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RES JUDICATA: A FOREIGN LAWYER'S IMPRESSIONS OF SOME LOUISIANA PROBLEMS

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This article describes some comparative impressions on the Louisiana aspects of the law of res judicata,¹ touching upon four topics as they appear to a lawyer trained exclusively within the Continental framework. The first three, identity of the parties, identity of the thing demanded and identity of the cause of action, constitute explicit prerequisites of the binding effect of judicial decisions as res judicata; the fourth, collateral estoppel, amounts to an expansion of the conclusive effect of prior adjudication on a narrower basis.

Identity of the Parties

Modern discussions of the party identity rule show two parallel tendencies: (a) to eliminate this requirement when one of the parties in the present suit was also a party in the former suit and lost against a person in a position similar to that of his present opponent (*e.g.*, multi-victim tort actions); and (b) more generally, to abolish the mutuality of estoppel doctrine, which refuses to make the extent of res judicata dependent upon the outcome of the litigation, thereby precluding the defeated party even against third persons not participating in the prior litigation, as in the landmark California case of *Bernhard v. Bank of America National Trust and Savings Association*.² Louisiana, like most Continental legal systems, does not take much notice of either of these tendencies. The similarity within the civilian tradition goes even further and embraces also the case in which the

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1. LA. CIV. CODE art. 2286. This is the same as FRENCH CIV. CODE art. 1351: "*L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité.*" For a brief discussion see J. VINCENT, PROCÉDURE CIVILE 86-94 (16th ed. 1973) [hereinafter cited as VINCENT]. See Comment, Louisiana Concept of Res Judicata, 34 LA. L. REV. 763 (1974); Comment, *Res Judicata—Matters Which Might Have Been Pleaded*, 2 LA. L. REV. 347 and 491 (1940).

2. 19 Cal. 2d 807, 122 P.2d 892 (1942).

parties now facing each other in litigation were in the previous suit codefendants against a common claimant. Such situations arise often in automobile accidents involving more than two cars. In Europe, the plea of *res judicata* would in most circumstances be rejected because the parties are certainly the same, but they were not in an adverse position during the former suit.³ From the recent cases of *Harper v. Hunt*⁴ and *Grain Dealers Mutual Insurance Company v. Hardware Dealers Mutual Fire Insurance Company*,⁵ it would seem that the same solution would also be valid under Louisiana law. In the latter case, the court stated that the judgment to share costs among codefendants was "not necessarily an adjudication of all the issues *as between the said codefendants*."⁶ Thus there arises the question of attributing a binding effect to the previous litigation at least in cases where all issues, especially as to the former codefendants' relative negligence, were then hotly contested between them. Such a solution might require the judge in the later suit to conduct laborious investigations into the former proceedings, in order to ascertain the degree of adversity in the respective positions taken by the codefendants. If this solution were to be adopted, the prospective parties to a lawsuit would be left without sufficient guidance as to the potential success of instituting a new suit against each other. As one of the main *res judicata* policies is to obtain stability of legal relationships and predictability in the judicial process, such a result which leaves the decision on *res judicata* practically to the discretion of the judge in the subsequent action, would be highly undesirable.

There may be some criticism that the scope of *res judicata* in Louisiana with regard to actions *in rem* is too narrow. If it focuses on the case of *Durmeyer v. Streiffer*,⁷ the criticism is incorrect. In *Durmeyer* the court correctly denied the conclusiveness against all the world of a judgment *in rem* relating to title in land. The argument that a final judgment as to the status of a person is *res judicata* as to all the world

3. See in Switzerland M. GULDENER, SCHWEIZERISCHES ZIVILPROZESS-RECHT 308 n.36a (2d ed. 1958) [hereinafter cited as GULDENER]; in Greece 2 ST. STAVROPOULOS, A COMMENTARY TO THE CODE OF CIVIL PROCEDURE (in Greek) 507 (1968); in Germany 2 B. WIECZOREK, ZIVILPROZESSORDNUNG UND NEBENGESETZE 724 (1957).

4. 247 So. 2d 192 (La. App. 1st Cir. 1971).

5. 196 So. 2d 650 (La. App. 1st Cir. 1967).

6. *Id.* at 652 (emphasis added).

7. 215 La. 585, 594, 41 So. 2d 226, 229 (1949).

does not furnish support in favor of the criticism, because third persons have rights only in things not in persons. The status of a person is *res judicata* as to all the world because only the person holding the status can assert it.

