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C. Theodore Leonard Jr.

# PLEADING AND PROVING THE DEFENSE OF RES JUDICATA IN NORTH CAROLINA

C. THEODORE LEONARD, JR.*

North Carolina, like all jurisdictions in the United States, suffers from the lack of modern treatises on the subject of judgments and the related problem of estoppel by judgment.[1] Of late, there seems to have been a revival of interest in the subject of *res judicata* and several periodicals have published comprehensive writings on various aspects of the doctrine.[2] This revival of interest has been due in no small degree to the large number of recent cases in which the question of *res judicata* has presented itself.[3] North Carolina has had its share of these cases and an analysis of some of the problems presented by them seems pertinent.[4]

In *Reid v. Holden*,[5] our Court quoted from *Sanderson v. Aetna Life Ins. Co.*[6] as follows:

> "*Res judicata* is an affirmative plea in bar which must be taken by answer and supported by competent evidence. When properly raised, the issue will be determined according to the practice of the Court, but the defense is not available on a motion to dismiss."

This quotation raises many questions as to the pleading and proving of *res judicata*, and the way in which such plea will be handled by the courts of North Carolina.

*Necessity of Pleading:*

*Res judicata* has been held to be an affirmative defense which must be raised by answer in a majority of the jurisdictions in the United States.[7] While some jurisdictions have allowed proof of the former

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[1] The latest authoritative treatise on the subject is Freeman's two volume work on JUDGMENTS published in 1925. Other treatises are: BIGELOW, LAW OF ESTOPPEL (6th ed. 1913); BLACK, LAW OF JUDGMENTS (2d ed. 1902).

The recent volume on *Judgments* published by the American Law Institute as a part of the *Restatement* is helpful but makes no attempt to analyze the cases.

[2] For example: *Development in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952); *Symposium on Res Judicata*, 39 IOWA L. REV. 213 (1954); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942); *Cleary, Res Judicata Reexamined*, 57 YALE L. J. 339 (1948); Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41 (1940).

[3] The most fertile source of these cases has been the automobile accident field where multiple plaintiffs and defendants are often involved.

[4] The scope of the doctrine of estoppel by judgment is infinitely broad and this article cannot deal with the entire area. An effort will be made to refer to other materials which may provide the answer to related problems beyond the reaches of this writing.

[5] 242 N. C. 408, 411; 88 S. E. 2d 125, 128 (1955).

[6] 218 N. C. 270, 273, 10 S. E. 2d 802, 803 (1940).

[7] 50 C. J. S., *Judgments* § 822 (1955).

judgment to come in under denials or a plea of the general issue,[8] North Carolina has consistently refused to allow this practice.[9] Should all of the facts sufficient to constitute the estoppel by judgment be set out in the answer, the court should dispense with the requirement of a formal pleading of the defense.[10] Furthermore, if the facts necessary to constitute the defense appear in the plaintiff's pleadings, there may be no necessity for pleading the estoppel.[11] Our Court has also stated that in an action for ejectment and possession of land, the estoppel need not be pleaded and a defendant is permitted to introduce the judgment without prior pleading.[12] When, in an action of ejectment or trespass, the eventual allegations of the complaint are denied, or if the plaintiff has had no opportunity to plead the estoppel or has not been required to do so, the record in the first suit may be introduced as evidence without special plea.[13]

Unless the case falls within one of the aforementioned exceptions, the rule is that the failure of the defendant to plead the judgment relied upon is an agreement to try the facts *de novo* and deprives him of the right to avail himself of the defense of *res judicata.*[14]

One North Carolina case in this area does not fall into one of the exceptions to the rule of pleading the estoppel and must be restricted to its facts. In *Current v. Webb,*[15] defendant found himself sued by two plaintiffs in separate actions in different counties. The defendant appeared specially and contended that he was not a resident of North Carolina and that at the time the attempted service of process was made on him, he had come into the state in obedience to a summons to testify at

[8] Rothman v. Rumbeck, 54 Ariz. 443, 96 P. 2d 755 (1939).

[9] McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES, § 461(7) (1929 ed.). Blackwell v. Dibbrell, 103 N. C. 270, 9 S. E. 192 (1889).

[10] Worthington v. Wooten, 242 N. C. 88, 86 S. E. 2d 767 (1955). The Court points out that it is the substance and not the form of a plea which matters. The opinion speaks of this as within the court's discretionary power, but it would seem unlikely that requirement of a formal plea could be supported on appeal since facts not conclusions of law govern construction.

[11] Miller v. First National Bank of Catawba County, 234 N. C. 309, 67 S. E. 2d 362 (1951); Alston v. Connell, 140 N. C. 485, 53 S. E. 292 (1906).

