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PRECLUSION DEVICES IN LOUISIANA: COLLATERAL ESTOPPEL

When a court of competent jurisdiction rules on the merits of a case, the judgment should be final, and the parties should not be allowed to relitigate matters previously decided. Such finality is necessary to insure consistency of judgments and efficient use of overcrowded courts. In addition it prevents harassing litigation, allows the parties to plan on the knowledge of their rights and obligations, and protects the integrity of the judiciary by sustaining the judgments of other courts.¹ To achieve these results, the common law has developed two preclusion devices:² *res judicata* and collateral estoppel.³ Only *res judicata* is recognized in Louisiana legislation,⁴ but recent cases appear to have adopted estoppel.⁵ The doctrine of estoppel has received little analysis, however, and there is scant indication of the breadth of the doctrine in Louisiana.

Common Law

Res judicata is the effect of a prior judgment in a later suit between the same parties on the same cause of action.⁶ Judgment for the plaintiff in the earlier suit bars further litigation on the same cause of action because there is a merger of the judgment and the cause of action. The plaintiff now derives his rights solely from the judgment.⁷ If the plaintiff loses, the judgment acts as a bar to a later suit on that same cause of action.⁸ In either case, the original cause

1. A. VESTAL, *RES JUDICATA/PRECLUSION* 7-12 (1969) [hereinafter cited as VESTAL].

2. F. JAMES, *CIVIL PROCEDURE* § 11.9 (1965) [hereinafter cited as JAMES].

3. The term "collateral estoppel" was first used by the *RESTATEMENT OF JUDGMENTS* (1942), although it is sometimes referred to as estoppel by verdict and estoppel by judgment. The *RESTATEMENT (SECOND) OF JUDGMENTS*, (Tent. Draft No. 1, 1973), uses the phrase "issue preclusion" to avoid confusion between collateral estoppel and ordinary estoppel. Such confusion can be seen in cases which equate collateral estoppel with judicial estoppel. The latter should be used only in conjunction with the rule which prohibits parties who have taken a particular position in their pleadings from changing that position in the course of the litigation or in subsequent litigation. M. BIGELOW, *LAW OF ESTOPPEL* 1xxxiii, 601-04 (3d ed. 1882).

4. LA. CIV. CODE art. 2286.

5. See text at note 50 *infra*.

6. *Cromwell v. County of Sac*, 94 U.S. 351 (1876); JAMES § 11.9. Although the term may be used broadly to include all means by which a former judgment may affect a later one, it will be used herein only to refer to the effect on a later suit on the same cause of action. *RESTATEMENT OF JUDGMENTS*, Introductory Note to §§ 41-44 (1942).

7. *Kotsopoulos v. Asturia Shipping Co., S.A.*, 467 F.2d 91 (2d Cir. 1972); *Union Guardian Trust Co. v. Rood*, 308 Mich. 168, 13 N.W.2d 248 (1944); JAMES 550; *RESTATEMENT OF JUDGMENTS* § 47 (1942); VESTAL 61-62.

8. *Miller v. National City Bank of New York*, 166 F.2d 723 (2d Cir. 1948); JAMES 550; *RESTATEMENT OF JUDGMENTS* § 48 (1942); VESTAL 105.

of action is extinguished, as are all issues litigated in support of that cause of action and all issues which might have been pleaded.⁹

Collateral estoppel, on the other hand, is the effect of a prior judgment in a subsequent suit between the parties brought on a *different* cause of action.¹⁰ The prior judgment bars relitigation only of issues which were actually raised, litigated and necessarily decided in the earlier suit.¹¹ Thus, the preclusive effect of estoppel is much narrower than that of *res judicata*.¹²

Limitations on Collateral Estoppel

Several restrictions on the use of collateral estoppel have been imposed by the courts to assure each party the right to try his case once, without affording him more than the single opportunity to which he is entitled. The first restriction is that only those issues which were *actually litigated* may be given estoppel effect.¹³ Thus, many courts refuse to allow estoppel when the prior judgment was based on a consent or default judgment.¹⁴ A consent decree is particularly unsuited as a preclusion device because it does not involve litigation and determination of issues in an adversary context, but is merely a contractual agreement between the parties on which the

9. *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1876); JAMES § 11.9. Indeed, *res judicata* applies even if no issues were litigated and the judgment was by default.

10. *United States v. International Bldg. Co.*, 345 U.S. 502 (1953); *Tait v. Western Maryland Ry. Co.*, 289 U.S. 620 (1933); *Cromwell v. County of Sac*, 94 U.S. 351 (1876) JAMES §§ 11.9, 11.18, 11.19.

11. *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944); *Cromwell v. County of Sac*, 94 U.S. 351 (1876); JAMES § 11.19; RESTATEMENT OF JUDGMENTS § 68 & Comment *p* (1942, Supp. 1948).

12. In a second suit on the same cause of action, the doctrine of *res judicata* prohibits a party from raising any issue which was, or could have been, raised in support of that cause of action in the first suit. Professor James explains that the parties can fairly accurately assess which issues are important to a particular cause of action, and should be forced to raise them or waive them with respect to that cause of action. However, because the instances in which collateral estoppel might apply are more difficult to assess, only those facts to which the parties have turned their attention may be given preclusive effect in a suit on a different cause of action. James notes that if a broader rule of collateral estoppel were adopted, the parties would feel pressured to litigate every minor and petty claim lest it be barred in a later case, thus impeding judicial efficiency. JAMES 576-77.

13. *Larsen v. Northland Transp. Co.*, 292 U.S. 20 (1934); *Cromwell v. County of Sac*, 94 U.S. 351 (1876); RESTATEMENT OF JUDGMENTS § 68 (1942).

14. *Lovejoy v. Ashworth*, 94 N.H. 8, 45 A.2d 218 (1946); RESTATEMENT OF JUDGMENTS § 68, comment *f* (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 68, comment *e* (Tent. Draft No. 1, 1973). This differs from the rules governing bar and merger, since even a default judgment will extinguish the cause of action so that it may not be sued upon later.

court enters judgment. In many cases the judgment does not contain a written recital of the issues involved, and consequently it would be extremely difficult to determine which issues would merit estoppel. In addition, it would seem likely that in most cases the parties intend their agreement to have no effect beyond the immediate controversy.¹⁵

Different considerations are involved in determining if preclusion should arise from a default judgment. Though no issues are actually litigated when the defendant defaults, they are nonetheless determined by the court rather than settled by the parties. While due process requires that the defendant be given an opportunity to appear and present his case, he may waive his rights by failing to contest, and such conduct may even reflect defendant's recognition of the validity of plaintiff's claim.¹⁶ Thus it has been suggested that a default judgment could be used to bar later litigation of the facts in plaintiff's complaint.¹⁷

A second requirement is that an issue be litigated *between the parties* in order to be precluded. For instance, issues of liability between parties will not be barred from consideration if they were aligned as co-defendants in a previous suit adjudicating only the plaintiff's right to recover from them and not the extent of liability between them.¹⁸ However, if the defendants in the previous suit litigated the question of their respective liability by means of a third party demand, the judgment in that case should preclude a later suit between them since their exact liabilities had been finally determined.

