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# The End of Collateral Estoppel in Louisiana: Welch v. Crown Zellerbach Corporation

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LHCA and workmen's compensation benefits have not been sufficient to meet the costs of these accidents. As a result, the excess costs have been borne by the state in the form of increased services to the injured worker and his dependents. The court's interpretation of article 2322 and its opinion in general illustrate its belief that the Louisiana Civil Code provides ample authority for passing on these costs to the heretofore practically immune, platform-owning oil companies. The decision, though strained in some respects,[75] properly reflects a notion of "enterprise liability," a "determination that the entity that causes risk to the public through some enterprise should be responsible for the damage caused by the enterprise so that the cost of the damage will be allocated as an expense of the enterprise."[76]

*Rand Dennis*

## THE END OF COLLATERAL ESTOPPEL IN LOUISIANA: *Welch v. Crown Zellerbach Corporation*

Plaintiff Welch, an employee of Austin Carpenter, was injured while on the land of defendant, Crown Zellerbach. In his first suit for workman's compensation benefits, plaintiff sought recovery from both Carpenter and Robert Campbell, Inc., alleging that his employer was the subcontractor of the latter. The court of appeal held that such a relationship had not been established.[1] Plaintiff's subsequent litigation against Crown Zellerbach depended upon the status of Robert Campbell, Inc. as plaintiff's statutory employer, which status could only be established by proving the Carpenter-Campbell subcontract and that Campbell was, in turn, the subcontractor of defendant. Crown Zellerbach prayed for dismissal of the suit, arguing that since the subcontractor/contractor relationship between Carpenter and Robert Campbell, Inc. necessary to hold Crown Zellerbach liable had been found nonexistent in the prior litigation, the plaintiff was estopped to relitigate the issue. The lower court agreed with this argument and dismissed the suit. The supreme court reversed and *held*, inter alia, that the collateral estoppel doctrine of issue preclusion does not obtain in Louisiana. *Welch v. Crown Zellerbach Corp.*, 359 So. 2d 154 (La. 1978).

75. *See* 365 So. 2d at 1296 (Marcus, J. & Sanders, C.J., dissenting).
76. 365 So. 2d at 1291 n.13.

1. See note 31, *infra*.

In Louisiana, the effect of a prior judgment on a present suit is governed by Civil Code article 2286.[2] The article itself, which is identical to article 1351 of the French Civil Code, speaks in terms of the "thing adjudged," stating that the "authority of the thing adjudged" will apply only as to the object of the judgment. The article then lists the criteria used to determine whether that application will be made.[3] There must be identity of the parties, the cause, and the thing demanded. Any effect which a prior judgment may have on a subsequent suit must be determined according to the provisions of this article. Thus, if a party in a suit enters a peremptory exception based on the preclusive effect of article 2286, and it is determined that the three identities are met, further litigation on that claim is not permitted.

In the common law, the analogous process by which the effect of a prior judgment on a subsequent suit is determined is embodied in the concepts of res judicata and collateral estoppel. Res judicata is a doctrine of claim preclusion and refers to the effect of a prior judgment in a subsequent suit between the same parties on the same cause of action.[4] The application of this doctrine accomplishes two separate effects: merger and bar. Thus, when the plaintiff obtains a judgment, his claim that was successfully prosecuted is merged into the judgment and has no identity apart from it. Alternatively, if the defendant wins, the plaintiff is barred from further prosecution of his unsuccessful claim.[5] The doctrine of res judicata is supplemented by the common law "might have been pleaded" rule, which requires a party to assert in a suit all claims or defenses in support of or against the cause of action.[6] Thus, through the application of the "might have been pleaded" rule, the common law maintains a very strict version of claim preclusion: the plaintiff is given only one chance to plead his cause of action against the defendant, and the

2. LA. CIV. CODE art. 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, and formed by them against each other in the same quality.

3. The jurisprudence has consistently held that article 2286 is to be strictly construed. *See, e.g.*, Olsen Eng'r Corp. v. Hudson Eng'r Corp., 289 So. 2d 346, 349 (La. App. 1st Cir. 1973); Bordelon v. Landry, 278 So. 2d 173, 175 (La. App. 4th Cir. 1973); Lege v. United States Fid. & Cas. Co., 186 So. 2d 670, 672 (La. App. 3d Cir. 1966).

