

is of course at an end. The estoppel by judgment is alone by virtue of the existence of the record of the judgment. The record proves the exercise of the judicial mind (or a statutory judgment by default), or it proves an agreement of the parties. The estoppel exists independently of the question as to whether or not there has been an exercise of the judicial mind. The fact of there having been an exercise of the judicial mind, as we have seen, affects the forum of the proceedings to be employed to get rid of or vary the judgment which is the foundation of the estoppel, but is not essential to create the estoppel by the judgment. That "res judicata" and "estoppel" are not convertible terms, and that there must be an exercise of the judicial mind to create "res judicata," would seem to be obvious propositions. The term "res judicata" seems after all to be merely descriptive of one means (even if it be the most usual means) by which a judgment may be founded.

It is submitted therefore that a judgment embodying an agreement of the parties does not import "res judicata," that such a judgment is no more conclusive upon the parties than the agreement on which it was based was before judgment, and that such a judgment may be varied or set aside for the same reasons as would be sufficient to enable the Court to vary or set aside the agreement as an agreement.

The authorities on the subject are not very numerous. The chief among them may be profitably referred to here.

In *Jenkins v. Robertson*, L.R. 1 Sc. App. 17, the facts were that in a previous action (allowed by the Scotch law to have the rights of certain persons to a right of way declared), the then plaintiffs had compromised the action, and judgment by consent in accordance with the terms agreed to by the parties had been entered. The plaintiff Jenkins, one of the claimants of the right of way, not a party to the previous proceeding, asserted that the judgment having been by consent did not import the principle of "res judicata" in respect of the right claimed so as to estop him, though not a party, and that not having been a party to it he was not estopped by it by reason of the consent of others. The House of Lords sus-