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CONSENT JUDGMENTS AS COLLATERAL ESTOPPEL

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Where the parties settle a dispute and a court enters a judgment upon the parties' consent, that judgment is in many ways like a judgment entered after full contest upon a jury verdict or a court's finding. It may be enforced in the same way as any other judgment.¹ It is no more subject to collateral attack.² The original claim may become merged in it or barred by it just as that claim would be in a judgment after contest.³ There is a serious conflict in the cases, however, on the

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¹ See Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 HARV. L. REV. 1314, 1316-19 (1959).

² E. Ingraham & Co. v. Germanow, 4 F.2d 1002 (2d Cir. 1925); Davis v. Leach, 121 F. Supp. 58 (E.D. Tex. 1954); Lewis v. St. Louis, T.M. & So. Ry., 107 Ark. 41, 154 S.W. 198 (1913); Crouse v. McVickar, 207 N.Y. 213, 100 N.E. 697 (1912); La Londe v. Hubbard, 202 N.C. 771, 164 S.E. 359 (1932); Note, 72 HARV. L. REV. 1314, 1321 (1959). *But cf. id.* at 1324-34.

³ Lawlor v. National Screen Serv. Corp., 211 F.2d 934 (3d Cir. 1954), *rev'd*, 349 U.S. 322 (1955) (accepting principle but finding new cause of action); Reconstruction Fin. Corp. v. Central Republic Trust Co., 128 F.2d 242 (7th Cir.), *cert. denied*, 317 U.S. 660 (1942); Rector v. Suncrest Lumber Co., 52 F.2d 946 (4th Cir. 1931); Twogood v. Pence, 22 Iowa 543 (1867); Law v. Cleveland, 213 N.C. 289, 195 S.E. 809 (1938); Barraco v. Courthouse Pharmacy, Inc., 280 S.W. 307 (Tex. Civ. App. 1925). Such a result generally coincides with the intention of the parties. When a controversy between them is compromised, they usually mean to settle all aspects of it. They may expressly stipulate to this effect, as in Nashville, C. & St. L. Ry. v. United States, 113 U.S. 261 (1885). Even if they do not it is often a reasonable inference that this was in fact their intention. See Barraco v. Courthouse Pharmacy, Inc., *supra* at 309 (dictum); Note, 72 HARV. L. REV. 1314, 1319 (1959). Occasionally, however, the language and other conduct of the parties make it clear that under the circumstances of the case they did not intend a complete or a permanent

question whether a consent judgment binds the parties collaterally upon facts which had been in issue in the action which was settled. One line of cases treats the consent judgment as implying a determination of those issues in the same way as would a judgment entered on the general verdict of a jury.⁴ Thus a consent judgment for plaintiff in a negligence case was held in *Biggio v. Magee*⁵ to imply a finding of defendant's negligence and the absence of negligence on plaintiff's part. Other courts reject this result, reasoning that a consent judgment implies no determination by the court of any issues in the case.⁶ It is

settlement of the controversy. Where this can be shown by admissible evidence it may (and should) prevent a consent judgment from being given the usual effect of merger or bar. See *Shell Petroleum Corp. v. Hess*, 190 Okla. 669, 126 P.2d 534 (1942); *Empire Oil & Ref. Co. v. Chapman*, 182 Okla. 639, 79 P.2d 608 (1938); *Reeves v. Philadelphia Gas Works Co.*, 107 Pa. Super. 422, 164 Atl. 132 (1933).

⁴ *International Bldg. Co. v. United States*, 199 F.2d 12 (8th Cir. 1952), *rev'd on this ground*, 345 U.S. 502 (1953); *O'Cedar Corp. v. F. W. Woolworth Co.*, 66 F.2d 363 (7th Cir. 1933), *cert. denied*, 291 U.S. 666 (1934); *Biggio v. Magee*, 272 Mass. 185, 172 N.E. 336 (1930); *Kelleher v. Lozzi*, 7 N.J. 17, 80 A.2d 196 (1951); *Public Serv. Elec. & Gas Co. v. Waldrup*, 38 N.J. Super. 419, 119 A.2d 172 (App. Div. 1955); *Larme Estates v. Omnichrome Corp.*, 250 App. Div. 538, 294 N.Y. Supp. 861 (1937); *Tillman v. National City Bank*, 118 F.2d 631 (2d Cir. 1941) (alternative ground or dictum); *ABC Truck Lines, Inc. v. Kenemer*, 247 Ala. 543, 25 So. 2d 511 (1946) (dictum); 2 FREEMAN, JUDGMENTS § 663 (5th ed. 1925). See dissent in *Taylor v. Hawkinson*, 47 Cal. 2d 893, 897, 306 P.2d 797, 800 (1957), and many of the broad statements in Annot., 2 A.L.R.2d 514 (1948) (e.g., those on 520, 521-28, 543-44). In *McKnight v. Pettigrew*, 141 W.Va. 506, 91 S.E.2d 324 (1956), the court assumed that the judgment would have collateral estoppel effect.

⁵ 272 Mass. 185, 172 N.E. 336 (1930); *accord*, *Kelleher v. Lozzi*, *supra* note 4; *ABC Truck Lines, Inc. v. Kenemer*, *supra* note 4 (dictum). *Biggio v. Magee* has become something of a leading case. See BLUME & JOINER, JURISDICTION AND JUDGMENTS: CASES AND STATUTES 504 (1952); FIELD & KAPLAN, MATERIALS ON CIVIL PROCEDURE 941 (1953). The only contemporaneous law review note upon it, however, appears in 10 B.U.L. REV. 565 (1930) (decision legally "sound," but "fail[ed] miserably in doing 'moral justice'").

As a result of this decision the Massachusetts legislature passed a statute providing that a consent judgment shall not bar an action by the original defendant "unless [the] agreement was signed by the defendant in person," where the payment of the original judgment was secured by a bond of a motor vehicle liability policy as defined in the Massachusetts compulsory insurance act. Mass. Acts 1932, ch. 130, § 1. The Massachusetts court construed this statute narrowly. Liability insurance is not required by the compulsory act to cover property damage. And where the consent judgment was for property damage only, the court held the statute inapplicable and followed the rule in *Biggio v. Magee*. *Macheras v. Syrmopoulos*, 319 Mass. 485, 66 N.E.2d 351 (1946). The next year the legislature overruled *Macheras* also. MASS. ANN. LAWS ch. 231, § 140A (1952).

The *Biggio* case was followed in *Long v. MacDougall*, 273 Mass. 386, 173 N.E. 507 (1930). After that decision, Long sued his insurer for its failure to notify Long of the proposed consent judgment in the first action and for destroying Long's claim without his authorization, by consenting to entry of judgment therein. *Long v. Union Indem. Co.*, 277 Mass. 428, 178 N.E. 737 (1931). The Supreme Judicial Court upheld the sustaining of a demurrer to the complaint. "An insurance company [under policy provisions generally to be found] . . . has an absolute right to dispose of an action brought against its assured . . . in such a way as may appear to it for its best interests. It is not bound 'to consult the interest of the assured to the prejudice of its own interests in case of a conflict between the two.'" *Id.* at 430, 178 N.E. at 738.

