

## COLLATERAL ESTOPPEL: APPLICATION TO ACTIONS BETWEEN FORMER CODEFENDANTS

AS A RESULT of injuries sustained in a highway collision, *A* brings an action against *B* and *C* for negligence. A consent judgment is entered against *B* and *C*. Subsequently, *B* sues *C* for negligence in the same collision. Can *C* successfully interpose the defense of collateral estoppel on the theory that the prior consent judgment conclusively establishes *B*'s negligence?

In *Pack v. McCoy*,<sup>1</sup> the North Carolina Supreme Court recently upheld such a defense, stating that a judgment against all defendants in a negligence action necessarily establishes the negligence of each in any future proceeding.<sup>2</sup> The court applied this broad rule to a situation in which the parties to be bound had not been adversaries and the issue of negligence had not been litigated. The dissent forcefully contended that state precedent should be overruled, pointing out that this holding is contrary to the weight of authority.<sup>3</sup>

The doctrine of collateral estoppel minimizes litigation by treating as conclusively established all facts that were litigated and determined between the same parties in a previous suit on a different cause of action.<sup>4</sup> Following this functional definition, the majority of courts apply the doctrine to former co-defendants in a suit on independent questions only if they were adversaries in the first action.<sup>5</sup> It is important to note that the *Pack* case involved an independent action between former co-parties, which should be distinguished from suits for indemnity or contribution. In an independent suit the former co-defendant asserts a

---

<sup>1</sup> 251 N.C. 590, 112 S.E.2d 118 (1960).

<sup>2</sup> *Id.* at 593, 112 S.E.2d at 121.

<sup>3</sup> *Id.* at 594, 112 S.E.2d at 121. Justice Bobbitt urged that *Lumberton Coach Co. v. Stone*, 235 N.C. 619, 70 S.E.2d 673 (1952), the only state precedent, be overruled.

<sup>4</sup> See Polarsky, *Collateral Estoppel*, 39 IOWA L. REV. 217, 219-20 (1954); RESTATEMENT, JUDGMENTS § 45 (1942). See generally *Cromwell v. Sac*, 94 U.S. 351 (1876).

Res judicata is the generic term covering merger, bar, direct estoppel, and collateral estoppel. See RESTATEMENT, JUDGMENTS, Introductory Note to chapter 3, (1942). When contending that a former judgment affects the outcome of the case, a party will plead res judicata, which is usually an affirmative defense. *Cf.*, FED. R. CIV. P. 8(c); CLARK, CODE PLEADING 611-12 (2d ed. 1947).

<sup>5</sup> 1 FREEMAN, JUDGMENTS § 424 (5th ed. 1925); see *e.g.*, *Clark's Adm'x v. Rucker*, 258 S.W.2d 9 (Ky. 1953); *Bunge v. Yager*, 236 Minn. 245, 52 N.W.2d 446 (1952); RESTATEMENT, JUDGMENTS § 82 (1942).

claim that he has irrespective of the former judgment; in suits for contribution and indemnity the claim is a direct result of judicial determination of liability. Although policy considerations unique to contribution and indemnity cases have resulted in judicial disagreement over the applicability of collateral estoppel to these actions,<sup>6</sup> nearly all courts apply the adversary requirement to independent suits between former co-parties.<sup>7</sup>