Another problem associated with the application of collateral estoppel is determining which of the issues litigated and decided in a suit may be given estoppel effect. Any lawsuit involves a multitude of issues of varying importance, some of which may not be fully

15. James, *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173-79 (1959).

16. *Harvey v. Griffiths*, 133 Cal. App. 17, 23 P.2d 532 (1933); VESTAL 198-203.

17. *Harvey v. Griffiths*, 133 Cal. App. 17, 23 P.2d 532 (1933); VESTAL 196-203. Professor Vestal suggests that estoppel could apply to an issue determined but not litigated if it is obvious from the facts of the case that the party's default amounted to an admission of the validity of plaintiff's claim. He suggests that this could be determined by "(1) the importance of the matter to the conceding party; (2) the cost of litigation; or (3) the ease with which a defense could be made on the conceded point." VESTAL 200. Thus, preclusion would not be applied when the defendant defaulted because his potential liability to the claimant was less than his probable legal fees. In such a case the default should be considered as an admission only for the purposes of the first suit, made as a matter of convenience.

18. RESTATEMENT OF JUDGMENTS § 82 (1942).

developed because it would be expensive or impractical to do so or because the fact finder would be distracted from the main areas of contention if each minor issue received comprehensive examination. If collateral estoppel were applied to bar a tangential issue which received only cursory treatment in the first suit, but which assumed major proportions in a later suit, serious injustice would result to the party being precluded. To determine which facts found in an earlier suit should be given estoppel effect, some common law jurisdictions have developed a distinction between ultimate and evidentiary (or mediate) facts.¹⁹ Ultimate facts, defined as those "upon whose combined occurrence the law raises the duty, or the right, in question,"²⁰ are given estoppel effect. Evidentiary or mediate facts, on the other hand, are those found in the course of reasoning to the ultimate conclusion²¹ and may be relitigated in a subsequent controversy. For instance, if the nullity of an instrument is alleged because of the insanity of one of the parties, the ultimate fact found would be the sanity or insanity of the party. The evidentiary or mediate facts determined in the course of the reasoning might include evidence of other important transactions, or of lucid conversations held with various people. These evidentiary facts would not be given estoppel effect in a later case, such as one to prove the content of the conversation; whereas the finding as to the party's sanity should be given estoppel effect in a suit contesting his sanity at the time he made another instrument (provided the interval between the two transactions does not suggest the possibility of changed circumstances). This distinction presumes that an ultimate fact received the full attention of the parties in the first case, and that evidentiary facts, being of lesser importance, were not exposed to such complete examination.²²

A more flexible test to determine which issues a party should be barred from relitigating was suggested in *Hyman v. Regenstein*,²³ which allowed estoppel when it was evident that the finding of fact was "necessary" to the first judgment and "it was foreseeable that the fact would be of importance in possible future litigation."²⁴ The

19. JAMES § 11.20; VESTAL 251-56; *Developments in the Law — Res Judicata*, 65 HARV. L. REV. 818, 842 (1952).

20. *The Evergreens v. Nunan*, 141 F.2d 927, 928 (1944) as quoted in *Developments in the Law — Res Judicata*, 65 HARV. L. REV. 818, 842 (1952).

21. *Id.* at 842-43.

22. A more extreme restriction which has been suggested would limit the use of preclusion to findings which were ultimate facts in both the first and the subsequent cases. *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir. 1944), *cert. denied*, 323 U.S. 720 (1944); JAMES § 11.20.

23. 258 F.2d 502 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959).

24. *Id.* at 510-11.

test of foreseeability avoids the difficulty often encountered in attempting to distinguish ultimate from evidentiary facts, and ends the anomaly of refusing to give estoppel effect to a fact labeled "evidentiary," though it may have been the most thoroughly and hotly contested issue of the case. In addition, it focuses most accurately on the cardinal policy objective of issue preclusion: allowing parties only one opportunity to develop an important fact, but preserving that single opportunity.²⁵

Mutuality of Estoppel

Another often cited limitation on the application of collateral estoppel is the doctrine of mutuality of estoppel which allows only the parties to a suit to be bound by *and* to use the judgment rendered therein as preclusion in later litigation.²⁶ Because due process prohibits the determination of a person's rights in an action in which he is not represented, collateral estoppel clearly could not be used *against* one who was not a party in the prior action. Many courts, however, also refuse to allow a stranger to the earlier suit to *use* that judgment against one who had been a party, considering it unfair to preclude a party who would not have been permitted to use the judgment if it had been favorable to him.

The doctrine of mutuality, however, has been seriously questioned and discarded in a number of jurisdictions.²⁷ The leading case of this movement, *Bernhard v. Bank of America National Trust and Savings Association*,²⁸ illustrates the approach which many courts now take. Mr. Cook, executor of the estate of Mrs. Sather, filed an account of his administration in probate court. Several heirs contested because Cook had failed to account for funds which they contended he had transferred from Mrs. Sather's bank without her con-

25. This test would require examination into the facts surrounding each case to determine whether, at the time of the first suit, the parties could have anticipated future litigation in which a particular issue would again be of major importance. VESTAL 255.

26. RESTATEMENT OF JUDGMENTS § 93 (1942): "[A] person who is not a party or privy to a party to an action in which a valid judgment other than a judgment in rem is rendered . . . (b) is not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action."

27. *Hardware Mut. Ins. Co. v. Valentine*, 119 Cal. App. 2d 125, 259 P.2d 70 (1953); *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n.*, 19 Cal. 2d 807, 122 P.2d 892 (1942); *Coca Cola Co. v. Pepsi-Cola Co.*, 36 Del. 124, 172 A.2d 260 (1934); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957) [hereinafter cited as *Currie*]; *Developments in the Law — Res Judicata*, 65 HARV. L. REV. 820, 862 (1951).

28. 19 Cal. 2d 807, 122 P.2d 892 (1942).

sent. The court settled the account after a hearing, finding that the funds had been intended as a gift to Cook. Following Cook's withdrawal as administrator, one of the heirs assumed that position and sued the bank from which the funds had been withdrawn, again charging the withdrawal had been without the consent of the deceased. The defendant pleaded *res judicata* on the basis of the judgment settling the account.

