RES JUDICATA—"MATTERS WHICH MIGHT HAVE BEEN PLEADED"

LOUISIANA CIVIL CODE OF 1870:

Art. 2286. The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

In the recent case of Hope v. Madison* the Louisiana Supreme Court was again confronted with one of the most serious conflicts in Louisiana jurisprudence: that caused by the introduction into our law of the common law maxim, that "an adjudication is final and conclusive not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to or essentially connected with the subject matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense."¹ This rule, which was introduced into Louisiana early in our history,² has repeatedly been both affirmed and disaffirmed, the court finding ample authority for either position in the two distinct lines of cases.³ The court has said that our concept of res

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* No. 35496 of the docket, decided Jan. 9, 1940, as yet unreported; rehearing denied Feb. 5, 1940.
1. 2 Fremin, Judgments (5 ed. 1925) 1421-1422, § 674.
3. This conflict was recognized by the Supreme Court in Succession of Marinoni, 183 La. 776, 790-791, 164 So. 797, 802 (1935):

"It is stated in the original opinion in the present case, however, that: "The rule is that where one claims a certain thing or seeks recognition of certain rights, he must assert all his pretensions, all his titles, in one suit. A plea of res adjudicata based on a former judgment between the parties on the same subject matter bars a second suit for the same purpose not only as to the titles specifically set up in the former suit, but as to those which might have been plead as well. A plaintiff can not withhold grounds for relief which he should have asserted and then, when he loses, file another suit setting forth the facts originally alleged and those withheld. Brooks v. Magee, 126 La. 388, 52 So. 551; Rareshide v. Enterprise Ginning & Mfg. Co., 43 La. Ann. 820, 9 So. 642."

"The doctrine above announced is too broadly stated, and is not in harmony with the latest decisions of this court on this point.

"In Tennent v. Caffery, 163 La. 976, 990, 113 So. 167, 172, this court said:

"'The doctrine of the common-law courts that res judicata includes not only everything pleaded in a cause, but even that which might have been pleaded, does not obtain generally under our system,'" citing Woodcock v. Baldwin, 110 La. 270, 275, 34 So. 440, 441. (Italics ours.)"

"The court was too optimistic in suggesting that recent decisions have been uniform; one of the most extreme dicta to be found on this point appears in Exchange Nat. Bank v. Holoman Bros., 177 La. 537, 542, 148 So. 702, 703
judicata is derived from the French, and has held that this doctrine is much more limited in Louisiana than in the common law; but it has also decided cases relying principally or entirely on common law authorities, and has stated rules more stringent than those attainable even under the common law.

It is the purpose of this comment to discuss the Louisiana decisions relating to res judicata when the matter advanced in the second suit might have been, but was not, litigated in a prior action. Because of limitations of space, it will be necessary to restrict the scope of this inquiry by assuming that the first suit resulted in a final and valid judgment of a competent court; that the two suits were between the same parties, appearing in the same qualities; that the object or thing demanded in the two suits was the same; and that the party knew of the matter which he failed to urge. Thus the question will be restricted, insofar as possible, to the identity of cause of action. This problem offers the greatest difficulties and gives rise to most of the differences between the common law and the French.

I. COMMON LAW

The common law of res judicata has frequently been misinterpreted even in those Louisiana cases which purport to follow it. The maxim, that a judgment is conclusive upon every matter which the parties might have pleaded, is understood at common law to mean that the judgment is conclusive upon the issues tendered, and upon everything which might have been urged to support or defeat those issues. Furthermore, the plaintiff must
bring forward all the issues necessary to support his cause of action, and the defendant is under a similar duty to produce all his defenses to that cause of action, for the judgment will be a final adjudication of all their rights thereunder. 9

But if the suit is upon a different cause of action, even though it arose out of the same transaction and might have been joined in the first suit, the prior judgment will not be a complete bar to the second suit; 10 it can be conclusive only as to a fact, matter, or issue which was actually adjudicated in the first suit, either expressly or by necessary implication. 11

Thus, "Where the second suit is upon the same cause of action set up in the first suit, an estoppel by judgment [res judicata as a bar] arises with respect to every matter offered or received in evidence, or which might have been offered, to sustain or defeat the claim in controversy; but, where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit." 12 To avoid confusion, the former is usually referred to as "res judicata" and the latter as "estoppel by judgment." 13 Res judicata, as thus restricted, is a complete bar to a second action, 14 while estoppel by judgment merely precludes the parties from contesting the matter, fact, or issue which was decided in the prior suit. 15

Since the above distinction is based upon the identity of the

9. 2 Black, Judgments (2 ed. 1902) 767-769, § 506; 2 Freeman, Judgments 1425-1429, § 676. Wildman v. Wildman, 70 Conn. 700, 41 Atl. 1 (1898), Hamersley, J., dissenting on the ground that the two causes of action were different.

10. "A prior judgment can operate as a complete bar to a second action only on the theory that it is a conclusive adjudication or an absolute estoppel as to every matter that might be urged in support of the latter. Except in those cases involving the doctrine of election of remedies [§ 684] or of inconsistent positions [§§ 631 and 696], or in some cases involving the effect of a former recovery [§ 588 et seq.], this obviously could only be true where the cause of action or claim in both cases is identical." 2 Freeman, Judgments 1427, § 676.


11. 2 Black, Judgments 767-769, § 506; 2 Freeman, Judgments 1429-1432, § 677. Cromwell v. County of Sac, 94 U.S. 351, 24 L.Ed. 195 (1876).


13. See Kelliher v. Stone & Webster, 75 F. (2d) 331, 333 (C.C.A. 5th, 1935). This terminology is not uniformly followed by the courts, but is adopted by most of the writers.

14. 2 Black, Judgments 767-769, § 506; 2 Freeman, Judgments 1425-1429, § 676.