<sup>6</sup> In the contribution action often the co-defendant who lost in the first action will be suing one who put up a successful defense. A rule which would allow the successful co-defendant to set up his former victory as a defense in the contribution action is at least arguably meritorious in as much as contribution and indemnity are in a sense derived rights. He has been adjudged not negligent toward the former plaintiff once and perhaps should not have to pay damages in a contribution action predicated on his joint liability to that same plaintiff. The courts, however, are split over which rule to follow in the indemnity and contribution situations. For cases holding that the former judgment conclusively establishes only the liability or non-liability of each co-defendant to the former plaintiff, see *City of Mobile v. George*, 253 Ala. 591, 45 So. 2d 778 (1950); *Preferred Acc. Ins. Co. v. Musante, Berman & Steinberg Co.*, 133 Conn. 536, 52 A.2d 862 (1947); *Brown Hotel Co. v. Pittsburgh Fuel Co.*, 311 Ky. 396, 224 S.W.2d 165 (1949); *American Motorists Ins. Co. v. Vigen*, 213 Minn. 120, 5 N.W.2d 397 (1942); *cf.*, *Hobbs v. Hurley*, 117 Me. 449, 104 Atl. 815 (1918); *Gleason v. Hardware Mut. Cas. Co.*, 324 Mass. 695, 88 N.E.2d 632 (1949). See also *Employer's Liab. Assur. Corp. v. Post & McCord*, 286 N.Y. 254, 36 N.E.2d 135 (1941). Other courts adhere to the adversary rule in both situations. See *e.g.*, *Appell v. Schneider & Pomerantz Baking Co.*, 126 Conn. 16, 8 A.2d 529 (1939); *Bakula v. Schwab*, 167 Wis. 546, 168 N.W. 378 (1918) (dictum). However, the policies here involved are not germane to a suit predicated on independent as distinguished from derived rights, and although perhaps the adversary rule should be applied in each situation, the problems should be separately analyzed. See *Bunge v. Yager*, 236 Minn. 245, 52 N.W.2d 446 (1952); *cf.*, *Wiles v. Young*, 167 Tenn. 224, 68 S.W.2d 114 (1934); *Snyder v. Marken*, 116 Wash. 270, 199 Pac. 302 (1921); 1 FREEMAN, *op. cit. supra* note 5, at §§ 424-25.

<sup>7</sup> See *Kimmel v. Yankee Lines*, 125 F. Supp. 702 (W.D. Pa. 1954), *aff'd per curiam* 224 F.2d 644 (3rd Cir. 1955); *Lowery v. Muse*, 151 A.2d 263 (D.C. Mun. App. 1959); *Clark's Adm'x v. Rucker*, 258 S.W.2d 9 (Ky. 1953); *Bunge v. Yager*, 236 Minn. 245, 52 N.W.2d 446 (1952); *Pearlman v. Truppo*, 10 N.J. Misc. 477, 159 Atl. 623 (1932); *opinion adopted* 10 N.J. Misc. 772, 160 Atl. 334 (1932); *Wiles v. Young*, 167 Tenn. 224, 68 S.W.2d 114 (1934); *Byrum v. Ames & Webb*, 196 Va. 597, 85 S.E.2d 364 (1955); *Snyder v. Marken*, 116 Wash. 270, 199 Pac. 302 (1921); 9 BLASHFIELD, *CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE* § 5835 (1955).

Some courts merely state that co-defendants are not bound. See *Buhler v. Villec*, 117 So. 2d 286 (La. App. 1960), which is based on LA. CIV. CODE ANN. art. 2286 (1945); *Clark v. Naufel*, 328 Mich. 249, 43 N.W.2d 839 (1950); *Trotter v. Klein*, 140 Misc. 78, 249 N.Y. Supp. 20 (Sup. Ct. 1930).

The New York courts are in complete disagreement on the question. Compare *Moran v. Lehman*, 7 Misc. 2d 994, 157 N.Y.S.2d 684 (Mun. Ct. 1956), and *Bennett v. Mitchell*, 2 Misc. 2d 116, 151 N.Y.S.2d 574 (Sup. Ct. 1956), with *Glaser v. Huette*, 232 App. Div. 119, 249 N.Y. Supp. 374 (1931), and *Trotter v. Klein*, 140 Misc. 78, 249 N.Y. Supp. 20 (Sup. Ct. 1930).

