and possibility of unfairness faced by Judge Learned Hand in a discussion of collateral estoppel in *The Evergreens v. Nunan*, 141 F.2d 927, 929 (2d Cir. 1944) *cert. denied*, 323 U.S. 720 (1944), where it was said that "[t]he stake in the first suit may have been too small to justify great trouble and expense in its prosecution or defense; and the chance that a fact decided in it, even though necessary to its result, may later become important between the parties may have been extremely remote." When the parties are different, the possibility of an injustice resulting would be multiplied.

¹⁷ See Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961). Generally, exceptions to the mutuality rule are concerned with instances of derivative liability.

¹⁸ JAMES, CIVIL PROCEDURE § 11.34, at 603 (1965). See generally *id.* §§ 11.23-11.35 for a complete discussion concerning the persons affected by *res judicata*.

¹⁹ *Wemmer v. Young*, 167 Neb. 495, 93 N.W.2d 837 (1958). The case of *Coca-Cola Co. v. Pepsi Cola Co.*, 36 Del. 124, 172 Atl. 260 (1934), discussed the accepted principle that depriving a person of any opportunity to be heard would violate due process, but stated that "[t]his reason falls when applied to one who had been a party to the former proceedings . . ." *Id.* at 130, 172 Atl. at 262. Thus, due process does not demand that a party have his day in court against each litigant.

party named in the action,²⁰ and the broad definition of privity has been said to include not only those with a definite legal relationship but those individuals who participate in the trial to such an extent that justice requires they be bound by the determination made therein.²¹ Although these principles determine who is bound by a judgment in addition to the named parties, it is apparent that they do not resolve the question of whether a person is entitled to the benefits of a favorable judgment in a prior action to which he was not a party.

The Nebraska cases reveal that "the law of res judicata is frequently treated as a branch of the law of estoppel and both terms have been used indiscriminately to indicate the force and effect of judgments and decrees."²² However, there is a significant distinction which should be made between res judicata as a bar to an entire action, and res judicata with regard to particular issues which were decided in a prior case.²³ Attention is brought to that fact for the sole reason that res judicata, in the strict sense,²⁴ is applied to prevent a plaintiff from repeatedly attacking a particular defendant on the same cause of action, and in such a

²⁰ For a general statement of the rule see *Summers v. Summers*, 177 Neb. 389, 128 N.W.2d 829 (1964).

²¹ See RESTATEMENT, JUDGMENTS § 83, comment *a* (1942); *accord*, *Independent Elevators v. Davis*, 116 Neb. 397, 217 N.W. 577 (1928).

²² *American Province Real Estate Corp. v. Metropolitan Util. Dist.*, 178 Neb. 348, 351, 133 N.W.2d 466, 468 (1965). This case lends support to the view that the parties must be substantially identical for a judgment to have any effect in a subsequent action. However, the case specifically held that a nominal party is not bound by the judgment rendered in an action.

²³ The distinction was discussed in the famous case of *Cromwell v. County of Sac*, 94 U.S. 951 (1876). It was there stated that "[i]n the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Id.* at 352-53.

²⁴ This particular terminology was used by the court in *United States v. Cathcard*, 70 F. Supp. 653 (D. Neb. 1946), in a discussion of the two forms of res judicata.

case, the defendant is obliged to aver that the parties are the same.²⁵ The perplexing question of mutuality is, of course, whether the "particular issue" form of *res judicata* must necessarily be hampered by the same requirement when a fully litigated issue arises from another action. The emphasis appears to shift in this instance from preventing a continuous vexation of the defendant to the principles of justice and expediency which are theoretically unaffected by a lack of identity of parties.

An early Nebraska decision held that mutuality of estoppel was necessary for a judgment to have any binding effect in a subsequent suit.²⁶ The more recent case of *Frey v. Hauke*²⁷ indirectly leads to the same conclusion. The plaintiff in that case was seeking an accounting between the respective parties as partners, and he was entitled to rely on the previous adjudication that a partnership, in fact, existed. The rule set forth was that once a question of fact has been decided it cannot be relitigated *between the same parties*.²⁸ It can be inferred that the plaintiff would have had to litigate the issue if he had not been a party to the action in which the question was decided.