15. 2 Black, Judgments 767, 769, § 506; 2 Freeman, Judgments 1429-1432, § 677. But see Comment (1926) 35 Yale L. J. 607, n. 1, which suggests that there is no difference between the operation of the judgment as a "bar" and as an "estoppel," since it will "bar" the second suit whenever a point determined by it is decisive of the second action.
cause of action in the two suits, it becomes a matter of primary importance to determine what constitutes the cause of action. There is no exact rule, since each case must depend largely upon its peculiar circumstances, but "cause of action" has been defined as the facts which establish the existence of a primary right in the plaintiff, and the violation of that right by some act or omission on the part of the defendant. Separate causes of action may arise from the same subject matter.

Where the cause of action is the same, however, differences in the grounds of action will not prevent the former judgment's operating as a bar. A single cause of action may be based on several grounds, and a plaintiff who fails to urge all the grounds at his disposal is thereafter precluded from litigating those omitted, as fully as though he had advanced them, but had failed to introduce evidence in support of them or to convince the court of their merits. Under the common law, the right to have a deed or contract set aside is regarded as a single cause of action, while fraud, incapacity, or undue influence constitute merely the grounds which give rise thereto.

In addition to identity of the cause of action, res judicata (in the stricter sense) requires identity in the thing sued for, identity of persons and of parties to the action, and identity of the quality in which these persons appear. This is substantially what Article


"The best and most invariable test as to whether a former judgment is a bar is to inquire whether the same evidence will sustain both the present and the former action. . . . Whatever be the form of action, the issue is deemed the same whenever it may in both actions be supported by substantially the same evidence. If so supported, a judgment in one action is conclusive upon the same issue in any other suit, though the cause of action is different. . . .

"On the other hand, if different proofs are required to sustain two actions, a judgment in one of them is no bar to the other. If the evidence in a second suit between the same parties is sufficient to entitle plaintiff to a recovery, his right cannot be defeated by showing any judgment against him in any action where the evidence in the present suit could not, if offered, have altered the result." 2 Freeman, Judgments 1447-1449, § 687.

17. 2 Freeman, Judgments 1433, § 678.


23. 2 Black, Judgments 927, § 610; 3 Bouvier's Law Dictionary (8 ed. 1914) 2910, Res Judicata. For a collection of cases on this point, see 34 C.J. (1924) 752, n. 33.
2286 of the Louisiana Civil Code states as the limitations on "the authority of the thing adjudged,"24 which no doubt explains in part the willingness of Louisiana courts to adopt the common law doctrine in its entirety. But substantially the same requisites are exacted by the French code25 and authors,26 with radically different results.27 It is apparent that the doctrines of res judicata are, to a large degree, a controversy of definitions.

A considerable part of the breadth of res judicata in the common law may be traced to the doctrine of estoppel by judgment. The identity of persons and qualities is necessarily required for the operation of this estoppel, as well as for the operation of res judicata as a bar; but the identity in the thing sued for and the identity of cause of action are replaced, for the purposes of the estoppel, by the single requirement of identity of issues.28 The issue must actually have been in controversy in the prior suit, expressly or by necessary implication;29 and the estoppel does not apply to issues which entered into the first suit only incidentally or collaterally, or which can be deduced from the form or character of the first judgment only by a process of argument and influence.30 This rule, from its statement, would not appear

25. Art. 1351, French Civil Code. For text, see infra, note 35.
26. 5 Toullier, Le Droit Civil Francais (ed. 1833) 264, no 143. Most of the French writers state these requirements as only three identities, that of "persons" being understood to include "in the same qualities." 12 Aubry et Rau, Cours de Droit Civil Francais (5 ed. 1922) 406, § 769 II; 3 Baudry-Lacantinerie et Barde, Traité Théorique et Pratique de Droit Civil (2 ed. 1905) 958, no 2674; Bonnier, Traité Théorique et Pratique des Preuves en Droit Civil et en Droit Criminel (2 ed. 1852) 709, no 761; 8 Dalloz, Répertoire de Legislation de Doctrine et de Jurisprudence (1847) 251, Chose Jugée no 103; 3 Garsonnet et Cézar-Bru, Traité Théorique et Pratique de Procedure Civile et Commerciale (3 ed. 1913) 425, no 710; 8 Huc, Commentaire Théorique et Pratique du Code Civil (1885) 397, no 311; 7 Larombière, Théorie et Pratique des Obligations (Nouvelle ed. 1885) 51, no 32; 20 Laurent, Principes de Droit Civil Francais (2 ed. 1876) 52, no 38; 5 Marcadé, Explication Théorique et Pratique du Code Civil (7 ed. 1873) 164-165; 2 Planiol, Traité Elémentaire de Droit Civil (11 ed. 1937) 22, no 54 bis 3°; 7 Planiol et Ripert, Traité Pratique de Droit Civil Francais (1931) 890-891, no 1553; 2 Pothier, Œuvres (2 ed. 1861) 470, no 888.

The same identities were required by Roman law. 7 Larombière, loc. cit.; 2 Pothier, loc. cit.

"Ces règles en elles-mêmes sont incontestables, car elles ne sont que l'expression de la raison universelle. Mais leur application soulève quelque-fois des difficultés assez graves." Bonnier, loc. cit.

(Translation) "These rules in themselves are incontestable, for they are but the expression of universal reason. But their application often raises rather grave difficulties."
27. See infra, p. 333 et seq.
28. 2 Black, Judgments 923, § 610.
30. 2 Black, Judgments 923-932, §§ 610-612.
to lead to results widely at variance with the French; 31 but "issue," as used in this connection, is understood quite broadly: If title to land was contested on any ground in the prior action, it is an issue finally concluded by the first judgment, which is an estoppel as to everything which was or might have been urged for or against the issue of title. 32 Similarly, whenever the validity of a contract, deed, or other written instrument is in issue, every matter either of law or fact which can be urged for or against its validity must be brought forward in a single suit; 33 and if the

31. See infra, p. 353 et seq.
32. 2 Freeman, Judgments 1812-1815, § 856, in which certain qualifications to this rule, depending upon the nature of the first action, are set forth.
"Take this illustration: Suppose a party brings suit to recover the possession of real estate, and alleges in his complaint that he is owner by virtue of a patent from the government. After a judgment against him, would he be permitted to maintain a second action, alleging that he was owner by virtue of a certain tax proceedings, or by virtue of a judicial sale? ... In both of such actions plaintiff's primary right, that of possession based on ownership, would be the same, the only difference being in the grounds of recovery. All the grounds of recovery, all the bases of the plaintiff's title, must be presented in the first action, or they are lost to him forever. . . ." Patterson v. Wold, 33 Fed. 791, 793 (C.C.D. Minn., 1888). Contrast the result suggested here with Laurent's answer to a similar hypothesis, that each "juridical fact which is the basis of the right of ownership claimed" [i.e., the patent and each sale individually] is a separate cause, hence may be made the basis of a distinct suit without being affected by a prior judgment on any of the others. 20 Laurent, op. cit. supra note 26, at 82, n. 64.