There is some dispute among authorities as to what constitutes adversaries. Most

The adversary requirement is based on important practical considerations. Our system of procedure demands that each party be able to utilize his tactics and strategy against his opponent to the best advantage. Co-defendants, however, are often placed in a difficult position. The plaintiff chooses the time and place of trial and joins the defendants.<sup>8</sup> Although some states permit cross-claims between co-parties, co-defendants may wish to litigate their own claims in another court at a different time.<sup>9</sup> Co-defendants should be allowed to direct their trial strategy against the plaintiff without prejudicing their right to subsequently litigate their independent claims.<sup>10</sup> Without cross-pleadings, a

---

jurisdictions require cross-pleadings or an issue raised by one party to which the other can demur or enter a denial. See *Clark's Adm'x v. Rucker*, 258 S.W.2d 9 (Ky. 1953); *Bunge v. Yager*, 236 Minn. 245, 52 N.W.2d 446 (1952); *Byrum v. Ames & Webb*, 196 Va. 597, 85 S.E.2d 364 (1955); FREEMAN, *op. cit. supra* note 5; RESTATEMENT, JUDGMENTS § 82 (1942). Some expressly negate any requirement of cross-pleadings and stress the actual determination of conflicting claims between the parties. See *Gleason v. Hardware Mut. Cas. Co.*, 324 Mass. 695, 88 N.E.2d 632 (1949); *Godomsky v. Freeman*, 120 N.J.L. 116, 198 Atl. 391 (1938); *Wright v. Schick*, 134 Ohio St. 193, 16 N.E.2d 321 (1938); 2 BLACK, JUDGMENTS §§ 599, 614 (2d ed. 1902); *cf.*, *Ohio Cas. Ins. Co. v. Gordon*, 95 F.2d 605 (10th Cir. 1938). Affidavits asserting an adverse position have also been determinative. See *Vaughn's Adm'r v. Louisville & N. R.R.*, 297 Ky. 309, 179 S.W.2d 441 (1944).

The requirement of an adverse position is of long-standing. See *e.g.*, *Buffington v. Cook*, 35 Ala. 312 (1859); *Cornwell v. Thompson*, 50 Ill. 329 (1869); *Jones v. Vert*, 121 Ind. 140, 22 N.E. 882 (1889). Only a few decisions support the instant case. See *Moran v. Lehman*, 7 Misc. 2d 994, 157 N.Y.S.2d 684 (Mun. Ct. 1956); *Bennett v. Mitchell*, 2 Misc. 2d 116, 151 N.Y.S.2d 574 (Sup. Ct. 1956); *Lumberton Coach Co. v. Stone*, 235 N.C. 619, 70 S.E.2d 673 (1952).

<sup>8</sup> See *Bunge v. Yager*, 236 Minn. 245, 52 N.W.2d 446 (1952); *Merrill v. St. Paul City Ry.*, 170 Minn. 332, 212 N.W. 533 (1927); *cf.*, *Pullman Co. v. Cincinnati, N.O. & T.P. R.R.*, 147 Ky. 498, 144 S.W. 385 (1912) (plaintiff joined several defendants in order to defeat removal to federal court and ignored some at trial).

Both suits are frequently in progress at the same time, and it is mere chance as to which is first concluded. In such a situation a defendant may wish to forego his appeal to concentrate on winning the suit in which he is plaintiff. *Owen v. Dixon*, 162 Va. 601, 175 S.E. 41 (1934); see *Kimmel v. Yankee Lines*, 125 F. Supp. 702 (W.D. Pa. 1954); *Wiles v. Young*, 167 Tenn. 224, 68 S.W.2d 114 (1934).

<sup>9</sup> For cases applying the adversary requirement in jurisdictions permitting cross-claims see *Kimmel v. Yankee Lines*, 125 F. Supp. 702 (W.D. Pa. 1954); *Lowery v. Muse*, 151 A.2d 263 (D.C. Mun. App. 1959); *Pearlman v. Truppo*, 10 N.J. Misc. 477, 159 Atl. 623 (1932); *Byrum v. Ames & Webb*, 196 Va. 597, 85 S.E.2d 364 (1955); RESTATEMENT, JUDGMENTS § 82, comments *a-b* (1942). It has been pointed out that an application of collateral estoppel would in effect make cross-claims compulsory where the legislature intended them to be permissive. *Lowery v. Muse*, *supra*, at 265; see *Bunge v. Yager*, 236 Minn. 245, 52 N.W.2d 446 (1952); 34 B.U.L. REV. 104 (1954).