[12] Carstarphen v. Carstarphen, 193 N. C. 541, 137 S. E. 658 (1927); Fleming v. Sexton, 172 N. C. 250, 90 S. E. 247 (1916); Weeks v. McPhail, 129 N. C. 73, 39 S. E. 732 (1901). No prior pleading is required in these cases because the plaintiff must plead and prove his title to the land in order to get judgment.

[13] Thorpe v. Parker, 199 N. C. 451, 154 S. E. 674 (1930); Stancill v. Jones, 126 N. C. 190, 35 S. E. 245 (1900). It should be noted that in these cases the judgment was said to have been introduced merely as *evidence* and not as a bar to recovery. In fact the Court in the *Thorpe* case states that when relied upon as a defense it must be pleaded. Regardless of the language of the opinion, the former judgment was used to estop the defendant from contesting the title to the land in the *Thorpe* case.

[14] Pate Hotel Co. v. Morris, 205 N. C. 484, 171 S. E. 779 (1933); Bear v. Comr. of Brunswick County, 124 N. C. 204, 32 S. E. 558 (1899); Harrison v. Hoff, 102 N. C. 126, 9 S. E. 638 (1889).

[15] 220 N. C. 425, 17 S. E. 2d 614 (1941).

an inquest. The judge in the first action to be heard, found that the defendant was a resident of Georgia and that therefore under G. S. 8-68[16] he was exempt from service of process. In the second action, the judge found that the defendant was a resident of North Carolina and that he was not exempt from service of process. The cases reached the Supreme Court at the same time. The Supreme Court found that there was evidence to support both findings but that the first ruling on the residence of the defendant was binding on the court in the later suit. This holding was made despite the fact that the defendant had not pleaded the former adjudication of his residence.[17]

*Manner of Pleading:*

A demurrer or a motion to dismiss may raise the defense of *res judicata* where the fact and nature of the defense appear on the face of the plaintiff's pleadings.[18] But ordinarily, a motion to dismiss an action on a plea of *res judicata* will not be allowed on the pleadings alone.[19] If the facts supporting the plea do not appear on the face of the complaint, the necessity for a plea by answer is founded upon G. S. 1-135(2)[20] since it involves new matter constituting a defense.[21] Where the matter is raised by a demurrer or by motion to dismiss, the court is limited to the facts disclosed by the complaint even though it has other sources of information.

Where it was impossible for the defendant to plead *res judicata* initially because the judgment relied upon had not then been rendered, the proper way to take advantage of the judgment in bar would appear to be by either amending the answer or by filing supplemental answer.[22] In North Carolina, it is within the power of the clerk of the court to permit a defendant to set up the estoppel by way of amendment.[23]

An answer setting up the defense of *res judicata* should allege all of the facts necessary to make the defense complete. This is for the pur-

[16] This statute provides that a witness from another state summoned to testify in this state shall be exempt from arrest or service of process in connection with matters which arose before his entrance into this state under the summons.

[17] The Court spoke of the judgment being in the nature of a judgment *in rem*, and stated that a judgment *in rem* is conclusive on all of those having an interest in the subject matter (in this case the subject matter being the residence of the defendant).

[18] Miller v. First National Bank of Catawba County, 234 N. C. 309, 67 S. E. 2d 362 (1951); Alston v. Connell, 140 N. C. 485, 53 S. E. 292 (1905).

[19] Pemberton v. Lewis, 243 N. C. 188, 90 S. E. 2d 245 (1955); Carver v. Spaugh, 227 N. C. 129, 41 S. E. 2d 82 (1946); Buchanan v. Oglesby, 207 N. C. 149, 176 S. E. 281 (1934); Dix-Downing v. White, 206 N. C. 567, 174 S. E. 451 (1934).

[20] "The answer of defendant must contain . . . (2) a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition." N. C. GEN. STAT. 1-135(2).

[21] Hampton v. North Carolina Pulp Co., 223 N. C. 535, 27 S. E. 2d 538 (1945).

[22] In some cases a defendant might avoid this problem by pleading in his original answer that there was a prior action pending.

[23] Porter v. Armstrong, 134 N. C. 447, 46 S. E. 997 (1904).

pose of enabling the court to see from the pleadings what facts are relied upon to work the estoppel.[24] While no North Carolina cases listing the necessary facts were found, it would seem that as a minimum, the facts alleged must demonstrate that the former suit was for the same cause of action, that it was between the same parties or their privies and that a final judgment was rendered by a court of competent jurisdiction. In this regard, it would seem proper to quote from the judgment or to attach it to the pleadings.