If mutuality of estoppel had been required, preclusion would not have been allowed because the bank had not been involved in the first suit. However, the court rejected the old rule, declaring that "the criteria for determining who may assert a plea [of issue preclusion] differ fundamentally from the criteria for determining against whom"²⁹ such a plea may be offered. The court reasoned that while due process would prohibit preclusion of a party who was not a party to and who therefore was not bound by an earlier judgment, one who had been bound by an earlier judgment should not be allowed to litigate again simply because he has switched opponents. Discarding the mechanical test of mutuality, the court announced that estoppel would be applied when "the party *against whom the plea is asserted [was] a party or in privity with a party to the prior adjudication,*"³⁰ and held that the plaintiff was precluded from relitigating the question of the ownership of the funds. This test has been accepted in a number of jurisdictions, and fulfills the purposes of preclusion much more effectively than the mechanical application of mutuality.

However, a selective application of the doctrine of mutuality is appropriate in some circumstances. Since the plaintiff in the prior action had the opportunity to select both the time the suit was brought and the forum in which it was heard, the defendant might not have been able to present his strongest defense, and judgment might have been adverse to him as a result of a procedural disadvantage. Thus, the use of a judgment as issue preclusion by a stranger to the first suit might well be limited to use against the party who had the initiative in the earlier action.³¹

Another instance when collateral estoppel may not be appropriate if mutuality is lacking occurs when multiple claimants, whose causes of action arise out of the same event, attempt to use issue preclusion against a single defendant, creating what Professor Currie describes as an anomalous situation. Currie explains his objection

29. *Id.* at 811-12; 122 P.2d at 894.

30. *Id.* at 813, 122 P.2d at 895 (emphasis added). In addition, the court set out the requirement that the issue determined in the first suit be identical to the one in the second suit and that there had been a judgment on the merits in the first suit.

31. *Currie* 308-22.

with the example of a train wreck in which fifty people are injured and sue the railroad in succession. No matter how many times the railroad won, it would not be allowed to use those judgments against later plaintiffs who had not been parties in the earlier action. Yet if the twenty-fifth plaintiff won, the use of that judgment by later plaintiffs could be justified under the language of *Bernhard* since the party against whom the plea is being asserted, the railroad, was a party to the prior action. Currie argues with some force that collateral estoppel should not be applied to permit half of the plaintiffs to recover merely because of the aberration of the twenty-fifth judgment.³²

Louisiana Legislation

Unlike the common law, Louisiana does not have a fully developed doctrine of issue preclusion. The Louisiana doctrine of res judicata is embodied in Civil Code article 2286, but there is no comparable provision for collateral estoppel. Since article 2286 was derived from article 1351 of the Code Napoleon, the Louisiana concept of res judicata is identical to that of the French and differs greatly from that of the common law. Article 2286 establishes the authority of the thing adjudged as a legal presumption,³³ rather than incorporating the common law rules of bar and merger of the cause of action.³⁴ Because the judgment is presumed correct, it is not open to further litigation.³⁵ The authority of res judicata takes place only with regard

32. *Id.* 285-89; See VESTAL 305-23.

33. See LA. CIV. CODE art. 2285.

34. Although some courts say that the Louisiana doctrine varies further from the common law in that res judicata in Louisiana does not extend to issues which might have been pleaded but which were not, this statement misconceives the "might have been pleaded" rule at common law. Both Louisiana and the common law bar later suits on the same cause of action even if new evidence or grounds are offered to support the cause. The Louisiana cases which interpret "might have been pleaded" to exclude *all* causes of action which might have been urged are thus inaccurate.

Louisiana jurisprudence has recognized three exceptions to the strict rule of res judicata: in petitory actions, suits to partition real estate, and suits for an injunction of executory process, a party must assert all causes in the first suit, or they will be waived. *Quarles v. Lewis*, 226 La. 76, 75 So. 2d 14 (1954). Although the cases speak of this as a limited acceptance of the "might have been pleaded" rule, it actually goes far beyond in excluding not merely grounds offered in support of the same cause but also other causes.

35. 1 PLANIOL, CIVIL LAW TREATISE pt. 1, no. 361, at 241 (11th ed. La. St. L. Inst. transl. 1959) [hereinafter cited as PLANIOL]; J. LECLEC'H, *De l'AUTORITÉ DE LA CHOSE JUGÉE* n° 1 (1951) [hereinafter cited as LECLEC'H]; 20 F. LAURENT, *PRINCIPLES DE DROIT CIVIL* n° 1 (2d ed. 1876) [hereinafter cited as LAURENT]; Comment, 34 LA. L. REV. 763, 769-74 (1974).

to the object of the judgment, which will be considered the same as the object of a later suit only when there is an identity in both suits between the thing demanded, the cause of action, and the parties. Because these three identities are strictly required for the application of *res judicata*³⁶ and are narrowly construed, the use of *res judicata* is often restricted.

The identity of parties required is not physical identity, but identity of quality or legal capacity.³⁷ Thus there would be no identity if the same person appeared in one suit in a representative capacity, and in the second in his individual capacity.³⁸

Article 2286 also requires an identity in the cause of action between the two suits, but it appears that this language is the result of a mistranslation from the French, since the French version of the 1825 Code,³⁹ as well as the Code Napoleon,⁴⁰ required identity of *cause*. Thus article 2286 should be read as embodying the civilian concept of cause rather than the common law cause of action.⁴¹ The cause is the juridical fact which forms the basis of the right demanded, *i.e.*, the principle generating the legal right,⁴² and should be distinguished

36. *State v. American Sugar Ref. Co.*, 108 La. 603, 32 So. 965 (1902).

37. LA. CIV. CODE art. 2286; 3 BAUDRY-LACANTINERIE, *TRAITÉ DE DROIT CIVIL* n° 2686-94 (2d ed. 1905) [hereinafter cited as BAUDRY-LACANTINERIE], *LECLEC'H* n° 87-98; 2 *PLANIOL* pt. 1 no. 54 (A)3, at 35.

38. 3 FUZIER-HERMAN, *CODE CIVIL ANNOTÉ* art. 1351, n° 1254 (1896); *CHOSE JUGÉE* in 8 DALLOZ, *JURISPRUDENCE GÉNÉRALE, REPERTOIRE* n° 281-82 (1847) [hereinafter cited as DALLOZ]. There would be the needed identity, however, if a party not named in the first suit was represented therein. Thus a judgment naming the curator of an interdicted person, or the tutor of a minor should be construed as extending to the interdict or minor. DALLOZ, n° 229, 234.

39. 1972 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA art. 2286 (J. Dainow ed.)

