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PROCEDURE

CIVIL PROCEDURE

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JURISDICTION

Code of Civil Procedure article 10 provides that a Louisiana court has jurisdiction to grant custody over a minor who is "in, or is domiciled in" the state. This provision usually permits the court to exercise jurisdiction over the status of a child after the marriage has been dissolved, because the child remains in the state, or the parent who is granted custody remains in the state and thus the child's domicile is in the state. In some instances, however, the parent who is granted custody leaves the state, accompanied by the child, and the other parent remains in the state. In such cases, does a Louisiana court have jurisdiction to alter the custody decree? The Third¹ and Fourth² Circuits have held that a court has "continuing jurisdiction" in such cases, but the First³ and Second⁴ Circuits have rejected the concept and held that a court was without jurisdiction. The issue was partially resolved by the supreme court during the 1976-77 term. In *Odom v. Odom*,⁵ the court held that where the child and the parent with custody are no longer in the state, and the parent remaining in Louisiana is not obligated to support the child, a Louisiana court does not have jurisdiction to adjudicate the custody of the child. The court reserved judgment on the issue of whether a Louisiana court would have continuing jurisdiction in cases in which the parent remaining in Louisiana is obligated to support the absent child, and also reserved judgment on whether, if continuing jurisdiction exists in such a case, its exercise would be limited by comity or due process.

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1. *Lynn v. Lynn*, 316 So. 2d 445 (La. App. 3d Cir. 1975).

2. *Pattison v. Pattison*, 208 So. 2d 395 (La. App. 4th Cir. 1968).

3. *Stewart v. Stewart*, 233 So. 2d 305 (La. App. 1st Cir. 1970).

4. *Nowlin v. McGee*, 180 So. 2d 72 (La. App. 2d Cir.), *writs refused*, 248 La. 527, 180 So. 2d 541 (1965).

5. 345 So. 2d 1154 (La. 1977).

DISCOVERY

The 1976-77 court term was a remarkable year for that most difficult of discovery issues, the extent to which a litigant may obtain the opinion of an expert witness retained by his opponent. Prior to 1976, the Code of Civil Procedure made no provision for discovery of expert witnesses through depositions or interrogatories. The only code provision speaking to the issue was article 1452, which after providing for discovery of the "work product" of an attorney under certain circumstances, contained the restriction that:

The Court shall not order the production or inspection of any part of the writing that reflects mental impressions, conclusions, opinions, or theories of an attorney or an expert

Pre-1976 jurisprudence indicated that this phrase prohibited discovery of expert witnesses through deposition or interrogatory.⁶ In 1976, the Louisiana Law Institute submitted to the legislature a comprehensive revision of discovery procedure, including proposed article 1425 providing for discovery of both facts and opinions of expert witnesses in the same manner as presently provided by Federal Rule 26(B)(4).⁷ However, the legislature deleted the reference to opinion in proposed article 1425 but retained the provision in prior article 1452 protecting from discovery those parts of writings containing expert opinion.⁸ Consequently, the new discovery procedure adopted by the legislature in 1976 provided detailed regulation of discovery of facts known by experts, but made no mention of the discoverability of expert opinion except the prohibition of discovery of writings containing such opinions. Then, prior to the effective date of the new discovery articles, the supreme court decided *Hanks v. Drs. Ranson, Swan & Burch, Ltd.*⁹ In that case, plaintiff sued the defendant medical

6. See, e.g., *State Department of Highways v. Spruell*, 243 La. 202, 142 So. 2d 396 (1962); *Cousins v. State Farm Mut. Auto. Ins. Co.*, 258 So. 2d 629 (La. App. 1st Cir. 1972); *Barnett v. Barnett Enterprises, Inc.*, 182 So. 2d 728 (La. App. 4th Cir. 1966).