<sup>10</sup> *Cf.*, *Mickadeit v. Kansas Power & Light Co.*, 174 Kan. 484, 257 P.2d 156 (1953); *Pearlman v. Truppo*, 10 N.J. Misc. 477, 159 Atl. 623 (1932); *Bakula v.*

co-defendant cannot produce or cross-examine witnesses concerning the co-parties' rights *inter se* and, therefore, is obviously in no position to establish his co-defendant's liability to him.<sup>11</sup> A co-defendant may also choose to default or consent to judgment due to personal motives or a small amount in controversy.<sup>12</sup> The adversary requirement, by guarantying that only adversaries will be precluded in the future, allows co-defendants to concentrate on the plaintiff without having to weigh the effect of each move on their independent claims. The important policy implicit in the adversary requirement is perhaps best summed up by one court: "The need for expedition and conclusion in litigation is not greater than the need for opportunity for . . . the fair and full trial of an issue."<sup>13</sup>

---

Schwab, 167 Wis. 546, 168 N.W. 378 (1918); Von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 303 (1929). If each co-defendant must be concerned about the effect on future litigation with his co-party, his defense may be weakened and a plaintiff's "divide and conquer" tactics greatly facilitated.

<sup>11</sup> See *Pullman Co. v. Cincinnati, N.O. & T.P. R.R.*, 147 Ky. 498, 144 S.W. 385 (1912); *Godomsky v. Freeman*, 120 N.J.L. 116, 198 Atl. 391 (1938); *Self v. International Ry.*, 224 App. Div. 238, 230 N.Y. Supp. 34 (1928); *Bakula v. Schwab*, 167 Wis. 546, 168 N.W. 378 (1918). The theory of the defense may be inconsistent with pleadings which allow such tactics. As one court said where the plaintiff apparently operated on different theories in each case, "The evidence each offered in that suit was for the purpose of defending against the plaintiff's claim, not for the purpose of having adjudicated an issue between themselves." *Byrum v. Ames & Webb*, 196 Va. 597, 601, 85 S.E.2d 364, 366 (1955). Cf., *Kimmel v. Yankee Lines*, 125 F. Supp. 702 (W.D. Pa. 1954) (different lawyers in each suit).

It has been pointed out that a co-defendant cannot appeal from a ruling affecting his co-party. See *Merrill v. St. Paul City Ry.*, 170 Minn. 332, 212 N.W. 533 (1927); *Pearlman v. Truppo*, 10 N.J. Misc. 477, 159 Atl. 623 (1932); *Bakula v. Schwab*, 167 Wis. 546, 168 N.W. 378 (1918).

<sup>12</sup> See note 20 *infra*. For similar reasons a co-defendant may not wish to defend vigorously. See *Crow v. Crow*, 70 Ore. 534, 139 Pac. 854 (1913) (co-defendant attempting to deprive estranged wife of interest in his property by collusive lawsuits); *Von Moschzisker*, *supra* note 10. It is interesting to note how often the first plaintiff was a guest in the second plaintiff's automobile. The insurance company is probably silently present here. See e.g., *Kimmel v. Yankee Lines*, 125 F. Supp. 702 (W.D. Pa. 1954); *Wiles v. Young*, 167 Tenn. 224, 68 S.W.2d 114 (1934); *Owen v. Dixon*, 162 Va. 601, 175 S.E. 41 (1934).

<sup>13</sup> *Godomsky v. Freeman*, 120 N.J.L. 116, 121, 198 Atl. 391, 393 (1938).

Although often unnoticed the issue may vary slightly in the two suits. See *Hellenic Lines v. The Exmouth*, 253 F.2d 473 (2d Cir.) (admiralty rule of major-minor fault), *cert. denied*, *American Export Lines v. Hellenic Lines*, 356 U.S. 967 (1958); cf. *Casey v. Balunas*, 19 Conn. Supp. 365, 113 A.2d 867 (1955); *Mickadeit v. Kansas Power & Light Co.*, 174 Kan. 484, 257 P.2d 156 (1953); *Godomsky v. Freeman*, *supra* (agency determinative in the first suit). This is especially true of "last clear chance" which, although it is seldom mentioned in the opinions, would seem to be applicable to most three-way accidents. See *Hardy v. Rosenthal*, 2 Cal. App. 2d 442, 38 P.2d 412 (1934);

In several jurisdictions a pleading rule forbids litigation of independent questions between co-parties.<sup>14</sup> In North Carolina this pleading rule, juxtaposed to the court's failure to follow the adversary requirement, places co-defendants in a highly perplexing situation. They have no opportunity to determine their claims in the first suit and are prevented by collateral estoppel from doing so in any subsequent action.<sup>15</sup> Consequently, a party may be completely denied redress in court. This last reason alone is sufficient to demand that collateral estoppel be applied only to adversaries.