4. *See, e.g.*, Cromwell v. County of Sac, 94 U.S. 351 (1876); F. JAMES, CIVIL PROCEDURE § 11.9 (1965); RESTATEMENT OF JUDGMENTS §§ 41-44 (1942).

5. *See* Kotsopoulos v. Austuria Shipping Co., S.A., 467 F.2d 91 (2d Cir. 1972); F. JAMES, *supra* note 4, at 550; RESTATEMENT OF JUDGMENTS §§ 47-48 (1942); A. VESTAL, RES JUDICATA/PRECLUSION 7-12 (1969).

6. 2 A. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 675, at 1422 (1925); RESTATEMENTS OF JUDGMENTS § 63 (1942).

defendant is given only one chance to urge any defenses that he might have to the plaintiff's cause of action.

Common law collateral estoppel is a doctrine of issue preclusion closely related and in some ways adjunct to the doctrine of res judicata. It determines the effect of a prior judgment in a subsequent suit between the same parties on a different cause of action,[7] resulting in a bar to relitigation of any issue actually raised, litigated, and necessarily decided in the earlier suit.[8] Thus, the "might have been pleaded" rule, which requires a party to assert in the same suit all claims or defenses to a cause of action, does not supplement collateral estoppel, which applies to a subsequent suit involving a different cause of action. Consequently, the preclusive effect of collateral estoppel is narrower than that of res judicata.[9]

The scope of issue and claim preclusion under article 2286 is not identical to that at commow law. For example, merger and bar are not recognized in Louisiana.[10] Rather, article 2286 creates a presumption of correctness in the earlier decision, which applies when the criteria of article 2286 are met.[11] Therefore, the operation of the article in determining the effect of a prior judgment on a subsequent suit must be discussed in terms of this presumption and its applicability.

Whether or not the presumption of correctness will be applied is determined by the criteria set forth in article 2286, requiring the triple identity of causes, parties, and demands. The identity of parties requirement, which has presented little difficulty in interpretation, refers to an identity of "quality" which is usually, but not always, physical identity.[12] The interpretation of "cause of action," however,

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7. A. VESTAL, *supra* note 5, at 107; Comment, *The Louisiana Concept of Res Judicata*, 34 LA. L. REV. 763, 764-65 (1974) [hereinafter cited as *Louisiana Concept*]; Comment, *Preclusion Devices in Louisiana: Collateral Estoppel*, 35 LA. L. REV. 158, 159 (1974) [hereinafter cited as *Collateral Estoppel*].

8. *See* United States v. International Bldg. Co., 345 U.S. 502 (1953); Tait v. Western My. Ry. Co., 289 U.S. 620 (1933); Cromwell v. County of Sac, 94 U.S. 351 (1876); F. JAMES, *supra* note 4, at § 11.19; RESTATEMENT OF JUDGMENTS § 68 (1942).

9. *See* Welch v. Crown Zellerbach Corp., 359 So. 2d 154, 156 (La. 1978); Dixon, Booksh & Zimmering, *Res Judicata in Louisiana Since Hope v. Madison*, 51 TUL. L. REV. 611, 617-18 (1977); 1 M. PLANIOL, CIVIL LAW TREATISE pt. 1, no. 361, at 241 (11th ed. La. St. L. Inst. trans. 1959); 2 M. PLANIOL, CIVIL LAW TREATISE pt. 1, no. 54A(2), at 34 (11th ed. La. St. L. Inst. trans. 1959).

10. *See, e.g.*, Mitchell v. Bertolla, 340 So. 2d 287 (La. 1976).

11. *See* Dixon, Booksh & Zimmering, *supra* note 9, at 617-18.

12. *See* Welch v. Crown Zellerbach Corp., 359 S. 2d 154 (La. 1978); Quinette v. Delhommer, 247 La. 1121, 176 So. 2d 399 (1965); 2 M. PLANIOL, *supra* note 9, at no. 54A(4). The identity of parties applies most obviously in cases of a "successor" to a party in the prior litigation. If the second party "stands in the shoes " of the prior party, he is precluded and bound by a previous judgment. 2 M. PLANIOL, *supra* note 9, at

has been more difficult. The current view is that "cause of action," as expressed in article 2286, should be read as "cause," which is analogous to the legal theory of recovery.[13]

The proper interpretation of the "thing demanded" is still a matter of doubt. One leading case held that it is the specific type of relief demanded.[14] However, this view has been severely criticized.[15] The better view seems to be that it is the type of relief demanded, but viewed in terms of the basis for the right of indemnification.[16] For example, in a personal injury suit resulting from an automobile accident, the type of relief demanded would be money damages to compensate for the injury resulting from a certain specified act of negligence by the tortfeasor; the act of negligence serves as the basis for the plaintiff's right to indemnification.