On the contrary, some doubts might be raised in connection with the application of the *same capacity* requirement. In two Louisiana cases, *Lambdin v. Travelers Insurance Company*,⁸ and *Holland v. St. Paul Mercury Insurance Co.*,⁹ suits were filed simultaneously on the same facts and issues. In each case, however, one suit was filed by a parent as individual and the other by the parent as tutor of the injured minor child. A jury in each instance gave recovery in one suit and not in the other. Only the unsuccessful claims were appealed, and *res judicata* did not apply due to a lack of identity of the parties *in their capacity*. The court was right in the first case when speaking of "the irreconcilable conflict between the verdicts upon the two demands"¹⁰ and denying nevertheless any binding effects. This reasoning is correct because it is not the function of *res judicata* to avoid or eliminate such grave conflicts in the judicial determination of *facts*. According to European doctrine, only legal relationships *per se*, capable of being judicially determined, can be covered by *res judicata*; mere facts do not fall within this binding effect.¹¹ A result of this perception is that the *res judicata* rules are not considered in Europe,¹² as in some common law jurisdictions,¹³ as matters of evidence concerning facts and factual allegations, but are contemplated within the broad area of the effects of judgments.¹⁴

Identity of the Thing

Passing now to the identity of the thing demanded, this requirement does not seem to cause much trouble in Europe.

8. 150 So. 2d 636 (La. App. 3d Cir. 1963).

9. 135 So. 2d 145 (La. App. 1st Cir. 1961).

10. *Lambdin v. Travelers Ins. Co.*, 150 So. 2d 636, 639 (La. App. 3d Cir. 1963).

11. See, e.g., ROSENBERG-SHWAB, ZIVILPROZESSRECHT 832-33 (11th ed. 1974) [hereinafter cited as ROSENBERG-SHWAB].

12. See 7 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 1014-15 (2d ed. ESMEIN, RADOUANT AND GABOLDE 1954) [hereinafter cited as PLANIOL & RIPERT].

13. S. BOWER & A. TURNER, THE DOCTRINE OF RES JUDICATA 9 (2d ed. 1969).

14. See R. BRUNS, ZIVILPROZESSRECHT: EINE SYSTEMATISCHE DARSTELLUNG 382 (1968) [hereinafter cited as BRUNS]; VINCENT at 86.

The thing demanded is determined by the final request in plaintiff's complaint, and coincides with the particular substantive right the infringement of which brought about the actual litigation.¹⁵ Some major Louisiana cases seem to follow the same line. The Louisiana Supreme Court said in *Quarles v. Lewis*:¹⁶ "Since the object of the first suit was to compel a specific performance whereas this suit is for recovery of damages resulting from untimely performance, it is clear that the demand in this suit is not the same as that in the first action."¹⁷ The same substantive foundation justifies distinguishing the thing demanded between actions for personal injury and property damages arising out of one and the same negligent behavior of the defendant.

The fact that in both suits plaintiff demands a sum of money or a money judgment,¹⁸ is not sufficient to assume identity of the thing demanded; money does not have a relevant identity in itself and it is necessary to examine the underlying right of indemnification. On the other hand, the thing demanded is only the plaintiff's final request and does not encompass issues which are necessary in order to reach a decision on the final request.¹⁹

From a continental viewpoint, there is some justified criticism of the language in *Heine v. Muse*.²⁰ There, a plaintiff had sued for and obtained a default judgment for the balance of the purchase price; in the second suit, the former defendant—now plaintiff—asked for return of the purchase price and for recovery of damages due to the opponent's misrepresentations that the property sold had been zoned commercial. In sustaining the plea of *res judicata*, the court found that the thing demanded in the prior suit was the

15. See A. BLOMEYER, ZIVILPROZESSRECHT: ERKENNTNISVERFAHREN 452-56 (1963) [hereinafter cited as BLOMEYER].

16. 226 La. 76, 75 So. 2d 14 (1954). For a criticism of this case see Comment, *Preclusion Devices in Louisiana: Collateral Estoppel*, 35 LA. L. REV. 158, 168 n.55, 172 n.73, 173 n.77 (1974). However, the view taken of LA. CIV. CODE art. 2286 in this Comment does not correspond to either the continental or in particular the French view of FRENCH CIV. CODE art. 1351 though the articles are corresponding ones.