7. The Federal rule permits a party through interrogatories to require any other party to identify the expert witnesses whom he expects to call, to state the subject matter of the expert's testimony, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. Further discovery from such experts, and any discovery of experts whom a party has retained but does not intend to call as a witness, may be obtained only by court order, and the court may, and in some circumstances must require the party seeking such additional discovery of expert testimony to pay part of the costs incurred in obtaining the expert's testimony.

8. LA. CODE CIV. P. art. 1424.

9. 340 So. 2d 152 (La. 1976).

corporation and one of its employees for malpractice; plaintiff thereafter took the deposition of one of the shareholder physicians, and sought to elicit from the witness an expert opinion concerning the injury. The supreme court upheld the witness's refusal to answer, pointing out that the witness was not a party, but was one whose opinion was prepared in anticipation of litigation or in preparation for trial and thus immune from discovery under the provisions of article 1452 of the original discovery rules. Since that provision of article 1452 to which the court referred in *Hanks* was continued verbatim in article 1424 of the new discovery rules, and since the new rules did not make any other provision for discovery of expert opinion, the logical conclusion was that under the new rules, opinion of an expert developed in preparation for trial would not be subject to discovery, whether contained in a writing or not.

But on the last day of the 1976-77 term, the supreme court, with three justices dissenting, ruled¹⁰ that a litigant could elicit through oral deposition expert opinion developed in preparation for trial, and that any expression to the contrary in *Hanks* was "inadvertent" and "dictum."¹¹ The majority reached its conclusion in this manner: (1) the opinion of an expert falls within the general definition of discoverable matter—"relevant to the subject matter involved in the pending action";¹² (2) since article 1424 (originally Article 1452) applies only to writings, and since article 1425 speaks only to the discovery of facts, neither provision bars discovery of the opinion of an expert witness through oral deposition.

Unlimited discovery of the opinions of experts who are retained in preparation for trial may be counterproductive. If these opinions are fully discoverable, a litigant may be encouraged to delay his pre-trial preparation and permit the other litigant to invest the time and money usually required in obtaining expert testimony. The diligent litigant who is required to share his findings with a dilatory opponent may in subsequent litigation delay the development of his case until the later stages of the litigation. As a result, pre-trial settlements may become less frequent. Thus, both purposes of discovery—the attainment of judicial efficiency and fairness to the parties—will be thwarted.

The federal rule-makers have recognized the conflict and have resolved it by placing discovery of expert opinion under the supervision of the court, and, where discovery is granted, by requiring the litigant

10. *Weidenbacher v. St. Paul Fire & Marine Ins. Co.*, 347 So. 2d 1160 (La. 1977).

11. *Id.* at 1162.

12. LA. CODE CIV. P. art. 1422.

obtaining discovery to share the expense incurred in the development and discovery of the opinion.¹³ The Law Institute recommended the federal approach, which accommodates the competing values, but an amendment in the Senate deleted the reference to opinion testimony, leaving the code without an express provision on the discovery by deposition of the opinion of a retained expert. The supreme court was thus faced with an "all or nothing" question, and a majority felt the legislative intent was to permit discovery. The wisest course may be to accommodate the competing values by permitting limited discovery and a sharing of the expenses, but that course can only be charted by the legislature.

In *Ogea v. Jacobs*,¹⁴ the supreme court addressed the issue of the general discoverability of the lawyer's "work product." Several years after the accident which prompted the suit in *Ogea*, plaintiff attempted to take the deposition of an employee; however, the employee testified that he was unable to recall material facts surrounding the accident. Plaintiff then sought production of an accident report which the employee had made shortly after the event. In an opinion by Justice Dennis, the court held that:

(1) A party seeking to avoid production of a writing which is otherwise discoverable bears the burden of proving that it was prepared or obtained in anticipation of litigation or in preparation for trial.

(2) If the writing was prepared or obtained in anticipation of litigation or in preparation for trial by an adverse party, article 1424 of the amended discovery provisions makes it non-discoverable unless the party seeking production then establishes that denial will "unfairly prejudice" him or cause him "undue hardship and injustice."