⁶ Motor vehicle cases: *Fruehauf Trailer Co. v. Gilmore*, 167 F.2d 324 (10th Cir. 1948); *Daniel v. Adorno*, 107 A.2d 700 (D.C. Munic. App. 1954); *Hellstrom v. McCollum*, 324 Ill. App. 385, 58 N.E.2d 295 (1944); *Burgess v. Consider H. Willett*,

the purpose of this Article to contend that the latter rule is right and that a consent judgment should not be given any effect as collateral estoppel except in the rare case where it may fairly be said that the parties intended this effect.

I

A consent judgment has a dual aspect. It represents an agreement between the parties settling the underlying dispute and providing for the entry of judgment in a pending or contemplated⁷ action. It also represents the entry of such a judgment by a court—with all that this means in the way of committing the force of society to implement the judgment of its courts. Because of the contractual aspect of a consent judgment it is always relevant, in determining the effect of the judgment, to ascertain the intent of the parties in accordance with the usual rules for construing their agreements.⁸ Once this has been ascertained two questions remain: (1) Is there any reason of policy why the law will not implement this intent? (2) Will the entry of judgment carry with it an effect beyond the intent of the parties (that is, either an effect counter to it or an effect with respect to which the intent of the parties was neutral)?

The first question may arise in a case where the parties have expressed the intent to be bound collaterally upon a given fact, or in the

Inc., 311 Ky. 745, 225 S.W.2d 315 (1949); cf. *Taylor v. Hawkinson*, 47 Cal. 2d 893, 306 P.2d 797 (1957), 56 MICH. L. REV. 117; *Perry v. Faulkner*, 98 N.H. 474, 102 A.2d 908 (1954).

Tax: *United States v. International Bldg. Co.*, 345 U.S. 502 (1953).

Antitrust: *Lawlor v. National Screen Serv. Corp.*, 211 F.2d 934 (3d Cir. 1954), *rev'd*, 349 U.S. 322 (1955) (The Supreme Court expressly stated, however, that it was "in accord with the decision below" on this point. 349 U.S. at 327.).

Patent infringement: *American Radium Co. v. Hipp. Didisheim Co.*, 279 Fed. 601 (S.D.N.Y. 1921) (alternative holding), *aff'd mem.*, 279 Fed. 1016 (2d Cir. 1922).

Miscellaneous: *Owsiejko v. American Hardware Co.*, 137 Conn. 185, 75 A.2d 404 (1950).

This is the prevailing view of modern commentators. RESTATEMENT, JUDGMENTS § 68 and comments (1942); Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217, 226-28 (1954); Note, *Collateral Estoppel by Judgment*, 52 COLUM. L. REV. 647, 656-57 (1952); Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 840 n.163 (1952); see Note, 72 HARV. L. REV. 1314, 1320 (1959); cf. Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 5-7 (1942).

⁷ Where one of the parties to a compromise is a minor, the settlement often contains an agreement for friendly suit and judgment so that the other party may be protected from infirmities in the agreement stemming from the minor's lack of capacity to contract. *Panel on Settlement Procedures*, 11 ARK. L. REV. 54, 55 (1956-7). A recent example is *Daniel v. Adorno*, *supra* note 6.

⁸ See Annot., 2 A.L.R.2d 514, 520, 544 (1948). Of course the rules for construing contracts are not always concerned with finding the subjective intention of the parties. The word is used here simply as a shorthand way of referring to the meaning which the law will give to the agreement in the light of all the admissible evidence. See generally 1 CORBIN, CONTRACTS §§ 106, 107 (1950); 3 *id.* § 538; RESTATEMENT, CONTRACTS §§ 226-36 (1932).

opposite case, where they have expressed an intent not to be so bound. Ordinarily the parties no doubt may elect to be bound,⁹ though doubt may arise in the exceptional situation where the fact upon which their agreement turns would not be binding upon them even if found by a court after full contest. An example would be a fact upon which the court's jurisdiction depends where "the policy against the court's acting beyond its jurisdiction is strong."¹⁰

Where the parties have expressed an intent not to be bound collaterally by a given fact, the first question coalesces with the second; it becomes a phase of the question whether entry of judgment upon the agreement will inexorably carry with it an effect beyond what the parties intended. Clearly courts may impose such a condition upon the granting of their judgments which commit the power of the society they represent. If parties want to prescribe limits upon the effect of their agreements, they may do so (within boundaries not here material) so long as their agreements remain private ones. But where they have sought the further sanction afforded by entry of a consent judgment, society is warranted in exacting appropriate conditions as the price of extending this sanction. The question is not whether society may appropriately impose conditions on a consent judgment. Clearly it may. The questions are rather whether society does impose this particular condition, and whether it should do so.

II

The rules of *res judicata* and collateral estoppel do not require that a consent judgment bind the parties to facts which were originally in issue in the action that was settled.

Res judicata is a term which has been given a good many different meanings. Current usage gives it a broad meaning which covers all the various ways in which a judgment in one action will have a binding effect in another. This includes the effect of the former judgment as a bar or merger where the later action proceeds on all or part of the very claim which was the subject of the former. It also includes what has come to be known as collateral estoppel: the effect of a former judgment

⁹ See Note, 72 HARV. L. REV. 1314, 1320-21 (1959).

¹⁰ RESTATEMENT, JUDGMENTS § 10(2) (e) (1942). See also *Addressograph-Multigraph Corp. v. Cooper*, 156 F.2d 483, 485 (2d Cir. 1946) ("[T]he public interest in a judicial determination of the invalidity of a worthless patent is great enough to warrant the conclusion that a defendant is not estopped by a decree of validity, at least when the decree was by consent, unless it is clear that in the litigation resulting in the decree the issue of validity was genuine."); *Pierson v. Pierson*, 15 N.J. Misc. 117, 121-22, 189 Atl. 391, 393-94 (Ch. 1937) (In suit for divorce, *res judicata* effect not given to consent judgment in prior maintenance suit since this would "sanction divorces by consent, in contravention of the public policy of the state.").

in a later action based upon a different claim or demand.¹¹ Probably the most famous formulation of the distinction was made by Mr. Justice Field in *Cromwell v. County of Sac*:¹²

"In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."¹³

Where collateral estoppel is involved "the inquiry must always be as to the point or question actually litigated and determined in the original action Only upon such matters is the judgment conclusive in another action."¹⁴

Later decisions require in addition that the determination of the "point or question" must have been necessary to the decision of the case.¹⁵ Thus where the former negligence action ended in a defend-

¹¹ See *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 326 (1955); RESTATEMENT, JUDGMENTS, Introductory Note ch. 3, § 68 (1942); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 2, 3 (1942). Compare RESTATEMENT, JUDGMENTS, §§ 47, 48 (1942).

¹² 94 U.S. 351 (1876).

¹³ *Id.* at 352-53.