17. 226 La. 76, 77, 75 So. 2d 14, 15 (1954).

18. See, e.g., *Blanchard v. Arkansas Louisiana Gas Co.*, 51 So. 2d 850, 852 (La. App. 2d Cir. 1951).

19. See BLOMEYER at 457-64; VINCENT at 93.

20. 206 So. 2d 529 (La. App. 1st Cir. 1968). I do not intend to touch upon the specific question of whether preclusion should also arise from a default judgment.

“recognition of the validity of the obligation created by the contract of sale.”²¹ On the Continent, the validity of this obligation would not be seen as the thing demanded in the first suit. The thing demanded would be only the balance of the purchase price, and the validity of the underlying contract would appear only as a preliminary question to be answered—as a *question préjudicielle*. Whether the buyer is barred from raising this question in the subsequent suit, should be a matter of collateral estoppel.

There are two provisions of the Louisiana Code of Civil Procedure which might appear strange to continental lawyers. According to article 425, if an obligee brings an action to enforce only a portion of the obligation, and does not amend his pleading to demand the enforcement of the full obligation, he loses the right to enforce the remaining portion. This article does not deprive the obligee of the rest of the obligation, it only enjoins its enforcement; in other words, it develops, like *res judicata* in general, *only procedural, not substantive effects*.

Prior to article 425 there were some Louisiana decisions which employed *res judicata* to bar the plaintiff in a second suit when he had split his cause of action in his first suit. This usage is contrary to the old doctrine of Pothier²² which would have said that *res judicata* effect is unavailable as there is no identity of the thing demanded. There does not seem to be any analogous statutory regulation in continental legal systems.²³ At the utmost, we would work with the notion of abuse of right and we could, in extreme situations, bar the enforcement of the remaining portion if this split does not correspond to any economic or social need of the creditor.²⁴ It is understandable that a general statutory prohibition, like that of article 425, curbs the mass of litigation and makes considerably easier the court's function in ruling on preclusive effects during an eventual subsequent suit.

The second provision, which is Louisiana Code of Civil Procedure article 862, states that a final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his

21. *Id.* at 531.

22. See POTHIER, TRAITÉ DES OBLIGATIONS 440 (MASSON ed. 1883).

23. See R. GINSBURG & A. BRUZELIUS, CIVIL PROCEDURE IN SWEDEN 309 (1965); GULDENER at 305-06 n.30.

24. *But cf.* BRUNS at 412-18.

pleadings and the latter contain no prayer for general and equitable relief. If by the term "relief" we understand different substantive remedies arising out of the same factual occurrence (*e.g.*, rescission of the contract or recovery of damages), the result would not only violate the principle of party presentation but would also run contrary to or, for that purpose, abolish the identity of the thing demanded in the *res judicata* doctrine. From the Official Revision Comments to article 862, however, one may conclude that its main function consists in suppressing "the harsh and unduly technical 'theory of the case' doctrine,"²⁵ which would correspond, in continental terminology, to suppressing the need for a particular legal qualification of the party's request. Without arguing for the former or the latter construction, it may be noted that the latter interpretation would make perfect sense to European eyes.

Identity of the Cause of Action

The problems of legal qualification lead to the third requirement of *res judicata*: the identity of the cause of action. French law requires that the cause be the same, in order for the binding effect of former adjudication to operate. Other continental legal systems, affected more strongly by German law, do not speak of the identity of cause, but require that the substantive right under dispute be the same in both suits.²⁶ Identity of substantive right presupposed until recently a common legislative source (*i.e.*, the same article or the same paragraph of a statute). However, in some instances there are distinct articles which for all practical purposes give rise to the *same* right in the sense of a legal power attributed to a person, with a content and to an extent independent of the particular statutory article serving as foundation (*e.g.*, recovery of damages because of breach of contract constituting at the same time a tort). Modern European doctrine is now at the point of consolidating those distinct articles to a common legal basis leading to one and the same right.²⁷ This is true

25. LA. CODE CIV. P. art. 862, comment b.

26. BLOMEYER at 450-57. For the somewhat broader Austrian solutions see 3 H. W. FASCHING, KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN 701-05 (1966).