(3) The concepts of "unfair prejudice," "undue hardship" and "injustice" set forth in article 1424 evolved from federal discovery, and Louisiana courts properly may rely upon federal jurisprudence under the analogous federal rule¹⁵ as persuasive authority in interpreting article 1424.

13. FED. R. CIV. P. 26(b)(4)(c) provides: "Unless manifest injustice would result, (1) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery" The statute also provides that in certain situations, the court may or must require the party seeking discovery to pay a fair portion of the fees and expenses reasonably incurred by the party against whom discovery is sought in obtaining the facts and opinions of the expert.

14. 344 So. 2d 953 (La. 1977).

15. FED. R. CIV. P. 26(b)(3) provides:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain

(4) A party denied production of a statement taken near the time of the event in suit is not thereby unfairly prejudiced or caused undue hardship or injustice in every case; however, the lapse of time since the event may combine with other factors, such as the unavailability of a witness or his reluctance, hostility, lapse of memory or apparent deviation from his prior statement, to establish such a risk of prejudice as would warrant production of the statement.

INCIDENTAL ACTIONS

Unlike the federal system, Louisiana does not permit a general cross-claim between co-parties to an action. The Code of Civil Procedure provides only a limited cross-claim: a co-party, by using the third party demand, may cross-claim against any other person, including a co-party, who may be liable to him for all or part of the principal demand.¹⁶ However, the device does not permit co-parties to assert their own independent claims against each other. The Louisiana courts have attempted to remedy the defect by an expansion of the concept of intervention: a defendant is permitted to "intervene" into the action by the plaintiff against the co-defendant, and to assert through the intervention his own claim for damages against his co-defendant.¹⁷ In *Travelers Insurance Co. v. Sonnier*,¹⁸ the Fourth Circuit provided an alternate method which is conceptually more sound than the fictitious "intervention" heretofore utilized. In *Sonnier*, the defendant driver filed a third party claim against the mechanic who repaired his automobile brakes, seeking both indemnity for the plaintiff's damages and recovery for his own damages. After noting that the claim for indemnity was properly joinable with the main demand under article 1111, the court held that once a defendant is joined under article 1111, the issue of what demands may be cumulated against him is governed by article 462, which permits cumulation of two or more actions

discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery had substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

16. LA. CODE CIV. P. art. 1111.

17. *Bellow v. New York Fire & Marine Underwriters, Inc.*, 215 So. 2d 350 (La. App. 3d Cir. 1968).

18. 344 So. 2d 73 (La. App. 4th Cir. 1977).

against the same defendant under certain circumstances.¹⁹ The court then concluded that since the defendant's claim for his own damages was properly joinable with his claim for indemnity under article 462, and since the claim for indemnity was joinable with the main demand under article 1111, the three actions could be heard in the same suit.

Adoption of the *Sonnier* rationale by other Louisiana courts would ease the need for a cross-claim. The *Sonnier* approach also could be extended to permit joinder of additional parties under article 463, providing state courts with a flexibility in joinder of parties similar to that enjoyed by federal courts through the application of Federal Rule 13(h).²⁰ Some problems would still remain, however. For example, under *Sonnier* the co-defendant who files the cross-claim must be able to assert that the co-defendant is or may be liable to him for all or part of the principal demand. A simple solution would be legislative adoption of a cross-claim similar to that provided by Rule 13(g) of the Federal Rules of Civil Procedure, which permits a party to urge against a co-party any claim arising out of the transaction or occurrence which is the basis of the principal demand. That standard prevents a defendant from grafting unrelated claims upon the principal demand, but provides the flexibility to assure that identical or similar fact issues may be litigated in a single trial.