40. FRENCH CIV. CODE art. 1351.

41. See Comment, 34 LA. L. REV. 763 (1974). The difference between cause and cause of action is important. Cause is the principle upon which a specific demand is grounded while cause of action embraces the cause and the demand, and is related to the party making the demand. Millar, *The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law*, 39 MICH. L. REV. 1, 4 n.13 (1940).

42. "The cause of a demand is the juridical fact which forms the legal ground of the privilege or of the right which is the object of the demand It is the generating principle of the claimed right, be it real or personal, its efficient cause" BAUDRY-LACANTINERIE n° 2679 (transl. supplied); LAURENT n° 62; *LECLEC'H* n° 70. Thus, the cause for a demand of money might be a loan, a sale, or a lease: "I demand 10,000 francs by virtue of a loan: what is the cause of my demand? The loan. I demand 10,000 francs as the amount of a sale: what is the cause of my demand? The contract of sale. After failing in my demand for 10,000 francs based on a loan, I may demand the same sum as the price of the sale; the cause differs from the other, and when the cause is different, the dispute before the judge is entirely different" LAURENT n° 63. (transl. supplied.)

from the grounds or proof offered to advance the claim. Although different evidence is offered in two suits, if it is offered in support of the same cause, *res judicata* applies.⁴³

A judgment on a particular cause and demand bars only a later suit on that same cause and not a new cause asserted to make the same demand. Thus it is difficult to avoid a multiplicity of suits demanding the recognition of the nullity of an instrument if each vice of form or consent or capacity is considered as a new cause. Some French writers have attempted to limit such litigation by interpreting the *nullity* of the transaction as the *cause* for the demand of dissolution.⁴⁴ In that case a party would have to plead all claims proving the nullity, since *res judicata* would bar any later suit on that cause. The Louisiana courts, however, have refused to accept this position,⁴⁵ and thus a party is free to demand the nullity of an instrument in successive suits based upon different vices.

Another requisite to the application of article 2286 is that there be an identity of the thing demanded, *i. e.*, of the immediate juridical benefit or right sought.⁴⁶ There must be an identity not merely of the material thing demanded but also of the nature of the right claimed.⁴⁷ Thus the judgment refusing a demand for interest as not yet due is not *res judicata* in a later demand for the capital amount, since the first judgment did not have as its object the question of whether the capital was due.⁴⁸

43. LAROMBIERE, OBLIGATIONS art. 1351 at n° 62 (1885). "The distinction [between cause and grounds] is elementary. The party claiming the right of ownership by alleging a sale must prove that there was a sale; the *cause* on which he bases his right must thus be established by evidence of fact and law which help to prove the basis of the demand or of the exception; these are the *grounds*." LAURENT n° 65. Thus if the demand is ownership of a certain thing by virtue of a sale, the cause of the demand is the sale. However, there may be various means by which the sale would be proven, such as by written act, or by parol. However, once the demand has been rejected, a later suit may not be brought on the same cause by alleging other grounds.

44. 2 E. BONNIER, TRAITE DES PREUVES n° 876 (4th ed. 1873). Other writers have suggested that the possible vices should be ranged in three groups: vices of consent, of form, and of incapacity. Each group would be considered one cause with the individual vices merely forming the specific proof. Thus if a party alleged a particular vice of consent and failed, he would not be allowed to charge another vice of consent in a later action. 5 V. MARCADE, EXPLICATION DU CODE CIVIL art. 1351 at 173-75 (7th ed. 1873).

45. *Hope v. Madison*, 194 La. 337, 193 So. 666 (1940). See also BAUDRY-LACANTINERIE n° 2681-82.

46. BAUDRY-LACANTINERIE n° 2675.

47. *Id.*; LECLEC'H n° 51.

48. The identity of demand would seem to be fulfilled when recognition of the same right is asked in a second suit, even though a different relief or recognition is requested. However, some Louisiana cases such as *Quarles v. Lewis*, 226 La. 76, 75 So.

Louisiana Jurisprudence

Prior to 1957, the only preclusion device generally recognized under Louisiana legislation and jurisprudence was *res judicata*. The doctrine was strictly interpreted according to the requirements of the Civil Code, and any expansion by adoption of the broader common law theory was resisted by the courts.⁴⁹ In 1957, however, the supreme court adopted common law estoppel as one of the bases for its decision in *California Co. v. Price*.⁵⁰ A concursus proceeding was instituted by the California Company to determine the ownership of royalties from mineral leases granted by both the state and the Price-Beckwith group. In a prior concursus proceeding involving different leases within the disputed area, the Price-Beckwith title was upheld over that of the state, and that group was awarded the funds. Based on that judgment, the Price-Beckwith group filed pleas of *res judicata* and estoppel, both of which were sustained by the supreme court without detailed analysis of which of the two exceptions was the more applicable. *Res judicata* would be appropriate if the thing demanded in each case was construed to be the ownership of the land on which the leases had been granted, but such an interpretation of thing demanded is a great deal broader than that usually given by the courts. Thus, the court also added that even if *res judicata* was not strictly applicable, estoppel would bar litigation of "every material allegation or statement made on one side in the prior Price case and denied on the other which was determined in the course of the proceedings."⁵¹ Accordingly, since the ownership of the land had been previously decided, the state was estopped from litigating that question again.

The *California* case did not treat estoppel⁵² as a new doctrine in Louisiana, but noted that it had been applied in several earlier cases,⁵³ and, in its opinion, specifically recognized in *Quarles v.*

2d 14 (1954), have equated thing demanded with the sort of relief asked. Thus a party is free to litigate his entire claim more than once, merely by requesting a different type of relief.

49. *Quarles v. Lewis*, 226 La. 76, 75 So. 2d 14 (1954).

50. 234 La. 338, 99 So. 2d 743 (1957).

51. *Id.* at 350, 99 So. 2d at 747.

52. Although *California* uses the term judicial estoppel, it is actually collateral estoppel or issue preclusion. Judicial estoppel bars a party who has made a statement in his pleadings from reversing his position in the same or subsequent litigation. However, when a material fact has been litigated and *ruled upon by the court* the preclusion which results is collateral estoppel. M. BIGELOW, *LAW OF ESTOPPEL* lxxxiii (3d ed. 1882).

53. *Buillard v. Davis*, 185 La. 255, 169 So. 78 (1936); *Heroman v. Louisiana Inst. of Deaf & Dumb*, 34 La. Ann. 805 (1882). The court further noted that although *Quarles v. Lewis*, 226 La. 76, 75 So. 2d 14 (1954) had considered those cases as "out of

Lewis.⁵⁴ The court was evidently referring to the discussion in *Quarles* of *Norton v. Crescent City Ice Manufacturing Co.*,⁵⁵ in which an exception of res judicata prevailed to bar certain heirs from asserting their personal claims in a wrongful death action following an adverse judgment in an earlier suit on their transmitted claims. *Quarles* agreed with the ruling in *Norton* but found res judicata inapplicable, suggesting that the plea of no cause of action or judicial estoppel would have been appropriate. Clearly *Quarles* used the term judicial estoppel to mean that parties should not be allowed to split a single cause of action, a concept entirely different from estoppel by judgment. The *California* court was thus in error in citing *Quarles* as authority that Louisiana recognizes issue preclusion.