The court, in addition to failing to follow the adversary requirement, apparently ignored the rule that collateral estoppel applies only to issues which have been actually litigated in a previous suit by applying the doctrine to a consent judgment.<sup>16</sup> This result is often reached by

---

Capps v. Whitson, 157 Va. 46, 160 S.E. 71 (1931). See also PROSSER, TORTS § 52 (2d ed. 1955).

<sup>14</sup> See Clark's Adm'x v. Rucker, 258 S.W.2d 9 (Ky. 1953); Self v. International Ry., 224 App. Div. 238, 230 N.Y. Supp. 34 (1928); Bell v. Lacey, 248 N.C. 703, 104 S.E.2d 833 (1958); Wrenn v. Graham, 236 N.C. 719, 74 S.E.2d 232 (1953); Horton v. Perry, 229 N.C. 319, 49 S.E.2d 734 (1948). Cross-actions for contribution are permitted in North Carolina. See Horton v. Perry, *supra*; N.C. GEN. STAT. §§ 1-222, 1-240 (1953).

North Carolina only requires the litigant to be a party to the judgment before being bound. See Lumberton Coach Co. v. Stone, 235 N.C. 619, 70 S.E.2d 673 (1952); Herring v. Queen City Coach Co., 234 N.C. 51, 65 S.E.2d 505 (1951). *But cf.*, Stanley v. Parker, 207 N.C. 159, 176 S.E. 279 (1934). See also Powell v. Ingram, 231 N.C. 427, 57 S.E.2d 315 (1950).

<sup>15</sup> Some courts follow both this pleading rule forbidding litigation *inter se* and the requirement of an adversary position before applying collateral estoppel. See Clark's Adm'x v. Rucker, *supra* note 14; *cf.*, Self v. International Ry., *supra* note 14; 2 BLACK, *op. cit. supra* note 7, at § 599. In these jurisdictions the doctrine of collateral estoppel should seldom apply to such an action. The only instance of a court following both rules and still applying collateral estoppel is Vaughn's Adm'r v. Louisville & N. R.R., 297 Ky. 309, 179 S.W.2d 441 (1944), where co-defendants had submitted affidavits asserting their adverse position. For a criticism of this result see Brown Hotel Co. v. Pittsburgh Fuel Co., 311 Ky. 396, 224 S.W.2d 165 (1949).

<sup>16</sup> See United States v. International Bldg. Co., 345 U.S. 502 (1953); Cromwell v. Sac, 94 U.S. 351, 352-53 (1876); James, *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173, 178 (1959); Polarsky, *supra* note 4, at 222; Von Moschzisker, *supra* note 10, at 301; RESTATEMENT, JUDGMENTS § 45, comment *c* (1942).

A court entering a consent judgment will normally determine only if the parties were capable of consenting and if they actually did consent. See Risk v. Director of Ins., 141 Neb. 488, 3 N.W.2d 922 (1942); James, *supra*. The court does not examine the merits of the claim but merely records the agreement; there is no actual litigation. *Accord*, Fruehauf Trailer Co. v. Gilmore, 167 F.2d 324 (10th Cir. 1948); see Burgess v. Consider H. Willett, Inc., 311 Ky. 745, 225 S.W.2d 315 (1949); Cutter v. Arlington Casket Co., 255 Mass. 52, 151 N.E. 167 (1926). There can be no appeal from a consent judgment. As an eminent jurist has said, "But neither party can complain of a consent order for the error in it, if there is any, is their own, and not

failing to distinguish between collateral estoppel and merger and bar.<sup>17</sup> The dissent in the instant case stresses the necessity of such a differentiation.<sup>18</sup>