¹⁴ *Id.* at 353. Thus it has been held that a judgment by default is no estoppel, in an action upon a different claim, of facts alleged in the complaint. *Crowder v. Red Mountain Mining Co.*, 127 Ala. 254, 29 So. 847 (1900). This was the position taken by Mr. Justice Field in *Cromwell v. County of Sac*, 94 U.S. 351, 356-57 (1876) (dictum). Cf. *Adams v. Adams*, 25 Minn. 72 (1878). It is the position taken by the commentators in the notes and articles cited note 6 *supra*.

It has also been held that matters admitted in the pleadings, or otherwise not put in issue, in the former action do not become the subject of estoppel between the parties in a later action upon a different claim. *Schumacker v. Industrial Acc. Comm.*, 46 Cal. App. 2d 95, 115 P.2d 571 (1st Dist. Ct. App. 1941); *Savage v. Central Elec. Co.*, 59 Colo. 66, 148 Pac. 254 (1915); *Ohio Nat'l Life Ins. Co. v. Board of Education*, 387 Ill. 159, 55 N.E.2d 163 (1944), *cert. denied*, 323 U.S. 796 (1945); *Jacobson v. Miller*, 41 Mich. 90, 1 N.W. 1013 (1879); *Tudor v. Kennett*, 87 Vt. 99, 88 Atl. 520 (1913); *Howlett v. Tarte*, 10 C.B.N.S. 813 (C.P. 1861); cf. *Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Co.*, 250 N.Y. 304, 165 N.E. 456 (1929) (dictum). This, too, is the position taken by the commentators cited note 6 *supra*. See the majority and dissenting opinions in *Taylor v. Hawkinson*, 47 Cal. 2d 893, 306 P.2d 797 (1957).

¹⁵ *Cambria v. Jeffrey*, 307 Mass. 49, 29 N.E.2d 555 (1940); RESTATEMENT, JUDGMENTS § 68, comment *o* (1942).

ant's judgment pursuant to an explicit finding that plaintiff was contributively negligent, the same court's equally explicit finding that defendant was negligent was held not binding in a later suit on a different claim, because the second finding (though explicit) was not necessary to support the judgment even as an alternative ground.¹⁶

According to these cases a fact or point must have been litigated (by the parties), determined (by the tribunal), and necessarily so determined before the parties will be bound collaterally upon it. The prevalence, although not the universality, of these rules is attested by their adoption by the American Law Institute in the *Restatement of Judgments*.¹⁷ Let us see how they apply to consent judgments.

Consent judgments are by no means all alike; they may differ in many aspects. We may take for our starting point a typical, simple case: where the parties are fully competent to contract, where the subject of the action is generally thought of as a private dispute¹⁸ (for example, a negligence case), and where neither the compromise agreement nor the judgment sought contains any express recital of facts which are in issue and which may come into later controversy. In such a case the court which enters a consent judgment makes no inquiry into the wisdom of the parties' bargain. Still less does it make any determination upon the facts which were originally in issue in the action.¹⁹ "[T]he court does not inquire into the merits or the equities of the case. The only questions to be determined by it are whether the parties are capable of binding themselves by consent, and whether they have actually done so."²⁰ These questions, it may be conceded, call upon the judicial function. Once they are decided, however, the court's function is ministerial. The court may be compelled by mandamus to enter judgment upon the stipulation of the parties.²¹ The parties may not appeal from the judgment, "for the error in it, if there is any, is their own, and not the error of the court."²² The court may

¹⁶ It could not be an alternative ground for the judgment because its tendency is to work in the opposite way. No support for a judgment in defendant's favor can be had from a finding that defendant was negligent.

¹⁷ RESTATEMENT, JUDGMENTS § 68 and comments (1942).

¹⁸ The boundaries between private and public law are far from clear—even with respect to the illustration chosen. For instance, the title of the Shulman lectures given by Leon Green at the Yale Law School on February 23 and 24, 1959, was "Tort Law: Public Law in Disguise."

¹⁹ *West Va. Oil & Gas Co. v. Geo. E. Breece Lumber Co.*, 104 F. Supp. 5, 6 (W.D. La. 1952); *New York Cent. & H.R.R. v. T. Stuart & Son*, 260 Mass. 242, 248, 157 N.E. 540, 543 (1927); *Dulles v. Dulles*, 369 Pa. 101, 107, 85 A.2d 134, 137 (1952).

²⁰ *Risk v. Director of Insurance*, 141 Neb. 488, 496, 3 N.W.2d 922, 926 (1942).

²¹ *State ex rel. Carmichael v. Jones*, 252 Ala. 479, 41 So. 2d 280 (1949).

²² *Dora v. Lesinski*, 351 Mich. 579, 582, 88 N.W.2d 592, 594 (1958) (quoting *Cooley, J.*, in *Chapin v. Perrin*, 46 Mich. 130, 131, 8 N.W. 721, 722 (1881)); *cf.*

not properly enter a judgment which departs from the parties' agreement.²³

In such a case it is clear that the requirements for collateral estoppel as stated in many cases and in the *Restatement of Judgments* are not met. The parties have not litigated the matters originally put in issue; they have settled them. The court does not determine the matters originally put in issue; or if it assumes to do so, the determination is quite gratuitous and unnecessary. It is not surprising then that a good many courts and commentators hold that the parties are not bound collaterally upon any of the facts originally at issue in the first action.²⁴ Nevertheless there are decisions flatly to the contrary²⁵ and it is appropriate to examine the basis for them.

Before doing so, however, we should note two variations of the simple case stated above. The first of these is the case where the court is called upon to determine the propriety or wisdom of the settlement before it enters judgment; the second, the case where the parties have stipulated the existence or nonexistence of one or more of the facts originally in issue.

If one of the parties is a minor or otherwise under legal incapacity, a court will not enter judgment upon their agreement unless it is satisfied of the justice and fairness of the settlement.²⁶ Again if the action concerns a matter of public interest rather than a private controversy, a court will not enter judgment upon a settlement of the parties without being satisfied "that it is equitable and in the public interest."²⁷ In these situations, then, the entry of judgment involves the judicial function to a further degree than did the simple case. Yet even here the court is not called upon to determine the facts originally in issue but at most to estimate the weight of the opposing contentions and measure the likelihood that one set would prevail if the issues were fully contested. In the common case where the personal injury claim of a minor has been settled, for example, the court is not required to determine whether there was in fact negligence, lack of contributory

Massell v. Daley, 404 Ill. 479, 89 N.E.2d 361 (1949) (Stating general rule but noting exception where judgment entered on "attempts by State officials to contract with reference to the State revenue." *Id.* at 483-84, 89 N.E.2d at 363-64).

²³ Bryan v. Reynolds, 143 Conn. 456, 123 A.2d 192 (1956); Matthews v. Looney, 132 Tex. 313, 123 S.W.2d 871 (1939); cf. Williamson v. Williamson, 224 N.C. 474, 31 S.E.2d 367 (1944).

²⁴ See note 6 *supra*.

²⁵ See note 4 *supra*.

²⁶ Missouri Pac. Ry. v. Lasca, 79 Kan. 311, 99 Pac. 616 (1909). Cf. note 7 *supra*. Judicial approval is required in some jurisdictions as a condition to enforcing an agreement against a trustee, executor, administrator, or guardian. Note, 72 HARV. L. REV. 1314, 1329 (1959).