*Proof Required to Support the Plea:*

Where *res judicata* has been properly pleaded, it should be supported by the introduction of the record of the former judgment, which must correspond in its essential particulars with the pleadings. The plea cannot be supported by a mere assertion that a former judgment was rendered in which the question was in issue and determined. The burden of proving the existence and the character of the judgment and its legal effect will fall upon the party pleading the estoppel, unless his opponent introduces the record of the former trial as a part of his case. The party pleading *res judicata* will be required to show that the particular point or question as to which he claims the estoppel was within the scope of the issues foreclosed by the prior litigation.[25]

Once the existence, legal effect, and character of the judgment are proved, the correctness of the judgment will be assumed by the court and the burden is on the party seeking to avoid the estoppel to prove matter in avoidance.[26] The judgment cannot be collaterally attacked.[27] Thus, where it was contended that a former consent judgment was not *res judicata* on the ground that the party lacked ability to consent, the Court said the proper procedure was to attack the judgment by motion in the original cause.[28] A party can avoid the conclusiveness of a consent judgment by showing fraud, deception of the opposing party or that the owner of the cause of action had no knowledge or means of knowledge of an item omitted from a single cause of action.[29] This avoidance is effective only to the extent that the former judgment will not bar a subsequent action for the item omitted.[30]

The best evidence of the existence of the judgment relied upon as a bar is the judgment roll itself. Where the record in the former action

[24] Hall v. Odom, 240 N. C. 66, 81 S. E. 2d 129 (1954); Upton v. Ferebee, 178 N. C. 194, 100 S. E. 310 (1919); Porter v. Armstrong, 134 N. C. 447, 46 S. E. 997 (1904).

[25] King v. Neese, 233 N. C. 132, 63 S. E. 2d 123 (1951).

[26] Williams v. New York Zinc Co., C. C. A. N. Y., 29 F. 2d 167 (1928).

[27] Bushee v. Surles, 77 N. C. 62 (1887).

[28] Gibson v. Gordon, 213 N. C. 666, 197 S. E. 135 (1938). The judgment recited that the settlement was reasonable and just; the Supreme Court said this was conclusive and barred a subsequent action on the same cause.

[29] Gaither Corp. v. Skinner, 241 N. C. 532, 85 S. E. 2d 909 (1955).

[30] *Ibid.*

is in existence, it is the only evidence admissible to prove its contents.[31] If it can be shown that there was a record which has been lost or destroyed, other competent evidence may be introduced to prove its contents.[32] Parol proof can be admitted in aid of the record only when there is a record to be aided,[33] and it has been held that in the absence of a complaint there can be no record.[34]

Where a judgment contains an ambiguity, parol evidence not inconsistent with the record is admissible to identify the issue which was adjudicated.[35] Should the extrinsic evidence leave any uncertainty as to the issue litigated, the whole subject will then be open to a new investigation, and the judgment has no effect as an estoppel.[36] Thus, it appears well settled in North Carolina that parol proof may be admitted in support of the plea of *res judicata* to identify the issue foreclosed,[37] but such proof is permissible only when the record does not identify the issue, and not for the purpose of contradicting it.[38]

Once it has been established that a relevant judgment was rendered, questions arise as to the scope of the issues therein litigated and whether the same parties or those in privity with them were involved in both actions. In proving that the issue in the present suit was included in the former action, the party claiming the estoppel is aided by a presumption that all matters which were embraced within the issues in the former action were there finally settled. The scope of this presumption varies in the different jurisdictions, there being three views as to the matters embraced within the issues.[39] These views are generally classified as: (1) "strict" view—only those matters actually presented by the pleadings and determined by the issues are estopped;[40] (2) "intermediate" view—

[31] Burton v. Carolina Power & Light Co., 217 N. C. 1, 6 S. E. 2d 822 (1940); Abernathy v. Armburst, 217 N. C. 372, 8 S. E. 2d 228 (1940).

[32] Aiken v. Lyon, 127 N. C. 171, 37 S. E. 199 (1900). The Court said that a certified copy of the record on appeal in the former action was competent proof.

[33] Person v. Roberts, 159 N. C. 168, 74 S. E. 322 (1912).

[34] *Ibid.* At first glance it might appear that this case conflicts with the *Aiken* decision, but both cases require a minimal showing that there was a record. One admits competent evidence of the record after there is proof of loss or destruction of the record itself. The other admits parol proof if a record is present, but the lack of a complaint is conclusive proof of the absence of a "record" in procedural parlance. (This holding can be explained on the grounds that in a pending suit, the absence of a complaint deprives the court of the jurisdiction over the action.)

[35] Savage v. McGlawhorn, 199 N. C. 427, 154 S. E. 673 (1930); Cropsey v. Markham, 171 N. C. 43, 87 S. E. 950 (1915); Whitaker v. Garren, 167 N. C. 658, 83 S. E. 759 (1914).

[36] Jones v. Beeman, 117 N. C. 259, 23 S. E. 248 (1895); Temple v. Williams, 91 N. C. 82 (1884). This uncertainty must appear on the face of the record if it is to be challenged, otherwise the matter cannot be inquired into.

[37] J. T. McTeer Clothing Co. v. Hay, 163 N. C. 495, 79 S. E. 955 (1913).

[38] Cropsey v. Markham, 171 N. C. 43, 87 S. E. 590 (1916).

