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Louisiana Practice - Res Judicata - Matters Which Might Have Been Pleaded

Burrell J. Carter

ever, the court of appeal, on rehearing, was of the opinion that the exception of no right of action and no cause of action filed by the defendant was "more properly an exception of want of capacity to sue."[12] The Supreme Court, in overturning the court of appeal's ruling on the exception, properly regarded the exception as one of no right of action.[13] The real question was not the plaintiff's capacity to sue but was, in fact, whether she had a justiciable interest in the property in question. Plaintiff was suing to have property acquired during marriage declared her separate property. There was no allegation that she was suing for the community, or as agent for her husband as head and master of the community, nor was there any issue as to her individual capacity to sue. Therefore, the exception was directed toward the question of whether she had an interest in having this property adjudicated to herself. This situation is not to be confused with the case where a wife purports, as agent for the community, to sue on a community cause of action. In such a case, the proper exception might well be one of want of capacity.[14] Pretermitting that question, however, the proper exception for challenging plaintiff's interest in the property and determining whether it was in fact separate or community property appears to be that of no right of action. If plaintiff, on trial of the exception, can adduce sufficient evidence to establish the property as part of her paraphernal effects, then the exception should be overruled; if not, it should be sustained.

Richard F. Knight

LOUISIANA PRACTICE — RES JUDICATA — MATTERS WHICH MIGHT HAVE BEEN PLEADED

Plaintiffs sued to have a probated olographic will declared a nullity. The controversy had been before the court on two prior occasions. In the first suit the will was attacked on the ground that the imposition of one numeral over another made the date uncertain, but it was held that the date was adequate. A second

12. Stevens v. Johnson, 81 So.2d 469 (La. App. 1955). While the opinion of the court of appeal is not entirely clear, the court seemed to indicate that, even accepting defendant's contention that the exception was one of no right of action, it was not well founded because the record furnished evidence to rebut the presumption that the property involved was community property.

13. See note 11 *supra*.

14. For a discussion of this point, see MCMAHON, LOUISIANA PRACTICE 30-31 (Supp. 1956).

suit was dismissed on an exception of no cause of action because the plaintiff was found to have misconstrued the holding in the first case. In the present procedings the will was attacked on the ground that it was physically impossible for the deceased to have made the will on the date established by the court because of his absence from the state. The trial court sustained exceptions of no right and no cause of action and a plea of res judicata. On appeal, *held*, exception of res judicata sustained. The object of all the suits was to establish the invadility of the will in question, and only the reasons for grounds for its validity are different. *Succession of Reynolds*, 231 La. 410, 91 So.2d 584 (1957).

In the principal case the court was again confronted with the conflict between common law and civilian principles of res judicata with respect to matters which might have been pleaded in a previous suit.[1] The competition of these two concepts within this area of the law in Louisiana necessitates their separate treatment.

At common law, the designation of a matter as one adjudged and not susceptible of re-adjudication may be based on the doctrine of res judicata or on the doctrine of estoppel by judgment. Res judicata, strictly speaking, will not be sustained unless there is identity of cause of action, of the thing sued for, of parties, and of the qualities in which they appear.[2] Once these requisites are met, the doctrine of res judicata bars a later demand arising out of any matter which was or might have been pleaded in a prior suit on the same cause of action.[3] The phrase "cause of action" has many meanings, but is generally defined as the facts which establish the existence of a primary right in the plaintiff and a violation of this right by the defendant.[4] 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

1. For a comprehensive treatment of this problem see Comment, *Res Judicata—"Matters Which Might Have Been Pleaded,"* 2 LOUISIANA LAW REVIEW 347, 491 (1940).

2. 2 BLACK, JUDGMENTS 927 § 610 (1902).

3. 2 FREEMAN, JUDGMENTS 1421-22, § 674 (1925). See 2 *id.* at 1422-24, § 675, for certain qualifications to this rule.

4. 2 *id.* at 1433, § 678. See American Fire and Casualty Co. v. Finn, 341 U.S. 6, 13 (1951).

of them.[5] "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 merely constitutes the grounds for the cause of action."[6]

"A considerable part of the breadth of res judicata in the common law may be traced to the doctrine of estoppel by judgment."[7] This doctrine is applied when the cause of action is different in the two suits, but issues which have been previously adjudicated are involved.[8] The estoppel extends not only to the issues actually adjudicated but to all matters which might have been urged in support of or against the issues.[9] "Issue," as used in this connection, is understood quite broadly, *i.e.*, when the validity of a contract, deed, or similar instrument is in issue, every matter either of law or fact which can be urged for or against its validity must be raised in a single suit.[10] If a plaintiff secures a judgment on a note or contract, its genuineness is impliedly adjudicated.[11]

The authority of the thing adjudged (res judicata) in French law is founded on Article 1351 of the French Civil Code.[12] The identity of *cause*, object, parties, and qualities are required in *every* instance. *Cause* may be defined as "the juridical fact which constitutes the basis of a right."[13] For example, suits to set aside a contract based on different vices would be supported by different causes although the object of all the suits would be the same, viz., to set aside the contract.[14] Since there must

5. 2 FREEMAN, JUDGMENTS 1437-40, § 681 (1925). See Comment, 2 LOUISIANA LAW REVIEW 347, 350 (1940).