Consent judgments are essentially contracts and should be so construed.<sup>19</sup> Their similarity to contracts of settlement and release is marked, as both are important methods of compromise.<sup>20</sup> Releases cannot be introduced in evidence in a different cause of action,<sup>21</sup> and

the error of the court."<sup>22</sup> *Dora v. Lesinski*, 351 Mich. 579, 582, 88 N.W.2d 592, 594 (1958) (Justice Voelker quoting Judge Cooley in *Chapin v. Perrin*, 46 Mich. 130, 131, 8 N.W. 121, 122 (1881)).

<sup>17</sup> See James, *supra* note 16, at 183. The opinions simply state that res judicata applies to consent judgments. See *O'Cedar Corp. v. F. W. Woolworth Co.*, 66 F.2d 363 (7th Cir. 1933); *Partridge v. Shepard*, 71 Cal. 470, 12 Pac. 480 (1886); *Biggio v. Magee*, 272 Mass. 185, 172 N.E. 336 (1930); *Stone v. Carolina Coach Co.*, 238 N.C. 662, 78 S.E.2d 605 (1953); *Crow v. Crow*, 70 Ore. 534, 139 Pac. 854 (1914); 1 FREEMAN, *op. cit. supra* note 5, at § 663.

<sup>18</sup> *Pack v. McCoy*, 251 N.C. 590, 595, 112 S.E.2d 118, 122 (1960).

<sup>19</sup> See *Burgess v. Consider H. Willett, Inc.*, 311 Ky. 745, 225 S.W.2d 315 (1949); James, *supra* note 16 at 175; Comment, *Collateral Estoppel by Judgments*, 52 COLUM. L. REV. 647, 656 (1952); *cf.*, *Fruehauf Trailer Co. v. Gilmore*, 167 F.2d 324 (10th Cir. 1948); *State ex rel. City of St. Paul v. Great Northern Ry.*, 134 Minn. 249, 158 N.W. 972 (1916); *LaLonde v. Hubbard*, 202 N.C. 771, 164 S.W. 359 (1932). *But cf.*, *Public Serv. Elec. & Gas Co. v. Waldroup*, 38 N.J. Super. 419, 119 A.2d 172 (1955); 3 FREEMAN, *op. cit. supra* note 5, at § 1350.

<sup>20</sup> See *Burgess v. Consider H. Willett, Inc.*, *supra* note 19; *Gibson v. Gordon*, 213 N.C. 666, 197 S.E. 135 (1938); James, *supra* note 16, at 190.

Consent judgments are especially important in settling minors' claims, as they are not bound by their contracts, and an out of court settlement with a contract of release would be useless. See *Daniel v. Adorno*, 107 A.2d 700 (D.C. Mun. App. 1954); *Pack v. McCoy*, 251 N.C. 590, 112 S.E.2d 118 (1960) (dissenting opinion); James, *supra* note 16, at 190. The situation applies to mental incompetency as well. See *Gibson v. Gordon*, *supra*.

Insurance companies also employ consent judgments frequently when representing insured defendants. See *Fruehauf Trailer Co. v. Gilmore*, 167 F.2d 324 (10th Cir. 1948); *Biggio v. Magee*, 272 Mass. 185, 172 N.E. 336 (1930). For a criticism of the latter case see James, *supra* note 16, at 189, 192; 10 B.U.L. REV. 565 (1930). This decision resulted in the passage of remedial legislation, which was unfortunately restricted to situations involving compulsory insurance. MASS. GEN. LAWS ch. 231, § 140 A (1932); see *Macheras v. Syrmopoulos*, 319 Mass. 485, 66 N.E.2d 351 (1946). More often the role of the insurance company is silent although it completely controls the defense. See *Risk v. Director of Ins.*, 141 Neb. 488, 3 N.W.2d 992 (1942); *Stone v. Carolina Coach Co.*, 238 N.C. 662, 78 S.E.2d 605 (1953); James, *supra* note 16, at 191. Although the right is usually reserved in the contract, there is some conflict over the power of the insurance company to consent to judgment and the effect of such a judgment. See Annot., 32 A.L.R.2d 937 (1953). Compare *Fikes v. Johnson*, 220 Ark. 448, 248 S.W.2d 362 (1952), and *Daniel v. Adorno*, 107 A.2d 700 (D.C. Mun. App. 1954), with *Long v. Union Indem. Co.*, 277 Mass. 428, 178 N.E. 737 (1931).