There are also several Nebraska cases which apply the rule that a judgment is not *res judicata* as to any fact at issue in subsequent actions where neither issues nor parties are the same.²⁹ The lack of identity in either respect was fatal to the litigants who were seeking the benefits of *res judicata*. Furthermore, the question involved with regard to the identity of the parties was the attempted assertion of a prior finding against one who had not participated in the former suit. Application of *res judicata* in this instance would, of course, be contrary to the *Bernhard* doctrine as well as traditionally accepted principles.³⁰

²⁵ *In re Estate of Schuette*, 138 Neb. 568, 293 N.W. 421 (1940); *Burke v. Munger*, 138 Neb. 14, 292 N.W. 53 (1940); *Thomas v. Thomas*, 33 Neb. 373, 50 N.W. 170 (1891).

²⁶ *Densmore v. Tomer*, 14 Neb. 392, 15 N.W. 734 (1883). The existence of the same rule is apparent in *Slattery v. Harley*, 58 Neb. 575, 79 N.W. 151 (1899), and *Monroe v. Hanson*, 47 Neb. 30, 66 N.W. 12 (1896).

²⁷ 171 Neb. 852, 108 N.W.2d 228 (1961).

²⁸ This principle was also applied in *Gilchrist v. Wright*, 169 Neb. 799, 101 N.W.2d 158 (1960); and *Shepard v. City of Friend*, 141 Neb. 866, 5 N.W.2d 108 (1942).

²⁹ *Kuhl v. School Dist. No. 76 of Wayne County*, 155 Neb. 357, 51 N.W.2d 746 (1952); *Gulizia v. Royal Indem. Co.*, 139 Neb. 832, 299 N.W. 220 (1941); *Plattsmouth Bridge Co. v. Turner*, 128 Neb. 738, 260 N.W. 562 (1935).

³⁰ See text accompanying note 6 *supra*, and note 19 *supra*.

Although the recent cases do not directly present the question of mutuality, the language consistently used by the court would seem to leave little doubt as to the vitality of the requirement in Nebraska. There is, however, a frequently applied rule of law which, in light of recent developments, is worthy of discussion. It has been stated that:

Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving *one of the parties* now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.³¹

The above rule will be referred to as the "interdependent rule" and can be broken down as follows: (1) The rule applies to interwoven and interdependent cases. (2) Only one of the parties to the former action need be before the court. (3) The existence of the first two points entitles, if not requires, the court to take judicial notice of its own prior proceedings. The second point at least raises the inference that the requirement of mutuality may be circumvented in some situations.

The prerequisite for applying this rule is that the cases involved must be interwoven and interdependent. The courts profess that the application of the rule is "warranted from the necessity of giving effect to former holdings which finally decide questions of fact and law."³² A merger of this reason with the plain meaning of "interwoven" and "interdependent" signifies that the cases which fall into this category must be related or connected as to the issues presented, and that the decisions made with regard to those issues should be consistent. This construction of the "interdependent rule" is supported by *Cover v. Platte Valley Pub. Power & Irr. Dist.*,³³ which is a significant case for two reasons. First, it provides some indication as to how broadly "interwoven" and "interdependent" may be defined. Second, it constitutes a vivid illustration of the requirement that only one party to the former action need be present to entitle the court to hold that the issues have been conclusively determined.

The court in *Cover* held that the trial court committed error

³¹ *Johnson v. Marsh*, 146 Neb. 257, 262, 19 N.W.2d 366, 369 (1945). (Emphasis added.) (The court took judicial notice of prior cases denying collateral attacks upon probate proceedings in a certain estate to sustain a demurrer to the complaint.)

³² *Id.* at 263, 19 N.W.2d at 369.

