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character and repute, evidence of character and repute may, if the court thinks it fit, be admitted as evidence bearing on the question whether the accused is or is not leading persistently a dishonest or criminal life." If the accused challenges any statement, the judge has two alternatives. He must either disregard the challenged statement,³⁹ or require legal proof of it.⁴⁰ Such a procedure accommodates both interests by allowing the judge to consider all unchallenged information, while at the same time insuring its accuracy by requiring proof of those statements which are challenged.

While the decision in the *Pope* case worked no obvious injustice on the particular defendant, its limited protection to defendants in general should provoke serious legislative attention to the possible adoption of a statutory presentence procedure. This procedure, while reserving the necessary discretion in the sentencing judge, should be geared to insure the utmost accuracy of any information, oral or written, which is offered in aggravation or mitigation of punishment. New concepts of administering sentences should not neglect the protection of the individual they seek to benefit.

WILLIAM E. SHINN, JR.

Estoppel by Judgment—Client Not Estopped in Action Against Attorney

A resident of Virginia and his wife engaged a North Carolina attorney to defend them in an action brought against them in North Carolina. The attorney failed to file any pleadings and a default judgment was entered against his clients. Subsequently, they employed other counsel and moved to set aside the default judgment on the ground of excusable neglect.¹ The attorney also retained counsel and joined in the prosecution of the motion. The court found that the neglect of the attorney was not attributable to his clients,² but

³⁹ *Rex v. Campbell*, 6 Crim. App. R. 131, 132 (1911).

⁴⁰ *Ibid.*

¹ N.C. GEN. STAT. § 1-220 (1953) provides: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment . . . taken against him through his mistake . . . or excusable neglect . . ."

² If a party has employed counsel and given him the necessary information about the case, the attorney agreeing to file an answer and protect his interest, failure of the attorney to perform his duty is excusable neglect on the part of the client. *Gunter v. Dowdy*, 224 N.C. 522, 31 S.E.2d 524 (1944); *Edwards v. Butler*, 186 N.C. 200, 119 S.E. 7 (1923); *Mann v. Hall*, 163 N.C. 50, 79 S.E. 437 (1913).

refused to set aside the judgment because they had no meritorious defense to the prior action.³ Rather than appealing from the order denying the motion, the clients instituted the instant action against the attorney, alleging that by reason of his negligence in the first action they had been substantially damaged.

As an affirmative defense the attorney pleaded an estoppel by judgment. He contended that it had been determined by final judgment in a court of competent jurisdiction that plaintiffs had no meritorious defense in the first action.⁴ Plaintiffs moved to strike this defense. The court ruled that the findings by the court which refused to set aside the default judgment did not constitute an estoppel. The defense was ordered stricken and on appeal this was affirmed.⁵

An estoppel by judgment differs from *res judicata* in that the latter refers to the conclusive effect of a judgment upon an adjudicated *cause of action*, and the former refers to the judgment's conclusive effect upon *issues* that were litigated and necessarily adjudicated by the judgment in litigation involving a different cause of action.⁶

It is fundamental that a final judgment, when rendered on the merits by a court of competent jurisdiction, is conclusive of rights,

³ In a proceeding to set aside a default judgment the court determines, as a matter of law, whether or not there was excusable neglect, and whether or not the facts alleged would constitute a meritorious defense if proven in a trial on the merits. *Helderman v. Hortsell Mills Co.*, 192 N.C. 626, 135 S.E. 627 (1926); *Gaylord v. Berry*, 169 N.C. 733, 86 S.E. 623 (1915). The judgment cannot be set aside unless the moving party can show both excusable neglect, and that he has a meritorious defense. *Greitzer v. Eastman*, 254 N.C. 752, 119 S.E.2d 884 (1961); *Moore v. Deal*, 239 N.C. 224, 79 S.E.2d 507 (1954). But even though it may be determined that there was excusable neglect and a meritorious defense, it is within the discretion of the court to set the judgment aside or not. The decision is not subject to review unless it appears there was an abuse of discretion. *Allen v. McPherson*, 168 N.C. 435, 84 S.E. 766 (1915); *Pepper v. Clegg*, 132 N.C. 312, 43 S.E. 906 (1903).

⁴ "In an action by a client against his attorney, the attorney is not liable for negligence in the conduct of litigation, where notwithstanding such negligence in defense of a suit, the client has no meritorious defense." *Masters v. Dunstan*, 256 N.C. 520, 523, 124 S.E.2d 574, 576 (1962). This logically follows, since where there is no meritorious defense the attorney's negligence results in no damage.

⁵ *Masters v. Dunstan*, 256 N.C. 520, 124 S.E.2d 574 (1962).

