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*,[1] 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.[2] 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.[3]

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.[4] 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.[5] 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

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[1] 251 N.C. 590, 112 S.E.2d 118 (1960).

[2] *Id.* at 593, 112 S.E.2d at 121.

[3] *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.

[4] 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).

[5] 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,[6] nearly all courts apply the adversary requirement to independent suits between former co-parties.[7]

[6] 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.

[7] 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.[8] 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.[9] Co-defendants should be allowed to direct their trial strategy against the plaintiff without prejudicing their right to subsequently litigate their independent claims.[10] 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).

[8] 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).

[9] 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).

[10] *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.[11] A co-defendant may also choose to default or consent to judgment due to personal motives or a small amount in controversy.[12] 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."[13]

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.

[11] 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).

[12] 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).

[13] 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.[14] 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.[15] 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.[16] This result is often reached by

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

[14] 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).

[15] 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).

[16] 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.[17] The dissent in the instant case stresses the necessity of such a differentiation.[18]

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

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the error of the court." 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)).

[17] 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.

[18] Pack v. McCoy, 251 N.C. 590, 595, 112 S.E.2d 118, 122 (1960).

[19] See Burgess v. Cousider 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.

[20] 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).

[21] See 4 WIGMORE, EVIDENCE § 1061 (3rd ed. 1940); *cf.*, MCCORMICK, EVIDENCE

consent judgments should receive comparable treatment.[22]

Applying collateral estoppel to consent judgments discourages settlements by making the use of the device less desirable.[23] A party will be less willing to settle small claims for fear of the effect on future litigation.[24] 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.[25] 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.[26] The instant case, blindly following a single precedent,[27] 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.

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§ 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).

[23] *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).

[23] 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).

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

[25] 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.

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

[27] Lumberton Coach Co. v. Stone, 235 N.C. 619, 70 S.E.2d 673 (1952).

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