<sup>21</sup> See 4 WIGMORE, EVIDENCE § 1061 (3rd ed. 1940); *cf.*, MCCORMICK, EVIDENCE

consent judgments should receive comparable treatment.<sup>22</sup>

Applying collateral estoppel to consent judgments discourages settlements by making the use of the device less desirable.<sup>23</sup> A party will be less willing to settle small claims for fear of the effect on future litigation.<sup>24</sup> With this rule in effect, parties are forced to settle all their claims at once or, more often, to litigate them all at the same time.<sup>25</sup> The policy of encouraging settlements and minimizing litigation should prohibit this extension of the doctrine.

Courts today often extend the doctrine of collateral estoppel in the frequently erroneous belief that they are eliminating unnecessary litigation.<sup>26</sup> The instant case, blindly following a single precedent,<sup>27</sup> rejected the settled adversary rule which has long safeguarded the application of collateral estoppel. Furthermore, by failing to analyze the problems involved in consent judgments, the court, adding error to error, applied collateral estoppel to a judgment that did not result from litigation. If the court had more thoroughly analyzed the policies and practical considerations involved in the case, it would have reached a different result.

---

§ 76 (1954). For a good statement of the rule concerning settlement and release see *Penn Dixie Lines v. Grannick*, 238 N.C. 552, 557, 78 S.E.2d 410, 413-14 (1953).

<sup>22</sup> *Accord*, James, *supra* note 16, at 175; Polarsky, *supra* note 4, at 226. Some courts while admitting the contractual nature of a consent judgment, apply collateral estoppel unless the parties agree not to apply it, *cf.*, *Public Serv. Elec. & Gas Co. v. Waldroup*, 38 N.J. Super. 419, 119 A.2d 172 (1955). Others entirely fail to see the contractual nature of the judgment. See *e.g.*, *Partridge v. Shepard*, 71 Cal. 470, 12 Pac. 480 (1886); *Herring v. Queen City Coach Co.*, 234 N.C. 51, 65 S.E.2d 505 (1951).

<sup>23</sup> See James, *supra* note 16, at 184; Polarsky, *supra* note 4, at 228; Comment, *Collateral Estoppel by Judgments*, 52 COLUM. L. REV. 647, 657 (1952). *But see* *Public Serv. Elec. & Gas Co. v. Waldroup*, 38 N.J. Super. 419, 426-27, 119 A.2d 172, 176 (1955). For an interesting case which would discourage the use of consent judgments see *Crow v. Crow*, 70 Ore. 534, 139 Pac. 854 (1913).

<sup>24</sup> See *Burgess v. Consider H. Willett, Inc.*, 311 Ky. 745, 225 S.W.2d 315 (1949); James, *supra* note 16, at 185, 187.

<sup>25</sup> A party is likely to contest every small claim or minor issue to the end if a present determination or consent judgment may be used against him in future litigation of which he is presently unaware. *Cf.*, *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944). It would seem, however, that in cases involving status, such as divorce, custody, and *in rem* proceedings, consent judgments should be given collateral effect. See *Jorgensen v. Jorgensen*, 32 Cal. 2d 13, 18, 193 P.2d 728, 732 (1948); Polarsky, *supra* note 4, at 231-32; *Von Moschzisker*, *supra* note 10, at 304; *cf.*, 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION § 1533 (1891). Compare, Polarsky, *supra* note 4, at 250-51.

<sup>26</sup> See, *e.g.*, *Moran v. Lehman*, 7 Misc. 2d 994, 157 N.Y.S.2d 684 (Munic. Ct. 1956).

<sup>27</sup> *Lumberton Coach Co. v. Stone*, 235 N.C. 619, 70 S.E.2d 673 (1952).