Similarly, contrast the following:
"A judgment determining title is as conclusive against title by limitation or adverse possession as against title by deed." 2 Freeman, Judgments 1815, § 856.
"... Si un tribunal vous condamne à restituer l'immeuble revendiqué contre vous, attendu que vous ne produisez aucun titre de propriété, et que, si vous aviez une possession utile, vous n'eussiez pas manqué d'invoguer la prescription, vous seres admis à prouver dans une autre instance la fausseté de ce dernier motif qui n'est qu'une opinion, et à plaider que vous avez de cet immeuble une possession suffisante pour en prescrire la propriété." 3 Garsonnet et Cézar-Bru, op. cit. supra note 26, at 411, n. 703.

(Translation) "... If a court orders you to return the immovable revalidated against you, on the grounds that you have not produced any title of ownership, and that, if you had had a useful possession, you would not have failed to invoke prescription, you will be allowed to prove, in another instance, the falsity of this last reason for the decision, which is no more than an opinion [of the court], and to plead that you have sufficient possession to enable you to prescribe the ownership [of the immovable]."

The right to have an instrument set aside is also said to be a single cause of action, hence res judicata (as opposed to estoppel by judgment) would apply. See supra, text p. 350 and note 22. The cases are not clear as to which theoretical ground is the basis of the bar or estoppel, but the result is well established.

"A previous adjudication as to [a deed's] validity or invalidity . . . is res judicata when it subsequently comes in question. An unsuccessful attempt to set it aside on one ground bars a subsequent similar attack on other grounds then existing." 2 Freeman, 1883-1884, § 894. Compare this with the view of actions of nullity taken by Bonnier and Griolet, which has been attacked by many of the better commentators. See infra, p. 395.
plaintiff secures judgment on a note or contract, its genuineness is impliedly adjudicated.\textsuperscript{84}

II. The Doctrine in France

"The authority of the thing adjudged" (res judicata) in French law is founded on Article 1351 of the French Civil Code,\textsuperscript{85} of which Article 2286 of the Louisiana code is a literal translation.\textsuperscript{86} This, in turn, was borrowed by the Code Napoleon from Pothier,\textsuperscript{87} and by Pothier from the Roman jurisconsults.\textsuperscript{88}

In Roman law, a distinction was drawn between real and personal actions: In the latter, failure of the plaintiff in a suit on one cause was no bar to a subsequent suit on another; but in a real action, a judgment for the defendant precluded any attempt to secure the immovable, even though the plaintiff offered to show that the ownership was his on a different account than that urged before.\textsuperscript{89} Two exceptions were recognized to this last rule, however:

1. When the title of ownership invoked in the second action arose subsequent to the first suit; and

2. When the plaintiff has expressed the precise cause on which he demands the immovable.\textsuperscript{90}

Huc suggests that these same rules could be applied under French law; but since modern French procedure (like that of Louisiana) requires that the precise cause for which the plain-


\textsuperscript{35} "L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité." Art. 1351, French Civil Code.

(Translation) "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause; the demand must be between the same parties, and formed by them against each other in the same quality."

\textsuperscript{36} The French version of Art. 2265, La. Civil Code of 1825, differs from the article of the French code only in punctuation.


\textsuperscript{39} 8 Huc., op. cit. supra note 26, at 414, n o 326; 2 Pothier, op. cit. supra note 26, at 472-474, n o 894.

\textsuperscript{40} 8 Huc, op. cit. supra note 26, at 414-415, n o 326; 2 Pothier, op. cit. supra note 26, at 474, n o 895-896.

\textsuperscript{41} Huc recognizes a conflict of opinion as to the second of these exceptions. 8 Huc, loc. cit. supra note 26, at 415, n o 326. See also 12 Aubry et Rau, op. cit. supra note 26, at 446, n. 107, § 769.
tiff seeks ownership of an immovable shall always be stated, every case would fall under the exceptions. Therefore a prior judgment can never be a bar to a subsequent action for the same immovable, if the second suit is based on a cause not urged in the first. The other commentators agree as to this result, maintaining that the distinction between real and personal actions no longer obtains under the Code.

Thus, in both real and personal actions, the question of whether a prior judgment (between the same parties, in the same capacities, and for the same object) is res judicata as to a second action resolves itself into the single question, is the cause identical? This is so obvious from the wording of the codal article that even the French commentators have almost attained unanimity; but in order to apply the rule, the term cause must be defined. In this the commentators differ radically.

Disregarding the niceties of language which provoke so much discussion among the commentators, cause may be defined as

42. 8 Huc, op. cit. supra note 26, at 415, n° 326. See also 7 Larombière, op. cit. supra note 26, at 77-78, n° 66; 2 Pothier, op. cit. supra note 26, at 474, n. 1. Contra: Bonnier, op. cit. supra note 26, at 716-717, n° 768.

43. "... Tous les auteurs s'accordent à dire que cette distinction, empruntée au droit romain, ne reçoit plus d'application dans notre droit français." 20 Laurent, op. cit. supra note 26, at 78, n° 63.

(Translation) "... All authors agree that this distinction, borrowed from the Roman law, is no longer applicable in our French law."


