The Louisiana Concept of Res Judicata

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THE LOUISIANA CONCEPT OF RES JUDICATA

There are several reasons why a decided case should preclude relitigation of what it decided. First, the parties at some point must know with certainty their rights and obligations arising out of the incident. Second, the decided case should prevent one party from being able to harass another by raising the same controversy again. In addition, the judicial system should not be burdened with hearing previously decided cases or subjected to the possibility of inconsistent decisions on the same matter.¹

The determination of when to preclude a second suit is a difficult problem, common to almost all legal systems.² Clearly if exactly the same suit is again raised its litigation should not be allowed. But if the case raised is not precisely the one previously litigated, it is difficult to determine when its litigation should not be allowed. A party should not be denied access to the courts on a claim legitimately not connected with that previously tried. However, he should not be allowed to subvert the finality of a prior suit by bringing one nominally different but essentially the same as the first. Similarly, a party should not have to bring or defend multiple suits to establish his rights or obligations arising out of a single incident.

In order to resolve this question, various concepts have developed.³ The most common is that of res judicata, which precludes the same parties from litigating the same cause of action (claim) raised in a prior suit even if that cause of action was not fully litigated. Thus a party must produce all the available evidence to prove his case and demand any relief to which he would be entitled should his case be proved. He is not allowed to relitigate simply by requesting a differ-

². VESTAL at 501.
³. These concepts include collateral estoppel, often referred to in Louisiana as judicial estoppel, which precludes relitigation of any facts previously judicially determined even though the new suit involves a different cause of action. Although collateral estoppel has been applied in Louisiana, see, e.g., California v. Price, 234 La. 338, 99 So. 2d 743 (1957), the concept has never been fully recognized and the Fourth Circuit has recently refused to apply it. Bordelon v. Landry, 278 So. 2d 173 (La. App. 4th Cir. 1973). See also Olsen Engr. Corp. v. Hudson Engr. Corp., 289 So. 2d 346, 352 (La. App. 1st Cir. 1973): "We note initially that there is some dispute over whether Louisiana embraces the doctrine of collateral or judicial estoppel."

Another preclusion device of more recent origin is the compulsory counterclaim. Louisiana does not recognize this preclusion device. Still another preclusion device is involved where a party has "split" his cause of action. See LA. CODE CIV. P. art. 425. This article is discussed in the text at note 72 infra.
ent type of relief or because he did not raise certain issues or evidence.

In both Anglo-American and Louisiana law the concept of res judicata is functionally the same. There is, however, a different underlying basis for the operation of the doctrine in the two systems. At common law, the doctrine is based on a concept of extinguishment of the cause of action. If a judgment is rendered for the plaintiff, the cause of action is considered to merge in the judgment leaving only the judgment. If a judgment is rendered for the defendant, the judgment operates as a bar to relitigation of the cause of action which is again considered extinguished. Since the cause of action is extinguished by the lawsuit, res judicata precludes litigation of not only that which was pleaded but also any issue which might have been pleaded with regard to that cause of action. In this way res judicata effects a true claim preclusion.

The Louisiana doctrine of res judicata is civilian in origin and is based on a presumption of correctness rather than on an extinguishment of the cause of action. Article 2285 of the Civil Code enumerates “the authority which the law attributes to the thing adjudged” as a legal presumption and article 2287 declares that “no proof is admitted against the presumption of the law . . . .” The basis of this presumption is that the lawsuit is an attempt to ascertain the truth. Since the controversy must have a definitive end at some point, the decided case is presumed to have found the truth and be correctly decided. In order to insure that only matters which have been adjudicated are precluded, Civil Code article 2286 provides:

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;

4. See generally M. Green, Basic Civil Procedure 201-07 (1972); F. James, Civil Procedure §§ 11.9-10 (1965).

5. This distinction between claim preclusion and issue preclusion has been developed by Professor Vestal. Res judicata and the compulsory counterclaim are forms of claim preclusion in that they preclude the entire claim from relitigation, even those portions not raised. Collateral estoppel, on the other hand, is a form of issue preclusion in that it precludes only those issues already adjudicated and not the claim itself.

6. In Louisiana, res judicata is raised by way of the peremptory exception. La. Code Civ. P. art. 927.


8. Id.; 1 M. Pothier, A Treatise on the Law of Obligations 581 (Evans transl. 1853).
and formed by them against each other in the same quality. 9

Therefore, the decided case precludes a second suit only if it involves the same parties, the same cause, and the same object of demand as the prior suit.