# *An Index to Modern Legal Problems*

On each of the following topics, LAW AND CONTEMPORARY PROBLEMS has published or will publish a symposium dealing with the legal, economic, administrative, and other social-science aspects of the subject. The date indicates the year of publication.

Agricultural Adjustment in the South	1934	Legislative Reapportionment	1952
Air Cargo	1950	Literary and Artistic Products and	
Alcoholic Beverage Control	1940	Copyright Problems	1954
Alimony	1939	Loan Shark Problem Today	1954
Atomic Power Development	1956	Low-Cost Housing and Slum Clearance	1934
Aviation Transport	1946	Medical Care	1939
Children of Divorced Parents	1944	Migratory Divorce	1935
Close Corporation	1953	Narcotics	1957
Collection of Real Property Taxes	1936	Nationalization of British Industries	1951
Collective Bargaining Under the		New Look in Corporation Law	1958
Wagner Act	1938	Obscenity and the Arts	1955
Combating the Loan Shark	1941	Old Age Security and Welfare Titles	
Commercial Arbitration†	1952	of the Social Security Act	1936
Commercial Code†	1951	Patent System†	1947, 1948
Consumption Taxes	1941	Presidential Office	1956
Cooperatives	1948	Preventive Law of Conflicts	1956
Correction of Youthful Offenders	1942	Price Control in a Cold War	1954
Crime and Correction	1958	Price Discrimination and Price	
Delivered Pricing	1950	Cutting	1937
Divorce: A Re-examination of		Private Insurance	1950
Basic Concepts	1953	Protection for the Consumer of	
Emergency Price Control Act	1942	Food and Drugs	1933
Enemy Property	1945	Radio and Television†	1957, 1958
Excess Profits Taxation	1943	Railroad Reorganization	1940
Expert Testimony	1935	Regulation of Insurance	1950
Farm Tenancy Legislation	1937	Regulation of Natural Gas	1954
Federal Courts	1948	Religion and the State	1949
Federal Employers' Liability Act†	1953	River Basin Development	1957
Federal Income and Estate Taxation	1940	School Pupils and the Law	1955
Federal Powers Over Crime	1934	Secured Commercial Financing	1948
Financial Protection for the Motor		Securities Act†	1937
Accident Victim	1936	Sentencing	1958
Financing Small Business	1945	Sex Offenses	1960
Food, Drug, and Cosmetic Legislation	1939	Sherman Antitrust Act and Its	
Governmental Marketing Barriers	1941	Enforcement	1940
Government Tort Liability	1942	Small Business	1959
Hemispheric Trade	1941	State Trading†	1959
Home Financing	1938	Trade-Marks in Transition	1949
Housing	1947	Transportation†	1959, 1960
Immigration	1956	"Unauthorized Practice of Law"	
Instalment Selling	1935	Controversy	1938
Institutional Investments	1952	Unemployment Compensation	1936
International Human Rights†	1949	Urban Housing and Planning	1955
International Trade Barriers	1946	Wage Earners' Life Insurance	1935
Interterritorial Freight Rates	1947	Wage and Hour Law	1939
Investment of Trust Funds	1938	War Claims	1951
Labor Dispute Settlement	1947	War Contract Renegotiation	1943
Labor in Wartime	1942	War Contract Termination†	1944
Land Planning in a Democracy	1955	Water Resources	1957

*Subscriptions:* \$7.50 per year (\$8.00 foreign; \$7.65 Canada; \$7.85 Pan-America).

*Single Copies:* \$2.50 each (\$2.65 foreign, \$2.55 Canada, \$2.60 Pan-America). Copies of all back issues are available.

*Bulk Orders:* On orders for ten or more copies of a single issue a discount of 20 per cent is applicable, f.o.b. Durham, N. C.

*Complete sets:* Arrangements can be made to supply complete sets, unbound, at a discount of 20 per cent from the combined price for the individual issues, f.o.b. Durham, N. C.

† Published in two parts, priced separately.

## LAW AND CONTEMPORARY PROBLEMS

DUKE STATION

DURHAM, NORTH CAROLINA