²⁷ United States v. RCA, 46 F. Supp. 654, 655 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943).

negligence, causal connection, and the like; but only whether, in view of the injury suffered, of the probable evidence, and of the chances of victory or defeat, the proposed settlement figure is a fair one. This too fails to satisfy the generally stated requirements for collateral estoppel. Here again the parties have not finally submitted the issues to the tribunal but have settled them; nor has the court been called upon to determine them—although its approval of the general fairness of the compromise *as a compromise* has been sought and obtained.²⁸

Even where the parties have stipulated to the existence or non-existence of certain facts and the judgment recites them expressly or by implication, the rules governing collateral estoppel do not require that these recitals be given binding effect between the parties subsequently pursuing different claims and demands against each other. We have seen that if the parties' agreement is construed to embrace such a binding effect their intent to be bound will generally be given effect;²⁹ but this is by virtue of the contractual aspect of the matter. The point here made is that if the *agreement* is not construed to call for such binding effect, then the *rules pertaining to judgments* do not require it.³⁰ This is so because the parties have not fully contested such an issue; they have agreed upon it instead of submitting it to the tribunal for determination.

If an allegation of one party is not denied or is admitted in the other party's responsive pleading, the weight of modern American authority probably holds that this admission in one action does not preclude the admitting party from contesting the allegation in a later action upon a different claim.³¹ If the admission is made by stipulation in the absence of an answering pleading, it is hard to see why the result should be different. A closer question is presented where the pleadings originally put the fact in issue and the issue or controversy as to that fact is thereafter removed by stipulation, which would be roughly

²⁸ See, e.g., *Persson v. United Parcel Serv., Inc.*, 202 Misc. 876, 110 N.Y.S.2d 865 (Sup. Ct. 1952) (personal injury); *Peoples Nat'l Bank v. Rogers*, 218 S.C. 11, 61 S.E.2d 391 (1950) (will contest); *Texas Employers Ins. Ass'n v. Grimes*, 153 Tex. 357, 269 S.W.2d 332 (1954) (wrongful death); *Donovan & McAllister, Consent Decrees in the Enforcement of Federal Anti-Trust Laws*, 46 HARV. L. REV. 885 (1933); *Isenbergh & Rubin, Antitrust Enforcement Through Consent Decrees*, 53 HARV. L. REV. 386, 388 (1940).

²⁹ See note 9 *supra* and accompanying text.

³⁰ *Cf. Empire Oil & Ref. Co. v. Chapman*, 182 Okla. 639, 641, 79 P.2d 608, 610 (1938), where, in holding that a second part of plaintiff's claim was not merged in a former consent judgment on the first part, the court said: "If they [the parties] did not have that intention, and neither led the other to believe it was full settlement of all damages, why should the law impose it upon them?"

³¹ See note 14 *supra*. In Note, 52 COLUM. L. REV. 647, 656 (1952), the author says: "This rule is generally accepted even by courts which consider a default judgment a proper basis for a plea of collateral estoppel—although the two positions are logically and practically inconsistent."

analogous to a later amendment of the pleadings so that a denial is replaced by an admission. Here the parties have removed the issue from the case before submitting the case to the tribunal. If a party may not in these circumstances avoid collateral estoppel upon that issue, that must be because of a rule which will not let him change his mind, and this in turn would rest either upon an insistence on consistency, or upon a judgment that whatever is gained from letting him change his mind is outweighed by the disadvantage put upon his adversary and upon the administration of justice where his mind is changed at so late a stage in the proceedings. Appraisal of this point belongs to the third part of this paper. It is enough for the present to note that there is support for the proposition that the parties would not be bound collaterally in such a case.³²

If then the prevailing rules of collateral estoppel do not require that the doctrine be applied to consent judgments of any kind other than those in which the parties have intended to be subsequently bound, we must inquire why some courts have found the doctrine applicable despite the absence of such contractual intent. Passing over those decisions that give no reasons for their result,³³ we shall find that some of the cases offer reasons which are altogether unsatisfactory in terms of doctrinal reasoning, while others reason from doctrinal premises which assume a broader operation of collateral estoppel than those we have been considering. We shall not, however, find any decisions in which the court has probed more deeply than the doctrinal level.

Two demonstrably unsatisfactory reasons are sometimes given. One may be called "the removal of ambiguity"; the other involves reliance on broad statements made in former cases where the problem of collateral estoppel was not before the court. These call for further treatment.

The matter of ambiguity. He who would have the advantage of collateral estoppel must show the existence of the conditions which render the doctrine applicable. This includes a showing that the point upon which collateral estoppel is claimed was actually determined in the former proceeding. And where it cannot be known whether the

³² See sources cited note 14 *supra* for point that there is no estoppel upon matters admitted by the pleadings in the former action. As we have seen, note 3 *supra*, a settlement is generally intended to embrace all items of the settled claim, so that courts may assume that a consent judgment was meant to operate as merger or bar in the absence of provision to the contrary. It is doubtful, however, that parties generally intend stipulations of fact to bind them in collateral matters unless they say so. It is therefore suggested that courts may not safely assume (or presume) that the parties intended collateral estoppel effect for stipulations of fact, in the absence of language or other proper evidence pointing affirmatively to such an intent.

³³ The point was, for example, assumed without discussion in *McKnight v. Pettigrew*, 141 W. Va. 506, 91 S.E.2d 324 (1956).

earlier judgment rested on the point now in issue or upon some other point, then the doctrine is unavailable.³⁴ Thus if judgment was entered on a general verdict for defendant in a negligence case, the judgment is equivocal: the jury may have based their verdict on plaintiff's contributory negligence, on the absence of defendant's negligence, or on the lack of a causal connection between defendant's negligence and the injury. If the ambiguity which lurks in such a judgment cannot be dispelled by admissible extrinsic evidence, the judgment cannot be used as an estoppel on any of the issues mentioned. A general verdict is not, however, always ambiguous as to all of its grounds. A plaintiff's verdict in a negligence case, for instance, must have involved a finding of defendant's negligence. It will therefore serve as the basis for an estoppel on this issue.

In holding collateral estoppel inapplicable to a consent judgment, an ambiguity in the compromise agreement and the judgment has sometimes been stressed.³⁵ And some decisions which apply collateral estoppel to consent judgments have been put on the ground that any such ambiguity has been removed, under the facts of those cases, because the agreement must have involved certain concessions and the judgment must have involved certain findings. A consent judgment for plaintiff in a negligence case, for example, has been held to imply a concession or finding of defendant's negligence.³⁶ It is submitted that both lines of cases proceed on faulty reasoning. The valid reasons for denying collateral estoppel effect to a consent judgment do not concern ambiguity at all, but rather the fact that there has been neither litigation nor determination of any of the original issues. And since ambiguity is not the reason for denying collateral estoppel here, the argument for applying it is not helped by dispelling the ambiguity.³⁷

Broad dicta in cases involving bar, merger, and the like. We have seen how *res judicata* is a broad term covering different concepts and how the distinction between the concepts has often been overlooked.