Third party practice was given an expansive reach by the Second Circuit in *Cotton States Chemical Co. v. Larrison Enterprises, Inc.*²¹ A retailer sued its customer for the purchase price of goods, and the customer brought a third party demand against the manufacturer for the damages sustained by the customer by the alleged failure of the product to perform in the manner warranted. The Second Circuit rejected an argument that

19. LA. CODE CIV. P. art. 462 provides:

A plaintiff may cumulate against the same defendant two or more actions even though based on different grounds, if

(1) Each of the actions cumulated is within the jurisdiction of the court and is brought in the proper venue; and

(2) All of the actions cumulated are mutually consistent and employ the same form of procedure.

Except as otherwise provided in Article 3657, inconsistent or mutually exclusive actions may be cumulated in the same judicial demand if pleaded in the alternative.

20. FED. R. CIV. P. 13(h) provides that persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim when the claims arise out of the same transaction or occurrence or series of transactions or occurrences, and if any question of law or fact common to the parties will arise in the action.

21. 342 So. 2d 1212 (La. App. 2d Cir. 1977).

third party demand was not proper because the defendant was not claiming that the third party defendant was liable to him "for all or part of the principal demand." The court pointed out that article 1111 provides that one may third party another who is his warrantor *or* who may be liable for all or part of the principal demand, and that the disjunctive "or" permits joinder of a warrantor who is not liable to the third party plaintiff for all or part of the principal demand.

TRIAL BY JURY

Title 13, section 5105 of the Louisiana Revised Statutes provides that "no suit against the state or a state agency or political subdivision shall be tried by a jury."²² In *Champagne v. American Southern Insurance Co.*,²³ the supreme court held that this provision did not bar a jury trial against a co-defendant properly joined with the political subdivision. In such cases, the court held, there should be a single trial, with the judge determining issues of fact involving the political subdivision. In *Jones v. City of Kenner*,²⁴ the plaintiff joined the municipality and its liability insurer, and sought a jury trial against the insurer. On appeal, the supreme court held that section 5105 does not bar a jury trial against the insurer, even though all of the issues against both defendants are identical. The court also upheld the statute against a charge that denial of jury trial against a political subdivision violates the Constitution of 1974.

In *Triche v. City of Houma*,²⁵ the issue before the First Circuit was whether section 5105 prohibited the state or a political subdivision of the state from obtaining a jury trial at its own request. The court held that the statute bars jury trials against public bodies without their consent, but does not prohibit those bodies from obtaining trial by jury.

APPEALS

Under constitutional provisions in effect since 1879,²⁶ the jurisdiction of Louisiana appellate courts extends to review of findings of fact by the lower courts. Since 1825, the Civil Code has contained a provision that in determining the amount of general damages sustained by a claimant, "much discretion must be left to the judge or jury"²⁷ While other

22. LA. R.S. 13:5105 (Supp. 1975).

23. 295 So. 2d 437 (La. 1974).

24. 338 So. 2d 606 (La. 1976).

25. 342 So. 2d 1155 (La. App. 1st Cir. 1977).

26. See *Gonzales v. Xerox Corp.*, 320 So. 2d 163, 165 n.1 (La. 1975).

27. LA. CIV. CODE art. 1934(3).

permissible constructions of the constitutional and statutory provisions were possible, the jurisprudence has consistently held that the "much discretion" provided by article 1934(3) is vested only in the trial court; the appellate court may not substitute its judgment as to general damages for that of the trial court, if the latter is within the "much discretion."²⁸ Where the appellate court has found an abuse of discretion by the trial court, however, it has adjusted the award for general damages to the amount which it deemed appropriate. This practice was disapproved by the supreme court in the landmark decision of *Coco v. Winston Industries, Inc.*,²⁹ decided during the 1976-77 term. In discussing appellate review of awards of general damages, the supreme court first re-emphasized that the court of appeal may disturb the award of the trial court only when the record clearly reveals an abuse of discretion. When there is a determination of such abuse, the supreme court stressed that the appellate court may disturb the award

only to the extent of lowering it (or raising it) to the highest (or lowest) point which is reasonably within the discretion afforded . . . [the trial] court It is never appropriate for a Court of Appeal, having found that the trial court has abused its discretion, simply to decide what it considers an appropriate award on the basis of the evidence.³⁰