⁶ RESTATEMENT, JUDGMENTS § 68, comment *a* (1942). This distinction is a technical one which is not always observed in the language of the court's decisions. See *Cannon v. Cannon*, 223 N.C. 664, 28 S.E.2d 240 (1943); *Southern Distrib. Co. v. Carraway*, 196 N.C. 58, 144 S.E. 535 (1928).

questions, and facts in issue as to all *parties* and their *privies* in all other actions involving the same matter.⁷ This principle is based on the "mutuality" concept and requires a former judgment to be mutually binding upon the parties before it can be used as an estoppel or is *res judicata*.⁸ A party will not be bound by a former judgment unless he could use it for protection, or for the foundation of a claim, had the judgment been decided the other way.⁹

The doctrine of mutuality is firmly established in North Carolina,¹⁰ and is recognized and applied by the majority of jurisdictions.¹¹

⁷ *Bryant v. Shields*, 220 N.C. 628, 18 S.E.2d 157 (1942); *Bruton v. Carolina Power & Light Co.*, 217 N.C. 1, 6 S.E.2d 822 (1940); *Gay v. Stancill*, 76 N.C. 369 (1877).

⁸ Comment, 34 N.C.L. Rev. 458 (1956).

⁹ *Queen City Coach Co. v. Burrell*, 241 N.C. 432, 85 S.E.2d 688 (1954); *Meacham v. Larus & Bros. Co.*, 212 N.C. 646, 194 S.E. 99 (1937); *Armfield v. Moore*, 44 N.C. 157 (1852).

A judgment in rem is generally taken as an exception to the mutuality doctrine, since it is binding on all those having an interest in the subject matter. But the fact that in rem judgments are good against the world actually brings them within the limits of the mutuality doctrine. Comment, 34 N.C.L. Rev. 458 (1956). *But see* *Current v. Webb*, 220 N.C. 425, 17 S.E.2d 614 (1941), where a former decision as to the residence of *D* was held to be in the nature of a judgment in rem and was *res judicata* when *D* was sued by a different plaintiff. Both cases involved a motion to quash the purported service of summons on *D*, and the facts of each case were identical. Service in both cases was made by the same officer at the same time. But the parties were not the same, and there was no showing of privity.

¹⁰ *Allred v. Webb*, 135 N.C. 443, 47 S.E. 597 (1904), has been cited as indicating that the mutuality requirement may lead to some unusual results. Comment, 34 N.C.L. Rev. 458, 464 (1956). In that case *X* died leaving nine heirs at law, but prior to her death she had executed a deed for the land in controversy to one of them, *D*. Another heir, *A*, in a former suit against *D*, alleged *X* did not have sufficient mental capacity to execute the deed, and the jury so found. The deed was declared void and ordered cancelled. Subsequently, the heirs brought a partition proceeding against *D*, alleging that each was entitled to a one-ninth interest in the property. The court ruled that the prior judgment was good only between *A* and *D*, since the estoppel must be mutual.

In a vigorous dissent, Chief Justice Clark argued that the former judgment was a final cancellation of the defendant's title, binding him against all parties. *But see* *First Nat. Bank v. McCaskill*, 174 N.C. 362, 93 S.E. 905 (1917), where the Chief Justice wrote an opinion on similar facts, but said such a judgment could not be pleaded as an estoppel.

¹¹ For a collection of cases, see *Annots.*, 23 A.L.R.2d 710 (1952); 133 A.L.R. 181 (1942). See generally *RESTATEMENT, JUDGMENTS* § 96, comment *a* (1942). Those who advocate the same issue rule advance the following rational. "The requirement that in order to be bound by a judgment a person must have had his day in court, say the critics of the mutuality doctrine, is a requirement of due process and the only necessary limitation on the persons who may be bound by, or entitled to the benefit of, a judgment's conclusive force. Thus when *A* obtains a judgment against *B* and attempts

There is, however, a long recognized exception to the rule where the liability of a defendant is dependent upon the liability of another—or on the existence of some culpable act of another—that has been judicially determined not to exist in other litigation by the same plaintiff, but to which the defendant was not a party nor privy. The theory¹² of this exception can be illustrated as follows: Assume that *A* and *B* are both liable, if at all, on the basis of the same factual situation, and the liability of one is derived from the liability of the other *because of some legal-relationship between them*. *P* sues *A* and obtains an adverse judgment, necessarily adjudicating that no primary liability towards *A* arose from the factual situation involved. In such a case *P* is precluded from retrying the same issue in a suit against *B*. Only those situations involving derivative liability, based on a legal relationship between the person invoking the judgment and a party to it are included in this exception, and it permits only defensive use of prior judgments.