27. See A. GEORGIADIS, DIE ANSPRUCHSKONKURRENZ IM ZIVILRECHT UND ZIVILPROZESSRECHT (1968) [hereinafter cited as GEORGIADIS]. See also K. D. Kerameus, 23 HARMENOPOULOS (Thessaloniki) 787-95 (1969).

especially with regard to the scope of res judicata; should the first suit founded upon the breach of contract be dismissed, a second action seeking to recover on the ground of tort is barred.²⁸ French law has shown a somewhat similar tendency when developing special rules for actions in nullity requiring a party to aggregate all his causes of nullity in one suit.²⁹ The general trend is to enlarge the scope of litigation, in order not to permit the losing party to escape the res judicata effect through technical intricacies of the substantive law.

Considered against this brief comparative background, Louisiana jurisprudence seems to me to follow the same trend—even if the reasoning is not always similar. For example, the Louisiana Supreme Court in the *Succession of Reynolds*³⁰ said that “it would be undesirable to hold that a party could bring suit to invalidate a will on certain grounds, then, when unsuccessful, institute another suit with the same object, viz. invalidity of the will, on other grounds, particularly when those grounds and the basis for same existed to the knowledge of the party at the time the first suit was brought.”³¹ As Chief Justice Fournet pointed out in his dissent, this is not the civil law notion of cause; but even this latter notion seems to advance, somewhat hesitatingly, to larger units. Certainly, rules of procedure implement the substantive law, and are not an end in themselves; and article 5051 of the Louisiana Code of Civil Procedure adopts a liberal construction of procedural provisions. Nevertheless, old and sometimes obsolete distinctions in the civilian tradition of substantive law should not be allowed to undermine res judicata, which reflects an important public policy in favor of the finality of judicial determination.

Collateral Estoppel

The fourth and last topic is collateral estoppel. This term does not necessarily mean what is understood in common law doctrine but mainly a certain expansion of the binding effects of judgments beyond their object—technically

28. GEORGIADIS at 257-58.

29. See P. HERZOG & M. WESER, CIVIL PROCEDURE IN FRANCE 555 n. 23 (1967); 6 PLANIOL & RIPERT at 381; 7 PLANIOL & RIPERT at 1032, 1033 n.1. See Comment, *Preclusion Devices in Louisiana: Collateral Estoppel*, 35 LA. L. REV. 158, 166 n.44 (1974).

30. 91 So. 2d 584 (1956).

31. *Id.* at 587.

speaking—and into some preliminary issues. Due to the interdependence of legal relationships and the continuously growing complexity of civil litigation, collateral estoppel tends more and more to occupy a central position in any procedural system. A short and oversimplified survey of this question in most European countries would gather them in three groups. The first group, including *inter alia* German and Italian law,³² restricts the scope of *res judicata* to the thing demanded through plaintiff's initial request. Issues decided explicitly or impliedly by the court in order to reach a judgment on the thing demanded are not precluded by the binding effect of the judicial decision, unless either party during the pending proceedings filed a separate claim, the so-called incidental declaratory action, asking the court to decide specifically a particular question on whose affirmative or negative answer depended the outcome of the whole suit. The main policy underlying this institution of incidental declaratory action³³ is to cut off any ambiguous and laborious inquiry by the judge of the second suit into the structure of the first judgment, the intention of the first judge, or the long set of pleadings in the first proceeding, and to entrust the scope of issue preclusion exclusively to the explicit procedural motions of the parties. By this method, the parties enjoy also a much better predictability as to whether a second suit would be available or not.

The second group includes the 1968 Greek Code of Civil Procedure (in preparation since the early thirties) as a principal example. The Greek Code does not recognize the institution of the incidental declaratory action,³⁴ but, enacting an earlier *jurisprudence constante*, bars the relitigation of all issues decided in the previous adjudication, provided three requirements are met: (a) these issues must be related to legal relationships and not to pure facts, *i.e.*, ultimate facts or evidentiary facts; (b) deciding them was necessary in order to render a judgment on plaintiff's request; and (c) these issues fall within the subject-matter competence of the court which rendered the first judgment.³⁵ Thus, under the Greek system,

32. See M. CAPPELLETTI & J. PERILLO, CIVIL PROCEDURE IN ITALY 253-54 (1965); ROSENBERG-SCHWAB at 831-32.

33. On the institution in German law see ROSENBERG-SCHWAB at 510-12.

34. See 2 PROJET OF THE CODE OF CIVIL PROCEDURE 404 (edited by the Ministry of Justice, in Greek, 1953); 3 PROJET OF THE CODE OF CIVIL PROCEDURE 203-04 (1951).