Despite the underlying differences with the Anglo-American concept, Louisiana's res judicata law is also one of true claim preclusion. 10 Where the three requirements of identity are met, the claim is precluded even if some matter not pleaded in the first suit is now pleaded. Thus in Louisiana, as in the Anglo-American law, a party should not be allowed a second suit simply because he did not pray for all the relief to which he was entitled on the cause asserted 11 or because he failed to offer all the evidence available to prove his claim. 12 It is incorrect to say, that because the matter was not pleaded in the first suit, a second suit should be allowed. Only when the new matter constitutes a different cause or thing demanded is a second suit permitted. 13

Final Judgment

For res judicata to apply there must be a "thing adjudged" which

9. The Moreau-Lislet copy of the Digest of 1808 cites Pothier as the source of this article. Reprint of the de la Vergne Volume: The Digest of the Civil Laws, Territory of Orleans in 1808, with Moreau-Lislet's Source Notes, bk. III, tit. III, art. 252 (reprint of Moreau Lislet's personal copy of the 1808 Digest with handwritten interleaf pages, reproductions of which may be found in the libraries of the Louisiana State University and Tulane University Law Schools). Except for punctuation, the French text of article 2265 of the Civil Code of 1825 corresponds exactly to article 1351 of Code Napoleon. The English text of the Louisiana article has been unchanged since 1825 and is now article 2286. See 1972 Compiled Edition of the Civil Codes of Louisiana art. 2286 (J. Dainow ed.).

10. See note 5 supra.

11. Generally a party who does not ask for all the relief to which he is entitled is said to have divided his cause of action. For a discussion of how this relates to res judicata see text at note 72 infra. In Quarles v. Lewis, 226 La. 76, 75 So. 2d 14 (1954), the supreme court held that when a party asked for a different form of relief in the second suit there was a different "thing demanded" and thus res judicata did not apply. For a critique of this case see text at note 61 infra.

12. In Succession of Reynolds, 231 La. 410, 91 So. 2d 584 (1956), several collateral heirs had attacked the decedent's will on the grounds that the correct date of the will was August 3, 1945 and not August 3, 1948 and that the will had been revoked. The court concluded that the date of the will was the 1948 date. In the present suit the heirs contended that the date of the will must be the 1945 date as it was physically impossible that the 1948 date be correct. The court held the suit barred by res judicata since only the reasons for invalidity urged in the second suit were different.

13. The Louisiana supreme court has stated that the common law rule that res judicata includes not only what was actually pleaded but also that which might have
Civil Code article 3556(31) defines as a final judgment. Compromises, judgments on the pleadings, summary judgments and dismissals with prejudice are considered final judgments. On the other hand, a dismissal without prejudice, for failure to join proper parties or for mootness, is not a final judgment. Similarly, where the dismissal results because the plaintiff failed to adequately allege a valid cause of action, the dismissal is not considered final. However, if the suit is dismissed because the plaintiff has no valid cause of action, the dismissal will be considered a final judgment.

Identity of the Parties

Article 2286 requires that there be identity of the parties. A
judgment in a suit between A and B should have no effect in a later suit between A and C even if each suit involves identical issues. A lawsuit determines the legal relationship between the parties to the suit and has no bearing on the relationship of those parties not present. The requirement of identity of parties is not one of physical identity but rather one of identity of capacity or quality. A person who sues or is sued in a representative capacity, as a father for his minor child or a tutor for his ward, would not be personally concluded by the action though, of course, the person represented would be. Additionally, the requirement of identity of the parties is met where a successor or privy of one of the parties is involved. Thus, a judgment determining one’s property rights will be binding on a vendee, donee, heir, or legatee who succeeds to his rights.

One area which has troubled the courts with respect to identity of the parties is that of vicarious liability. If a plaintiff brings an unsuccessful suit against a defendant employee for damages caused by the employee’s negligence, is he thereafter precluded from suing the employer? An affirmative answer was given by the Louisiana supreme court in Muntz v. Algiers where the court sustained an exception of res judicata by the employer without discussing the

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23. Quinette v. Delhomme, 247 La. 1121, 176 So. 2d 399 (1965); Ruiz v. Succession of Viosca, 291 So. 2d 527 (La. App. 4th Cir. 1974); Succession of Marlin, 240 So. 2d 387 (La. App. 2d Cir. 1970); Succession of Deledernier, 184 So. 2d 37 (La. App. 4th Cir. 1966). See LA. CIv. CODE art. 3556(28): “Successor is, generally speaking, the person who takes the place of another. There are in law two sorts of successors: the successor by universal title . . . and the successor by particular title, such as the buyer, donee or legatee of particular things, the transferee.”

A privy has been defined as “representatives and successors including any person having a legal right or interest in the subject matter of the prior suit derived through succession or assignment from the litigant who asserted the right; or any person whose legal right or interest in the subject matter in the prior suit was asserted by his legal representative such as the husband as head and master of the community representing the community interest of the wife, or the tutor asserting the interest of his minor ward.” Coates Equip. & Ser., Inc. v. Glover, 181 So. 2d 455, 459 (La. App. 1st Cir. 1965).

In Coates, the court held that Coates as an individual and Coates, Inc. were not privies. But cf. Sample v. La. Oil Refining Corp., 162 La. 941, 111 So. 336 (1927) (where the court held that since Nabors Oil Co. could not bring a second suit because of res judicata neither could Sample bring one for the use and benefit of Nabors Oil.) See also Barnett v. Develle, 289 So. 2d 129 (La. 1974); Calhoun v. La. Materials Co., 206 So. 2d 147 (La. App. 4th Cir. 1968).

question of identity of the parties. In *Williams v. Marionneaux*, the supreme court agreed with the decision in *Muntz* but criticized its rationale on the ground that there was no identity of parties. The *Williams* court reasoned that if an injured party compromises his claim against an employee, there is no cause of action against the employer.