One of the first cases to consider the effect of collateral estoppel in Louisiana was *State v. American Sugar Refining Co.*[17] The case is interpreted as expunging all common law notions of res judicata and collateral estoppel from Louisiana law and establishing the supremacy of civilian notions as to the effect of a prior judgment on

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no. 54A(4). The result would be the same if a tutor brought suit for his ward—a later suit by the ward for himself would be precluded, but not a suit by the *tutor*, for himself, because it involves the same parties, but in different capacities. LA. CIV. CODE art. 2286; 1 R. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS no. 37, at 581-82 (3d Am. ed. 1853).

13. Mitchell v. Bertolla, 340 S. 2d 287, 291 (La. 1976). Athough the article reads "cause of action," this was held to be a mistranslation from the French. *Id.* The proper translation should be "cause," which the court believed to be closer to "legal theory," rather than "claim," which is the common law view. This is generally supported by civilian doctrine. *See* 2 M PLANIOL, *supra* note 9, at no. 54A(3); Comment, *Res Judicata—"Matters Which Might Have Been Pleaded,"* 2 LA. L. REV. 347, 357-60 (1940). The general effect of *Mitchell* has been to eliminate the "might have been pleaded rule" from Louisiana jurisprudence. *See* Dixon, Booksh & Zimmering, *supra* note 9, at 620 n.54. However a problem may arise in determining exactly what cause was advanced in the prior suit. *See* Black v. Meadowview Homes, Inc. 201 So. 2d 218 (La. App. 2d Cir. 1967). In *Black*, the court held that one unsuccessful suit in contract precluded a later suit based on unjust enrichment. The court justified this result by reasoning that the cause advanced must be determined by the allegations of fact in the petition. Since in the first suit the plaintiff advanced sufficient facts to entitle him to seek relief on the theory of unjust enrichment, the court's refusal to grant the relief requested precluded further litigation on that cause. This approach seems correct, since articles 1841 and 2164 of the Louisiana Code of Civil Procedure adopt a system of fact pleading in which a court may award any relief to which the parties are entitled. For further commentary on this case and its implications, *see Louisiana Concept*, *supra* note 7, at 772.

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

15. For a strong attack, *see Louisiana Concept*, *supra* note 7, at 775.

16. Kerameus, *Res Judicata: A Foreign Lawyer's Impressions of Some Louisiana Problems*, 35 LA. L. REV. 1151, 1154 (1975).

17. 108 La. 603, 32 So. 965 (1902).

a subsequent suit. However, it need not be read as prohibiting all forms of issue preclusion, as will be shown below.

Common law collateral estoppel was first given serious consideration by the Louisiana courts in *California Co. v. Price*,[18] which established the doctrine in Louisiana jurisprudence.[19] The California Company instituted a concursus proceeding to determine ownership of oil royalites payable to the lessors of certain mineral rights. The land upon which the lease was granted was claimed by the state and also by the Price-Beckwith group, both of which had leased the mineral rights to the California Company. This was not the first litigation involving the land in question; in a prior concursus proceeding,[20] the court had held the Price-Beckwith group to be the owner of the royalties derived from different wells on the same tract of land, having made the determination that the group actually owned the land. Relying on the earlier judgment, Price-Beckwith pleaded res judicata and estoppel. The *California Co.* court upheld both, commenting that if res judicata were not available, estoppel would nevertheless bar relitigation of "every material allegation or statement made on one side in the prior case, and denied on the other, which was determined in the course of the proceedings."[21]

Although the authority for the court's broad statement is somewhat less than absolute,[22] this case clearly stands for the existence of issue preclusion in Louisiana, notwithstanding any loose labelling indicating otherwise. Despite the suggestions of several

18. 234 La. 338, 99 So. 2d 743 (1957).