35. GREEK CODE OF CIV. P. art. 331.

parties do not have to ask for explicit ascertainment of incidental issues in order to bring about an issue preclusion, yet the court in the second suit ought always to investigate the previous proceeding, principally from the viewpoint of a "necessity" connection between the issues and the final outcome of the first litigation.

The third group concentrates around French law which neither knows a formal incidental declaratory action nor deals in any way with issue preclusion. The scope of *res judicata* is governed by article 1351 of the Code Napoléon which is the same as article 2286 of the Louisiana Civil Code. Neither Pothier nor the French redactors seem to have considered this question, in favor or against collateral estoppel. Nevertheless, when confronted with a plea of *res judicata* involving mainly issue preclusion, French courts dwell upon the *real meaning* or *real scope* of the previous judgment, and search within it for implied decisions of incidental questions.³⁶ Thus they often reach what would here be called "issue preclusion," without using either this term or the expression collateral estoppel.

Louisiana Developments

Against this somewhat skeleton-like comparative background, any consideration of the Louisiana jurisprudence would raise two questions: (1) is there any issue preclusion in this jurisdiction? and, (2) if so, what would be its legal foundation? The first question is empirical; the second is doctrinal. Without purporting to give an authoritative answer to these questions, the following observations represent a foreigner's glimpse into a common problem of the judicial process.

With reference to the first question, the cases of *California Co. v. Price*³⁷ and *State v. Placid Oil Co.*³⁸ both expound principles of issue preclusion. Nevertheless, doctrinal and judicial criticism³⁹ of the *California* case pointed out that the

36. See 12 AUBRY & RAU, DROIT CIVIL FRANÇAIS 334-35 (6th ed. ESMEIN 1958); 1 RIPERT & BOULANGER, TRAITÉ DE DROIT CIVIL D'APRÈS LE TRAITÉ DE PLANIOL 319 (1956).

37. 234 La. 338, 99 So. 2d 743 (1957). See Comment, *Preclusion Devices in Louisiana: Collateral Estoppel*, 35 LA. L. REV. 158, 167-77 (1974).

38. 300 So. 2d 154, 172 (La. 1974).

39. *Shell Oil Co. v. Texas Gas Transmission Corp.*, 176 So. 2d 692 (La. App. 4th Cir. 1964); *The Work of the Louisiana Supreme Court for the 1957-1958 Term*, 19 LA. L. REV. 338, 392 (1959).

statement on issue preclusion was a mere dictum, since the same result could have been reached independently of this reasoning (*i.e.*, upon the traditional *res judicata* pattern with its three identities). However, it is not clear how there was an identity of the thing demanded. The oil wells, from which the funds in dispute derived, were not the same in the first and the second *concursum* proceedings. Common in both proceedings was only the question concerning the ownership of the same portion of Grand Bay, but that question was precisely *not* the thing demanded either in the first or in the second proceedings; it was merely a litigated issue in order for the court to reach judgment, a *question préjudicielle*. It is striking that nobody seems to question the result of the *California* case; the discussion concentrates on whether this result needs issue preclusion as a foundation or may fall within the legislative scope of *res judicata*. And it seems to be a perfectly succinct statement, as Mr. Justice Tate says, "we may or we may not have judicial estoppel in Louisiana."⁴⁰ This general agreement on the practical extent of the binding effects of prior proceedings shows clearly the soundness and desirability of the result, even for those who oppose the use of collateral estoppel.

The old case of *State v. American Sugar Refining Co.*⁴¹ is considered to have expunged common law notions of estoppel from *res judicata* in Louisiana and to have established continental doctrine as the authority for the interpretation of article 2286. Justice Provosty, speaking for a unanimous court and considering the hypothetical case of two suits on the several installments of interest on a note, said: "Immediate payment of the capital would not be demanded, but its recognition as a debt would *necessarily* constitute the main demand of the suit. Interest would follow as a mere consequence."⁴² This perception of (1) the party's actual request as a *mere* consequence, and (2) the inquiry into *necessary* (even if only implied) presuppositions of the actual demand, as falling within the binding effect of the judgment, is precisely what exceeds normal *res judicata*; according to European terminology, this would move into the vast area of preliminary questions being estopped by the judgment.⁴³

40. *The Work of the Louisiana Appellate Courts for the 1967-68 Term*, 29 LA. L. REV. 278, 279 (1969).