[39] 2 BLACK ON JUDGMENTS § 614 (1891); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES, § 659 (1929 ed.); Note, 10 N. C. L. REV. 201 (1931).

[40] Jones v. Beeman, 117 N. C. 259, 23 S. E. 248 (1895). "In order to make a

the estoppel includes what was actually raised by the pleadings, or what might have been properly predicated on them, but not matters which might have been brought into the litigation, but were not embraced within the pleadings;[41] and (3) "liberal" view—the estoppel covers not only the matters actually determined but all others which might properly have been determined by it.[42]

The North Carolina position on this is not as clear as might be desired. As pointed out previously, there is language in the opinions to support all of the three views but most of the Court's recent statements fall into either the "liberal"[43] or the "intermediate"[44] category. While one student writer has stated that the decisions and the language of most of the cases show that North Carolina has accepted the intermediate view,[45] the language of many of the recent cases tends toward the liberal position and creates considerable doubt that this opinion can be accepted.

Regardless of any uncertainty as to the scope of the judgment, it is quite clear that a plaintiff will not be allowed to split what the Court regards as a single cause of action;[46] nor will a defendant be permitted to

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former judgment conclusive and operative as a bar, it must appear either on the face of the record . . . that the *precise* question was raised and determined in the former suit." (Emphasis added.)

[41] Polson v. Strickland, 193 N. C. 299, 136 S. E. 873 (1926); Price v. Edwards, 178 N. C. 493, 101 S. E. 33 (1919); Coltrane v. Laughlin, 157 N. C. 282, 72 S.E. 961 (1911).

[42] Moore v. Harkins, 179 N. C. 167, 101 S. E. 564 (1919); Case Mfg. Co. v. Moore, 144 N. C. 527, 57 S. E. 213 (1907).

[43] "The judgment or decree of a court possessing competent jurisdiction is final as to the subject matter thereby determined. The principle extends further. It is not only conclusive as to the matters actually determined, but as to every other matter which the parties might litigate in the cause and which they might have decided. . . . This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention; a different course might be dangerous and often oppressive." Moore v. Harkins, 179 N. C. 167, 169, 101 S. E. 564, 566 (1919). See also, Houghton v. Harris, 243 N. C. 92, 89 S. E. 2d 860 (1955); Worthington v. Wooten, 242 N. C. 88, 86 S. E. 2d 767 (1955); Gaither Corp. v. Skinner, 241 N. C. 532, 85 S. E. 2d 909 (1955); Kelly v. Kelly, 241 N. C. 146, 84 S. E. 2d 809 (1954).

[44] "The judgment is decisive of the points raised by the pleadings, or which might properly be predicated on them. This certainly does not embrace any matters which might have been brought into the litigation, or any causes of action which the plaintiff might have joined, but which, in fact, are neither joined nor embraced in the pleadings." Reid v. Holden, 242 N. C. 408, 414, 88 S. E. 2d 125, 130 (1955), quoting from Shakespeare v. Caldwell Land & Lumber Co., 144 N. C. 516, 521, 57 S. E. 213, 215 (1907). See also: Queen City Coach Co. v. Burwell, 241 N. C. 432, 85 S. E. 2d 688 (1954); Jefferson v. Southern Land Sales Corp., 220 N. C. 76, 16 S. E. 2d 462 (1941); Leary v. Virginia-Carolina Joint Stock Land Bank, 215 N. C. 501, 2 S. E. 2d 570 (1939).

[45] Note, 10 N. C. L. REV. 201 (1931).

[46] As stated by *Connor, J.* in Underwood v. Dooley, 197 N. C. 100, 104, 147 S. E. 686, 689 (1929): "It is, therefore, well settled in this jurisdiction that one who has sustained damages, resulting from injuries both to his property, and to his person, caused by the single wrong or tort of another, can maintain only one action for the recovery of his damages, and that he cannot split his cause of action, arising from a single wrong or tort, and maintain separate actions against the *tort-feasor,* as defendant, and recover therein for separate items of damage resulting from said

claim that he had defenses which were not presented at the earlier trial.[47]

*Identity or Privity of Parties:*

The principle that the former action must have been between the same parties currently attempting to litigate or persons in privity with those parties has long been established and accepted. It is based on the "mutuality" concept which requires that the parties be mutually bound before a former judgment is *res judicata.*[48] This idea runs through all of the *res judicata* cases except where the judgment was *in rem.* A judgment *in rem* is held binding upon all of those having an interest in the subject matter, under the maxim that "a matter adjudged is taken for truth."[49] While one does not think of a judgment strictly *in rem* as requiring mutuality, the fact that such a judgment is good against the world clearly brings it within the limits of the mutuality doctrine.