19. For a more extensive discussion, *see* Dixon, Booksh & Zimmering, *supra* note 9, at 629-30; *Collateral Estoppel*, *supra* note 7, at 167-77.

20. California Co. v. Price, 225 La. 706, 74 So. 2d 1 (1954).

21. 234 La. at 350, 99 So. 2d at 747. Although the court referred to this as judicial estoppel, this form of issue preclusion is more properly referred to as collateral estoppel. *See Collateral Estoppel*, *supra* note 7, at 168 n.55.

22. The court made a specific reference to *Quarles v. Lewis*, 226 La. 76, 75 So. 2d 14 (1954). 234 La. at 350, 99 So. 2d at 747. Apparently, the court referred to the discussion in *Quarles* of *Norton v. Crescent City Ice Manufacturing Co.*, 178 La. 150, 150 So. 859 (1933). However, the court's reference is inaccurate. The problem lies in the careless use of the term judicial estoppel. The *California Co.* court used it to refer to issue preclusion, but the *Quarles* court used the same phrase to refer to the policy against the splitting of a cause of action—an entirely different concept. *See Collateral Estoppel*, *supra* note 7, at 168 n.55. The *Quarles* court was also incorrect in its use of the term judicial estoppel. That term properly refers to a rule prohibiting parties from taking inconsistent positions in pleadings filed during the course of, or during subsequent, litigation. M. BIGELOW, LAW OF ESTOPPEL lxxxiii, 601 (3d ed. 1882). However, the references by the court in *California Co.* to *Heroman v. Louisiana Institute*, 34 La. Ann. 805 (1882), and to *Buillard v. Davis*, 185 La. 255, 169 So. 78 (1936), is accurate. These authorities cannot provide more than unsteady support for a civilian theory of preclusion, since *Heroman* is founded almost exclusively on common law authorities, 30 La. Ann. at 815, and since *Buillard* is grounded on *Heroman*, 169 So. at 86.

comentators,[23] res judicata would not have been applicable in such a case because the "thing demanded" in each suit was not the same. The object of the demand in the first suit was the royalties resulting from the drilling and exploitation of certain wells; the object of the demand in the second proceeding was also royalties, but those resulting from the leasing and drilling of different wells. With res judicata unavailable, only issue preclusion can justify the *California Co.* result.[24]

After *California Co.*, the lower courts approached the doctrine of issue preclusion with uncertainty. The doctrine was recognized, but was rejected as inadequate in many cases.[25] Uncertainty over the continuing validity of *California Co.* prevented the application of estoppel in another case, although the circumstances were ideal for its application.[26] Even the supreme court avoided the opportunity to make a definitive statement.[27]

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23. *See, e.g.*, Dixon, Booksh & Zimmering, *supra* note 9, at 629; *Collateral Estoppel*, *supra* note 7, at 169.

24. Kerameus, *supra* note 16, at 1160.

25. *See, e.g.*, Exhibitors Poster Exch. Inc. v. National Screen Serv. Corp., 421 F.2d 1313 (5th Cir. 1970) (scope of previous judgments held not to apply to later alleged antitrust violations); Sliman v. McBee, 311 So. 2d 248 (La. 1975) (compromise held not to have estoppel effect); Sutterfield v. Fireman's Fund American Ins. Co., 344 So. 2d 1159 (La. App. 4th Cir. 1977) (different issues presented in the subsequent suit); Miller v. East Ascension Tel. Co., Inc., 331 So. 2d 182 (La. App. 1st Cir. 1976) (crucial issue held previously unadjudicated); Shell Oil Co. v. Texas Gas Trans. Corp., 176 So. 2d 692 (La. App. 4th Cir. 1964) (estoppel held to apply only to questions of fact, and not to questions of law).

26. Bordelon v. Landry, 278 So. 2d 173 (La. App. 4th Cir. 1973). In *Bordelon*, the parties, drivers injured in an automobile collision, filed suits against each other in different parishes. After Landry received a favorable judgment in his suit, he attempted to use an estoppel theory to preclude Bordelon's claim, urging that since the first court had found Bordelon negligent and himself free of negligence, estoppel should apply to these very same issues in the suit by Bordelon. Since these were the crucial issues in the case, adoption of Landry's view would have decided the case for him. Unsure about the continuing vitality of *California Co.*, the court of appeal decided against Landry, hoping that on appeal the supreme court would take this opportunity to settle the estoppel question once and for all; however, no action was taken on the case by the supreme court.