A similar problem was presented in *Bowman v. Liberty Mutual Finance Co.* Mrs. Bowman's demand against the employer for damages caused by its employee had been rejected in an earlier suit in federal court. A second suit against the employee was barred by the First Circuit though the court did not discuss the issue of identity of the parties.

Thus, a suit against an employer or employee will preclude a later one against the other although in neither case do the courts state that there is identity of the parties. However, in an analogous situation, Pothier did consider there to be identity of the parties where the primary obligor was sued first. In speaking of the surety-debtor relationship he indicated that:

>[i]n consequence of the obligation of the surety being dependent upon that of the principal debtor, the surety is also regarded as the same party with the principal, in respect to whatever is decided for or against him."

If this analysis were applied to all situations where there is a secondary obligor, a suit against the primary obligor would be conclusive as to the secondary obligor as res judicata would apply.

This would create no problem where the primary obligor was found not to be liable. But if the primary obligor is found liable, it is at least doubtful that this determination should be binding on the secondary obligor who will not have had his day in court. To hold the secondary obligor bound by the first determination might open the door to collusive suits and would subject him to inadequate defense.

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26. Had the court decided that suit is maintainable in this situation a problem would exist should the employer be found liable. Under our law the employer could sue the employee for indemnification. Yet the employee had been held not liable in the first suit. If the employee were required to indemnify the employer then that judgment in his favor would be meaningless. On the other hand if the employee were protected the employer would lose his right of indemnification.
27. 149 So. 2d 733 (La. App. 1st Cir. 1963).
29. This was the situation in *Williams, Muntz, and McKnight*. See Note, 14 La. L. Rev. 901 (1954), where the author takes the position that res judicata is inapplicable in this situation.
where the primary obligor has no real interest in defending the suit. This problem could be dealt with by making the suit against the primary obligor conclusive as to the secondary obligor only where notice of suit is served on the secondary obligor and he is allowed to intervene to protect his rights. This would enable the secondary obligor to adequately defend himself but he could still be bound by a suit in which he did not participate. A more feasible solution might be to make a judgment against the primary obligor evidence in the second suit which shifts the burden to the defendant to disprove liability. In this way the first suit is accorded some weight but the secondary obligor is not bound by an action to which he was not an actual party.

Louisiana courts have held that there is no identity of the parties where co-defendants have previously litigated the issue of fault between themselves and later relitigate the issue as adverse parties. A leading case is Harper v. Hunt. In a prior suit Foster sued both Harper and Hunt and Harper was exonerated from liability. When he sued Hunt, Harper claimed that the issue of his negligence was res judicata. The First Circuit rejected the exception saying there was no identity of parties.

The court’s opinion is at least partially predicated on the fact that there was a third party to the original suit. However, the crucial question would appear to be whether the parties were able to litigate fully the issues between themselves in the prior case. If not, they would be appearing in a different “quality" and no identity should be found. If they were able to litigate fully those issues at the first trial there would appear to be no reason for finding the parties not identical simply because of the presence of a third party in the first suit.

Identity of the Cause

Article 2286 also requires that “the demand must be founded on the same cause of action . . . .” A correct translation of the French

30. For example, the primary obligor may be judgment proof and allow a default judgment to be taken against him.
31. This solution could also be used in the Bowman situation where the secondary obligor is sued first.
32. 247 So. 2d 192 (La. App. 1st Cir. 1971).
33. “[T]he demand must be between the same parties; and formed by them against each other in the same quality.” LA. CIV. CODE art. 2286.
34. See also Stevens v. N.O. & N.E.R.R. Co., 341 F. Supp. 497 (E.D. La. 1972); Buhler v. Villec, 117 So. 2d 286 (La. App. Orl. Cir. 1960). In Buhler, the court held that the identities of cause and object of demand were also not present.
text of the 1825 Code should be "the demand must be founded on the same cause . . . ." Thus, our article refers to the civilian concept of cause and not to the common law cause of action. Both of these concepts deal with the underlying basis of the suit and are similar. However, one subtle distinction is crucial to a proper understanding of our res judicata law and can best be drawn by way of example. When a lessor sues for rent and his demand is rejected, a second suit for rent which becomes due at a different date will not be barred by res judicata. At common law it will not be barred because the cause of action is not the same—a different month's rent is involved. For the civilian, however, the cause is the same since both suits are based on an alleged failure to fulfill the contractual requirement of paying rent. The contract and its breach is the cause—the underlying basis—of each suit. The fact that two different month's rent are involved is taken into consideration under the concept of thing demanded rather than under the concept of cause. From this it can be seen that cause of action refers to the particular underlying basis of a particular suit, while cause refers to the underlying basis of a suit in a non-particular way.

Planiol has noted that there are no difficulties in determining cause when the claim has as its object a real right or a debt: the cause is the principle giving rise to the right; in the case of a real right


36. Planiol defines cause as "the judicial or material fact which is the basis of the right claimed or the defense pleaded." 2 PLANIOL, CIVIL LAW TREATISE pt. 1, no. 54 A(6), at 38 (11th ed. La. St. L. Inst. transl. 1959).