44. Because of limitations of space, these stipulations are necessary; the principal difficulties of the doctrine of res judicata, both in French law and Louisiana law, will be found in the identity considered here. See supra, p. 348. The object (thing demanded) may be defined as "the immediate juridical benefit sought." 8 Huc, op. cit. supra note 26, at 407, n° 319. It is generally required that there be the same corpus, the same quantity (if corporeal things), or the same right (if incorporeal). 12 Aubry et Rau, op. cit. supra note 26, at 431-432, § 769 II B; 20 Laurent, op. cit. supra note 26, at 56, n° 40. Laurent suggests that the question be settled by the application of the general principles of the thing adjudged: that the whole criterion should be whether or not the first judge has actually decided what is submitted in the second suit. 20 Laurent, op. cit. supra note 26, at 56-59, n° 40.

45. 12 Aubry et Rau, op. cit. supra note 26, at 440, § 769; 3 Baudry-Lacantinerie et Barde, op. cit. supra note 26, at 961, n° 2679; Bonnier, op. cit. supra note 26, at 716, n° 768; 8 Dalloz, op. cit. supra note 26, 290, n° 191; 3 Huc, op. cit. supra note 26, at 413, n° 325; 20 Laurent, op. cit. supra note 26, at 78, n° 65; 5 Marcadé, op. cit. supra note 26, at 173; 5 Toullier, op. cit. supra note 26, at 208-209, n° 158.

But cf. 7 Planiol et Ripert, op. cit. supra note 26, at 400, n° 1560, saying that the requirement of identity of cause was taken from a fragment of Paul which concerned only real actions; that the modern commentators have been wrong in generalizing it; and that the requirement of this identity can very well be abolished. To the same effect, see 2 Planiol, op. cit. supra note 26, at 24, n° 54 bis 60; Planiol, however, continues with a discussion of his views of the law under the requirement of the identity of cause, which is recognized in both works as well established.
"the juridical fact which constitutes the basis of the right." This helps as little as any definition, but perhaps it may be clarified by a hypothesis: A brings an unsuccessful suit against B, alleging that he is entitled to an estate in the latter's possession because B sold it to him; subsequently A sues for the same estate, alleging that it is his by virtue of inheritance or donation. In the first action the cause is the sale; in the second, the legacy or donation. Failure in the first suit would, therefore, be no bar to the second.

This appears to be the general understanding of the word; at any rate, none of the commentators quarrels with the result suggested above. As Planiol remarks, little difficulty is encountered when the claim has for its object a real right or a credit; the controversies have centered upon actions in nullity, rescission, annulment, and others of that nature.

Here the French differentiate between cause and means. As seen above, identity of cause is necessary for a prior judgment to constitute res judicata; but if the cause is the same in the two suits, a difference in the means will not suffice to permit the new action to lie. Means may be defined as the circumstances which

46. This is the definition given by Laurent (20 Laurent, op. cit. supra note 26, at 80, n° 63) and attributed by him to Colmet de Santerre.

Other commentators have defined "cause" as

5 Marcadé, op. cit. supra note 26, at 173.

-"the immediate basis of the right which the party seeks to exercise."

6 Planiol, op. cit. supra note 26, at 24 n° 54 bis 60;

7 Planiol et Ripert, op. cit. supra note 26, at 90, n° 1560.

-"that which serves as the basis of the demand, the juridical reason or motif on which it is based."

8 Dalloz, op. cit. supra note 26, at 260, n° 122.

-"the juridical fact which forms the direct and immediate basis of the right or of the legal benefit of which one of the parties seeks to avail himself."

9 Aubry et Rau, op. cit. supra note 26, at 440, § 769.

-"the juridical fact which constitutes the legal basis of the benefit or of the right, object of the demand."

10 Baudry-Lacantinerie et Barde, op. cit. supra note 26, at 961, n° 2679.

-"the legal basis of the right which the parties urge against each other respectively, by action or by exception."

11 Larombière, op. cit. supra note 26, at 73, n° 60.

-"the fact which is invoked by the plaintiff as constituting the basis of his right."

12 Huc, loc. cit. supra note 26, at 413, n° 325.

47. Few of the commentators go beyond the vague generalization of a definition. Among those who give hypotheses such as the above, see 3 Baudry-Lacantinerie et Barde, op. cit. supra note 26, at 961-962, n° 2679; 7 Larombière, op. cit. supra note 26, at 73, n° 60; 20 Laurent, op. cit. supra note 26, at 80, n° 63.

48. 2 Planiol, op. cit. supra note 26, at 24, n° 54 bis 60. See also 7 Planiol et Ripert, op. cit. supra note 26, at 900, n° 1560.

49. 12 Aubry et Rau, op. cit. supra note 26, at 441 et seq., § 769 II C; 3 Baudry-Lacantinerie et Barde, op. cit. supra note 26, at 962-963, n° 2680; 8 Huc, op. cit. supra note 26, at 421-422, n° 329; 20 Laurent, op. cit. supra note 26, at 84, n° 65; 5 Marcadé, op. cit. supra note 26, at 173 et seq.; 5 Toullier, op. cit. supra note 26, at 269-270, n° 161. Compare this distinction with the common law differentiation of cause and grounds of action, supra p. 350.
concur to constitute a cause.\textsuperscript{50} or more restrictedly as the proofs or arguments of fact and law which serve to prove the cause.\textsuperscript{51} In general, means is any subdivision of the cause, so the broadness of the concept of the former varies inversely with the broadness of the latter. Once the commentator's view of cause is ascertained, his definition of means is easily understood.