41. 108 La. 603, 32 So. 965 (1902).

42. *Id.* at 608, 32 So. 965 at 967.

43. See K. D. KERAMEUS, RES JUDICATA AND PRELIMINARY QUESTIONS

Provosty's other hypothet in the same opinion is still more characteristic. He writes: "If I break my neighbor's fence, and to his suit for damages I plead the nonexistence of any law subjecting me to pecuniary liability in such a case, and the day after being cast in the suit I break the fence again under circumstances exactly similar, and another suit ensues, there will be as close identity between the two suits as between two suits for the taxes of different years; but we imagine no one would think of applying the law of *res judicata* to the second suit. If, however, in the first suit, instead of confining myself to denial of plaintiff's claim, I set up an independent right, justifying my conduct, as that I am owner of the fence in question, or that I have by contract the right to break said fence, then, as a matter of course, as to this defense, if again set up in the second suit, there would be *res judicata*; but the reason would be that, while urged as a defense, this claim of right would in reality be a demand brought by way of reconvention. I should, *pro hac vice*, have ceased to be defendant and become plaintiff; and the necessary feature of identity of demand in the two suits would be presented."⁴⁴

It may be noted that even under the modified circumstances of the hypothet (with an independent right), the thing demanded itself is not affected; it always remains the claim of damages because of the broken fence. What Provosty in reality suggests here is an extension of the binding effects to a purely preliminary question which, only through Provosty's ingenious but artificial construction, is raised to an actual demand in order to satisfy the obvious practical need for preclusion of the issue of the defendant's contractual right.

Concerning the second question: even if issue preclusion is observed in the judicial practice, where does one look for its legal foundation under the strict wording of article 2286? This provision has been controlling *res judicata* also in France, where the courts have never ceased to search for implied decisions of incidental questions in the previous judgment upon which a plea of *res judicata* is made.⁴⁵ For the restrictive language of the statutory provision ("the authority of the thing adjudged takes place only with respect to what was the object of the judgment") aims to prevent the whole reasoning

(in Greek) 104-13 *passim* (1967) [hereinafter cited as KERAMEUS].

44. *State v. American Sugar Refining Co.*, 108 La. 603, 613, 32 So. 965, 969 (1902).

45. See text at note 36, *supra*.

of the court (with its factual findings and legal holdings) from being included in *res judicata*, but does not bar distinctions within the grounds of the judicial decisions; in any event this does not run against issue preclusion which was completely unknown in 1804.⁴⁶ Not only French jurisprudence, but also the Greek experience under the old Code of Civil Procedure containing the same article, show that this provision and issue preclusion may peacefully coexist to some extent. Thus, collateral estoppel need not be called "an ill defined jurisprudential importation from the common law."⁴⁷

Conclusion

In brief conclusion one can say that *res judicata* constitutes an area where many important policies meet and clash with each other: stability of legal relationships, protection of acquired rights, judicial peace, dignity of the judiciary, efficiency in the administration of justice. Living in an era of global phenomena, including massive litigation, one would not necessarily march against the expansion of *res judicata*. Recent developments in common law jurisdictions indicate that this expansion might well correspond to urgent practical needs. There remains, however, one important caution: *res judicata* has always been an effective tool in promoting not only consistency but also predictability in the judicial evaluation of relevant human behavior. Yet predictability is irreconcilable with leaving the delineation of the scope of *res judicata* to the court in each particular case, according to standards of substantive justice. *Res judicata* as an institution is founded upon the additional possibility of *unjust* decisions.⁴⁸ Making a further distinction, it can be stated that to accept *res judicata* derived from just decisions and to reject it when resulting from seemingly unjust ones would undermine the function of the entire institution and would severely disturb the administration of justice.

46. For a discussion of the pertinent French law at that time see KERAMEUS at 78-80.

47. See, e.g., *Baker v. Wheless Drilling Co.*, 303 So. 2d 511, 514 (La. App. 2d Cir. 1974).

48. See Hazard, *Res Nova in Res Judicata*, 44 SO. CAL. L. REV. 1036, 1041-42 (1971).