³⁴ *Washington, A. & G. Steam Packet Co. v. Sickles*, 65 U.S. (24 How.) 333 (1861); *Sawyer v. Nelson*, 160 Ill. 629, 43 N.E. 728 (1896). It is true that if the judgment can be shown to rest on alternative grounds, there is an estoppel upon both. *First Nat'l Bank v. City of Covington*, 129 Fed. 792 (E.D. Ky. 1903); RESTATEMENT, JUDGMENTS § 68, comment *n* (1942). The reference in the text is not to such a case but to the situation where it cannot be shown what the ground of decision was.

³⁵ This was apparently an important ground of decision in *United States v. International Bldg. Co.*, 345 U.S. 502 (1953); see also *Cromwell v. County of Sac*, 94 U.S. (4 Otto) 351, 356, 357 (1876).

³⁶ The opinion in *Biggio v. Magee*, 272 Mass. 185, 172 N.E. 336 (1930), likens a consent judgment to one upon the verdict of a jury and points out that plaintiff could not recover unless he proved negligence and proximate cause and unless it also appeared that his own want of due care did not contribute to his injury.

³⁷ Indeed, it is exceedingly doubtful whether the ambiguity involved was in fact dispelled in the cases referred to. See text following note 71 *infra*.

This has resulted in a good many statements cast broadly in terms of the binding effect of judgments which are perfectly accurate in the context of the cases being dealt with, but which are not for that reason appropriate in other contexts. In most cases where the parties agree upon a consent judgment they probably do, for example, intend it to dispose of all phases of the claim or demand in suit. Where this is their intention, it is quite proper that the judgment should operate as a bar or merger so as to prevent further litigation upon that claim.³⁸ Decisions to this effect often state broadly that a consent judgment is just as binding upon the parties as would be any other judgment. Courts in subsequent cases have sometimes reasoned from such statements to a conclusion that the parties are collaterally bound upon the facts originally at issue in the compromised action.³⁹

Finally, as we noted above, some of the decisions contrary to the position we have taken here expressly or by implication adopt a set of premises which give broader effect to collateral estoppel than do the authorities we have so far relied upon. Thus, the *Restatement of Judgments* declares that the parties will not be bound collaterally upon facts which were admitted by the pleadings, facts which were originally denied but admitted before trial after withdrawing the denial, or facts which were alleged in a complaint which defendant has failed to answer, even though the facts so admitted were necessary predicates of the judgment.⁴⁰ There are, however, authorities to the contrary on each of these points.⁴¹ If the controlling precedents disagree with the

³⁸ See note 3 *supra*.

³⁹ This is true of the opinion in *Public Serv. Elec. & Gas Co. v. Waldroup*, 38 N.J. Super. 419, 119 A.2d 172 (App. Div. 1955). The court cites *Fidelity Union Trust Co. v. Union Cemetery Ass'n*, 136 N.J. Eq. 15, 40 A.2d 205 (Ch. 1944), *aff'd*, 137 N.J. Eq. 455, 45 A.2d 670 (Ct. Err. & App. 1946); *Middlesex Concrete Prods. & Excavating Corp. v. Borough of Carteret*, 35 N.J. Super. 226, 113 A.2d 821 (App. Div. 1955).

The *Fidelity Union* case does not involve collateral estoppel at all but rather the implementing of the consent decree. *Carteret* involved a motion to reopen a consent judgment which had been entered upon part of the claim sued upon, and to add separate defenses to the remaining part of the claims. The court held that collateral estoppel did not preclude the offered amendments because these defenses "were not actually litigated and determined by the judgment." *Id.* at 238. Any implication that they might have been treated as litigated had they come within the scope of the consent judgment is tenuous indeed. In the *Carteret* opinion the court cited with approval *RESTATEMENT, JUDGMENTS* § 68 (1942). The *Waldroup* court also cites *Davis v. Leach*, 121 F. Supp. 58 (E.D. Tex. 1954) (a case of merger); *Berry v. Somerset Ry.*, 89 Me. 552, 36 Atl. 904 (1897) (attempt to strike off consent judgment); *Keen v. Parker*, 217 N.C. 378, 8 S.E.2d 209 (1940) (collateral attack upon efficacy of consent judgment to vest title to real estate); *Deaner v. Jones*, 114 N.C. 649, 19 S.E. 637 (1894) (*semble*).

⁴⁰ *RESTATEMENT, JUDGMENTS* § 68, comments *f, g, h, i* (1942).

⁴¹ *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683 (1895) (default); *Bissell v. Spring Valley Township*, 124 U.S. 225 (1888) (judgment on demurrer; estoppel upon fact admitted by the demurrer); *Oregon Ry. v. Oregon Ry. & Nav. Co.*, 28 Fed. 505 (C.C.D. Ore. 1886) (default); *Masters v. City of Rainier*, 238 Fed. 827 (D. Ore. 1917) (fact admitted in pleadings); *Servente v. Murray*, 10 Cal. App.

Restatement on these propositions, then they warrant the giving of collateral estoppel effect to facts which the court finds must have been conceded by the parties.

So much for the authorities. Except where they require one result or the other in a particular state by strict application of *stare decisis*, they contain enough elasticity and conflict to permit a court either to give or to deny collateral estoppel effect to a consent judgment. It remains to examine the considerations of expediency and policy which are relevant to making such a determination.

III

There are, first, the considerations favoring the finality of judgments. These are familiar enough but they may well be subjected to close analysis for their bearing on the present problem. Perhaps the most frequently mentioned policies are expressed in the Latin maxims: *interest reipublicae ut sit finis litium* and *nemo debet bis vexari pro eadem causa*. These overlap but they are not the same. The former stresses the social interest in ending litigation, the latter emphasizes the hardship of multiple litigation on the individual adversary.

The social interest in cutting down litigation need not be labored today. There is general concern in and out of the profession with calendar congestion and the law's delays. But it should be noted that the old maxim is so narrow that it may sometimes be a misleading guide in pursuing the desirable result. The ending of litigation may not always be the best way to minimize it or cut it down. Wherever any aspect of *res judicata* is invoked there are (at least) two lawsuits being considered: the one in which the judgment was rendered and the one in which its binding effect is claimed by a party. The maxim supposes that litigation is ended by eliminating the second action, either altogether (as in the case of merger or bar) or as a vehicle for relitigating a point in issue (as in the case of collateral estoppel). Indeed a rule which eliminates the second action in this way will often cut down litigation, but not always. It will not do so whenever a strict rule of finality will have the effect of blowing up the first action to such important dimensions that it takes more judicial time and effort than would the two potential actions under a rule which permitted them. This, it is submitted, is likely to be the case where—as here—the rule of finality would tend to impede the settlement without contest of the first action.

2d 355, 52 P.2d 270 (1st Dist. Ct. App. 1935) (facts admitted in pleadings); Reich v. Cochran, 151 N.Y. 122, 45 N.E. 367 (1896) (default). The case for the *Restatement* position and against that in the decisions cited in this note is elaborated in the articles and notes cited note 6 *supra*.