One case indicates that the mutuality requirement may lead to some unusual results. In *Allred v. Webb,*[50] plaintiffs sought a partition of real estate which they claimed by descent from their mother who had died intestate. Defendant denied plaintiffs' right to partition and claimed the ownershp of the property under a deed from the deceased. Plaintiffs pleaded a former judgment in an action brought by one of them in which the court had found that the grantor lacked the capacity to make the deed, had declared the deed null and void, and ordered it cancelled. After discussing at some length the harshness of the doctrine of estoppel, the Court held that the judgment could not be asserted by those not

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wrong or tort." See also, Burton v. Carolina Power & Light Co., 217 N. C. 1, 6 S. E. 2d 822 (1940), where the Court held that a plaintiff can carve out as large a slice as the law allows, but he can cut but once. The opinion points out that no one should be twice vexed for the same cause of action and they are disposed to strictly enforce this maxim.

[47] Plaintiff brought action to quiet title and introduced the former judgment in favor of the defendants for the purpose of attacking it. The attack was based on the fact that the plaintiff had two defenses which were not presented at the former trial. The Court held that a party is conclusively presumed, when sued in a second action on matters before litigated, to have set up in the former action all the defenses available to him. Cleve v. Adams, 222 N. C. 211, 22 S. E. 2d 567 (1942).

[48] The mutuality doctrine provides that a party will not be bound, against his contention, by a former judgment, unless he could have used it as protection, or as the foundation of a claim, had the judgment been the other way.

[49] Current v. Webb, 220 N. C. 425, 17 S. E. 2d 614 (1941), the decision by a court as to the residence of the defendant was held to be in the nature of a judgment *in rem* and *res judicata* on the question in a later suit where the defendant was sued by a different plaintiff. In Savage v. McGlawhorn, 199 N. C. 427, 154 S. E. 673 (1930), a party sued two partners on a contract and one of the partners set up a former recovery against the plaintiff for breach of the same contract. It was held that the fact that one of the defendants was not a party to the original action did not prevent the former judgment from being *res judicata* since there was but one contract. A former judgment will not be conclusive against a successor in title of a party in a former action if it appears that the present controversy involves, in addition, some lands not covered in the former action. Hardison v. Everett, 192 N. C. 371, 135 S. E. 288 (1926).

[50] 135 N. C. 443, 47 S. E. 597 (1904).

parties to the former action on the grounds that one who is not bound by an estoppel cannot take advantage of it.[51] The majority of the court appears to have allowed the mutuality requirement to override the fact that the deed being declared null and void and ordered cancelled of record destroyed the instrument on which the defendant's claim was based.[52]

The conclusiveness of a judgment is normally upon the real party in interest,[53] thus where the State sues an officer on his peace bond the relator is the party bound by the judgment.[54]

North Carolina has one well-recognized exception to the identity or privity of party requirement. In *Leary v. Virigina-Carolina Joint Stock Land Bank*,[55] the Court held that where the relation between the parties is analogous to that of principal and agent, master and servant, or employer and employee, the rule is that a judgment in favor of either in an action by a third party, rendered on a ground equally applicable to both, must be accepted as conclusive against the plaintiff's right of action against the other. While some authorities support this rule on grounds of privity of parties, our Court feels it is an exception based on public policy.

The converse of the rule in the *Leary* case is not accepted. In *Queen City Coach Co. v. Burwell*,[56] plaintiff bus company sued for damages to a bus as a result of a truck-bus collision. The defendant set up in bar a former judgment in which the driver of the bus had been denied recovery for personal injuries received in the collision on the grounds that there was no negligence on the part of the truck company or its driver. The Court stated the question to be one of first impression and,

[51] The lack of mutuality referred to is that if the former action had found that the plaintiffs' intestate did have the mental capacity to execute the deed, the decision would not have precluded the other children from contesting the same lack of capacity.

[52] *Clark, C. J.*, in a vigorous dissent argued that the judgment was a final cancellation of the defendant's title and being rendered against him, bound him against all parties. The *dissent* has a well-reasoned argument and the question is a close one with strong support for both sides.

[53] This is true only where the real party in interest is a party to the action, or represented through a nominal party.

[54] Reid v. Holden, 242 N. C. 408, 88 S. E. 2d 125 (1955); Patterson v. Franklin, 168 N. C. 75, 84 S. E. 18 (1914).

[55] 215 N. C. 501, 2 S. E. 2d 570 (1939). This case arose out of an automobile-truck collision and was quite involved. An officer of the defendant bank was a passenger in a car driven by his chauffeur when the car was struck by the truck of the plaintiff, killing the bank official. The owner of the truck sued the bank to recover for damages to its truck on the grounds that the automobile driver's negligence was the cause of the accident. The bank set up in bar a recovery by the administrator of the deceased officer in an action in which the truck owner had set up the defense of negligence on the part of the car driver. The Court held the judgment in the former action was conclusive on the question of the car driver's negligence, and the plaintiff was barred in the present action.