However, the court was correct in relying on *Buillard v. Davis*⁵⁶ as an instance of estoppel by judgment. In *Buillard*, a petitory action,

line with the rest of the jurisprudence," it had not specifically overruled them, and it was never the intention of the supreme court to overrule them. *California Co. v. Price*, 234 La. 338, 350, 99 So. 2d 743, 747 (1957).

54. 226 La. 76, 75 So. 2d 14 (1954).

55. *Id.* at 85-86, 75 So. 2d at 17, citing *Norton v. Crescent City Ice Mfg. Co.*, 178 La. 150, 150 So. 859 (1933). Although the *California* court did not further specify which passage in *Quarles* it was relying upon, it seems most likely that this passage was intended. However, *Quarles* did recognize certain aberrations in Louisiana's rules on preclusion which were termed exceptions to the strict requirements of article 2286. In addition to the well known exceptions dealing with petitory actions, suits to partition real estate, and suits to enjoin executory process, *Quarles* noted a further exception in certain cases in which an identity of thing demanded was lacking. 226 La. 76, 84 n.2, 75 So. 2d 14, 17 n.2 (1954). That court cited *Picard v. Mutual Life Ins. Co. of New York*, 212 La. 234, 31 So. 2d 783 (1947), *State v. American Sugar Refining Co.*, 108 La. 603, 32 So. 965 (1902) and *Carpenter v. Metropolitan Life Ins. Co.*, 167 So. 223 (La. App. Orl. Cir. 1936) for the holding that res judicata would bar a second demand on the same cause of action when the things demanded in the two suits varied from one another only in time of accrual. Those cases could more accurately be cited for the proposition that when plaintiff makes a demand and defendant offers an affirmative defense, that defense is also adjudicated and acquires the force of res judicata. In *Carpenter* plaintiff sued for disability payments under an insurance policy and lost following litigation of the affirmative defense that the policy was not in force at the time of the injury. The plaintiff then sued for payments accruing after the first suit, but was barred by the plea of res judicata. Although the demand was different in that it related to payments accruing at a different point in time, the determination in the earlier suit that no payments were due had acquired the force of the thing adjudged. *Quarles*, however, did not view these cases as being a wider, though correct interpretation of thing demanded, but as exceptions to the normal requirements of res judicata. If the position in *Quarles* (thing demanded was only the specific disability payments) is adopted, this "exception to res judicata" should more accurately be termed collateral estoppel: the second suit is being barred because the issue vital to its success (the validity of the contract itself) had been litigated and specifically decided in the earlier suit.

56. 185 La. 255, 169 So. 78 (1936).

the court rejected defendants' plea of res judicata which was based on two earlier suits refusing to invalidate the administrator's sale by which the defendants claimed ownership. The court held Civil Code article 2286 inapplicable because the thing demanded in the two suits was not the same, but precluded the issue of ownership in the second case on the basis of estoppel. The *Buillard* court ruled that a "decision upon the issues involved by a competent court operates as a conclusive estoppel between the parties,"⁵⁷ thus providing a precedent for the use of common law estoppel by judgment as an alternate basis of decision in *California*. Yet, because *California* could have been decided solely on the basis of res judicata, it stands more as an indication of the supreme court's willingness to apply collateral estoppel in an appropriate case, than as a firm mandate to be necessarily adhered to by the courts of appeal.

Predictably, the lower courts' reaction to *California* has been mixed,⁵⁸ outside of the narrow area of barring relitigation of fault in demands for alimony after divorce when the wife had previously been found at fault in a suit for separation from bed and board.⁵⁹ In other areas of litigation, although the Fourth Circuit has consistently maintained that estoppel is not a part of Louisiana law and that the court's statement in *California* was mere dictum,⁶⁰ most circuits seem willing

57. *Id.* at 281, 169 So. at 86. It is clear that this case involved estoppel by judgment or issue preclusion, since the court stated, "[w]e therefore conclude that the judgments in [the previous cases] are binding on the respective parties thereto . . ." *Id.* at 281, 169 So. at 86-87 (emphasis added).

58. The federal courts, however, have widely accepted *California* as introducing issue preclusion to Louisiana law. *McDonald v. O'Meara*, 473 F.2d 799, 802 (5th Cir. 1973) and cases cited therein; *Breeland v. Security Ins. Co.*, 421 F.2d 918 (5th Cir. 1969); *Stevens v. New Orleans & Northeastern R.R. Co.*, 341 F. Supp. 497 (E.D. La. 1972).

59. *Fulmer v. Fulmer*, 288 So. 2d 398 (La. App. 4th Cir. 1974); *In re Williams*, 288 So. 2d 401 (La. App. 4th Cir. 1974); *Broussard v. Broussard*, 275 So. 2d 410 (La. App. 3d Cir. 1973); *Richardson v. Richardson*, 275 So. 2d 845 (La. App. 4th Cir. 1973). After this Comment was prepared for publication, the Louisiana supreme court affirmed the decision of *Fulmer v. Fulmer*, 301 So. 2d 622 (La. 1974), holding that a determination of fault in separation proceedings precludes relitigation of fault for purposes of an award of alimony. Although the court based the decision on its interpretation of the legislative intent behind Civil Code article 160, rather than specifically relying on collateral estoppel, it would seem that issue preclusion is the most satisfying explanation of the decision; i.e., because there had been a final determination of a material issue in the prior case, that issue was not allowed to be relitigated.

60. *Bordelon v. Landry*, 278 So. 2d 173 (La. App. 4th Cir. 1973); *Johnson v. Fidelity & Cas. Co.*, 201 So. 2d 177 (La. App. 4th Cir. 1967); *Shell Oil Co. v. Texas Gas Trans. Corp.*, 176 So. 2d 692 (La. App. 4th Cir. 1965). Most of the courts' statements have themselves been dicta because the cases were not proper ones for the application of estoppel. For example, *Johnson* dealt with lack of identity of parties,

to apply issue preclusion in an appropriate case,⁶¹ but have not yet had occasion to do so.⁶²

Some courts have confused the term "judicial estoppel" in cases since *California* by using it to refer to various concepts other than issue preclusion. An example is *Williams v. Marinneaux*⁶³ in which the supreme court affirmed dismissal of a suit against an employer for injuries to a third person caused by his employee. Because plaintiff had released the employee, the supreme court approved the lower court's action in sustaining an exception of no cause of action. The court also overruled an exception of res judicata which had been sustained by the lower court, declining to recognize an exception to the requirement of identity of parties which had been allowed in some earlier cases.⁶⁴ The court did find that the result of those cases could be supported on the basis of "judicial estoppel."

