tacitly admitted that Section 634 does not protect against future prosecution. Unless the statute can be so construed as to include this protection, it is possible that Section 634 could be held unconstitutional on the ground that the immunity it affords is not as broad as that provided by the Constitution.

In view of the fundamental importance of the privilege against self-incrimination, the existing immunity statute should not be left to the uncertainties of judicial construction. Legislation should be sponsored to clarify the scope of Section 634 with respect to contempt and to provide an immunity as broad as that in the Constitution.

FAILURE TO PLEAD FEDERAL COMPULSORY COUNTERCLAIM AS BAR TO STATE SUIT

The plaintiff administrator sued in a Massachusetts state court to recover for the wrongful death of the decedent, killed when his auto collided with that of the defendant. In a prior suit arising out of the same accident, a federal district court had awarded damages to the defendant (plaintiff there) against the decedent's administrator. The defendant claimed that the district court judgment was res judicata and that the plaintiff's alleged cause of action should have been pleaded in the prior suit in compliance with the compulsory counterclaim provision of the Federal Rules of Civil Procedure.[1] The Massachusetts trial court entered judgment for the defendant notwithstanding a verdict for the plaintiff. On appeal to the Supreme Judicial Court this judgment was reversed. *Campbell v. Ashler.*[2]

The court reasoned that the judgment of the federal district court was not res judicata in the instant action because the administrator was acting in a different capacity in the federal court and was therefore not the same party. There the administrator represented the estate of the deceased for the "benefit of creditors and distributees," while in the present case he represented the heirs or next of kin pursuant to the Massachusetts wrongful death statute.[3] It is conceivable that two distinct causes of action exist,[4] one a common law cause of

[1] Rule 13(a), 28 U.S.C.A. foll. § 723c. See note 11, infra.

[2] 320 Mass. 475, 70 N.E. 2d 302 (1946).

[3] McCarthy v. Wood Lumber Co., 219 Mass. 566, 107 N.E. 439 (1914); Beauvais v. Springfield Institution for Savings, 303 Mass. 136, 20 N.E. 2d 957 (1939); Eaton v. Walker, 244 Mass. 23, 138 N.E. 798 (1923). There is similar authority in other jurisdictions. May Coal Co. v. Robinette, 120 Ohio St. 110, 165 N.E. 576 (1929); Spradlin v. Georgia R. & Electric Co., 139 Ga. 575, 77 S.E. 799 (1913). See Chicago, R.I. & P.R. Co. v. Schendell, 270 U.S. 611 (1926), and Troxell v. Del. Lack. & West. R. Co., 227 U.S. 434 (1913). The leading Massachusetts decision, the McCarthy case supra, may be distinguished from the instant case, however. There the administrator had recovered in an action for personal injuries which had been commenced by the deceased in her lifetime. That judgment was held not to bar a further recovery under the wrongful death statute.

[4] Secrest v. Pacific Electric R. Co., 60 Cal. App. 2d 746, 141 P. 2d 747 (1943); Farrington v. Stoddard, 115 F. 2d 96 (C.C.A. 1st, 1940). 4 Rest., Torts § 925, comment i (1939) states,

action for pain and suffering and personal injuries to the decedent, for the benefit of the estate, and the other a statutory cause of action for death, accruing to the benefit of the next of kin. Although the weight of authority is to the contrary,[5] it might not be unreasonable to say that a judgment rendered *in favor of* the administrator for the decedent's personal injuries should not operate to bar further recovery under the wrongful death statute.[6] When judgment has been rendered *adverse* to the administrator in an action for damages, however, the adjudication should act as a bar to a further claim for wrongful death.[7] A judgment for damages rendered in favor of the defendant strikes at the foundation of the cause of action for death, for it is based upon the same facts.[8] To circumvent this conclusion by asserting that the administrator acts as a different person in each action is to pursue a legal fiction to an absurd extreme. One court has asked, "Can the plaintiff commence an action wherein she seeks to recover damages to herself based upon the acts of negligence of the defendant which a competent court has already adjudicated not to exist? While the right of recovery in the instant case is not the same right of recovery as in the other case, each case is predicated upon and supported by the same facts."[9]

". . . . judgment on a survival statute has no effect upon the damages under a death statute since the damages in one case are based upon events preceding death, while the damages under the other statute are based upon harm caused by death." In St. Louis, Iron Mtn. & Southern R. Co. v. Craft, 237 U.S. 648 (1915), the Supreme Court stated that in a similar situation under the Federal Employers' Liability Act there were two separate causes of action. See note 10, infra.