This exception is also well recognized in North Carolina, and the court has held that where the relationship between two parties is analogous to that of principal and agent, or master and servant, or

to use the judgment to bind *X*, who was neither party nor privy to the *A-B* litigation, *X* is not bound because the 'day in court' requirement is not fulfilled. But in litigation between *X* and *B*, the opponents of mutuality say that *B* has had his day in court (against *A*) and lost; therefore no logical reason exist to prevent *X* from using *A's* judgment to conclude *B* on issues that the judgment necessarily adjudicated. And this is true whether *X* is a defendant, using the *A-B* judgment to bar *B's* suit against him, or a plaintiff using the judgment to preclude a defense by *B*." Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 307 (1961).

But "the contention that when *X* uses *A's* judgment against *B*, *B* has had his day in court, clearly begs the question: his day in court against whom? When *B* was a party to the suit in which judgment was rendered, and *X* was a stranger to that suit, *B* has no more had his day in court against *X* than if *X* had been a party to the suit, and *B* a stranger to it." Moore & Currier, *supra* at 310. Because of the sum involved in *A's* claim, or other more personal reason, *B* may have been quite willing to allow *A's* judgment against him, but not *X's*; and to preclude *B* from defending *X's* suit would in effect deny him his day in court.

¹² Moore & Currier, *supra* note 11, discusses two general theories supporting this exception, but admits that the broader theory includes the narrower one. The narrower theory, briefly, is that "an indemnitee against whom a claim is asserted on the basis of secondary liability derived from the primary liability of his indemnitor is normally permitted to invoke the conclusive effect of a judgment adverse to the same plaintiff rendered in a suit between him and the indemnitor, although the indemnitee-defendant was neither party nor privy to the suit, and would not be bound had the judgment gone the other way." Moore & Currier, *supra* note 11, at 311. See generally RESTATEMENT, JUDGMENTS §§ 96-99 (1942).

employer and employee, a judgment in favor of either in an action brought by a third party, rendered upon a ground equally applicable to both, will be accepted as conclusive against the claimant's right of action against the other.¹³

Another exception is stated in the Restatement of Judgments.¹⁴ Under this rule, one who controls an action, but is not a party to it, is bound as if he were a party, on the principle that a person is entitled only to one adjudication of an issue.¹⁵

In the principal case it was recognized that the estoppel was not mutual, because an opposite finding on the question of meritorious defense could not have estopped the attorney from denying negligence on his part and asserting want of a meritorious defense. Thus, apply-

¹³ *Leary v. Virginia-Carolina Joint Stock Land Bank*, 215 N.C. 501, 2 S.E.2d 570 (1939).

"[W]here the doctrine of *respondet superior* is or may be invoked, the injured party may sue the agent or servant alone, and if a judgment is obtained against the agent or servant and such judgment is not satisfied, the injured party may bring an action against the principal or master. In such case, however, the recovery against the principal or master may not exceed the amount of the recovery against the agent or servant On the other hand, if the agent or servant satisfies the judgment against him or obtains a verdict in his favor, no action will lie against the principal or master." *Thompson v. Lassiter*, 246 N.C. 34, 38, 97 S.E.2d 492, 496 (1957).

At times the court has reached the proper result under this principle without referring to it. In *Crosland-Cullen Co. v. Crosland*, 249 N.C. 167, 105 S.E.2d 655 (1958), the plaintiff was the initial beneficiary of X's life insurance policy, but assigned it to X's wife. When X died the proceeds of the policy were paid to his widow. Plaintiff sued the insurance company alleging that the assignment was invalid. The assignment was found to be valid and there was a judgment for the insurer. In a subsequent suit against the widow, it was held that the judgment in favor of the insurer established the validity of the assignment as far as plaintiff was concerned, and it mattered not that the widow was not a party. Although the court spoke in terms of the "same issue" rule, it would seem that the relationship of indemnitee-indemnitor between the insurance company and the widow should support the result.

Savage v. McGlawhorn, 199 N.C. 427, 154 S.E. 673 (1930), was apparently decided on an in rem theory. Plaintiff P sued partners A and B for breach of contract, and A set up a former recovery against P for breach of the same contract. It was held that although B was not a party to the original action this did not prevent the former judgment from being res judicata, since there was but one contract. Again, the partnership relation between A and B should have supported this result.

¹⁴ "A person who is not a party but who controls an action, individually or in co-operation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound." RESTATEMENT, JUDGMENTS § 84 (1942).

¹⁵ *Id.* at comment a (1942).

ing the mutuality concept, the finding made would not estop the plaintiffs.¹⁶

It is obvious that the exception to the mutuality rule, which is based upon liability derived from some legal relationship between the parties, does not encompass the principal case. This exception is invoked only against third party plaintiffs and not between those liable on the same factual situation because of the legal relationship.

The effect of the attorney's control over the proceeding to set aside the default judgment is not so obvious. The attorney argued that his participation in the motion put him in privity with plaintiffs. The court, however, ruled that there was no privity between them,¹⁷ and that mere participation in the motion created no estoppel by judgment between plaintiff and one not a party.