The concept of judicial estoppel in *Williams* is not the same as that in *California*, which applied issue preclusion between the same parties. Rather, what the court calls judicial estoppel in *Williams* is only the narrow principle that a "cause of action abates against the person secondarily liable"⁶⁵ when in an earlier suit the tortfeasor has been found not negligent. The rationale supporting this principle seems to be that to allow separate suits against the two defendants would threaten to produce inconsistent judgments which might

and *Shell Oil* was concerned with the federal rule of collateral estoppel as applied under the full faith and credit clause. *But see Bordelon v. Landry* where the court recently held that common law collateral estoppel was not applicable in Louisiana. The court did so, however, because it felt the supreme court had never carefully addressed the applicability of issue preclusion, and had never "invoked the doctrine except in a general and peremptory manner without setting guidelines relative to necessary elements and limitations." 278 So. 2d at 176. The court made it clear that its holding was made in the hope that the supreme court would take the opportunity to grant writs and make a definitive ruling.

61. *Olsen Eng'r. Corp. v. Hudson Eng'r Corp.*, 289 So. 2d 346 (La. App. 1st Cir. 1973); *State v. Placid Oil Co.*, 274 So. 2d 402 (La. App. 1st Cir. 1972); *Lege v. United States Fid. & Guar. Co.*, 186 So. 2d 670 (La. App. 3d Cir. 1966); *Giroir v. Dumesnil*, 172 So. 2d 89 (La. App. 1st Cir. 1965).

62. Estoppel has not been applied either because of a lack of identity of parties or because no issues were common to the two suits. *Olsen Eng'r Corp. v. Hudson Eng'r Corp.*, 289 So. 2d 346 (La. App. 1st Cir. 1973) (lack of identity of parties); *Lege v. United States Fid. & Guar. Co.*, 186 So. 2d 670 (La. App. 3d Cir. 1966) (issue of disability under Workmen's Compensation Act not at issue in prior tort action).

63. 240 La. 713, 124 So. 2d 919 (1960).

64. *Muntz v. Algiers & G. St. Ry. Co.*, 116 La. 236, 40 So. 688 (1906); *McKnight v. State*, 68 So. 2d 652 (La. App. 1st Cir. 1953) (sustaining pleas of res judicata in suits against persons secondarily liable following an unsuccessful suit against party primarily liable).

65. 240 La. 713, 722, 124 So. 2d 919, 922 (1960).

hinder the right of a secondarily liable defendant to indemnity from the primarily liable tortfeasor.⁶⁶ Clearly then, *Williams* should not be viewed as authority for the proposition that Louisiana recognizes issue preclusion without regard to the identity of the parties.⁶⁷

Scope of Estoppel in Louisiana

Although collateral estoppel has been recognized in several Louisiana cases, there has been little judicial indication of the boundaries within which it will be applied. Some limits upon its use are evident, however, from *California Co. v. Price*⁶⁸ and additional guidelines may be drawn from the common law experience.

California demands an identity of parties for estoppel,⁶⁹ a requirement cited by the courts of appeal as the reason for refusing to allow estoppel in a number of cases.⁷⁰ Although not clearly articulated, this seems to be the same identity as required for res judicata. If so, the requirement should be re-examined in light of the differences in origin and nature of the two preclusion devices. The three identities of article 2286 are interrelated and their combined occurrence is required to identify the object of the judgment to which the presumption of truth and force of res judicata applies.⁷¹ The value of

66. The common law has also been troubled with the application of res judicata when the second suit is brought against one secondarily liable who would be entitled to indemnity for any judgment he was compelled to pay. The RESTATEMENT OF JUDGMENTS § 96 (1942) states that when the injured party sues one with an obligation to indemnify, a judgment on the merits for defendant also terminates the cause of action against the party entitled to indemnity. The desire to avoid inconsistency of judgments and confusion in the suit for indemnity seems to be the basis of the rule at common law as well as in Louisiana.

67. However, some federal cases have so interpreted it, and have gone far beyond *California* and *Williams* in the application of collateral estoppel. For instance, in *Cauefield v. Fidelity & Cas. Co.*, 378 F.2d 876 (5th Cir. 1967), the court relied on *Williams* to bar plaintiff *B* from litigating an issue which had been found in defendant's favor in a previous suit with plaintiff *A* notwithstanding that *B* had not been a party to the earlier suit and that there was no relationship between *A* and *B* giving rise to vicarious liability. Even in those jurisdictions which have abandoned mutuality as a requirement for estoppel, it seems that estoppel may be applied only when the prior judgment is being used as preclusion *against* a party to the earlier suit. *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942).

68. 234 La. 338, 99 So. 2d 743 (1957).

69. *Id.* at 350, 99 So. 2d at 747.

70. *Olsen Eng'r Corp. v. Hudson Eng'r Corp.*, 289 So. 2d 346 (La. App. 1st Cir. 1973); *State v. Placid Oil Co.*, 274 So. 2d 402 (La. App. 1st Cir. 1972), *rev'd on other grounds*, 300 So. 2d 154 (La. 1974); *Giroir v. Dumesnil*, 172 So. 2d 89 (La. App. 1st Cir. 1965).

71. LAURENT n° 39, 88.

the adoption of one of those identities as a blanket limitation on estoppel is thus not immediately apparent. Moreover, since collateral estoppel is purely a common law doctrine, the fact that many common law jurisdictions have discarded the strict requirement of identity of parties for preclusion, allowing a stranger to use a judgment against one who had been a party to the suit, should encourage Louisiana courts to consider at least a limited use of preclusion when strict identity of parties is lacking.

The use of collateral estoppel in the *California* case indicates that it would be available whenever res judicata would not be applicable because of a lack of identity of demands. An expanded use of issue preclusion in this situation would be extremely helpful, since the courts' tendency to construe "thing demanded" very narrowly has unnecessarily limited the availability of res judicata. For instance, in *Quarles v. Lewis*,⁷² an adjudication decreeing specific performance of a contract was held to have no preclusive effect on a later suit for delay damages arising from non-performance of the same contract because of lack of identity of demand. A more accurate analysis would have found the cause of the two suits (the contract) to have been the same, and the thing demanded (relief for breach of that contract) to have been identical, thus bringing the case within the scope of Civil Code article 2286.⁷³ However, even if a court prefers not to apply res judicata when a different relief is requested, it could allow estoppel of those facts which had been previously determined. Since the contract and its breach had been litigated and determined, the only remaining question in the second suit would have been the amount of delay damages, if any, which were due. The use of estoppel in such an instance would considerably narrow the scope of the controversy and expedite the second trial.