[5] Mellon v. Goodyear, 277 U.S. 335 (1928); Lanning v. Erie R. Co., 265 App. Div. 576, 40 N.Y.S. 2d 404 (1943); cases collected in 39 A.L.R. 579. The instant problem is not affected by the fact that recovery was had by the decedent in his lifetime, or by the administrator under a survival statute. In either case the recovery is made upon the same theory, and is based upon the same facts.

[6] McCarthy v. Wood Lumber Co., 219 Mass. 566, 107 N.E. 439 (1914).

[7] Secrest v. Pacific Electric R. Co., 60 Cal. App. 2d 746, 141 P. 2d 747 (1943); Little v. Blue Goose Motor Coach Co., 244 Ill. App. 427 (1927); Frescoln v. Puget Sound Traction, Light & P. Co., 225 Fed. 441 (Wash., 1915); Schmelzer v. Central Furniture Co., 252 Mo. 12, 158 S.W. 353 (1913); Brammer's Adm'r v. Norfolk & W.R. Co., 107 Va. 206, 57 S.E. 593 (1907); see Johnson v. Cleveland C.C. & St. Louis R. Co., 21 Ohio C.C.N.S. 268, 43 Ohio C.C. 341 (1905). Contra: May Coal Co. v. Robinette, 120 Ohio St. 110, 165 N.E. 576 (1929); Peeples v. Seaboard Air Line R. Co., 115 S.C. 115, 104 S.E. 541 (1920); Downs v. United R. Co. of St. Louis, 184 S.W. 995 (Mo., 1916); Spradlin v. Georgia R. & Electric Co., 139 Ga. 575, 77 S.E. 799 (1913). In Walton v. Southern Pacific Co., 8 Cal. App. 2d 290, 48 P. 2d 108 (1935), a nonsuit in an action for personal injuries was held not to bar an administrator from recovery for wrongful death. But in Miller v. U.S. Gypsum Co., 96 F. 2d 69 (C.C.A. 2d, 1938), it was held that dismissal of an action for damages because of the statute of limitations was sufficient to bar an action for wrongful death.

[8] It is immaterial for the purpose of this discussion whether the suit be brought against the administrator for damages, or brought by the administrator for personal injuries to the decedent. The reason for invoking the doctrine of res judicata is that the same facts have already been litigated between the same parties.

[9] Frescoln v. Puget Sound Traction, Light & P. Co., 225 Fed. 441, 443 (Wash., 1915). Here, a widow had lost an action to recovery damages for personal injuries to her deceased husband. This adjudication was held to preclude further recovery under a wrongful death statute.

In an analogous situation the United States Supreme Court has held that under the Federal Employers' Liability Act recovery might be had for both pain and suffering and death, but that both grounds of recovery must be asserted in one action in order to avoid needless litigation.[10] Subsequently, the Court recognized the desirability of this policy in the compulsory counterclaim provision of the Federal Rules of Civil Procedure.[11]

The case raises an important question which the Massachusetts court avoided by characterizing the administrator as two legal persons. Under Federal Rule 13 (a),[12] failure to plead as a counterclaim a cause of action arising out of the same transaction or occurrence bars a later action based upon those facts which might have been pleaded as a counterclaim.[13] In the instant case, the administrator did not plead his action for wrongful death in the federal court, but as-

[10] St. Louis, Iron Mtn. & Southern R. v. Craft, 237 U.S. 648 (1915). The Court construed broadly an amendment, § 9, 36 Stat. 291 (1910), 45 U.S.C.A. § 59 (1943), to the Federal Employers' Liability Act, 35 Stat. 65 (1908), 45 U.S.C.A. §§ 51–58 (1943), which reads ". . . . but in such cases there shall be only one recovery for the same injury." The Court stated at p. 659, ". . . . we think this clause . . . . is not intended to restrict the personal representative to one right to the exclusion of the other, ... but to limit him to one recovery of damages for both, and so to avoid the needless litigation in separate actions of what would better be settled once for all in a single action." In Northern Pacific Ry. Co. v. Maerkl, 198 Fed. 1, 7 (C.C.A. 9th, 1912) the court said, ". . . . damages resulting from the personal suffering, and from such death, not only may be recovered . . . . in one action but *must* be recovered in one action only if at all. . . . ."