37. Some distinctions between the concepts are noted in Comment, 2 LA. L. REV. 347-65, 491-525 (1940).


39. "Causa actions or causa petandi in the Roman and Continental systems signifies only the ground of action, as distinguished from the matter of parties and object . . . whereas the 'cause of action' of Anglo-American law embraces within its conception all three of these elements namely, ground, parties, and object. Where we thus speak of 'identity of the cause of action,' Continental terminology would require reference to the 'identity of demand' or 'identity of action,'" MILLAR, THE PREMISES OF THE JUDGMENT AS RES JUDICATA IN THE CONTINENTAL AND ANGLO-AMERICAN LAW, 39 MICH. L. REV. 1, 4 n.13 (1940).

40. Cause of action may be thought of as referring to the basis of this action; e.g., the particular breach which brought about this action. It does not encompass the basis of the prior action which was a different breach and thus not the cause of this action.
it is a purchase, donation, a legacy, etc.; in the case of the debt it is a loan, a guaranty, a sale for which the price is due, damages caused by a tort, etc.\footnote{11}

There is, however, difficulty in determining cause in suits involving a demand for the nullity of a transaction. In \textit{Hope v. Madison}\footnote{12} the plaintiff had brought a prior unsuccessful suit contending that a sale to her attorney was null for lack of consideration and fraud. The present suit was brought to annul the sale on grounds that an attorney may not purchase a litigious right under Civil Code article 2447. The supreme court overruled an exception of res judicata holding that the cause was not identical in the two cases. The court viewed the cause of the first suit to be the lack of consideration and fraud rather than the nullity of the sale. Although there is considerable doctrinal authority for this narrow view of cause,\footnote{41} it places the parties in an unequal position. If the attorney-vendee in \textit{Hope} had sued the vendor to establish his right in the property, the cause of his suit would clearly be the alleged sale. Furthermore, if the defendant-vendor had successfully defended on the grounds of lack of consideration and fraud (asserting a cause as a defense), the plaintiff-vendee could not relitigate on the basis of the same sale since the cause would be identical; \textit{i.e.}, the sale. But if the defendant-vendor was unsuccessful in his defense, under the reasoning of \textit{Hope}, he could bring a second suit to annul the sale on different grounds since this would constitute a new cause. Thus the vendor would again be allowed two attempts at establishing the nullity of the sale while the vendee would have only one chance to prove its validity.

This narrow view of cause prevents the doctrine or res judicata from fulfilling its function. It encourages an unsuccessful party to relitigate on an alternative basis, thereby prolonging the eventual determination of the rights and obligations of the parties. This allows the harassment of the successful party and increases the caseload of the courts. Although in most cases a party will assert all of his causes in order to avoid the time and expense of multiple litigation, this is not always true.\footnote{44}

While a broader view of cause has not been accepted,\footnote{45} one court

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\footnote{12} 194 La. 337, 193 So. 666 (1940).
\footnote{41} See Comment, 2 \textit{La. L. Rev.} 347-65, 491-525 (1940).
\footnote{42} One exception should be made to this broader view of cause where the second suit for nullity is based on facts not existent or not knowable at the time of the first suit.
\footnote{43} See, \textit{e.g.}, \textit{Succession of Marioni}, 183 La. 776, 164 So. 797 (1935); \textit{Alexander v. Alexander}, 196 So. 2d 628 (La. App. 1st Ctr. 1967).
\end{footnotes}
of appeal has expanded the narrow view advanced in *Hope*. The court in *Hope* seems to equate cause with the particular theory offered by the plaintiff for recovery. When a new theory was asserted in the second suit a new cause was said to be asserted. In *Black v. Meadowview Homes, Inc.*,[46] the Second Circuit held that an unsuccessful suit in contract precluded a later one based on unjust enrichment. The court reasoned that:

[n]either the object of the judgment, the demand nor cause of action is determined by the theory of the pleadings but by the allegations of fact. We hold that the petitioner pleaded sufficient facts in his first petition, which would have allowed him to seek and prove his entitlement to the relief he asks for in the instant case.[47]

Although cause is still equated with theory of recovery, it is the allegations of fact which determine which theories may have been raised.[48]

This approach appears to make sense. In Louisiana the court may award “any relief to which the parties are entitled . . . .”[49] and is not limited to the theory of a party’s pleadings in rendering a judgment. In a case like *Black*, the court may, without regard to the fact that the theory was not pleaded, render a judgment based on unjust enrichment. Thus it may be said that the court implicitly adjudicated this unpleaded basis in the first suit. If the theory was assertable from the facts pleaded but was not in fact asserted, and the court failed to consider it, the party pleading the facts, rather than the party who in no way raised the theory, should suffer the harm.