There are three distinct views as to what constitutes cause in an action of nullity:

1) That the invalidity of an instrument is a single cause; and that the vices of consent, the vices of form, the incapacities, etc., which will establish such invalidity, are merely means. Therefore an attack upon the instrument on the ground that it was forged will bar a subsequent attack on the ground that it was secured by fraud or violence, or that the person who signed was insane or was a minor. Under this view the results attained are comparable to those under common law doctrines.\textsuperscript{52} This view is taken by Griolet and Bonnier,\textsuperscript{58} but is attacked by the other authors as a confusion of cause with the object of the demand.\textsuperscript{64}

2) That the various grounds of invalidity should be grouped into vices of consent, vices of form, the incapacities, etc.; each of these groups constitutes a cause, the separate vices within each category (as fraud, error, duress) constituting mere means.\textsuperscript{55} This view, the prevalent one among the older commentators, was taken from the differentiation between proximate and distant cause advanced by the Roman jurisconsult, Neratius.\textsuperscript{56} He

\textsuperscript{50} 12 Aubry et Rau, loc. cit. supra note 49.
\textsuperscript{51} 3 Baudry-Lacantinerie et Barde, loc. cit. supra note 49; 8 Huc, loc. cit. supra note 49; 20 Laurent, op. cit. supra note 26, at 82-83, no 65.
\textsuperscript{52} See supra, pp. 350, 352, and note 33.
\textsuperscript{53} Griolet, De l'Autorité de la Chose Jugée (1868) 109-113.
\textsuperscript{54} Aubry et Rau (12 Aubry et Rau, op. cit. supra note 26, at 440, § 769 n. 86), Baudry-Lacantinerie (3 Baudry-Lacantinerie et Barde, op. cit. supra note 26, at 965-966, no 2692), Garsonnet et Cézar-Bru (2 Garsonnet et Cézar-Bru, op. cit. supra note 26, at 425, no 708), and Huc (8 Huc, op. cit. supra note 26, at 425, no 330), attribute this view also to Bonnier, citing no 876 of his work (presumably the first edition). The second edition of Bonnier (op. cit. supra note 26, at 716-719, no 768-772), which was the only one available to the writer, does not seem to substantiate the statements given above; but M. Bonnier's position is by no means clearly stated. See Marcadé's criticism, 5 Marcadé, op. cit. supra note 26, at 177-178; the footnote on pages 178-179 is to the effect that Bonnier subsequently changed his views to accord with those of Marcadé, no 874 of Bonnier's third edition being cited.
\textsuperscript{55} 3 Baudry-Lacantinerie et Barde, loc. cit. supra note 53; 2 Garsonnet et Cézar-Bru, loc. cit. supra note 53; 8 Huc, loc. cit. supra note 53. Cf. 5 Marcadé, loc. cit. supra note 53.
\textsuperscript{56} Aubry et Rau, op. cit. supra note 26, at 441, § 769 II C; 5 Marcadé, op. cit. supra note 26, at 173 et seq.; 5 Toullier, loc. cit. supra note 49, and at 272-274, no 166.

contended that only the *proximate cause* was necessary to *res judicata*; a difference in the distant or remote *causes* (means) would not prevent the prior judgment's acting as a bar.57 The commentators who follow this view58 term their various groups proximate *causes*, and the individual vices remote *causes*: Thus an attack on the ground of fraud would preclude a subsequent attack on the ground of error or duress, for these merely tend to prove the same *proximate cause*, i.e., nullity for vices of consent; but it would not prevent an attack on the ground of insanity, which tends to substantiate a different *proximate cause*, i.e., nullity for incapacity.

This result is justified on the ground that public policy requires that there be an end to litigation;59 the plaintiff, therefore, is presumed to have based his demand on all the vices comprised in that group, although he may actually have founded his suit on only one of them.60 Marcadé recognizes the illogic and arbitrariness of the grouping rule,61 but nevertheless adheres to it; for this Laurent has criticized him severely.62

The rule is not only arbitrary and illogical, contends Laurent, but is entirely unjustified;63 the theory that the plaintiff is pre-

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57. 12 Aubry et Rau, op. cit. supra note 26, at 441, § 769 II C; 5 Marcadé, loc. cit. supra note 26, at 173 et seq.; 5 Toullier, op. cit. supra note 26, at 272-273, no 165. See also 8 Dalloz, op. cit. supra note 26, at 294, no 198; 8 Huc, op. cit. supra note 26, 421-423, no 329; 20 Laurent, op. cit. supra note 26, at 72-82, no 63-64.
58. 12 Aubry et Rau, loc. cit. supra note 57; 7 Larombière, op. cit. supra note 26, at 98 et seq., no 81 et seq.; 5 Marcadé, op. cit. supra note 26, at 176; 5 Toullier, op. cit. supra note 26, at 269-270, no 161.
59. 12 Aubry et Rau, op. cit. supra note 26, at 442, § 769, n. 89; 7 Larombière, op. cit. supra note 26, at 99, no 81; 5 Marcadé, op. cit. supra note 26, at 175. Cf. 20 Laurent, op. cit. supra note 26, at 96, no 73.
60. 7 Larombière, loc. cit. supra note 26, at 98 et seq., no 81 et seq.; 5 Marcadé, op. cit. supra note 26, at 175-176. Cf. 20 Laurent, op. cit. supra note 26, at 94-95, no 73.
61. 5 Marcadé, op. cit. supra note 26, at 174-175.
62. 20 Laurent, op. cit. supra note 26, at 93 et seq., no 72 et seq.
63. 20 Laurent, loc. cit. supra note 62. Cf. 3 Baudry-Lacantinerie et Barde, op. cit. supra note 26, at 964-965, no 2861: "Mais cette distinction purement théorique n’est pas moins contraire au texte de l’art. 1851, qui parle de la cause en général, qu’au principe fondamental de la matière. L’autorité de la chose jugée ne met obstacle à une nouvelle instance qu’autant qu’elle porte exactement sur ce qui a été décidé par un précédent jugement. Donc, au point de vue de la condition qui nous occupe, il faut qu’elle soit fondée sur la même cause qui a fait l’objet des conclusions des parties et sur laquelle le juge a statué après débat. Or, dans les espèces que nous avons présentées tout à l’heure, le juge n’avait pas statué sur tous les vices de forme dont le testament pouvait être entaché, ou sur tous les vices de consentement dont la convention pouvait être atteinte, mais seulement sur le vice particulier que les parties avaient soumis à son examen. Donc rien ne s’oppose à ce qu’il vérifie, dans un second procès, l’existence d’un autre vice, c’est-à-dire d’une autre cause de nullité. Le nouveau jugement ne peut ni contredire ni confirmer le premier.