[56] 241 N. C. 432, 85 S. E. 2d 688 (1954). The decision points out that the facts in bar preclude mutuality and do not come within an exception to the doctrine.

being of the opinion that the rights of the parties were separate and distinct, held that there was no privity and no estoppel.[57] Should the plaintiff recover, it would present no more than a case of contrary verdicts by different juries which the Court feels to be of less concern than the possibility of depriving a party of his day in court.

When the parties to the two actions are not the same and the plaintiff denies any privity of parties between himself and any party to the former judgment, an issuable fact is raised and the question may have to go to the jury.[58] Should the facts relating to the plea be admitted then it may be passed upon by the judge as a matter of law.[59]

*Nature of the Former Judgment:*

Many courts require that a judgment be final and on the merits if it is to be *res judicata,* and hold that a judgment of nonsuit, voluntary or involuntary, does not operate to bar another action.[60] This rule was followed in North Carolina until the case of *Hampton v. Rex Spinning Co.*[61] in which it was held that a former judgment of nonsuit was a bar to a second action.[62] In order to sustain a plea of estoppel by judgment in an action initiated after judgment of nonsuit, the court must find that the allegations and evidence in the second action are substantially identical with those in the first action.[63] Since the former judgment of nonsuit is *res judicata* only when these requirements are met, evidence must be taken to support the plea and it cannot be determined from the pleadings alone.[64] If the judgment below fails to set forth in detail the facts which the court found and no request was made for such findings, it will be presumed that the court, upon proper evidence, found the facts necessary to support the plea of *res judicata.*[65]

[57] In the course of the opinion the Court said that a judgment for or against the defendant in an action growing out of an accident is not *res judicata,* or conclusive as to the issues of negligence, in a subsequent action based on the same accident by another plaintiff against the same defendant.

[58] Williams v. Hutton & Bourbannais Co., 164 N. C. 216, 80 S. E. 257 (1913).

[59] Burton v. Carolina Power & Light Co., 217 N. C. 1, 6 S. E. 2d 822 (1940); Williams v. Hutton & Bourbonnais Co., *supra,* note 58.

[60] Gardner v. Michigan Central R. R., 150 U. S. 349 (1893); Mohn v. Tingley, 194 Cal. 470, 217 Pac. 733 (1923); Sander v. New Orleans & N. E. R. R., 139 La. 85, 71 So. 238 (1916).

[61] 198 N. C. 235, 151 S. E. 266 (1930).

[62] Note, 13 N. C. L. Rev. 253 (1934). The writer of the note feels the departure a commendable one which should be extended to cover nonsuits where the evidence showed the plaintiff could not recover as a matter of law. This position was taken by the Court in Kelly v. Kelly, 241 N. C. 146, 84 S. E. 2d 809 (1954).

[63] Batson v. City Laundry Co., 209 N. C. 223, 183 S. E. 413 (1935); Ferguson v. Rex Spinning Co., 206 N. C. 911, 174 S. E. 300 (1934); Hampton v. Rex Spinning Co., 198 N. C. 235, 151 S. E. 266 (1929).

[64] Pemberton v. Lewis, 243 N. C. 188, 90 S. E. 2d 245 (1955); Buchanan v. Oglesby, 207 N. C. 149, 176 S. E. 281 (1934): Dix-Downing v. White, 206 N. C. 567, 174 S. E. 451 (1934).

[65] Carver v. Spaugh, 227 N. C. 129, 41 S. E. 2d 82 (1946); McCune v. Rhodes-Rhyne Mfg. Co., 217 N. C. 351, 8 S. E. 2d 219 (1940).

Where the former judgment was on the merits, the plaintiff is presumed to have introduced all the evidence available at the time of the former trial. There is no such presumption where a judgment of nonsuit is entered on a demurrer to the evidence, and the plaintiff is permitted to bring another action in which he "mends his licks."[66]

A judgment dismissing a case for lack of jurisdiction is not in effect a nonsuit and if a decision on the merits had been rendered it would be a nullity, giving rise to an estoppel only on the question of jurisdiction.[67]

*Steele v. Beaty*,[68] was an action for damages resulting from an alleged abortion attempt in which the defendant pleaded as a bar a former action in which the plaintiff stated that she did not care to prosecute further and agreed to a dismissal. The action had been dismissed and the complaint withdrawn by order of the court. The trial court did not feel this was *res judicata*. The Supreme Court pointed out that the judgment was entered after the signing of releases by the plaintiff and was in the nature of a *retraxit*.[69] Since a judgment in *retraxit* is usually based on a settlement out of court, it corresponds to a judgment on the merits and bars another suit on the same cause of action.