The decision, following closely an earlier supreme court decision instructing the appellate courts on the procedure to apply in reviewing cases in which the trial judge has granted an additur or remittitur,³¹ indicates that the court has adopted what may be called, for want of a better name, a "ball park" theory of application of article 1934(3). The high court apparently feels that a reviewing court should first determine the permissible limits of an award which could be made by a rational trier of fact; if the award by the lower courts falls within those limits, it should not be disturbed, and if the award falls beyond those limits the court should increase or reduce it to the highest or lowest outer limit, as appropriate.

The *Coco* rule may be supported on two grounds. First, an important element in fixing an award for general damages is the weight given to the claimant's testimony as to his pain and suffering. Accordingly, there is a

28. See, e.g., *Bitoun v. Landry*, 302 So. 2d 278 (La. 1974); *Fox v. State Farm Mut. Auto. Ins. Co.*, 288 So. 2d 42 (La. 1973).

29. 341 So. 2d 332 (La. 1976).

30. *Id.* at 335.

31. *Miller v. Chicago Ins. Co.*, 320 So. 2d 134 (La. 1975).

reason for placing great value upon the determination of the trial court, which has seen the claimant testify, and in limiting the power of an appellate court to tamper with the award after reading the record. The approach adopted by the supreme court may be designed to coax the appellate courts toward greater emphasis upon that factor in exercising appellate review of damages. Secondly, repeated substitution by an appellate court of its own opinion as to quantum for that of the trial court, when combined with other appellate practices inherent in the Louisiana system of appellate review of law and fact, may have a demoralizing effect upon a trial judge and his assessment of his role in the judicial process. If this is true, *Coco* is a reaffirmation by the high court of the important role the trial judge plays in the administration of justice.

An equally important aspect of the *Coco* decision was the court's instruction to appellate courts on the weight to be given prior awards in determining the permissible limits of general damages in subsequent cases. The court wrote that:

Courts of appeal have placed too much emphasis on their review of other reported decisions. Certainly no two cases are ever fully alike. And whether two cases are so similar as to produce like quantum judgments is hardly discernible by gleaning the facts of the comparable decision from simply a written opinion of an appellate tribunal. Of course, another factor bearing on this matter is that significant change has been, and is taking place in our society not the least of which are changes in economic conditions (particularly rampant inflation), fluctuating job categories, employment opportunities, and even lifestyles. Furthermore, it is impossible for an appellate court to judge what evidence in a particular case was given special weight by the finder of fact.³²

In the same term in which it re-affirmed its dedication to the "much discretion" limitation upon appellate review of awards of general damages, the supreme court cast some doubt upon the continuing strength and vitality of the "manifest error" rule which has limited appellate review in other areas. The doubt springs from the court's disposition of *Thornton v. Moran*,³³ an automobile accident case which began its ominous odyssey as a bifurcated accident trial in the district court. Plaintiff sued defendant but did not seek trial by jury; defendant instituted a separate action against plaintiff and obtained a jury trial. The matters were consolidated for trial,

32. 341 So. 2d at 335-36.

33. 343 So. 2d 1065 (La. 1977).

after which the judge found for plaintiff in the first action, but the jury found for the plaintiff (the defendant in the first action) in the companion case. On appeal, the First Circuit reasoned that both decisions were within the latitude permitted the finder of fact by *Canter v. Koehring*³⁴ and its progeny, and affirmed. Acting upon a writ application, the supreme court ex parte and in a per curiam opinion granted the writ, reversed and remanded the case to the court of appeal with instructions

to resolve the difference in the factual findings between the jury and the judge . . . and to render a single opinion based upon the record.³⁵

On remand the appellate court, apparently piqued by the turn of events, interpreted the supreme court's opinion as an instruction to the appellate court to select the most reasonable among two reasonable decisions, and then selected the jury's verdict as the most reasonable.³⁶

The supreme court's decision in *Thornton* is puzzling. When the "manifest error" rule is applied to bifurcated trials, situations will arise in which inconsistent results, each within the discretion granted by the rule to the trier of fact, will be reached by judge and jury. The supreme court's intolerance for such a result could reflect a lessening of its adherence to the rule. Certainly, by requiring either the trial judge or the appellate court to harmonize the results, the court is creating an exception to the rule.