In support of this latter ruling the court quoted the headnote from *Falls v. Gamble*.¹⁸

No estoppel of record is created against one not a party to the record, even though he had instigated the trespass, on account of which the action was brought, aided in defence of the action, employed counsel, introduced his deeds in evidence and paid the cost, and though he and the present defendant claimed by deeds under the present trespasser.¹⁹

The *Falls* case is a strong decision to the effect that even one who instigates and controls the action is not bound by the judgment unless he is a party thereto.²⁰ But that decision was handed down

¹⁶ Even if the court had found excusable neglect and a meritorious defense and still refused to set aside the default judgment in exercise of its discretion, this could not estop defendant from asserting want of a meritorious defense without denying him his day in court.

¹⁷ "When used with respect to estoppel by judgment, the term 'privity' denotes mutual or successive relationship to the same rights of property." *Queen City Coach Co. v. Burrell*, 241 N.C. 432, 435, 85 S.E.2d 688, 691 (1954).

¹⁸ 66 N.C. 455 (1872).

¹⁹ *Id.* at 455.

The court also cited *Meacham v. Larus & Bros. Co.*, 212 N.C. 642, 194 S.E. 99 (1937), where *A* and *B*, both passengers in an automobile, were injured when their automobile collided with one driven by *D*. *A* sued *D* for damages and *B* testified for *A* at the trial, which resulted in a judgment adverse to *A*. *B* then sued *D* who pleaded the former judgment as res judicata. It was held that *B*'s participation in the former trial created no estoppel against him. While the result is the same as in the principal case, the difference in one's participation as a witness and as attorney would seem great enough to render this case of doubtful value as precedent.

²⁰ In *Falls v. Gamble*, 66 N.C. 455 (1872), *A* and *B* both claimed under

ninety years ago, and the court failed to mention that more recent decisions²¹ have recognized the Restatement of Judgments rule²² that control is an exception to the general requirement of parties or privies.

Nevertheless, the result of the principal case seems correct for reasons of sound administrative policy. The control exercised by the attorney over the proceeding to set aside the default judgment is all the more reason to deny his plea of estoppel when he is later sued by his former client. To apply the exception to this case would in effect allow the attorney who controlled the proceeding to work toward a result beneficial to his own interest, but detrimental to his clients. Since the attorney was acting in a representative capacity, this would be a violation of his fiduciary obligations.²³

SAMUEL S. WOODLEY, JR.

deeds from *X*. *A* brought an action against *B* to recover the land and introduced both deeds from *X* into evidence, attempting to prove that the deed to *B* was given while *X* was an infant of ten. *B* pleaded as an estoppel a former suit by *B* against *X* for trespass, where *A* had instigated the trespass then complained of, aided in defending that suit, employed counsel, and introduced his deed from *X* in evidence. The jury decided in the former action that *X* was not an infant when he delivered his deed, which passed title to *B*. *A* admitted his part in the former action. Although the same questions were involved in both actions the court found no privity between *A* and *X*, holding that *A*'s participation in that action made him an accessory before and after the act, but not a sufficient party to be estopped by it.

²¹ In *Thompson v. Lassiter*, 246 N.C. 34, 97 S.E.2d 492 (1957), *A* brought an action against *B* to recover damages suffered by him in a collision between an automobile driven by *B* and a family purpose automobile owned by *A* and driven by his son. *A* alleged damage to his automobile, medical expenses for his son, and loss of his son's services. In a former action by *C*, who was injured in the same accident, against *B*, *A*'s son was made a party by *B* for purposes of contribution. *A* participated in that suit as guardian ad litem, and both *B* and *A*'s son were found guilty of negligence. *B* pleaded the former action as an estoppel, and the court agreed, quoting the Restatement of Judgments.

Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co., 238 N.C. 679, 79 S.E.2d 167 (1953), recognized the Restatement of Judgments rule as an exception, but held the facts alleged were insufficient to invoke it. See generally Annot., 13 A.L.R. 9 (1942).

²² *Falls v. Gamble*, 66 N.C. 455 (1872), would seem to fall within this rule. See RESTATEMENT, JUDGMENTS § 84, comment *b* (1942). "The rule also applies to one who participates in an action because an issue in the action is the tortious quality of an act on which his liability or freedom from liability depends, or because *the validity of a deed to which he claims title is involved.*" (Emphasis added.)

²³ One case has been found, on comparable facts with the principal case, where a former finding was held conclusive in an action between an attorney and his former client, but in that case the finding of fact in the prior suit was to the best interest of the client. In *Boynton v. Brown*, 103 Ark. 513, 145 S.W. 242 (1912), attorney *A* brought suit against *B* for attorney's fees