A judgment by consent or agreement is just as binding in North Carolina as one based on the findings and verdict of the jury.[70] The only way to avoid the effect of such a judgment is to show that the consent was obtained by fraud or through mistake, or that the party was without capacity to make the agreement. Even such a showing will be to no avail where the court has investigated the facts and found the settlement to be just and reasonable.[71]

In a recent case,[72] two defendants were sued for damages growing out of a truck-bus collision. The joinder was based on concurring negligence. The defendants initially denied liability but later agreed to a consent judgment permiting the plaintiff to recover from them both. When the bus company later sued the truck owner, the Court held that the truck owner was entitled to set up the prior consent judgment as a bar to the plaintiff's action. Decisions of this type may work against

[66] Kelly v. Kelly, 241 N. C. 146, 84 S. E. 2d 809 (1954); Batson v. City Laundry Co., 206 N. C. 371, 174 S. E. 90 (1934); Swainey v. The Great Atlantic and Pacific Tea Co., 204 N. C. 713, 169 S. E. 618 (1933); Tuttle v. Warren, 153 N. C. 459, 69 S. E. 426 (1910).

[67] Weeks v. McPhail, 129 N. C. 73, 39 S. E. 732 (1901).

[68] 215 N. C. 680, 2 S. E. 2d 854 (1934).

[69] A *retraxit* is an act by which a plaintiff withdraws his suit. It is an open and voluntary renunciation of his suit in court and differs from a nonsuit in that it is a positive and not a negative act.

[70] Houghton v. Harris, 243 N. C. 92, 89 S. E. 2d 860 (1955); Herring v. Queen City Coach Co., 234 N. C. 51, 65 S. E. 2d 505 (1951).

[71] Gibson v. Gordon, 213 N. C. 666, 197 S. E. 135 (1938). The next friend of the plaintiff in this action contended that the consent was procured from the plaintiff while he was *non compos mentis*. The recital in the judgment that the settlement was investigated and found reasonable was held to preclude this contention.

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

settlement of small damage actions by consent, since a party will be hesitant to consent to a small judgment which may bind him in all other actions growing out of the same accident.

The general rule in this country is that a default judgment is final and conclusive if the court has full jurisdiction in the case.[73] North Carolina is in accord with this view.[74]

*Practice of the Court:*

The issue of *res judicata* will be determined according to the practice of the court,[75] and in North Carolina the practice of the courts has varied widely. In one case it was stated that "an estoppel by judgment . . . must be established like other defenses, at the time of trial by verdict of the jury."[76] This somewhat extreme view has not been followed and ordinarily the issues raised will be determined prior to the trial of the main case. The manner in which the issue is raised before trial has varied greatly,[77] and no clear pattern can be drawn from the cases. Recently the use of the motion to strike matter from the answer has caused a trial judge to rule on the question of *res judicata* at a pre-trial hearing.[78] Where the *res judicata* issue is passed on at pre-trial, the judge has only the pleadings and the documents constituting the record in the former action before him, unless there are stipulations to the con-

[73] 50 C. J. S., JUDGMENTS § 631.

[74] Worthington v. Wooten, 242 N. C. 88, 86 S. E. 2d 767 (1955). The plaintiff sought to enjoin the defendant from enforcing a judgment lien on his lands and the defendant alleged as *res judicata* the judgment by default final in his favor and the clerk's later denial of the plaintiff's motion to vacate the judgment for excusable neglect. It was held that the action was barred.

[75] Reid v. Holden, 242 N. C. 408, 88 S. E. 2d 125 (1955).

[76] Williams v. Hutton & Bourbonnais Co., 164 N. C. 216, 223, 80 S. E. 257, 260 (1913).

[77] *By motion of the plaintiff:* Carver v. Spaugh, 227 N. C. 129, 41 S. E. 2d 82 (1946); *By motion of the defendant:* Leary v. Virginia-Carolina Joint Stock Land Bank, 215 N. C. 501, 2 S. E. 2d 570 (1939); *Overruling a plea in bar:* Queen City Coach Co. v. Burwell, 241 N. C. 432, 85 S. E. 2d 688 (1954); *By consent of both parties that judge decide plea in chambers:* Worthington v. Wooten, 242 N. C. 88, 86 S. E. 2d 767 (1955). Two were heard before trial but no revelation was made of how the motion was presented: Gibson v. Gordon, 213 N. C. 666, 197 S. E. 135 (1938) (court below dismissed on a plea of *res judicata* before the case was called for trial). Ferguson v. Rex Spinning Co., 206 N. C. 911, 174 S. E. 300 (1934) (The former action relied upon was a judgment of nonsuit, the Supreme Court overruled the trial court's dismissal before trial since there was no evidence heard or facts found.) In Jenkins v. Jenkins, 225 N. C. 681, 36 S. E. 2d 233 (1945), the court by stipulation heard the case without a jury.