"Au surplus, nous devons attirer l’attention sur le point suivant: comme
sumed to have based his suit on all the vices included in the
group he chose is a fiction, since if the court found one of that
group which the plaintiff had not urged, it could not render judg-
ment in his favor thereon. This fiction, and the sacrifice of the
individual to the general interest demanded by the grouping rule,
are not permissible without legislative action. Instead, Laurent
suggests the third view:

3) That each of the vices is a separate cause, and therefore
failure of the plaintiff in an attack on the ground of fraud will
not bar a subsequent attack on the grounds of error or duress, or
any other vice. This view has been adopted by practically all
the modern commentators.
A distinction is drawn between actions in nullity, based on a cause which vitiates the right at the time of its origin, and actions in resolution or revocation, which are based on causes arising subsequent to the right. Therefore, failure in a suit for the nullity of a contract for vices of consent cannot bar a second action for its resolution on the ground of nonperformance of the defendant's obligations. Furthermore, resolution or revocation of the same contract, sale, or donation may be sought in successive suits for different causes: After losing a suit for resolution of a sale on the allegation that the vendor is late in delivering the thing sold, the vendee may sue for the resolution of the same sale on the ground of impossibility of delivery.

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the Court of Cassation still adheres to the “grouping” system. 8 Huc, op. cit. supra note 26, at 426, no 330; 2 Planiol, loc. cit. supra note 67. Cass., 13 avril 1869, Sirey, 1869.1.403. It is submitted, however, that the Court of Cassation disregarded the “grouping” system in the arrêt of 20 octobre 1885, Sirey, 1888.1.23, and decided in accordance with the modern view.

69. 3 Baudry-Lacantinerie et Barde, op. cit. supra note 26, at 966, no 2683; 8 Huc, op. cit. supra note 26, at 426, no 330. See also 12 Aubry et Rau, op. cit. supra note 26, at 443 et seq.; Griolet, op. cit. supra note 53, at 113; 7 Larombière, op. cit. supra note 26, at 95, no 79.


71. Cass., 20 novembre 1834, Sirey, 1835.1.816. 7 Larombière, op. cit. supra
Regarding the problem of choice of remedies, there has been little practical difficulty. The hypothesis is commonly given: A sells a movable to B, warranting it against redhibitory vices; such vices having been revealed, B has a choice of two actions: the redhibitory action, to rescind the sale and receive back the purchase price, or the action quanti minoris, whereby he retains the movable but sues for a diminution of price." The commentators are agreed that a suit for redhibition bars a subsequent suit for diminution of price, although their theoretical explanations vary. The specific problem presented in the hypothesis is unimportant in Louisiana, for this result is specified by Article 2543 of the Louisiana Civil Code.

The consideration in the last few pages has been entirely from the viewpoint of a plaintiff who brings two successive suits; the same rules are applicable, however, to the defendant, the basis of whose defense is a cause. Apparently this applies both to real and personal actions; at any rate, its applicability to the

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73. There is but a single cause, from which two actions arise. 20 Laurent, loc. cit. supra note 72; 2 Pothier, op. cit. supra note 26, at 475-476, no 898.

These theories are criticized by Huc (8 Huc, op. cit. supra note 26, at 418-421, no 328), who says that the result is reached under Article 1644 of the French Code, which is based on considerations peculiar to the situation.

74. "The purchaser who has contented himself with demanding a reduction of the price, can not afterwards maintain the redhibitory action. "But in a redhibitory suit, the judge may decree merely a reduction of the price." Art. 2543, La. Civil Code of 1870.

The same evidence is necessary to support a redhibitory action as an action quanti minoris; the purchaser may choose between the two remedies. Farmer v. Fisk, 9 Rob. 351 (La. 1844).

75. Cass., 18 mars 1863, Sirey, 1863.1.420; Cass., 14 novembre 1866, Sirey, 1867.1.133; Cass., 20 janvier 1886, Sirey, 1889.1.224. Note that the definitions of cause given by most of the commentators look to the exercise of rights by defendants as well as by plaintiffs, some of them explicitly referring to both actions and defenses. See supra, note 46. The definition of Huc (8 Huc, op. cit. supra note 26, at 413, no 325) appears at first glance to be limited in its application to actions brought by a plaintiff, but actually it also applies to defendants. See infra, note 76.

"On observe, dans la pratique, que ce qui délimite le terrain sur lequel a porté le premier litige est très souvent l'exception opposée par le défendard, beaucoup plus que la demande formulée par le demandeur. Ainsi une somme d'argent est réclamée à un débiteur par son créancier; le débiteur se défend en opposant l'exception de prescription; le débat va rouler sur une question de prescription, et non pas sur toutes les autres questions qu'on peut se poser à l'occasion de cette créance." 2 Planhol, op. cit. supra note 26, at 24, n. 3, no 54bis 96.

(Translation) "It may be observed that in practice, the limitation of the field which the first litigation has covered is very often made by the defense
interposed by the defendant, much more than by the demand formulated by the plaintiff. Thus a sum of money is claimed against a debtor by his creditor; the debtor defends by interposing the exception of prescription; the controversy is going to revolve on a question of prescription, and not on all the other questions which could be set up by reason of this credit."

76. The commentators apparently consider this point either too obvious or too unimportant for extended consideration. Most of them make no mention whatever of the rules applicable to the defendant, other than to include the bases of defenses in their definitions of cause. The principle stated is clearly established in the case of real actions, but the statements on personal actions are not as clear as might be desired.


Personal Actions: The passages from Aubry et Rau and Larombière, just cited, appear at first glance to be limited to real actions; but the immediately prior consideration in each had led to the conclusion that the same rules applied (to the plaintiff) in both personal and real actions. It would seem, therefore, that the limiting words were used merely to make it clear that this abrogation of the Roman restriction on real actions applies also to defendants in real actions (as well as personal). Larombière continues with broad language, apparently applicable to any kind of action, and concludes that "the same rules apply to action and to defense." This construction is further substantiated by the author's specific inclusion of defenses in his consideration of certain personal actions (e.g., cf. 7 Larombière, op. cit. supra note 26, at 94, 97-98 n° 78, 80).