A slightly different problem is presented by the recent case of *Bordelon v. Landry.*[50] Following an automobile wreck, Landry filed suit against Bordelon and Bordelon filed against Landry in a different court.[51] When a judgment for Landry was rendered in the suit he filed,

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46. 201 So. 2d 218 (La. App. 2d Cir. 1967).
47. *Id.* at 219. It should be noted that holding that the unsuccessful suit in contract precluded a later one based on unjust enrichment is limited to the facts. Under *Black* it is entirely possible that a suit in contract will not preclude a later one in unjust enrichment given other circumstances.
48. *See also* Heine v. Muse, 206 So. 2d 529 (La. App. 1st Cir. 1968).
49. La. Code Civ. P. art. 1841. Additionally, the Code of Civil Procedure provides that an appellate court “shall render any judgment which is just, legal, and proper upon the record on appeal.” La. Code Civ. P. art. 2164.
50. 278 So. 2d 173 (La. App. 4th Cir. 1973).
51. Landry filed suit with his wife in Plaquemines Parish against Bordelon and his liability insurer. Bordelon sued in Jefferson Parish for the wrongful death of his wife and damages to his automobile against Landry, his liability insurer and the manufacturer of Landry’s car. 278 So. 2d at 174.
he raised an exception of res judicata in Bordelon’s suit against him. The Fourth Circuit held that Bordelon’s suit was not precluded by the prior adjudication because the cause of action in the two suits was different. According to the court, the cause of action asserted by Landry was based upon the injuries he received while the cause of action asserted by Bordelon was his own injuries. The court concluded that since the causes of action were not identical, adjudication in the first suit did not preclude litigation of the latter under article 2286.

While it is true that both Bordelon and Landry had causes based upon their injuries, the fact of injury alone does not constitute a cause under article 2286. There must be some legal basis for the suit which, in a tort action, is the negligence or fault of the party who caused the injury. The cause of Bordelon’s suit was his assertion of injury due to Landry’s negligence. The same is true for Landry’s suit against Bordelon. Thus res judicata should apply in Bordelon’s suit only if the question of Landry’s negligence was previously adjudicated. It appears that a plea of contributory negligence was raised by Bordelon in the suit against him by Landry. A plea of contributory negligence should be seen as the assertion of a cause as a defense since it puts at issue the question of the plaintiff Landry’s negligence.

In rendering a judgment for Landry, where a plea of contributory negligence had been raised, the court must have determined that Bordelon was negligent and that Landry was not. Thus, the issue of Landry’s negligence was adjudicated in the first trial and an exception of res judicata should apply to preclude the second suit. The parties are the same, the cause is the same since Bordelon is attempting to again raise the question of Landry’s negligence, and the thing demanded is the same since the object of the second suit is to establish Landry’s negligence—the same object of Bordelon’s plea of contributory negligence in his first suit.

52. Planiol defines cause as “the juridical or material fact which is the basis of the right or the defense pleaded.” 2 PLANIOL, CIVIL LAW TREATISE pt. 1, no. 54 A(6) (11th ed. La. St. L. Inst. transl. 1959). It is fault or negligence coupled with the fact of injury which is the basis of the rights claimed by Bordelon and Landry.

53. “It is clear the issues presented to the courts in both cases were: (1) the negligence of Landry; (2) the negligence of Mrs. Bordelon; and (3) the negligence of Ford.” Bordelon v. Landry, 278 So. 2d 173, 174 (La. App. 4th Cir. 1973).

54. Planiol makes it clear that a cause may be asserted as a defense. See supra. See also La. Code Civ. P. art. 424: “A person who has a right to enforce an obligation also has a right to use his cause of action as a defense.”

55. In his dissent Judge Redmann stated: “In my view the Plaquemines action necessarily decided, as between Landry and Bordelon, (1) Landry was not negligent and (2) Bordelon was negligent. Therefore Landry should not have to litigate those questions again and the dismissal of Landry and his insurer should be affirmed.” 278 So. 2d at 177 (dissenting opinion).
This analysis is more consistent with the basis of Louisiana res judicata law—the presumption of correctness—than is the Bordelon decision. Under the decision, every occurrence which results in multiple injuries is subject to multiple suits with the possibility of inconsistent decisions. A could be found liable to B and B could be found liable to A. The fact that the first court found B to be at fault would be accorded no importance and certainly no irrebuttable presumption of being correct.56

Identity of the Thing Demanded

Identity of the thing demanded57 refers to the particular controversy which the court must adjudicate. Its purpose is to insure that res judicata does not preclude litigation of a suit simply because it is based on the same cause urged in a prior suit between the same parties. For a second suit to be barred it must have as its object the same controversy and subject matter. Let us assume that A and B disagree over whether they have entered a valid installment contract. When the first installment becomes due A sues. In this case the object of demand will be controlled by the defense asserted by B. If B successfully defends on the ground that there is no valid contract between them, an exception of res judicata should be maintainable in a latter suit on a different installment. By his defense, B has, in

56. The court also considered applying the doctrine of collateral estoppel or estoppel by judgment which precludes the relitigation of the same issues between the parties even though the cause in the two suits is not identical. After a review of the jurisprudence, the court concluded that Louisiana did not recognize the doctrine.