Since in *Thornton* the supreme court remanded to the appellate court with instruction to harmonize the decisions, it may be argued that that body is charged with the function of harmonizing inconsistent results in bifurcated trials. Under existing law, however, the trial judge also has the power to harmonize the results by determining that the jury's decision, or his own, is contrary to the law and the evidence, and granting a new trial on that ground.³⁷ One may argue that the trial judge, who has heard the witnesses, is in a better position to harmonize the results, but one also may contend that permitting the trial judge to perform this function in a bifurcated trial in which both decisions are within the *Canter* range would deprive the litigant who selected the jury of his right to trial in that forum.

RES JUDICATA

The final chapter in the mystery surrounding the doctrine of estoppel by judgment (collateral estoppel) in Louisiana law may have been written

34. 283 So. 2d 716 (La. 1973).

35. 343 So. 2d at 1066.

36. 348 So. 2d 79 (La. App. 1st Cir. 1977).

37. LA. CODE CIV. P. arts. 1972(3), 1973.

in *Mitchell v. Bertolla*,³⁸ a unanimous decision by the state's highest court. In *Mitchell*, a litigant brought an action to annul an option to sell on the grounds of lesion, and an action for non-payment of the rent. After an unsuccessful decision, plaintiff sought the same relief in a separate suit, urging fraud and misrepresentation. The supreme court held that the second action was not barred either by res judicata or by collateral estoppel.

The determination that res judicata did not apply was consistent with Louisiana's unique application of that doctrine. Generally, at common law, res judicata bars a subsequent suit for the same relief on other grounds which "might have been pleaded" in the first suit. Thus *Mitchell* would have been disposed of in other states on a plea of res judicata. In Louisiana civil actions res judicata derives from Civil Code article 2286, which requires that the "causes of action" be the same. Our courts have held that the term "cause of action" is a mistranslation of the French, and should read "cause." Thus res judicata does not apply unless both the object of the demand, *i. e.*, the relief, and the cause, *i. e.*, the grounds, are the same. Applying that doctrine to the *Mitchell* facts, the two claims were based upon different grounds, and res judicata did not apply.

The issue of the application of collateral estoppel was much more difficult for the court to resolve, for reasons not easily explainable. A brief history is necessary to an understanding of the problem. Common law jurisprudence developed collateral estoppel as a method of precluding relitigation in some instances in which res judicata would not apply. Under the doctrine of collateral estoppel at common law, if the causes of action are not the same but a fact material to the second suit necessarily was decided in the first suit, the party against whom the fact was decided is estopped to deny that fact in the second suit. Since the party estopped has had his day in court for the determination of that fact, there is no violation of due process, and judicial efficiency dictates that the matter not be relitigated. Collateral estoppel is of limited use in common law jurisdictions; in most instances in which a fact necessarily was decided in earlier litigation between the same parties, the "might have been pleaded" rule will cause both claims to be treated as a single cause of action, and res judicata, and not collateral estoppel, will bar relitigation. Collateral estoppel applies only where the causes of action are different, but the expansive definition of cause of action in common law jurisdictions leaves little room for application of the doctrine.

38. 340 So. 2d 287 (La. 1976).

In Louisiana, the definition of a cause of action for *res judicata* purposes is much narrower: every theory of relief is a separate "cause," even though it might have been pleaded in an earlier suit. If Louisiana were to adopt collateral estoppel and apply it whenever the state's restrictive concept of *res judicata* would treat the claims as separate "causes" or "causes of action," collateral estoppel would give a broad preclusive effect to prior litigation, thus undermining the policies which gave rise to the state's adoption of a narrow concept of *res judicata*.