The citation from Hue, supra, undoubtedly applies to personal actions; but it is possible that he was referring to successive defenses by A to two suits brought by B (e.g., suits for different years' interest on a note, in which A attacks the validity of the note), and not to a case in which the defendant in the first suit brings a second action to effect the recovery of the property transferred by the first judgment. It is submitted, however, that the author would have stated this limitation if he had intended his rule to apply restrictedly.

Defenses to real and personal actions are considered without distinction by the author of note (1), Sirey, 1867.1.133; and it is clearly established that the defendant in a real action may, after losing, sue to revendicate the property on a ground which he might have urged in defense to the first suit (see citations under "Real Actions," supra).

No case from the French courts has been discovered in which any distinction was drawn between real and personal actions, in this regard. In Cass., 5 novembre 1872, Sirey, 1873.1.198, D.P., 1873.5.91, a suit by a lessor against a bankrupt lessee, resulting in a judgment affirming the lease and giving the plaintiff damages for rent past due and to become due to the end of the lease, was held not to bar a subsequent suit in which the resolution of the lease was decreed on the ground of inexecution of the lessor's obligations, and the damages reduced to the amount of rent for the period during which the premises were habitable. Also see: Cass., 14 novembre 1866, Sirey, 1867.1.133 (revocation of donation permitted on a ground which might have been urged in defense to a prior suit, in which the donee secured execution on property of the donor).

It would seem clear that defendants in personal actions are also accorded the same privileges as plaintiffs, if it were not that the commentators seem to imply, by affirmative pregnant, that the defenses of payment and remission cannot be urged after the judgment in the first suit unless the defendant was ignorant of it, had forgotten about it, or did not have the means of proof at the time of the suit on the debt. 3 Baudry-Lacantinerie et Barde, op. cit. supra note 26, at 967-968, n° 2684; 3 Garsonnet et Cezar-Bru, op. cit. supra note 26, at 426-428, n° 709; 8 Hue, op. cit. supra note 26, at 426-427, n° 381; 7 Larombière, op. cit. supra note 26, at 167-170, n° 162; 20 Laurent, op. cit. supra note 26, at 187-189, n° 164. This problem was discussed by the commentators before the redaction of the Code, the difficulty arising from the conflict between an old law requiring all peremptory exceptions (of which
former is well settled. Thus if A brings a petitory action against B, who defends solely on the ground that he has prescribed the land in controversy, a judgment for A will not prevent B's bringing a second suit and proving that he had title by purchase from C.77 But if the cause has actually been advanced by the defendant in the first suit, new evidence (means) in support of the defense will not serve as the basis of a new action.78

payment was one) to be pleaded before judgment in the first suit, and the inequity of permitting a creditor to retain double payment. 9 Merlin, Répertoire Universel et Raisonné de Jurisprudence (4 ed. 1813), 142, no 14. The more liberal view prevailed, and has in general been continued by the modern commentators, subject to the limitations stated above. (The three differing views of the commentators are summarized in 3 Garsonnet et Cézar-Bru, loc. cit.) However, cf. Cass., 2 juillet 1861, Sirey, 1861.1.846, in which it was held that a judgment recognizing a debt does not preclude the defendant's subsequently showing that a remission had been granted, providing only that this defense had not been advanced in the first suit; the court apparently did not consider whether or not the defendant had the evidence of discharge available at the time of the first action. Contra: Cass., 29 juillet 1851, Sirey, 1851.1.577, a decision which is criticized by A. Carette in a note at the same citation.

This question would ordinarily be beyond the indicated scope of this Comment, but, if the same rules are applicable to the plaintiff as to the defendant in a personal action, why may not the defendant show payment or remission in a subsequent suit even though he knew of the defense and had the proof available at the time of the first suit? The question originally arose from a specific rule of procedure which would necessarily except these defenses from the operation of general principles (9 Merlin, loc. cit.); that may well be the explanation under modern French law. (By way of analogy, Louisiana procedure requires that peremptory exceptions be pleaded before definitive judgment. Art. 346, La. Code of Practice of 1870. And payment has been considered a peremptory exception. Gleises v. Faurje, 6 La. 455 (1834).)

From all of the above it may be seen that: 1) The defendant in a real action may bring a separate suit on a cause which he might have urged in defense to the first suit; 2) the defendant in a personal action can offer a defense, to a subsequent suit on the same instrument, which he might have advanced in the first; 3) apparently the defendant in a personal action can bring a separate suit to effect the return of property transferred by the first judgment; 4) but if payment or remission is the defense which he failed to urge, he apparently may not do so unless he had forgotten it, did not know of it, or did not have the means of proof at the time of the first suit.

Procedure: It is obvious that the defendant who has been cast in a petitory action can himself bring a petitory action, and therein advance the title which he failed to urge in defense to the first suit. The remedy in the case of actions other than those for the ownership of land is not so obvious; but the usual device appears to be an action in quasi-contract, under Articles 1235 and 1376 of the French Civil Code (cf. Arts. 2133 and 2301, La. Civil Code of 1870). 20 Laurent, loc. cit.; note by A. Carette, Sirey, 1851.1.577. Where property has not yet been transferred under the first judgment, other devices may be necessary: in the case of Cass., 14 novembre 1866 (supra), the donor sued for "the revocation of the said donation . . . and consequently the annulment of the seizure" under the first judgment.

77. 12 Aubry et Rau, loc. cit. supra note 76; 3 Garsonnet et Cézar-Bru, op. cit. supra note 26, at 411, no 703; 7 Larombière, op. cit. supra note 26, at 80, no 63. Cass., 6 décembre 1837, Sirey, 1838.1.33.

Contrast this result with that of the common law, supra, p. 352 and note 32.

78. 12 Aubry et Rau, loc. cit. supra note 76; 7 Larombière, loc. cit. supra note 77, and at 163, no 159. Note (1), Sirey, 1867.1.133. Cass., 29 juillet 1851, Sirey, 1851.1.577; Cass., 7 mai 1861, Sirey, 1861.1.704; Cass., 18 mars 1863, Sirey, 1863.1.420.
The authority of the thing adjudged attaches only to the dispositif of the judgment (the actual decision), and not to the motifs (reasons for the decision); and it applies only to those parts of the dispositif as have actually been submitted to the court by the parties, and decided by the judgment. Hence a judgment granting alimony to a plaintiff, on the ground that he is the defendant's child, does not conclude the question of the plaintiff's filiation unless this issue was raised and actually litigated by the parties. To determine this, the dispositif is interpreted by reference to the pleadings in the case. Whenever the application of res judicata is doubtful, the exception should be rejected.