If a consent judgment already entered in the first suit is held to be binding in the second, this will of course cut down litigation in the controversy at bar by eliminating trials in both cases. But if such binding effect not intended to be a part of the settlement is thrust upon the parties by law, then in future cases parties will tend to avoid a settlement which carries with it such unintended consequences. This will greatly increase the pressures to try the first suit and to contest it to the utmost. To be sure, the outcome of litigation in first actions may well facilitate the settlement or abandonment of second ones. But since the majority of actions are in any event disposed of without trial, any rule which tends to assure contest rather than compromise of either action probably tends, on balance, to increase rather than decrease litigation.

Thus far in the discussion we have been assuming that the first action was settled before trial. This of course need not be true. A consent judgment may in fact implement a compromise reached at any point in the proceedings before final judgment. The later the settlement is reached, the less saving in judicial time and effort is involved. Something could be said, therefore, for a rule which would give greater collateral estoppel effect to consent judgments entered after trial, or a substantial part of the trial, than to those entered early in the proceedings.⁴²

The maxim *bis vexari* stresses the repose of the individual adversary—a matter concerned not only with expense and economic repose, but also with real, if less tangible, psychological values. It includes in some situations stability of title to property and more often an assurance that parties and perhaps others may rely on the continuance of rights and liabilities that appear to have been established by the judgment. These values do not, I submit, call for giving collateral estoppel effect to consent judgments. Of course they are involved wherever the parties intended to be bound, but we are discussing the question whether binding effect should be given such a judgment beyond that intent. And it is hard to see how any legitimate expectation of repose may be founded on a hope that the judgment will afford a protection beyond that bargained for—although, to be sure, one of the parties may have cherished an undisclosed unilateral hope that he would get such a windfall.

⁴² Compare RESTATEMENT, JUDGMENTS § 68, comment *f*, at 303 (1942), where the position is taken that no estoppel attaches to facts once in issue where the denial is “withdrawn or disregarded at the trial,” or where the issue is excluded upon pre-trial procedure, but that estoppel does attach to a fact put in issue where a failure of proof supports a directed verdict at the trial itself.

Another value which *res judicata* may serve is consistency. As a virtue this may easily be overrated, but before we go into that, let us distinguish between consistency among judicial decisions and consistency among positions taken by a party. Judicial consistency, it may be assumed, tends to promote the moral acceptability of judicial decisions and this is certainly an end worthy to be sought. But no such principle is involved in the case of a consent judgment for in entering it, the court does not, as we have seen,⁴³ determine the issues originally made in the action but something quite different. Any determination, therefore, which a court or jury makes in a later case upon those issues is the only determination upon them made by an agency of the law, and no question of consistency among judicial decisions is involved. This point is not so technical and esoteric as to escape lay understanding. The man in the street recognizes a consent judgment as part of the apparatus of settlement and knows that it does not reflect the court's finding on the original issues. Indeed, in negligence cases he is apt to be quite unaware of the entry of judgment, thinking of the case only as "settled."

If a party is to be bound collaterally to allegations or concessions which he has made in the process of settling a case, this may tend to promote consistency among the positions taken by the party. The advantages of such consistency are, however, highly questionable and are usually outweighed by other considerations. This is the prevailing modern judgment. The history of pleading and procedure has been marked by a continuous retreat from the fairly rigid insistence on consistency that marked earlier practice. Today, generally, a plaintiff may in his complaint pursue alternative and inconsistent remedies.⁴⁴ A defendant may interpose as many grounds of defense as he has without regard to consistency.⁴⁵ A party may plead hypothetically,⁴⁶ which comes to the same thing so far as consistency is concerned. He may simultaneously deny and demur to the same allegation.⁴⁷ He is no longer bound by a single legal theory of his action,⁴⁸ nor compelled to

⁴³ See notes 18-23 *supra* and accompanying text.

⁴⁴ FED. R. CIV. P. 8(e) (2); CLARK, CODE PLEADING § 42 (2d ed. 1947); McDonald, *Alternative Pleading in the United States*, 52 COLUM. L. REV. 443 (1952); McDonald, *Alternative Pleading* (pts. 1-2), 48 MICH. L. REV. 311, 429 (1950).

⁴⁵ FED. R. CIV. P. 8(e) (2); Clark, *op. cit. supra* note 44, at § 99; McDonald, 52 COLUM. L. REV. 603 (1952).

⁴⁶ FED. R. CIV. P. 8(e) (2); Clark, *op. cit. supra* note 44, at § 42; Hankin, *Alternative and Hypothetical Pleadings*, 33 YALE L.J. 365 (1924); McDonald, 48 MICH. L. REV. 313 (1950). The hypothetical form of statement is probably not as widely allowed as the alternative form.

⁴⁷ FED. R. CIV. P. 12(b); Clark, *op. cit. supra* note 44, at § 86.

⁴⁸ *Id.* at § 43.

elect between inconsistent theories.⁴⁹ In short, there is no longer any general doctrine of preclusion from inconsistent positions⁵⁰ although a party may be estopped to change his position where another has reasonably acted in reliance upon the original position so that a change will work him injury.⁵¹

This wide repudiation of consistency has been quite deliberate. It has been based on a pragmatic judgment that parties will too often be deprived of substantive justice if they are strait-jacketed by procedural rules requiring consistency among claims and defenses. As we shall see, this is no less true of the situation under discussion.

From what has been said it follows that the policies underlying *res judicata* furnish little if any reason for binding the parties collaterally to the facts originally in issue or admitted in an action which ended in a consent judgment, at least where the first action was settled before trial. Let us next examine the considerations which militate against such binding effect of a consent judgment.

For one thing collateral estoppel like any other aspect of *res judicata* always involves the possibility of perpetuating error. It is the very essence of the doctrine that it operates upon mistaken findings as well as upon correct findings by precluding reexamination of the grounds upon which findings were based. But this possibility is a price society has decided to pay, in the generality of cases, for the benefits that flow from finality. It is to be assumed, no doubt, that most judicial findings are not clearly mistaken even though many of them could on the evidence have gone either way. Probably the same is true of concessions and findings made in the course of a compromise; the chance of perpetuating error does not seem materially greater here than it is in contested cases.⁵²

Another danger which lurks peculiarly in collateral estoppel has had a good deal of attention lately.⁵³ Bar and merger are concerned with a single claim or cause of action. Generally, if not always, the full

⁴⁹ *Id.* at § 77.

⁵⁰ See, however, Note, *The Doctrine of Preclusion From Inconsistent Positions in Judicial Proceedings*, 59 HARV. L. REV. 1132 (1946).

⁵¹ Note, 52 COLUM. L. REV. 647, 657 n.55 (1952).

⁵² Compare Note, 52 COLUM. L. REV. 647, 654 (1952) (contested issues more likely to be decided correctly), with Note, 72 HARV. L. REV. 1314, 1320 (1959) (danger of perpetuating error "is inapplicable to consent judgments").