³³ 162 Neb. 146, 75 N.W.2d 661 (1956).

in not taking judicial notice of its own records in a previous case³⁴ involving the defendant wherein he had been adjudged negligent in constructing and maintaining an inadequate flood-water drain. Although the plaintiff was not a party to the first proceeding, it was concluded that to allow the defendant to again adjudicate the question of negligence "would be a travesty upon justice and permit a trifling with judgments duly rendered according to law."³⁵ Thus, the only question for determination in the second suit was whether the defendant's negligence was the proximate cause of the injury and the extent of the damages. No mention was made of *res judicata* or the mutuality rule.³⁶

The only discernible connection of real significance between the *Cover* case and the prior action is that both plaintiffs were similarly situated and based their claim for relief upon the continuing negligence of the defendant.³⁷ Beyond those facts it is difficult to isolate any reason which made these two cases distinctively interwoven and interdependent, and it appears logical to assume that any such plaintiff who alleged injury would have been entitled to a directed verdict on the issue of negligence. Consequently, a comparison of the *Cover* case and those abolishing mutuality leads to the conclusion that the interdependent rule was used merely as a different means to the same end.

A factor of some importance is that the first action was brought to obtain an injunction requiring the defendant to increase the carrying capacity of the drain as well as to recover damages resulting from a flood. Thus, the issue of negligence was decided by a judge instead of a jury, and because of that fact, it was undoubt-

³⁴ *Faught v. Platte Valley Pub. Power & Irr. Dist.*, 147 Neb. 1032, 25 N.W.2d 889 (1947).

³⁵ *Cover v. Platte Valley Pub. Power & Irr. Dist.*, 162 Neb. 146, 154, 75 N.W.2d 661, 668 (1956).

³⁶ If the court intended its holding to be consistent with the rule of mutuality, some support can be found in a New York case. In *Town of Vienna v. State*, 203 Misc. 1053, 119 N.Y.S.2d 545 (Ct. Cl. 1953), the court took judicial notice of prior cases which established the defendant's negligence, but denied that it was doing so on the theory of *res judicata* since there was no identity between parties plaintiff. However, the parties had agreed beforehand that the state's liability was to be determined by another case arising out of the same flood. The finding of negligence was merely omitted from the stipulated facts upon which the complainant was seeking damages.

³⁷ Although the court in *Faught v. Platte Valley Pub. Power & Irr. Dist.*, 147 Neb. 1032, 1035, 25 N.W.2d 889, 891 (1947), mentioned the fact that *Cover's* land was adjacent to the plaintiff's, the recovery sought by *Cover* in his case was for damages resulting from a different flood than that complained of in the *Faught* case.

edly much easier to rule in the subsequent suit that the question had been settled in the prior action. Nevertheless, that does not detract from the fact that the plaintiff in the *Cover* case was not a party to the former action, and according to orthodox principles, would have had to litigate the issue of negligence before a jury since the suit by *Cover* was for damages only.

The final element of the "interdependent rule" is judicial notice. The early cases in Nebraska denied trial courts the right to take judicial notice of any prior proceeding in a different case.³⁸ The exception to this general rule was formulated to allow such for interwoven and interdependent cases within the same court,³⁹ and there appears to be no demanding reason to question the propriety of the practice at this time.

The important question is whether the factor of judicial notice limits the application of the rule to situations where the same court hears both cases which are considered interwoven and interdependent. Certainly, interwoven and interdependent cases must be capable of existing in two or more different courts for the simple reason that the location or identity of the court should, in itself, have no bearing upon the relationship of one controversy to another.⁴⁰

Since judicial notice is specifically limited to interwoven and interdependent cases *within the same court*, it is unlikely that the courts will ever be granted the right to take judicial notice of proceedings in other courts.⁴¹ However, that limitation should not

³⁸ *Gibson v. Sexson*, 82 Neb. 475, 118 N.W. 77 (1908) (Would not take notice of proceedings in a different court.); *Allison v. Fidelity Mut. Fire Ins. Co.*, 74 Neb. 366, 104 N.W. 753 (1905) (Court would not take judicial notice of another case within the same court.).

³⁹ *Witzenburg v. State*, 140 Neb. 171, 299 N.W. 533 (1941). (Trial court took judicial notice of a prior case to sustain a demurrer on the basis of *res judicata* where the plaintiff, of necessity, based his causes of action upon the judgment and record of another case and was precluded from arguing contrary to that judgment and record although the defendant was not a party to the previous action.)

⁴⁰ It is submitted that the relevant fact in the *Cover* case was that the plaintiff there was in the position to be damaged in the same manner as was the plaintiff in the previous action. The situation is thus analogous to that in *United States v. United Air Lines, Inc.*, 216 F. Supp. 709 (N.D. Nev. 1962), *aff'd*, 335 F.2d 379 (9th Cir. 1964) where all of the passengers happened to be in the same aircraft, and all met their death as the result of one negligent act. That case was not brought in the same court as the original action, and a limitation of that nature would appear to be unfounded.