**Preliminary Summary**

Before entering into a consideration of the Louisiana cases, it may be well to summarize briefly the more notable differences between the common law and the French law of res judicata.

I. Common law.

A. Where the cause of action is the same in the two suits,

1. The prior judgment is decisive of all matters or issues which

   a) The plaintiff urged or might have urged in support thereof,
   b) The defendant raised or might have raised in defense thereof;

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79. 12 Aubry et Rau, op. cit. supra note 26, at 402 et seq., § 769 I 2; 3 Baudry-Lacantinerie et Barde, op. cit. supra note 26, at 956-957, n° 2672; 8 Dalloz, op. cit. supra note 26, at 219-220, n° 24; 2 Garsonnet et Cézar-Bru, op. cit. supra note 26, at 408-411, n° 703; 7 Larombière, op. cit. supra note 26, at 36-37, n° 18; 20 Laurent, op. cit. supra note 26, at 40 et seq., n° 29 et seq. Cass., 10 février 1891, Sirey, 1591.1.243; Doual, 28 avril 1874, D.P., 1875.2.49; Grenoble, 22 juillet 1880, D.P., 1881.2.177. But cf. 8 Huc, op. cit. supra note 26, at 393-396, n° 310.

80. 3 Baudry-Lacantinerie et Barde, op. cit. supra note 26, at 957-958, n° 2673; 7 Larombière, op. cit. supra note 26, at 48-49; n° 29; 20 Laurent, op. cit. supra note 26, at 43-45, n° 32.

81. 7 Larombière, loc. cit. supra note 80; 20 Laurent, loc. cit. supra note 80.

82. “Pleadings” is adopted for the translation of “conclusions.”

83. 3 Baudry-Lacantinerie et Barde, loc. cit. supra note 26, at 956-957, n° 2672; 7 Larombière, op. cit. supra note 26, at 49-50, n° 30; 20 Laurent, op. cit. supra note 26, at 51, n° 37. Cf. Saul v. His Creditors, 7 Mart. (N.S.) 425 (La. 1829). A few cases at common law hold that a former judgment cannot be an estoppel as to a fact which was not in issue on the face of the pleadings. Towns v. Nims, 5 N.H. 259, 20 Am. Dec. 578 (1830); see cases from Connecticut, Indiana, Iowa, New Hampshire, and England collected in 34 C.J. (1924) 921, n. 74.

84. 8 Dalloz, op. cit. supra note 26, at 348-349, n° 293; 7 Larombière, op. cit. supra note 26, at 163, n° 158; 20 Laurent, op. cit. supra note 26, at 164, n° 131; 5 Toullier, op. cit. supra note 26, at 268, n° 157.
2. But, in addition to there being identity of cause of action, there usually must be identity in the thing sued for and in the parties and the qualities in which they appear.

B. Where the cause of action is different in the two suits,
   1. The judgment is an estoppel only as to issues actually adjudicated (expressly or by necessary implication) in the prior action;
   2. But the estoppel extends to matters which might have been, but were not, urged in support of or against these issues.
   3. The identities of cause of action and thing demanded are replaced by the requirement that the issues be the same.

II. French law.
   A. The identities of cause, object, parties, and qualities are required in every instance (Article 1351, French Civil Code).
   B. Therefore, since there must always be identity of cause and object (thing demanded), there can be no exact counterpart of the common law estoppel by judgment.
      1. But, since cause is sufficiently broad to include the bases of defenses, the same results are attained in many instances without violating the requirements of Article 1351 (provided always that the object is the same).
   C. In general, it may be said that no matters except those of evidentiary nature are concluded by a judgment, unless they were actually submitted to the decision of the court.

The following differences in results should be particularly noticed:

a) In actions for the ownership of land, the common law (under the doctrine of estoppel by judgment) requires that the plaintiff cumulate all his claims in one suit, for the judgment will be conclusive of all claims which might have supported the issue of title, whether they were urged or not. The French law, on the contrary, permits a separate suit on each sale, on each right of inheritance, each donation, each exchange.

b) Similarly, the common law requires the defendant in such a suit to advance all his defenses; if he has a claim of owner-
ship which he does not advance, it is forever lost to him. The French permit him to defend on one claim of title in the first suit, and should he lose, he may sue on whatever other claims he may have.

c) One who attacks the validity of a written instrument is required by the common law to advance all his grounds of invalidity in one suit;\(^8\) in France, this view has been adopted by only two obscure commentators, one of whom subsequently abandoned it.\(^8^6\) The modern view in France permits a separate suit or defense on each vice, and even the view which formerly prevailed was much more liberal than the common law.

CLAUDE O'QUIN

[This Comment will be concluded in a forthcoming issue of the Louisiana Law Review, with a discussion of the Louisiana jurisprudence.]

REMISSION IN THE CIVIL LAW

LOUISIANA CIVIL CODE OF 1870:

ART. 2100. The creditor, who consents to the division of the debt with regard to one of the codebtors, still has an action in solido against the others, but under the deduction of the part of the debtor whom he has discharged from the debt in solido.

ART. 2101. The creditor, who receives separately the part of one of the debtors, without reserving in the receipt the debt in solido or his right in general, renounces the debt in solido, only with regard to that debtor.

The creditor is not deemed to remit the debt in solido to the debtor when he receives from him a sum equal to the portion due by him, unless the receipt specifies that it is for his part.

The same is to be observed of the mere demand made of one of the codebtors, for his part, if the latter has not acquiesced in the demand or if a judgment has not been given against him.

ART. 2203. The remission or conventional discharge in favor of one of the codebtors in solido, discharges all the

\(^8^5\) It is not clear whether this is on the basis of res judicata as a bar, or estoppel by judgment; see supra, note 33.

\(^8^6\) See note 63, supra.