⁵³ The recent attention stems from *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir.), cert. denied, 323 U.S. 720 (1944). The case attracted little law review comment when it was decided. See 57 HARV. L. REV. 921 (1944). Later treatment has, however, accorded it a good deal of attention. See RESTATEMENT, JUDGMENTS § 68, comment *p* (Supp. 1948); Polasky, *supra* note 6, at 237-38; Note, 52 COLUM. L. REV. 647, 661-63 (1952); Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 841 n.169, 843 (1952).

dimensions of this claim can be seen by the competent lawyer at the outset of the first litigation. No great unfairness, therefore, results from a rule which compels the parties to pursue all offensive and defensive aspects of this claim in one suit. Collateral estoppel on the other hand reaches into all possible future disputes among the parties, no matter how hard it may be to predict them at the outset of the first litigation. This multiplicity of possible contexts in which a present finding may become important means that it may some day assume a significance and carry consequences which are altogether unforeseeable when the issue is first litigated. This may be unfair to a party who has failed to litigate an issue to the utmost because the foreseeable contexts in which it might be used entailed no serious risk to his interests. So at least is the danger in theory. In practice, however, this unfortunate possibility does not seem to have been realized in a significant number of cases; almost always the later context in which the earlier finding is invoked was readily foreseeable to the competent eye at the time of the first litigation. The second claim or cause of action has in practice nearly always been a natural and quite predictable outgrowth of the situation which gave rise to the original claim.⁵⁴ Typical examples have been: in tort, cross-claims or claims of other parties arising out of the same accident; in contract, claims for later installments of interest, rent, and the like, arising out of the same contract; in tax cases, taxes for later tax years based on the same historical transaction.

What has been said is just as true of consent judgments as it is of judgments after contest. It is submitted that the unforeseeable-context danger has been greatly exaggerated and furnishes no strong reason for denying application of collateral estoppel to consent judgments. The strongest reasons for denying such application are, rather: (1) the fact that in many cases the application of the doctrine is unforeseeable (although the context in which it is applied may be foreseeable enough); (2) the fact that where the parties do foresee that the doctrine will be applied, it will lessen the chances of compromise; (3) application of the doctrine will in practice often create an embarrassing and unnecessary conflict of interest between a liability insurer and its insured.

When the parties settle a case and agree to the entry of a consent judgment therein, they should expect that their agreement will be subjected to the usual canons of construction and that they will be bound by any stipulation which this process of construction yields. This would include an agreement to be bound collaterally—in future disputes—upon an agreed or conceded point. Where the law imposes a binding effect

⁵⁴ This was true in the *Evergreens* case itself and in all the cases cited notes 4, 6 *supra*.

beyond what the parties intended, this is likely to come as a surprise to at least one of them. Surprise may be less to be feared once the rule of collateral estoppel for consent judgments becomes established and widely known, but the first time the question comes up, and even after that where no lawyer is involved, the result will prove a trap for the unwary. In the typical tort situation, for example, where both drivers are injured and are insured against liability, the defendant in the first suit (or his lawyer) may well know that a settlement by his own insurance carrier with the original plaintiff is generally held not to bar his, the defendant's, own claim against the plaintiff.⁵⁵ The law, in other words, has no policy which would prohibit the respective insurance companies from paying both of two conflicting and theoretically inconsistent claims. Since liability in these cases is usually a doubtful question of fact, such two-way payment is a common thing. Under the policy, the original defendant's insurance carrier has exclusive control over settlement within policy limits and over the conduct of any litigation of a claim (within such limits) against the insured. It would be a rare lawyer indeed who, knowing all these rules and perhaps also something of the generally prevailing rules of collateral estoppel, would expect—unless there had been some peculiar history in the local jurisprudence on the point—a result like that in *Biggio v. Magee*.⁵⁶ And if, as often happens, the original defendant is content to let the insurance company's lawyer take care of the first suit, and so fails to consult a lawyer of his own, the rule in *Biggio* will be a booby trap that is almost sure to catch him.⁵⁷

Let us assume, however, that the rule is known in advance by everyone concerned and see how it will affect the conduct of the parties in the first suit. One of the parties will get the benefit of the rule and will be happy to have it operate—if such a result could be had without incurring any disadvantage—though it will give him more protection than he is willing to pay for. His adversary may however be unwilling to settle if the settlement will inevitably carry with it this collateral disadvantageous consequence. Collateral estoppel would present a stumbling block in the way of desirable compromise which would work against the interests of both parties and of society.

⁵⁵ *E.g.*, *Fikes v. Johnson*, 220 Ark. 448, 248 S.W.2d 362 (1952); *De Carlucci v. Brasley*, 16 N.J. Super. 48, 83 A.2d 823 (L. 1951). This is the general rule. Annot. 32 A.L.R.2d 937 (1953).

⁵⁶ See notes 4, 5 *supra*.

⁵⁷ The question arises whether such a circumstance would give the insured a right of action against his own insurer. As we have seen, note 5 *supra*, Massachusetts denies such a right of action. *Long v. Union Indem. Co.*, 277 Mass. 428, 178 N.E. 737 (1931). But see *Keeton, Liability Insurance and Reciprocal Claims from a Single Accident*, 10 Sw. L.J. 1, 23 (1956); 51 COLUM. L. REV. 1062, 1063-64 (1951).

Of course the rule in question would not attach to a compromise agreement alone, but only to a judgment by consent entered upon it. We must therefore examine the question whether consent judgments play an important part in facilitating compromise.

Many disputes are settled without the use of consent judgments. Indeed where settlement is made before action is begun the parties rarely go through an amicable suit and a consent judgment. In such a case the compromise agreement (accord and satisfaction), generally called the release, is regarded as sufficient. Even after suit has been brought the release and withdrawal of the action afford fairly adequate protection in most instances.⁵⁸ The consent judgment may, however, offer one or more of a number of advantages.

It is less vulnerable to attack than a release. A release may be set aside for fraud in the inducement⁵⁹ or for mutual mistake,⁶⁰ and upon such an attack the assailant may, in many jurisdictions, get a jury trial on the issue of fraud or mistake.⁶¹ A judgment may be set aside for fraud, in many jurisdictions, only where the fraud is upon the court itself, rather than upon the adversary, or where it is extrinsic to the issues in the settled action.⁶² Moreover, issues of fact in proceedings to set aside a judgment are generally tried without a jury.⁶³

Something more than a release may be necessary where one of the parties is an infant or under legal incapacity so that he will not be bound by his agreements. Adequate protection to the other party in such cases requires either a consent judgment or a judicial order approving the compromise.⁶⁴ The same may be true where the interest

⁵⁸ In some jurisdictions which follow the rule of *Biggio v. Magee*, liability insurers often do not insist on a consent judgment to implement settlements. Letters From Marvin Williams, Jr., Esq., Birmingham, Ala., Sept. 21, 1959; John L. Saltonstall, Jr., Esq., Boston, Mass., Sept. 21, 1959 (and dealing with the interim period before legislative change abolished the rule); Robert Shaw, Esq., Newark, N.J., Sept. 28, 1959; to the author. The situation in West Virginia appears to be confused. Letter From J. Campbell Palmer, III, Esq., Sept. 19, 1959, to the author. Letters on file in Yale Law Library.