27. Mitchell v. Bertolla, 340 So. 2d 287 (La. 1976). In *Mitchell*, the first suit was to cancel a purchase option, on the grounds of nonpayment and lesion; the second suit was to cancel the same option on grounds of fraud and lack of consideration. Justice Dixon, speaking for the majority, used a purely common law theory of collateral estoppel, and attempted to mesh with it a purely civilian theory of "cause." Finding the result wanting, he rejected application of the doctrine. *Id.* at 290. In so doing, the court avoided the real issue at hand. What was being requested was not a mechanical application of a common law version of collateral estoppel, but preclusion of certain issues decided in the prior suit between the parties. A doctrine of issue preclusion must be fitted to the doctrine of claim preclusion (res judicata) which it supplements.

In the area of family law, issue preclusion was clearly recognized in *Fulmer v. Fulmer.*[28] In that case, the Louisiana Supreme Court held that once fault is litigated in proceedings for separation from bed and board, it may not be relitigated in later alimony proceedings. In order to reach this result, the court relied on an interpretation of article 160 of the Civil Code,[29] rather than relying explicitly on collateral estoppel. Nevertheless, the actual effect is one of issue preclusion: the judgment in one case is determinative of issues in another case, although the thing demanded in each is clearly different (judgment of separation versus alimony payments).[30]

In the instant case, the plaintiff woodcutter, injured in the course of his employment while on the land of Crown Zellerbach, filed suit for workmen's compensation benefits. Plaintiff's immediate employer, subcontractor Carpenter, and the alleged contractor, Robert Campbell, Inc., were named as defendants. The alleged statutory employer, Crown Zellerbach, was not joined. Judgment was rendered in favor of plaintiff against both defendants. Only Campbell appealed, and the appeal was successful.[31]

Subsequently, Welch filed suit against Crown Zellerbach, alleging that as statutory employer, Crown Zellerbach owed workmen's compensation benefits to plaintiff as a result of the injury.[32] Crown Zellerbach filed a peremptory exception of prescription, alleging first, that an interruption of prescription could only have occurred if Crown Zellerbach and Carpenter were solidarily liable, and second, that a finding of solidary liability required the existence of a subcontractor/contractor relationship between Crown Zellerbach and Campbell, as well as between Carpenter and Campbell. Since the appellate court had previously decided there was no such relationship between Campbell and Carpenter, the district court held that relitigation of the relationship issue was precluded and sustained the peremptory exceptions of prescription, peremption, and res judicata. The court of appeal affirmed on the basis of peremption without reaching the plea of res judicata, thus giving preclusive effect to the former judgment.[33]

In reversing, the supreme court appears to have negated entirely the existence of any sort of issue preclusion in Louisiana. It must

28. 301 So. 2d 622 (La. 1974).

29. *Id.* at 625.

30. *See Collateral Estoppel, supra* note 7, at 169 n.59.

31. Welch v. Robert Campbell, Inc., 316 So. 2d 822 (La. App. 1st Cir.), *cert. denied,* 321 So. 2d 523 (La. 1975). The court held that Welch failed to establish an employer-employee relationship between himself and Campbell which, of course, precluded Welch's workman's compensation recovery.

32. LA. R.S. 23:1061 (1950).

33. 351 So. 2d 1255 (La. App. 1st Cir. 1977).

be noted that this case was not an ideal one for the application of estoppel or preclusion, as the element of mutuality was not present. The doctrine of mutuality[34] holds that estoppel exists only between the original parties to the action and may not be asserted by any others. Although this doctrine has fallen into decline in recent years, it still retains some vitality.[35] Since Crown Zellerbach was not a party to the action between Campbell and Welch, which resulted in a finding that Campbell was not liable, it can be argued that Crown Zellerbach could not obtain any benefit from the decision.[36]

Although the court discusses only common law collateral estoppel, the opinion seems opposed to the idea of preclusion of issues in any form; the court comments that "collateral estoppel is a doctrine of issue preclusion alien to Louisiana law."[37] The court notes that "cause" under 2286 and "cause of action" in the common law have different meanings and concludes from this that collateral estoppel "is not susceptible of an orderly application in a jurisdiction utilizing civil law terminology."[38] The logic behind this statement is nowise clear; the basic idea of issue preclusion is not alien to either system and, as will be seen, is probably susceptible to more convenient use in Louisiana than in the common law jurisdictions.