Another area in which the courts have struggled in applying traditional notions of the thing demanded is in cases involving recurring suits for periodic interest payments, or for periodic payments under an insurance policy.⁷⁴ The narrow analysis is that the cause is the insurance contract and the rights flowing from it, and that the demand is the particular payment involved, making res judicata unavailable under the terms of the civil code. *Quarles v. Lewis* approved this narrow view, but adverted to a jurisprudential exception to article 2286 which allowed preclusion in this area when the two demands

72. 226 La. 76, 75 So. 2d 14 (1954).

73. Money damages and specific performance are merely different sorts of relief to which plaintiff would be entitled as a result of defendant's breach.

74. See *Carpenter v. Metropolitan Life Ins. Co.*, 167 So. 223 (La. App. Orl. Cir. 1936).

differ from one another only in time of accrual.⁷⁵ Rather than adhering to such a jurisprudential exception to the requirements of the Code which may encourage similar exceptions in inappropriate circumstances, it would seem preferable to apply collateral estoppel⁷⁶ or to make *res judicata* available by giving a broader scope to "thing demanded."⁷⁷

Although *California* did not confront the question, it would seem that, as at common law, estoppel could also be used in cases in which *res judicata* does not apply because a new cause is the basis of the second suit. The use of issue preclusion would be especially beneficial in cases dealing with nullity of instruments, since as has been noted,⁷⁸ Louisiana accepts the narrow view that each possible vice or defect is a separate cause for nullity. The courts are unwilling to preclude a party from alleging fraud as the cause of nullity simply because in an earlier suit based on another vice the validity of the instrument was upheld. The use of issue preclusion, however, while not barring the second suit, would streamline the judicial process by refusing to allow relitigation of any ultimate facts which had been fully explored in the earlier case.

Another type of case in which a narrow interpretation of cause prevents the application of article 2286 is exemplified by *Bordelon v. Landry*.⁷⁹ Landry was awarded judgment against Bordelon for dam-

75. 226 La. 76, 75 So. 2d 14 (1954). *Quarles* further limited application to cases in which the demand had been rejected in the first case.

76. If the *Quarles* view (that demand in these cases is to be taken as the various payments as they accrued) is accepted, collateral estoppel would bar the parties from contesting in the second suit only those ultimate facts which had been determined in the first case. Thus if the first case rejected the demand solely because a payment was not due, the parties would be free to raise other issues, such as whether the policy was valid. If, however, the first court had rejected the demand because it found that the policy had never come into effect, the validity of the policy could not be contested in the second suit. If the first case had awarded judgment for a particular payment after deciding that the contract was in force, that issue could not again be litigated in the second suit. Defendant would have to offer some other defense to the claim for a later payment, such as payment already having been made.

77. This is possible if it is recognized that the object of a demand is defined not merely by plaintiff's pleadings, but also by the defendant's answer. For instance, if *A* demands an interest payment, *B* defends on the ground that it is not yet due and the judgment rejects *A*'s demand solely on that ground, the object of the judgment is merely that no interest is now due and the issue of *B*'s ultimate liability is not reached. However, if *B* defends that there is no loan from which interest would be due, and the judgment grants or rejects *A*'s demand on the ground of the existence of the loan, that is the object of the judgment. BAUDRY-LACANTINERIE n° 2675; LAROMBIÈRE n° 51; 1 M. POTHIER, OBLIGATIONS n° 44 (3d Am. ed. 1853).

78. See text at note 46 *supra*.

79. 278 So. 2d 173 (La. App. 4th Cir. 1973).

ages arising out of an automobile accident based on the finding that Bordelon's negligence caused the accident and that Landry was not negligent. Bordelon then sued Landry for damages in a separate case, and the court refused Landry's plea of *res judicata* because the cause of action in the earlier suit was not the same.⁸⁰ The application of collateral estoppel in this situation would have prevented the relitigation of Bordelon's negligence since this had been the critical issue in the earlier case.⁸¹

If collateral estoppel is to be applied consistently, further clarification of which issues are to be precluded is essential. Though the *California* case stated that judicial estoppel extends to every material fact decided in the course of the controversy,⁸² the court does not explain what it considers to be a material fact, and the statement that *all* such issues are to be precluded seems overly broad in light of the various limitations imposed in other jurisdictions.⁸³ Because the court did not need to examine this question at length, its statement should not be taken as an end to this inquiry.

Other states have devised numerous tests to narrow the scope of issue preclusion which is often restricted to "ultimate" facts found in the first case. The test of *Hyman v. Regenstein*⁸⁴ which restricts preclusion to facts necessarily decided in the first case which could be foreseen as important in possible future litigation provides a workable standard that allows flexibility in the application of estoppel. Since preclusion must balance the need for the efficient use of the courts against the desire to allow full litigation of each lawsuit, the reasonable expectations of the parties as to what issues are important seems to be a fair guide in this determination.

In any case, the scope of preclusion should not be determined by the application of mechanical rules, but by weighing the competing interests of efficiency and fairness to the litigants. Thus, in certain types of cases, the law may favor relitigation of issues rather than preclusion. Louisiana courts, despite their limited experience with

80. The court noted that "'cause of action' is not synonymous with 'automobile collision,'" and opined that the parties' causes of action were their respective injuries. Thus there was no identity of cause of action between Bordelon's suit on his injuries and Landry's suit on his. 278 So. 2d at 175.

81. The court of appeal refused to apply collateral estoppel in the hope that the supreme court would grant writs and make some definitive statement on collateral estoppel, since this case would have been an ideal one for its application. However, no action has been taken by the court.

82. 234 La. 338, 350, 99 So. 2d 743, 747 (1957).

83. See text at note 19 *supra*.

84. 258 F.2d 502 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959).

estoppel, have at least tacitly faced this issue in alimony cases. Civil Code article 160 allows alimony after divorce to the wife who has not been at fault. If an earlier suit for separation from bed and board was granted on the basis of fault, and the divorce has been granted on the basis of the spouses' living separate for two years⁸⁵ or because there has been no reconciliation after the judgment of separation,⁸⁶ the court must decide if the prior determination of fault should bar relitigation in the alimony suit.