It could be argued that the second suit in the Bordelon situation should be barred even where no plea of contributory negligence was raised. In Spitzkeit v. Robinson, 289 So. 2d 847 (La. App. 4th Cir. 1974), the court held that the defendant's failure to plead an affirmative defense "does not now enable her to bring an action to annul the judgment . . . ." Id. at 847. See also Steele v. Ruiz, 202 So. 2d 376 (La. App. 4th Cir. 1967). Contributory negligence is an affirmative defense. If a party may not later raise it in a suit to annul, it makes little sense to allow a suit in tort which might, in effect, overrule the first decision.

57. "The thing demanded must be the same . . . ." LA. CIV. CODE art. 2286.

58. The requirement of identity of object "simply means that in both suits there must be contemplated 'a recognition of the same right as to the same thing'; it 'signifies in reality identity of the questions.' " Millar, The Premises of Judgment as Res Judicata in Continental and Anglo-American Law, 39 MICH. L. REV. 1, 16 (1940) quoting from 3 GARSONNET & CEZER-BRU, TRAITÉ THÉORIQUE ET PRATIQUE DE PROCÉDURE CIVILE ET COMMERCIALE 420, 422 n.9 (3d ed. 1913). Planiol defines the requirement of identity of thing demanded as being that the second suit "concerns the same object" as the first. 2 PLANIOL, CIVIL LAW TREATISE pt. 1, no. 54 A (3) (11th ed. La. St. L. Inst. transl. 1959). While there is no enunciated requirement of identity of object in Anglo-American law, it is implicit in the requirement of identity of the cause of action. See note 39 supra.
effect, made the whole of the debt the object of demand. Thus if A later sues on a different installment the object of demand, as well as the parties and cause will be the same.\textsuperscript{59} If B, however, successfully defended the first suit on the ground that the installment had been paid or was not yet due, the object of demand is limited to that installment. Res judicata should not be maintainable in another suit on a different installment. The object of such a suit is another installment and the question of whether it is now due was not litigated in the first action.\textsuperscript{60}

Since the object of demand refers to the object or matter upon which the parties demand an adjudication it should not be confused with the form of relief for which a party asks. This was done in \textit{Quarles v. Lewis}.\textsuperscript{61} The plaintiff in the original action had been granted specific performance on a contract of sale. He later brought a second suit for damages because of the defendant’s failure to take title and pay on the date agreed upon. The supreme court disallowed the exception of res judicata on grounds that the thing demanded in the two suits was not the same.

The fact that \textit{Quarles} requested damages in the second suit does not give that suit an object different from that of the first. The object of \textit{Quarles’} demand in both suits was an adjudication of his rights stemming from the contract. Pothier makes clear that the kind of relief requested does not affect the object of demand. He notes that an unsuccessful action \textit{quanto minoris} for the reduction in the price of a horse which is alleged to have a fault has the same object of demand as a later one for rescission of the sale on account of the same fault. The object of demand in both suits involves the same horse—the same controversy.\textsuperscript{62} Similarly, in \textit{Quarles}, the object of

\textsuperscript{59} In the same context Baudry-Lacantinerie gives the following example: “In a lawsuit, I have demanded from you a sum of 10,000 francs, constituting the amount due of a claim of 20,000 francs, which I allege to have against you, and my demand has been dismissed by a judgment which determines that I am not your creditor; I would not be able to demand from you by a new action the balance of my alleged claim.” 3 BAUDRY-LACANTINERIE ET BARDE, \textit{Traité Théorique et Pratique de Droit Civil—Des Obligations} 960 (2d ed. 1905) (translation supplied).

\textsuperscript{60} Thus, there is no “identity of the questions.” See note 58 supra.

\textsuperscript{61} 226 La. 76, 75 So. 2d 14 (1954).

\textsuperscript{62} “[S]uppose, for example, you proceed against me by the action \textit{quanto minoris} to obtain an abatement in the price of a horse, which you allege to have a certain fault against which I have warranted him, it is decided that the horse has not that fault, or that the warranty did not extend to it, and the demand is dismissed; if you afterwards institute another action against me to rescind the sale, on account of the same fault, I may oppose the exception \textit{rei judicatae}, although the new demand is made in a different form, and aims at a different conclusion, the three requisites already mentioned occur, it is the same horse, \textit{eadem res}, there is also \textit{eadem cause}
demand in both cases was the same breach—the same controversy—and the exception of res judicata should have been sustained.  

In *Nicholson v. Holloway Planting Co.*,4 a prior suit5 had been brought which recognized the existence of a servitude of drain from the Nicholson property over the Holloway property but denied the plaintiff Nicholson an injunction because no interference was shown. A second suit was brought for an injunction and for damages. The First Circuit6 concluded that the second suit did not involve any new controversy between the parties and sustained an exception of res judicata. The supreme court reversed. However, the basis of the supreme court reversal was that the present suit involved matters which occurred subsequent to the trial of the first suit and which could not have been adjudicated at that time.7 Thus, as the supreme court saw it, the second suit did not have the same object as the first because an entirely different controversy had been placed before the court. This is entirely proper. Unlike *Quarles* the court was called upon to decide an entirely different matter which was in no way litigated in the first suit.8

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*petandi*, for the question in both cases is, whether I have warranted against the fault which you complain of, and the question is between the same parties, the difference of the actions, and of the conditions, does not prevent their having the same object and being *eadem res . . .*.” 1 M. Pothier, *A Treatise on the Law of Obligations* 587 (Evans transl. 1853).