[11] Rule 13 "(a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." 28 U.S.C.A. foll. § 723c. This rule, adopted in 1938, is an outgrowth of Federal Equity Rule 30, 28 U.S.C.A. foll. § 723, adopted in 1913, but broadened so as to include legal as well as equitable counterclaims. American Mills Co. v. American Surety Co., 260 U.S. 360 (1922); Advisory Committee Note 1 to Federal Rules, 28 U.S.C.A. foll. § 723c, Rule 13; 1 Moore's Federal Practice 68 (1938).

[12] 28 U.S.C.A. foll. § 723c.

[13] Audi Vision Corp. v. R.C.A. Mfg. Co., 136 F. 2d 621 (C.C.A. 2d, 1943); Home Ins. Co. of N.Y. v. Trotter, 130 F. 2d 800 (C.C.A. 8th ,1942); John R. Alley Co. v. Fed. Nat. Bank of Shawnee, 124 F. 2d 995 (C.C.A. 10th, 1942); Hancock Oil Co. v. Universal Oil Products Co., 115 F. 2d 45 (C.C.A. 9th, 1940); Thierfield v. Postman's Fifth Ave. Corp., 37 F. Supp. 958 (N.Y., 1941); Union Central Life Ins. Co. v. Burger, 27 F. Supp. 554 (N.Y., 1939); American Mills Co. v. American Surety Co., 260 U.S. 360 (1922); Williams v. Bank of America Nat. Ass'n, 55 F. 2d 884 (C.C.A. 2d, 1932); Howard v. Leete, 257 Fed. 918 (C.C.A. 6th, 1919); Caflisch v. Humble, 251 Fed. 1 (C.C.A. 6th, 1918); Knupp v. Bell, 243 Fed. 157 (C.C.A. 4th, 1917); Kreitmeyer v. Baldwin Drainage District, 2 F. Supp. 208 (Fla., 1932); Champion Spark Plug Co. v. Champion Ignition Co., 247 Fed. 200 (Mich., 1917); Portland Wood Pipe Co. v. Slick Bros. Construction Co., 222 Fed. 528 (Idaho, 1915); Electric Boat Co. v. Lake Torpedo Boat Co., 215 Fed. 377 (N.J., 1914); Salts Textile Mfg. Co. v. Tingue Mfg. Co., 208 Fed. 156 (Conn., 1913); Marconi Wireless Telegraph Co. v. National Electric Sig. Co., 206 Fed. 295 (N.Y., 1913). The cases before 1938 were decided under Federal Equity Rule 30, 28 U.S.C.A. foll. § 723.

serted it later in a state court. This raises the problem of whether a state court will give full faith and credit to a federal rule of procedure.[14]

The fact that the federal courts have their own rules of procedure indicates that they are not bound by the procedural rules of the state in which they sit, even though they are bound by the substantive law of that state.[15] By the same reasoning, a state court is not bound to accept the Federal Rules of Civil Procedure. But a state court must give the same "full faith and credit" to a decree of a federal court which it gives to a decree of a court of a sister state.[16] Rule 13 (a) lays down a new rule of res judicata which in effect says, "It is not mandatory to plead as a counterclaim a claim arising from the same transaction or occurrence, but failure to do so precludes its later assertion."[17] Thus, the judgment of a federal court in which a counterclaim should have been pleaded, but

[14] This question has not been answered by judicial decision. But when the problem was posed to Judge Clark in proceedings where the proposed Federal Rules were discussed, his hopes were expressed:

"Mr. Drake: 'On this provision that the counterclaim should be set up in the action accompanied by your statement as to the penalty for failure, would that operate to bar the presentation of the cause of action in the counterclaim in a state court later?'

"Mr. Clark: 'I don't suppose we could govern that finally. I think the answer would be that it should. I don't know what the legal ruling is likely to be. I should think it very likely a state court would so rule. But I am not at all sure how it would work out.'" Proceedings of the Cleveland Institution of the Federal Rules 248 (1938). In the Proceedings of the Washington Institution of the Federal Rules 58 (1938) Judge Clark said, "We have followed the idea of the equity rule that you must plead your counterclaims arising out of the transaction or situation upon which the claim is based, when we say 'must' it means, of course, that if you don't do it no penalty is going to apply to you in this case, but you will be barred from thereafter asserting it. Of course it is true that we probably can't tell state courts what they should hold, but certainly the significance of this rule, as of the equity rule upon which it is based, is that you must file your counterclaim, or, if you don't, you can't sue on it separately."