⁴¹ Apparently the federal courts are not restricted in this manner. See *Holmes v. United States*, 231 F. Supp. 971 (N.D. Ga. 1964). (Judicial

logically hinder the operation of the rule that judicial notice is only a substitute for actual evidence, that can be pleaded and proven.⁴² They are simply alternative means by which a former judgment may be brought before the court as indicated by the following statement:

The pleadings and judgment, but not the opinion of the appellate court, may be introduced in evidence to support a plea of *res judicata*. However, under the circumstances here shown, that would not be necessary because the trial court was duty bound to take judicial notice thereof.⁴³

The quotation was taken from a case applying the "interdependent rule" but in which both parties had been adverse litigants in a prior proceeding. A person who was not a party to the former action would no doubt have difficulty in persuading the court to rule that the evidence he entered concerning that action should produce a judgment based upon the principle of *res judicata*.⁴⁴ However, a person should be allowed to convince the court that his case and a prior one are interwoven and interdependent, and as a result, only one of the parties to the prior action need be before the court for determination made therein to be conclusive.⁴⁵ If such can be done, it makes little difference whether the reason is labeled *res judicata*, collateral estoppel, or simply justice according to the facts as it evidently was in the *Cover* case.

The purpose of this discussion is to illustrate that the rule *can* be viewed as nothing more than a restricted version of the doctrine set forth by Justice Traynor.⁴⁶ It must be mentioned that not all of the cases which apply the interdependent rule present the problem of mutuality nor do even most of them.⁴⁷ The point to be

notice of prior suits against the defendant in other jurisdictions was taken, and the suit was held barred by *res judicata*.)

⁴² Board of Educ. Lands & Funds v. Gillett, 158 Neb. 558, 64 N.W.2d 105 (1954); Piechota v. Rapp, 148 Neb. 442, 27 N.W.2d 682 (1947).

⁴³ Wischmann v. Raikes, 168 Neb. 728, 750-51, 97 N.W.2d 551, 565 (1959). (Court took judicial notice of plaintiff's prior action in obtaining an injunction, and concluded that he was barred from bringing a second suit for damages since that was an issue which could have been litigated.)

⁴⁴ See text accompanying notes 27-29 *supra*. But see Witzenburg v. State, 140 Neb. 171, 299 N.W. 533 (1941).

⁴⁵ The litigant would, in effect, be complying with the rule set down in Schuster v. Douglas, 156 Neb. 484, 56 N.W.2d 618 (1953), which requires a person who relies upon the rule of *res judicata* to bring such facts into the record as will affirmatively show that the opposing parties relation to the former action was such as to make the judgment therein conclusive of the matter in controversy.

⁴⁶ See text accompanying note 6 *supra*.

⁴⁷ *E.g.*, Anderson v. Anderson, 155 Neb. 1, 50 N.W.2d 224 (1951).

stressed is that the *Cover* case does present the mutuality problem, and it would be extremely difficult to criticize it on the basis that it was unjust to the opposing party. Whether the doctrine will be extended and refined to provide an established formula for disregarding mutuality depends, of course, upon the direction taken by the courts.

IV. CONCLUSION

Recent courts and writers have severely criticized the rule of mutuality. As an abstract principle of justice, it has been termed a "tinkling cymbal, an empty and fatuous formula productive of more harm than good."⁴⁸ There are those who would disagree, but it seems reasonable to say that justice does not *always* demand that a person prove his own case or defend his own rights after either one of these has been clearly and fairly decided. All justice demands is that one party not be allowed an unconscionable advantage over another.

Perhaps Nebraska is not as strongly bound by the rule of mutuality as some cases indicate. If this is so, the challenge lies in the formulation of sound principles through which courts can decide whether a person should be entitled to the benefits of a judgment when he would not have been bound by a decision adverse to his interest. The alternative is to adhere to a strict requirement of mutuality which is unnecessary, undesirable, and against the trend of authority.

Gailyn L. Larsen '67

⁴⁸ Currie, *supra* note 7, at 322.