See also *Vico Concrete Co., Inc. v. Antley*, 283 So. 2d 830 (La. App. 2d Cir. 1973), in which Antley had brought a previous redhibitory action to recover costs. In the present suit by Vico for amount owed on open account Antley reconvened for a remission of the price due. “[W]e are of the opinion the main object or thing demanded in both actions by Antley is identical.” Id. at 832.

63. The situation in *Quarles* is distinguished from the installment contract example in the text at note 60 supra. In that installment contract example the object of demand in the first suit is the installment then sued on. In the second suit a different installment and thus a different object is involved. In *Quarles* the object of demand in the first suit was the contract and the failure to perform thereon. The litigation was not limited to a particular installment or portion of the contract. In the second suit the same contract and the same failure to perform were drawn into question. Thus the object of demand was the same in both suits. The fact that Quarles failed to pray for damages in the first suit did not entitle him to a second.

64. 284 So. 2d 898 (La. 1973).
66. 268 So. 2d 74 (La. App. 1st Cir. 1972).
67. “Certainly [the plaintiff’s] failure to prove interference or sufficient interferences on the facts as they were found to exist in 1966 does not bar his effort to prove that an interference existed in 1970.” *Nicholson v. Holloway Planting Co.*, 284 So. 2d 898, 900 (La. 1973). “[D]amages incident to blockade occurring prior to the trial of the first suit . . . are not being claimed in this litigation.” Id. at 901.
68. The court in dicta questioned whether the object of demand could be the same since the first suit was for an injunction and the second for an injunction and damages.
The case of California Co. v. Price is perhaps the best known supreme court case on the authority of the decided case. The dispute centered around ownership of royalty proceeds which were claimed by the state and by the Price-Beckwith group. The supreme court held the Price-Beckwith group to be owners of the proceeds on the grounds that they were the owners of the leased land. The second suit involved ownership of proceeds from seven other wells on the same leased premises. The supreme court sustained pleas of res judicata and judicial estoppel by the Price-Beckwith group. In considering the plea of res judicata the court did not specifically show that the three requisite identities were present apparently because the court did not feel this was necessary in view of the sustained plea of judicial estoppel.

There was ample basis for deciding this case under Article 2286. The parties and cause were identical in the two suits. And the court's interpretation of the judgment in the first suit makes it clear that the object of the demand of the two suits was the same. The court stated that the object of the litigation in the first suit was an adjudication of title to the land "because the validity of the title would have to be determined in order for the court to decide who was entitled to the funds." The second dispute involved exactly the same question since the decision would again hinge on ownership of the leased land. Hence, the thing demanded, that which the court was asked to adjudicate, was the same in both suits.

Division of an Obligation

Article 425 of the Code of Civil Procedure provides that a party "cannot divide an obligation due him for the purpose of bringing..." The fact that "thing demanded" does not refer to the type of relief for which a party asks is discussed in the text at note 61 supra. The court's decision that res judicata did not apply was based on the fact that damages were not being claimed on account of the incidents which brought on the first suit. See also Succession of Martin, 240 So. 2d 387 (La. App. 2d Cir. 1970) in which the court held that the object of demand was the same in two suits involving the validity of an act of adoption.

71. See also Olsen Engr. Corp. v. Hudson Engr. Corp., 289 So. 2d 346 (La. App. 1st Cir. 1974). This suit involved a pipeline explosion. In a prior suit in federal court Hudson and U.S. Steel had been sued in a wrongful death action and each filed a crossclaim against the other for indemnification and contribution. U.S. Steel was ultimately found to be solely liable and its crossclaim against Hudson was dismissed. The present suit involved a claim for property damage. Hudson and U.S. Steel were again both named as defendants and U.S. Steel filed a third party demand against Hudson. Hudson excepted to the third party demand on the ground of res judicata. The court...
separate actions on different portions thereof." The article further provides that if an action is brought to enforce only a portion of the obligation, the right to enforce the remaining portion is lost.\textsuperscript{72} In Anglo-American law and in the Louisiana jurisprudence this doctrine is known under the name of "splitting a cause of action." Under this doctrine, it has been held, for example, that a party may not sue for personal injuries and later bring suit for property damages.\textsuperscript{73} The alleged fault creates only a single obligation which must be enforced in a single suit.

At common law the doctrine of splitting a cause of action is a corollary of res judicata. In every case where a cause of action is split the parties are the same and, by definition, the cause of action is the same. Thus the doctrine of splitting a cause of action is actually a refinement of res judicata and applies only where res judicata would itself apply.