6. See note 5 *supra*.

7. See Comment, 2 LOUISIANA LAW REVIEW 347, 351 (1940).

8. 2 BLACK, JUDGMENTS 928, § 610 (1902). The identity of the persons and qualities is necessarily required for the operation of this estoppel, but the identity of the thing sued for and cause of action are replaced by the single requirement of identity of issues. See Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955).

9. 2 FREEMAN, JUDGMENTS 1450-53, § 688 (1925).

10. 2 *id.* at 1465-68, § 693; 1882-83, § 894.

11. 2 *id.* at 1884-85, § 895.

12. FRENCH CIVIL CODE art. 1351: "The faith due to res judicata only extends to what forms part of the judgment. The thing sued for must be the same; the action must be based on the same cause; the action must be between the same parties and brought by the same parties against the same parties in the same capacity."

13. 20 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS 80, no 63 (2d ed. 1876). For a collection of the various definitions of cause by other French commentators, see Comment, 2 LOUISIANA LAW REVIEW 347, 355, n. 46 (1940).

14. 3 BAUDRY-LACANTINERIE ET BARDE, TRAITÉ THEORIQUE ET PRATIQUE DE DROIT CIVIL 964-65, no 2681 (1905); 8 HUC, COMMENTAIRE THEORIQUE ET PRATIQUE DU CODE CIVIL nos 303-342 (1895); 2 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT

always be identity of cause and object (things demanded), there can be no counterpart of the common law estoppel by judgment.

In Louisiana[15] the doctrine of res judicata rests on Article 2286 of the Civil Code which is taken literally from the French Code.[16] Aside from the requirements of identity of the thing sued for, of the parties, and of the qualities in which they appear, there must be identity of the cause of action. The Louisiana Supreme Court has repeatedly held that this article is *stricti juris* and any doubt as to the identity of the causes of action in two suits must be resolved in favor of the plaintiff.[17] For many years the Louisiana courts alternatively accepted and rejected the "might have been pleaded" maxim of the common law, without overruling contrary decisions.[18] Then, in the case of *Hope v. Madison*[19] the Supreme Court re-examined the jurisprudence on the subject and announced that in the future, with but three exceptions,[20] res judicata would not be sustained unless the

CIVIL FRANÇAIS 693-94, nos 2189-2190 (1939). See Comment, 2 LOUISIANA LAW REVIEW 347, 358-65 (1940). The French differentiate between *cause* and *means*, and if the cause is the same in two suits, a difference in the means will not suffice to permit a new action to lie. 12 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 450, no 769 (1922); 7 LAROMBIERE, THEORIE ET PRATIQUE DES OBLIGATIONS 163, no 159 (ed. 1885). *Means* may be defined as the circumstances which concur to constitute a cause, or more restrictively, as proofs or arguments of fact and law which serve to prove the cause. 3 BAUDRY-LACANTINERIE ET BARDE, TRAITÉ THEORIQUE ET PRATIQUE DE DROIT CIVIL 962-63, no 2680 (2d ed. 1905); 20 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS 82-84, no 65 (2d ed. 1876).

15. See Comment, 2 LOUISIANA LAW REVIEW 347, 353-365 (1940).

16. FRENCH CIVIL CODE art. 1351; LA. CIVIL CODE art. 2286 (1870).

17. Hope v. Madison, 194 La. 337, 193 So. 666 (1940); McWilliams v. Gulf States Land & Improvement Co., 111 La. 194, 35 So. 514 (1903); State v. American Sugar Refining Co., 108 La. 603, 32 So. 965 (1902); West v. His Creditors, 3 La. Ann. 529 (1848).

18. *E.g.*, Hope v. Madison, 194 La. 337, 193 So. 666 (1940) (rejecting the "might have been pleaded" maxim with three exceptions); Buillard v. Davis, 185 La. 255, 169 So. 78 (1936) (holding estoppel by judgment applies in Louisiana); Exchange Nat. Bank v. Holoman Bros., 177 La. 537, 148 So. 702 (1933) (accepting the "might have been pleaded" maxim); State v. American Sugar Refining Co., 108 La. 603, 32 So. 965 (1902) (holding that res judicata will not be sustained if all the requisites of Article 2286 are not present). See also Woodcock v. Baldwin, 110 La. 270, 275, 34 So. 440, 441 (1902) (where it was said that the common law rule of res judicata does not generally obtain in Louisiana).

19. 194 La. 337, 193 So. 666 (1940). See McMahon, *The Work of the Louisiana Supreme Court for the 1954-1955 Term — Civil Procedure*, 16 LOUISIANA LAW REVIEW 361 (1956). See also Comment, 2 LOUISIANA LAW REVIEW 347, 491 (1940).