[15] Compare Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

[16] It has been said that Art. 1, § 4 of the United States Constitution does not require a state court to give "full faith and credit" to a decree of a federal court, since Art. 1, § 4 merely says, "Full faith and credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other *State* . . . ." (emphasis added). Baldwin v. Iowa State Traveling Mens Ass'n, 283 U.S. 522 (1931). However, 1 Stat. 122 as amended in R.S. § 905, 28 U.S.C.A. § 687 states, "And the said records and judicial proceedings . . . . shall have such faith and credit given to them in *every court* within the United States as they have by law or usage in the courts of the state from whence the records are taken." (emphasis added). This statute, along with Art. 4, § 1, requires a state court to give "full faith and credit" to a decree of a federal court. Stoll v. Gottlieb, 305 U.S. 165 (1938); Davis v. Davis, 305 U.S. 32 (1938); Hancock Nat. Bank v. Farnum, 176 U.S. 640 (1900); Metcalf v. Watertown, 153 U.S. 671 (1894); Embry v. Palmer, 107 U.S. 3 (1882); Mills v. Duryee, 7 Cr. (U.S.) 481 (1813); Botz v. Helvering, 134 F. 2d 538 (C.C.A. 8th, 1943); Mueller v. Mueller, 124 F. 2d 544 (C.C.A. 8th, 1942). Some courts have reached this conclusion on the basis of the Constitution alone. "By the letter, this section [Art. 4, § 1] applies only to public acts, records and judicial proceedings of the *States*, but construction has made it equally applicable to judgments in Federal courts." In re Thompson's Estate, 339 Mo. 410, 424, 97 S.W. 2d 93 (1936); cf. Hayes v. Payne Inv. Co., 174 Neb. 24, 254 N.W. 684 (1934); 34 C.J. 1160, n. 59.

[17] Although the distinction between matters of procedure and matters of substance is often a hazy one, it would seem a misnomer to call this rule a rule of procedure.

was not, is res judicata and bars a subsequent attempt to plead the subject matter of the omitted counterclaim. This result is accepted by the federal courts[18] and should be so recognized by state courts.[19] The Massachusetts court, in allowing the administrator to plead a claim which should have been pleaded as a counterclaim in the prior action,[20] failed to give the judgment of the federal district court the full faith and credit which that judgment merited.

The reason underlying the compulsory counterclaim rule is clearly to prevent multiplicity of suits through settlement in one action of all controversies between the parties.[21] But the rule also has its disadvantages. It requires a litigant to present a claim at a time and place chosen by his adversary, which may well result in inconvenience (and even impossibility) in producing witnesses, and difficulty in effectively preparing a case. The very existence of a cause of action may not be realized at the time, nor may the extent of damage be calculable. Because of such considerations, courts have sometimes evaded the thrust of the rule by holding that the claim did not arise out of the "same transaction or occurrence"[22] or that it did not arise "at the time of filing."[23] However, if it is clearly inconvenient to bring the counterclaim in the action at hand, the Federal Rules provide for separate trials "in furtherance of convenience and to avoid prejudice."[24] This provision allows wide latitude in the court's discretion and would prevent use of the compulsory counterclaim rule to reach an inequitable result.

[18] Authorities cited note 13 supra.

[19] In Red Top Trucking Corp. v. Seaboard Freight Lines, 35 F. Supp. 740 (N.Y., 1940), it was held that a federal court cannot enjoin a state court from hearing a later action because application of the bar of the former judgment is for the court in which the later action is brought.

[20] There was no contention that the administrator's action for wrongful death did not come under the provisions of Rule 13(a).

[21] Parmelee v. Chicago Eye Shield Co., 157 F. 2d 582 (C.C.A. 8th, 1946); John R. Alley Co. v. Fed. Nat. Bank of Shawnee, 124 F. 2d 995 (C.C.A. 10th, 1942); Ohio Casualty Ins. Co. v. Maloney, 3 F.R.D. 341 (Pa., 1943); Penn. R. Co. v. Musante-Phillips Inc., 42 F. Supp. 340 (Cal., 1941); Schram v. Lucking, 31 F. Supp. 749 (Mich., 1940); Warren v. Indian Refining Co., 30 F. Supp. 281 (Ind., 1939). "The compulsory counterclaim device is, of course, only a means of bringing all logically related claims into a single litigation, through the penalty of precluding later assertion of omitted claims." Lesnick v. Public Industrials Corp., 144 F. 2d 968, 975 (C.C.A. 2d, 1945).