This dilemma apparently produced the confusion about the existence of collateral estoppel in this state which reigned in Louisiana jurisprudence prior to *Mitchell*. There is no code or statutory basis for collateral estoppel, and the courts have been hesitant to adopt it. The doctrine seemingly was embraced by the supreme court in the 1940 case of *Hope v. Madison*.³⁹ Subsequent decisions, however, have ignored collateral estoppel in situations in which it obviously was applicable,⁴⁰ and one appellate court simply has declared that the doctrine does not exist in Louisiana.⁴¹

In *Mitchell* Justice Dixon, writing for a unanimous court, alluded to the fragile status of collateral estoppel in Louisiana and its incompatibility with the civilian concept of *res judicata*. Justice Dixon reasoned that since collateral estoppel was borrowed by Louisiana from the common law, our courts must apply the doctrine within the "framework" of common law concepts. He then concluded that collateral estoppel could not apply in Louisiana unless the causes of action would have been separate at common law.

The court's decision sharply limits the reach of collateral estoppel in Louisiana law. In *Mitchell*, the two claims, seeking the same relief but upon different grounds, were separate under Louisiana *res judicata*, and hence relitigation was not barred by that doctrine. In determining whether collateral estoppel precluded relitigation, the court looked to whether the claims would have been separate causes of action at common law. Since they would not have been (according to common law analysis they would have been part of the same cause of action, and relitigation would have been barred by *res judicata*), estoppel was inapplicable. Thus the two claims were too far apart for the civilian version of *res judicata*, and too close together for the borrowed common law concept of collateral estoppel, and relitigation was not precluded by either doctrine.

The debate over whether collateral estoppel exists in Louisiana may

39. 194 La. 337, 193 So. 666 (1940).

40. *See, e.g.*, *Fulmer v. Fulmer*, 301 So. 2d 622 (La. 1974).

41. *Bordelon v. Landry*, 278 So. 2d 173 (La. App. 4th Cir. 1973).

now be moot. There are relatively few situations in which a fact which has been litigated will be material to subsequent litigation between the same parties on a different cause of action as defined by common law. This narrow reach of collateral estoppel is acceptable in common law jurisdictions because most repetitive litigation is precluded by the broad common law doctrine of *res judicata*. In Louisiana, however, the same narrow application, prescribed in *Mitchell*, when coupled with a narrow definition of *res judicata*, means that the judicial system will continue to be burdened with successive litigation between the same parties and based upon the same operative facts.

The Louisiana position is difficult to sustain as a policy decision. Fairness to one of the litigants (the victor in the first suit), respect for judicial authority and the obvious judicial efficiency should outweigh the competing unfairness to the unsuccessful litigant. However, one may argue that our unique doctrine of appellate review of both law and fact dictates that an appellate court should not be unnecessarily restricted in its quest for justice between the parties. Certainly, the unsuccessful litigant whose valid claim or defense is lost because his counsel failed to plead, and the courts initially failed to recognize, a valid theory of the case usually cannot look elsewhere for justice; he could not recover under a malpractice theory unless he could show that he would otherwise have been successful on the alternate theory.⁴²

Perhaps the best that can be said is that the limited preclusive effect which Louisiana now attaches to judgments is causing little difficulty because most attorneys have not realized the full potential of the civilian concept of *res judicata*, now strengthened by *Mitchell's* dilution of collateral estoppel. The subsequent course of relitigation in Louisiana should be watched closely, however, because abuse of the Louisiana concept could lead to erosion of the integrity of the judicial decision.

42. See, e.g., *Ramp v. St. Paul Fire & Marine Ins. Co.*, 254 So. 2d 79 (La. App. 4th Cir. 1971), *aff'd*, 269 So. 2d 239 (La. 1972).