[78] Houghton v. Harris, 243 N. C. 92, 89 S. E. 2d 860 (1955). (Plaintiff moved to strike allegations of a former consent judgment on ground that he was merely buying his peace. The court held the estoppel was binding.) Lumberton Coach Co. v. Stone, 235 N. C. 619, 70 S. E. 2d 673 (1952). (Plaintiff moved to strike allegations of a former consent judgment where both parties had been defendants. The court held the judgment was *res judicata* on the question of concurring negligence.) Herring v. Queen City Coach Co., 234 N. C. 51, 65 S. E. 2d 505 (1951). (Cross action by a defendant against an additional defendant for contribution. Former consent judgment between the two was held binding and the motion to strike the allegations of *res judicata* was denied and the additional defendant was dismissed.)

trary.[79] Despite the somewhat severe restrictions imposed, the statutory provision for pre-trial conferences[80] may provide the most workable method for handling the estoppel issue before trial of the main case.[81]

Where the final appraisal of the validity of the defense requires more evidence than is available prior to trial, judges have allowed the case to proceed to various stages before holding the former judgment to be a bar. In several cases the trial was halted at the close of the plaintiff's evidence,[82] while in others the judge withheld his decision until the close of all the evidence.[83] One rather unusual case found the judge refusing to nonsuit at the close of the plaintiff's evidence, then refusing to nonsuit at the close of all the evidence, but changing his mind in the course of the final arguments and dismissing for *res judicata.*[84]

Should extrinsic evidence be required to identify the parties or the issues, and the proof admit of more than one conclusion, it becomes a question of fact for the jury.[85] If the question must go to the jury, the court should instruct as to the effect to be given the prior judgment, the burden of proof and other pertinent matters relating to the issues raised by a plea of *res judicata.*

Once the plea of *res judicata* is established by the necessary proof, there appear to be two ways in which the North Carolina courts handle the matter. The most often used method is to dismiss the action on the grounds of *res judicata,*[86] but a nonsuit of the plaintiff's action is frequently used.[87]

[79] Reid v. Holden, 242 N. C. 408, 88 S. E. 2d 125 (1955). In Stone v. Carolina Coach Co., 238 N. C. 662, 78 S. E. 2d 605 (1953), the plaintiff at pre-trial demurred to defendant's plea of *res judicata* and the court held that this presented the sole question of whether the facts *alleged* constituted a valid defense and the judge was not permitted to hear evidence or find facts *dehors* the record. (Emphasis added.)

[80] N. C. GEN. STAT. 169.1 *et seq.*

[81] Most problems which arise as the result of a *res judicata* plea are matters of law which could be determined by a judge at pre-trial if the parties would stipulate the necessary documents in order that they could be examined in making the determination. This would not provide a complete solution, but the possibilities appear worth exploration.

[82] Gaither Corp. v. Skinner, 241 N. C. 532, 85 S. E. 2d 909 (1955); Kelly v. Kelly, 241 N. C. 146, 84 S. E. 2d 809 (1954). (The Supreme Court held that since evidence was available in the present action which was not introduced at the former trial, the granting of a nonsuit at the close of the evidence on the grounds of *res judicata* was premature due to the the fact that the former judgment relied upon was a nonsuit.); Abernathy v. Armburst, 217 N. C. 372, 8 S. E. 2d 228 (1940).

[83] Batson v. City Laundry Co., 209 N. C. 223, 183 S. E. 413 (1935).

[84] Burton v. Carolina Power & Light Co., 217 N. C. 1, 6 S. E. 2d 822 (1940).

[85] Williams v. Hutton & Bourbonnais Co., 164 N. C. 216, 80 S. E. 257 (1913); Blackwell v. Dibbrell, 103 N. C. 270, 9 S. E. 192 (1889).

[86] For representative cases where the trial court dismissed on a plea of *res judicata,* see: Reid v. Holden, 242 N. C. 408, 88 S. E. 2d 125 (1955); Kelly v. Kelly, 241 N. C. 146, 84 S. E. 2d 809 (1954); Carver v. Spaugh, 227 N. C. 129, 41 S. E. 2d 82 (1941); Cleve v. Adams, 222 N. C. 211, 22 S. E. 2d 567 (1942); Abernathy v. Armburst, 217 N. C. 372, 8 S. E. 2d 228 (1940).

[87] Gaither Corp. v. Skinner, 241 N. C. 532, 85 S. E. 2d 909 (1955); Burton v. Carolina Power & Light Co., 217 N. C. 1, 6 S. E. 2d 822 (1940).

*Conclusion:*

North Carolina's position in this area of *res judicata* seems on the whole a common sense approach which is in line with the approach taken by a majority of the jurisdictions in the United States. There is, however, a definite need for a quick and inexpensive method by which the plea may be determined prior to trial of the main case. The most promising solutions appear to be through either an expansion of the scope of the pre-trial conference or by providing a procedure similar to the summary judgment procedure of the Federal courts.

In view of the rapidly increasing importance of the plea of *res judicata,* it is to be hoped that the doctrine will receive more attention from the bar and bench than has been accorded it in the past.