20. The exceptions to the general rule applied in this case and recognized by courts are: (1) that generally a breach of contract or single tort gives rise to but one cause of action (*but see* Quarles v. Lewis, 226 La. 76, 86, 75 So.2d 14, 17 (1954), where the court treated this as "judicial estoppel"); (2) that all claims and defenses must be set up in a petitory action or they will be considered waived; and (3) that in seeking relief against execution a litigant must set out all the then existing reasons or grounds. See Himel v. Connely, 195 La. 769, 197 So. 424 (1940), where another was added, viz., that the parties must assert whatever title they have in suits for partition of property. See also McMahon, *The Work*

requisites of Article 2286 were present. The French view as to cause or cause of action seems to have been adopted, for the court quoted at length from Planiol and expressly rejected the "might have been pleaded" maxim of the common law.[21]

In the instant case the court purportedly adhered to the civil law concept of res judicata as manifest in Article 2286 of the Code, but in fact applied the common law rules. There was no mention of identity of cause of action, although the court did state that the test of Article 2286 had been met.[22] After stating that the object of the suits was the same, the court held that only the *reasons* for the invalidity of the will were different.[23] In the concurring opinion the view was expressed that although the *cause of action* was the same in the suits and only the reasons were different, res judicata would not be available.[24] The concurring Justice stated that the suit should be amenable to an exception of no cause of action or one of judicial estoppel since the failure of the plaintiff to assert a known claim would be considered a waiver of that claim.[25] In the dissenting opinion the view was expressed that the plea of res judicata should not be sustained for the cause of action in each suit was not the same, and the suit did not fall into one of the three areas in which, under *Hope v. Madison*,[26] the "might have been pleaded" maxim obtains in Louisiana.[27]

It appears that the majority and the concurring opinion have confused the *object* of the suit with the civil law concept of cause of action or cause. At common law the object of the suit in the instant case would be identical with the cause of action, viz., the invalidity of the will would be both the object of the suit and the

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of the Louisiana Supreme Court for the 1940-1941 Term — Pleading and Practice, 3 LOUISIANA LAW REVIEW 363-64 (1941).

21. 194 La. 337, 193 So. 666 (1940). In this case Mrs. Hope sued Madison to set aside a sale of property on the ground that it was made without adequate consideration. Her demand was rejected and in a second suit she demanded that the sale be set aside on the ground that it was the sale of a litigious right. The Supreme Court held that although the parties and the object demanded were identical, the plea of res judicata could not be sustained because the cause of action was not the same.

22. 91 So.2d 584, 587 (La. 1956).

23. *Id.* at 587-88.

24. *Id.* at 588.

25. As has been previously pointed out, estoppel by judgment occurs only when there is no identity of cause of action and object, and the clear language of Article 2286 should preclude the applicability of this doctrine in Louisiana. See Comment, 2 LOUISIANA LAW REVIEW 347, 503-05 (1940).

26. See note 19 *supra*.

27. 91 So.2d 584, 588-89 (La. 1956).

cause of action.[28] However, the civilian concept of cause of action is much more restricted, and the object of the suit would not coincide with the cause of action.[29] The allegedly inexact date in the first suit, the grounds for the allegation that deceased died intestate in the second suit, and the allegation that deceased could not have possibly signed the will due to his absence from the state in the present suit would constitute different causes under the civil law.[30] Therefore, invalidity of the will would have been only the object of the suit and nothing more.

It is suggested that the civil law concepts of cause of action and res judicata should preclude the general applicability of the "might have been pleaded" maxim in Louisiana. Although public policy requires that litigation have an end, res judicata should not be applied unless there is present a *thing adjudged,* according to the requisites of Article 2286. Furthermore, the holding in the instant case appears to undo much of the good work of *Hope v. Madison* and the several cases following it.[31] It is suggested that an adherence to the civilian concepts of cause of action and res judicata as expressed in the above case and the dissent in the present case would alleviate the confusion resulting from the coexistence of two discordant lines of authority.

Burrell J. Carter

SALES — AUTOMOBILES — BONA FIDE PURCHASER DOCTRINE

Plaintiff, an Alabama automobile dealer, agreed to sell an automobile to a Louisiana used car dealer for cash on delivery. Plaintiff's agent was instructed to deliver the car to New Orleans and to accept only cash in payment. When the agent delivered the car, however, he accepted a draft. The agent returned to Alabama and delivered the draft to plaintiff who made no effort to annul the sale or to secure the return of the car, but kept the draft for several days and then deposited it for collection. In the meantime, the used car dealer sold the automobile to defendant, a good faith purchaser. The draft was dishonored,

28. See note 4 *supra.*

29. Hope v. Madison, 194 La. 337, 193 So. 666 (1940). See note 14 *supra.* See also Comment, 2 LOUISIANA LAW REVIEW 347, 491 (1940).

30. See note 29 *supra.* They would, however, be reasons according to the common law concept of cause of action.

31. *E.g.,* Leadman v. First Nat. Bank, 198 La. 466, 3 So.2d 739 (1941); Lloveras v. Reichert, 197 La. 49, 200 So. 817 (1941).