The division of an obligation under Code of Civil Procedure article 425 should be viewed in the same manner. When an obligation is divided, the same parties, the same cause and the same object of demand are urged in the two suits. For example, when a party sues

\begin{itemize}
\item \textsuperscript{72} \textsuperscript{72} LA. CODE CIV. P. art. 425: "An obligee cannot divide an obligation due him for the purpose of bringing separate actions on different portions thereof. If he brings an action to enforce only a portion of the obligation, and does not amend his pleadings to demand the enforcement of the full obligation, he shall lose his right to enforce the remaining portion."
\item \textsuperscript{73} Thigpen v. Guarisco, 197 So. 2d 904 (La. App. 1st Cir. 1967); Thompson v. Kwett & Reel, 25 So. 2d 124 (La. App. 1st Cir. 1946); Jackson v. United States Fid. & Guar. Co., 199 So. 419 (La. App. 2d Cir. 1940).
\end{itemize}
for personal injuries and later attempts to sue for property damage, the parties are identical, the underlying basis of the action—the alleged fault—is identical, and the object of demand is the same since both suits involve the same basic controversy between the parties. The fact that a different form of relief was requested should make no difference with regard to the application of res judicata.74

The Louisiana jurisprudence has also held that a wrongful death action and a survivor action constitute a single obligation and must be brought together.75 Strictly speaking res judicata would not apply in this situation. In the survivor action the heirs sue on behalf of their deceased ancestor while in the wrongful death action they sue in their own behalf. Thus, there is no identity of parties. Likewise the object of a wrongful death action is different from that of the survivor action where there is a question of whether the death was caused by the tortious conduct. This question would not be adjudicated in the survivor action.

However, requiring the wrongful death and survivor actions to be brought in a single suit is consistent with the underlying objectives of res judicata. The claim of the heirs for wrongful death is dependent upon a finding of fault on the part of the defendant in the survivor action. If the defendant is not liable to the deceased he clearly should not be liable to the heirs for his wrongful death. Requiring the actions to be brought together thus prevents possible inconsistency of decisions and is in accord with the presumption of correctness which is the foundation of our res judicata concept. It also promotes judicial economy in that much of the same evidence is relevant and material to both actions. Thus while the actions would not, strictly speaking, be subject to an exception of res judicata under article 2286, the basic purposes of the res judicata concept are furthered by requiring them to be brought together.

The fact that the doctrine of res judicata and division of an obligation are consistent should be an aid in the decision of cases like Quarles v. Lewis.76 In Quarles the court specifically declined to decide whether the second suit for damages would be precluded as the division of a single obligation “because the sole issue for determination . . . is whether the suit for specific performance is res judicata of the present action for damages.”77 Had the court been aware of the interrelationship between the two doctrines it could not have decided as it did.78

74. See text at note 61 supra.
76. 226 La. 76, 75 So. 2d 14 (1954), discussed in text at note 61 supra.
77. Id. at 87, 75 So. 2d at 18.
78. There are three jurisprudential exceptions to the rule that a suit is not conclusive of a cause or object of demand not pleaded in the first suit. In petitory actions,
Conclusion

In almost every Louisiana case involving res judicata language can be found to the effect that res judicata is stricti juris and not to be applied in cases of doubt. The fact that there are distinctions between the requirements of article 2286 and those of Anglo-American law has undoubtedly contributed to this attitude. The courts have been quick to reject doctrines like the "might have been pleaded" rule which have developed at common law. However, many of the supposed distinctions have been made on the basis of an improper understanding of article 2286. As has been pointed out, the "might have been pleaded" rule, correctly understood, is as implicit under article 2286 as it is under the common law requirements of identity cause of action and parties.

A more functional approach to res judicata is needed to deal with the developments of modern law in other areas. For example, the doctrine of vicarious liability has undergone significant development since the adoption of the code. The courts have correspondingly developed new preclusion concepts to deal with this development. The applicability of res judicata to other areas of development must likewise be ascertained. This is not to say that every suit the least bit connected with a prior one should be precluded. Article 2286 is

suits for partition of an immovable, and suits for an injunction against the execution of a judgment, or of a writ of seizure and sale in executory process, "the parties to the suit must assert whatever titles they have and not hold back any claim for future litigation." Himel v. Connely, 195 La. 769, 777, 197 So. 424, 427 (1940). See also Quarles v. Lewis, 226 La. 76, 75 So. 2d 14 (1954); Comment, 2 LA. L. Rev. 491 (1940). Thus, in these instances, a judgment precludes not only relitigation of an identical cause or demand but the litigation of a separate cause or demand as well. If A claims title to land through B and C, he must litigate both bases of his ownership in the petitory action. If he fails to set up his title through C, he may not thereafter assert title on this basis even though it would constitute a separate cause. The basis for these exceptions is in the need for stability of title. See Comment, 2 LA. L. Rev. 491, 521-23 (1940).


80. See, note 13 supra.

81. In the master-servant relationship Civil Code article 2320 provides that masters will be liable for the damage occasioned by his servants only "when the masters . . . might have prevented the act which caused the damage, and have not done it." However, Louisiana cases hold the master liable even where he could not have prevented the act. See Ragas v. Douglas, 139 La. 773, 72 So. 242 (1916); Nelson v. Crescent City R.R. Co., 49 La. Ann. 491, 21 So. 635 (1897).

82. See text at notes 24-27 supra.
designed to insure that only matters previously litigated are precluded. But in applying the article it must be remembered that res judicata is designed to preclude that which has been adjudicated, and when relitigation of matters already decided is allowed, a judgment is meaningless.

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