⁵⁹ *Wilson v. Southwest Cas. Ins. Co.*, 228 Ark. 59, 305 S.W.2d 677 (1957); cases collected Annot., 21 A.L.R.2d 272 (1952); 117 A.L.R. 1022 (1938).

⁶⁰ *Ormsby v. Ginolfi*, 107 So. 2d 272 (Fla. Dist. Ct. App. 1958); *Clancy v. Pacenti*, 15 Ill. App. 2d 171, 145 N.E.2d 802 (1957); *Rankin v. New York, N.H. & H.R.R.*, 154 N.E.2d 613 (Mass. 1958) (under FELA); *Goodman v. Missouri Pac. R.R.*, 312 S.W.2d 42 (Mo. 1958) (*semble*); cases collected Annot., 117 A.L.R. 1022 (1938).

⁶¹ *Bowie v. Sorrell*, 209 F.2d 49 (4th Cir. 1953); *Ormsby v. Ginolfi*, *supra* note 60; *Rankin v. New York, N.H. & H.R.R.*, *supra* note 60; *Goodman v. Missouri Pac. R.R.*, *supra* note 60; cases collected Annot., 43 A.L.R.2d 786, 808-10 (1955).

⁶² See Note, 72 HARV. L. REV. 1314, 1325-27 (1959); 7 MOORE, FEDERAL PRACTICE ¶ 60.37[1] (2d ed. 1955).

⁶³ See, e.g., *State ex rel. Beckham v. Vanderburgh Circuit Court*, 233 Ind. 368, 119 N.E.2d 713 (1954); *King v. King*, 225 N.C. 639, 35 S.E.2d 893 (1945); 7 MOORE, *op. cit. supra* note 62, ¶ 60.28[3], at 329-30.

⁶⁴ See Notes 7, 26 *supra*; *Panel on Settlement Procedures*, 11 ARK. L. REV. 54, 55 (1956-1957); Note, 72 HARV. L. REV. 1314, 1328 (1959).

of the public in the matter is great enough so that the parties are not free to settle it without approval of the court.⁶⁵

A consent judgment or decree may provide judicial supervision and sanctions needed to implement the settlement.⁶⁶ This is seldom important in the ordinary negligence case settled by an amply solvent insurance company or large self-insurer. In other contexts, as in anti-trust cases, it may become very important.

It follows that a rule which makes consent judgments less desirable, will have some tendency to impede and embarrass the settlement process.

The rule extending collateral estoppel to consent judgments finds perhaps its harshest implications in the field of torts. In automobile collision cases both parties often suffer some injury. Each party's claim for his own injury is nominally against the other. Where there is adequate liability insurance, however, each claim is actually against the other's insurer, which has the right and duty to conduct, control and pay for the defense against that claim and to make whatever payment is made on it (all within policy limits). In reality then there are four rather than two interests involved in these claims: each claimant is in the picture *only as claimant*; ⁶⁷ each insurer is in it *only as defender*. The insured has no financial stake in the claim made nominally against him; the insurer has none in the claim by its insured. Yet if their claims go to litigation the only parties of record to the action (or actions) will in most states be the two individual claimants who will also appear nominally as the defenders against the respective claims. Every allusion to insurance will be scrupulously kept from the record.

This complex of facts means in effect that a lawyer hired exclusively by the insurer will in many cases enter an appearance for the insured which is not, on the record, limited to the insured's nominal interest as defender (largely coinciding with the insurer's real interest) but extends to any interest of the insured which may be affected by the litigation.⁶⁸ It also means that any judgment rendered, by consent or otherwise, will appear to be one between the two named parties to the action.

These last facts in turn mean that the rule of *Biggio v. Magee* will raise an embarrassing and quite unnecessary conflict of interest between

⁶⁵ See note 27 *supra*.

⁶⁶ See Donovan & McAllister, *supra* note 28; Isenberg & Rubin, *supra* note 28.

⁶⁷ This is an oversimplification. The insured has a personal stake in the claim against him to the extent that it may exceed the policy limits, to the extent that the insurer may have defenses under the policy such as lack of notice or lack of cooperation, to the extent represented by the possibility of the insurers' insolvency, and so on. In the ordinary case where coverage is ample however, the statement in the text is fairly accurate.

⁶⁸ This was true, for example, in the cases cited note 5 *supra*. See also Keeton, *supra* note 57, at 20-21.

insurer and insured. If the insurer settles a claim against its insured, it will legitimately want the most complete protection available against future claims. Such protection will often include a consent judgment.⁶⁹ Under *Biggio v. Magee*, however, the insurer will either have to forego this protection or destroy its own customer's claim against a third party, whom the insurer has not the least interest in protecting. And the insured, where he has the choice, must either forego his own personal injury or property damage claim, or prevent his insurer from protecting its interests to the full.⁷⁰

If any material benefit resulted from a rule which created these dilemmas, it might on balance be justified. The rule does, of course, bring a windfall to the insurer who can avoid compromising until the other party's insurer has settled, but that is scarcely a benefit which its recipient has earned in any way or has any legitimate expectation of getting. The interest of society in bestowing a windfall on one of its members under such circumstances is trivial at most, and is surely overbalanced by the cost to other members. No one has ever urged this windfall as a justification of the rule.

A better defense of the rule would be that it preserves the administration of justice from exhibiting the spectacle of two flatly inconsistent, apparently mutually destructive judgments. But even this is not a very good defense and deals with superficial appearance rather than reality. Any inconsistency, in the first place, is not one between judicial determinations of the same issue for, as we have seen, a consent judgment involves no determination of the facts in issue.⁷¹ Moreover there is not necessarily involved the taking of inconsistent positions by either party. Rather the two judgments suggest that each individual claimant has persisted in asserting his own innocence and his adversary's fault, and that the respective insurers have separately assessed the chances of success and failure of each claim and compromised each one accordingly. A consent judgment, in sum, involves neither a finding nor a concession that either party has been negligent or free from negligence. And, as for the apparent futility of mutually destructive judgments, it is quickly dispelled by recalling that in hard fact the respective insurers will stand as the judgment debtors and the respective claimants as the judgment creditors. It will not be the case, as everyone knows, of futile cross-payments between defendant and plaintiff.

The rule of *Biggio v. Magee* is altogether without justification, either in doctrine or policy.

⁶⁹ See text accompanying notes 59-66 *supra*.

⁷⁰ See the excellent treatment of the problem in Keeton, *supra* note 57.

⁷¹ See notes 19, 20 *supra* and accompanying text.

IV

Where the agreement upon which a consent judgment is based is fairly to be construed as providing that the parties should be bound collaterally upon a certain point, that agreement will and should generally be given effect. An intention to be bound in this way should not however be found unless the language or admissible evidence affirmatively points to it, and such an intention should not be inferred from the circumstance, taken alone, that the agreement or judgment contains a stipulation or recital of the fact's existence.

Where the parties to a consent judgment have not agreed to be thus bound, the rules pertaining to the effect of judgments do not require that they should be, and the relevant considerations of policy and expediency require that they should not be.