If the husband has been granted a separation on the basis of the wife's fault, the cases hold that she is estopped from relitigating fault in a demand for alimony.⁸⁷ When the wife obtains the judgment of separation her freedom from fault has been litigated if she sued on the basis of the husband's abandonment, since she is required to show that she had given him no lawful cause to leave the matrimonial domicile.⁸⁸ In this case, the jurisprudence has recognized that the husband should be estopped from raising the question of fault in the suit for alimony.⁸⁹ The wife's freedom from fault is also decided in a

85. LA. R.S. 9:301 (1950).

86. LA. R.S. 9:302 (1950).

87. *Broussard v. Broussard*, 275 So. 2d 410 (La. App. 3d Cir. 1973), held that a wife is estopped from litigating the question of her freedom from fault in her demand for alimony when the husband has obtained a judgment of separation on the basis of the wife's abandonment, since the wife's fault was a material issue decided in the course of the separation suit. *Richardson v. Richardson*, 275 So. 2d 845 (La. App. 4th Cir. 1973), held that when the husband obtains the separation on the basis of the wife's habitual intemperance and the divorce on the basis of no reconciliation, the wife's fault has been determined in the separation suit and cannot be relitigated. Thus it would seem that whenever the husband has obtained a divorce or a separation based on the wife's fault, she will be precluded from raising that issue in a later demand for alimony.

88. LA. CIV. CODE art. 143: "Separation grounded on abandonment by one of the parties can be admitted only in the case when he or she has withdrawn himself or herself from the common dwelling, without a lawful cause. . . ." Lawful cause has been interpreted as fault on the part of the other spouse.

89. In *Rayborn v. Rayborn*, 246 So. 2d 400 (La. App. 1st Cir. 1971), *writ ref'd*, 258 La. 775, 247 So. 2d 868 (1971), the court in dictum viewed a refusal to relitigate as the means of stopping fraud through collusive suits. *Accord*, *Fulmer v. Fulmer*, 288 So. 2d 398 (La. App. 4th Cir. 1974). *Contra*, *Davidson v. Jenkins*, 216 So. 2d 682 (La. App. 3d Cir. 1968); *Gamino v. Gamino*, 199 So. 2d 202 (La. App. 4th Cir. 1967). However, the court in *Ballard v. Ballard*, 283 So. 2d 836 (La. App. 2d Cir. 1973), followed the case of *Guarisco v. Guarisco*, 271 So. 2d 553 (La. App. 1st Cir. 1972), rather than *Rayborn* and held that when the wife introduces a prior judgment of separation based on the husband's abandonment, the burden of proof shifts to the husband to prove that the wife was at fault and thus not entitled to alimony. In *Guarisco*, however, the wife had obtained the separation on the basis of the husband's cruel treatment, and her freedom from fault was never at issue. In *Ballard*, the separation was based on the husband's abandonment. The decision reached in *Fulmer* on similar facts seems more correct.

separation suit in which she is the plaintiff when her husband unsuccessfully meets her allegation of fault with a defense of comparative rectitude or mutual fault.⁹⁰ If the court finds that the wife was not at fault, the determination should bar further litigation in the alimony demand.⁹¹

The use of estoppel in these circumstances, however, has not been universally accepted.⁹² A strong dissent in *Broussard v. Broussard*⁹³ points to the social harm in requiring the parties to fully litigate fault in the separation suit or face estoppel in the alimony demand. Such litigation can effectively destroy any possibility of the spouses' reconciliation. While this objection merits consideration, it is offset by the fact that to allow the parties to circumvent the law by obtaining an immediate separation (*e.g.*, on the grounds of the husband's abandonment when the wife is actually at fault) and then to permit the parties to turn around and contest the grounds of the separation is to work a fraud on the court. Since the parties may obtain a separation by living separate and apart for one year, the use of estoppel to prevent collusive suits seems to be a good policy.⁹⁴

Another aspect of estoppel which merits close attention is the effect, if any, to be given a default or consent judgment. The traditional requirement that collateral estoppel extends only to issues which have been litigated and adjudicated would seem to render it inapplicable in cases decided by default or consent. Some writers, however, have urged the use of collateral estoppel following certain default judgments when it is certain that such use would not overly prejudice the defendant. Although the problem was not at issue in the *California* case, the court apparently presumed that a full litigation

90. When the wife sues for separation on the basis of the husband's fault and he merely answers with a general denial, the wife's freedom from fault has never been decided, and the judgment could have no preclusive effect in the alimony suit. Nevertheless, the cases hold that when the wife is granted a separation on the basis of the husband's cruel treatment, and mutual fault is not put at issue, the wife may introduce the judgment of separation in her suit for alimony and the burden then shifts to the husband to prove the wife at fault. *Rayborn v. Rayborn*, 246 So. 2d 400 (La. App. 1st Cir. 1971); *August v. Blache*, 200 La. 1029, 9 So. 2d 402 (1942).

91. It must always be kept in mind that the judgment of separation should be given estoppel effect in the later alimony action only when there is no allegation that after the separation the wife had committed acts causing the divorce. Thus, estoppel should generally be allowed when the divorce is based on no reconciliation following the separation. *In re Williams*, 288 So. 2d 401 (La. App. 4th Cir. 1974).

92. *Davidson v. Jenkins*, 216 So. 2d 682 (La. App. 3d Cir. 1968); *Gamino v. Gamino*, 199 So. 2d 202 (La. App. 4th Cir. 1967).

93. 275 So. 2d 410 (La. App. 3d Cir. 1973).

94. *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Persons*, 34 LA. L. REV. 201 (1974).

would be required whenever preclusion is to be applied. In view of Louisiana's limited experience with collateral estoppel, it seems likely that if the question were squarely presented, the court would refuse preclusion based on a default judgment.

Conclusion

The Louisiana supreme court in *California Co. v. Price* recognized the need for a broader preclusion device in Louisiana than article 2286. But the case was not very strong and it has created uncertainty in the courts of appeal. Wider use of collateral estoppel to narrow the range of controversy in a second suit would be a beneficial supplement to the narrow scope of res judicata as construed by Louisiana courts and would avoid repetitious, costly, and time-consuming litigation inherent in the courts' apparent unwillingness to broaden their interpretation of "cause" and "thing demanded."⁹⁵ Although collateral estoppel is a common law doctrine with no counterpart in the civil law, additional preclusion devices are needed to alleviate the congestion in the courts, which did not exist when the Code was adopted. As noted in another jurisdiction, "the doctrine of res judicata is primarily one of public policy and only secondarily of private benefit to individual litigants."⁹⁶ Louisiana must choose between efficient courts and the limitless opportunity for each person to litigate when the strict requirements of res judicata are not met. If the courts are unable to make a clear choice, the legislature should act.

Marilyn C. Maloney

95. See text at notes 44 and 72 *supra*.

96. *Coca Cola Co. v. Pepsi-Cola Co.*, 36 Del. 124, 130, 172 A. 260, 262 (1934).