[22] Clair v. Kastar, 138 F. 2d 828 (C.C.A. 2d, 1943) (patent action for the "use, manufacture or sale of defendant's 'stabilizers' by its customers" is not the same transaction or occurrence as the "use, manufacture or sale by plaintiffs of their own 'stabilizers' "); Williams v. Robinson, 1 F.R.D. 211 (D.C., 1940) (action for libel and slander growing out of defendant's accusation of adultery in a maintenance suit is not the same transaction or occurrence as that which gave rise to the maintenance suit).

[23] Detroit, T. & I. R. Co. v. Pitzer, 61 N.E. 2d 93 (Ohio, 1943). Here a state court refused to apply Rule 13 (a) to bar the second action because the claim could not have arisen before, and was based upon, the prior suit. While the court refused to apply the Rule, it indicated that had the plaintiff's claim been mature, at the time of filing, it would not have entertained the present action.

[24] Federal Rules of Civil Procedure, 28 U.S.C.A. foll. § 723c Rule 42 (b). See also Rule 13 (i).

Under the ruling of the principal case, the administrator, almost certain to fail in a federal court because of Rule 13 (a), averted defeat by bringing his action for wrongful death in a state court. A state court should not be party to the evasion of an unfavorable jurisdiction in order to secure a favorable judgment.[25] It was this very practice which caused so much criticism of the doctrine of *Swift v. Tyson*[26] and finally resulted in the overruling of that case.[27]

SERVICE ON FOREIGN EXECUTORS AND ADMINISTRATORS UNDER NON-RESIDENT MOTORIST STATUTES

Service was made on the domiciliary administratrix of the estate of a South Dakota decedent whose son had injured the plaintiff while driving decedent's truck in Iowa. This service was in accordance with the Iowa Non-Resident Motorist Statute,[1] which provides for service upon the executor or administrator of the estate of a non-resident motorist who had been a party to an accident in Iowa. Upon application of the defendants, the case was removed to a federal court on the ground of diversity of citizenship. This court, on its own motion, heard arguments as to its jurisdiction and held that despite the voluntary appearance of the defendant before the court, it lacked jurisdiction over her because of the doctrine that an executor or administrator has no legal standing as such outside of the state in which he was appointed. The court went even further and declared that portion of the Iowa statute allowing suit against foreign executors and administrators invalid. *Knoop v. Anderson.*[2]

In reaching its decision, the court followed the general rule that an executor or administrator cannot sue or be sued in his representative capacity outside the state of his appointment.[3] While there has been some tendency to permit foreign executors or administrators to sue,[4] the rule barring suits against them in courts

[25] Ikeler v. Detroit Trust Co., 30 F. Supp. 643 (Mich., 1939). A party should not be permitted to bring in a federal court an action which should have been litigated in a state court, by a strained construction of Federal Rules 13 and 14. Converse reasoning also applies. Prior to the Federal Rules it had been held that a suit brought in a federal court under diversity of citizenship would not permit a party to intervene as plaintiff when his residence was the same as that of the defendant. Such an attempt by the intervenor to circumvent state jurisdiction was perceived and prevented. De Graffenreid v. Yount-Lee Oil Co., 30 Fed. 2d 574 (C.C.A. 5th, 1939); Clauss v. Palmer Union Oil Co., 222 Fed. 870 (C.C.A. 9th, 1915); Forest Oil Co. v. Crawford, 101 Fed. 849 (C.C.A. 3d, 1900).

[26] 16 Pet. (U.S.) 1 (1842).

[27] Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). The abuse caused by incorporation in another jurisdiction consciously designed to enable the bringing of suits in federal courts under diversity of citizenship, thus obtaining favorable "federal law" under the doctrine of Swift v. Tyson, 16 Pet. (U.S.) 1 (1842), is illustrated in Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928). See Frankfurter, Judicial Power of Federal and State Courts, 13 Corn. L.Q. 499, 525 (1928).

[1] Iowa Code (1946) §§ 321.498–321.511. [2] 71 F. Supp. 832 (Iowa, 1947).

[3] Lawrence v. Nelson, 143 U.S. 215 (1891); Reynolds v. Stockton, 140 U.S. 254 (1891); Wyman v. Halstead, 109 U.S. 654 (1883); Story, Conflict of Laws § 183 (1938).

[4] Helme v. Buckelew, 229 N.Y. 363, 128 N.E. 216 (1920).