The court further states that the adoption of collateral estoppel would "subvert" the ideal of the "ancient legislation."[39] The court draws a specific conclusion as to the intent of the redactors in drafting article 2286: since the Code defines res judicata in such narrow terms, the legislators must have preferred relitigation to erroneous perpetuation of incorrect judicial decisions. The adoption of an "issue preclusion device" broadening the operation of res judicata would, therefore, subvert this ideal.[40]

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34. *See, e.g.*, Bernhard v. Bank of American Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942); Hardware Mut. Ins. Co. v. Valentine, 119 Cal. App. 2d 125, 259 P.2d 70 (1953); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); *Collateral Estoppel*, *supra* note 7 at 162.

35. *See* Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961). For information regarding the states which have abandoned the mutuality requirement, *see* Annot., 31 A.L.R.3d 1044, 1067-77 (1970).

36. However, it would appear that the logic that provided the foundation for *Bernhard* would apply in Louisiana. See note 33, *supra*. In *Muntz v. Algiers & Gretna Street Railway Co.*, 116 La. 236, 40 So. 688 (1906), the court held that a judgment in favor of the defendant lessee would protect the defendants from subsequent suits by the unsuccessful plaintiff. *But see* Williams v. Marionneaux, 240 La. 713, 124 So. 2d 919 (1960). The current doctrine seems to favor the *Muntz* view (*i.e.*, that parties primarily and derivatively liable for a debt are the same). *See* Dixon, Booksh & Zimmering, *supra* note 9, at 619.

37. 359 So. 2d at 156.

38. *Id.* at 157.

39. *Id.*

40. *Id.*

The court erroneously relies upon the intent of the redactors as a foundation for its opinion. As an eminent authority on civilian jurisprudence, Professor Kerameus, has pointed out, issue preclusion was unknown at the time Civil Code article 2286 was enacted.[41] Therefore, an investigation of the exact purpose of the legislators with respect to issue preclusion is fruitless.[42] Furthermore, it is submitted that the court is incorrect when it states that any sort of issue preclusion is alien to Louisiana law; a workable form of issue preclusion can be achieved, while violating neither the letter, nor the spirit of article 2286.

In many commentaries concerning article 2286, emphasis has been placed upon the second sentence of the article, while the first sentence, equally important, has been slighted. As a result, the courts have a firm idea as to *when* to apply the presumption of correctness (when the identities are met) but are less certain as to *what* it should be applied. The courts conceive of the first sentence as restricting the application of article 2286 to entire suits or claims only, such that either everything is precluded (res judicata) or nothing is precluded. It is submitted that if the underlying rationale of the article is the presumption of correctness accorded the findings of the previous court, then the presumption should apply whenever the triple identities of the article are satisfied. Issues within suits may be the same, although the suits themselves bear no more than a superficial similarity.

The current court approach is reminiscent of the common law concepts of merger and bar, which address themselves to the claim and not to the individual issues within the suit. It appears that the courts have been attempting to apply the civilian method while possessed of a common law mind-set. The result has been an unnecessarily restricted scope of preclusion. The authority of the "thing adjuged" extends to that which was the "object of the judgment"; it is submitted that the "object of the judgment" may comprehend many things, implicit as well as explicit.

The French, operating under similar constraints, have evolved a practical and workable method for issue preclusion, one that the Louisiana courts could adopt without much difficulty. French jurisprudence does not restrict the application of res judicata to the

41. This point was made by Professor Kerameus in a letter to the author dated December 12, 1978.

42. Furthermore, the phrasing of the court's opinion creates the suspicion that it divined the legislative intent through its own interpretation of article 2286, then purportedly arrived at an interpretation of article 2286 through its comprehension of the legislator's intent. This circuitous process is highly suspect.

entire suit. Rather, distinctions within the grounds of the decisions are not barred.[43] The guiding purpose is to search for implied judgments on *questions préjudicielle, i.e.,* issues necessarily identified in the course of the first suit.[44] When the three identities are met in such an instance, the specific issue *préjudicielle* is precluded from further litigation.[45] The purpose of French Civil Code article 1351 is to ensure that the *questions préjudicielle* are actually identical, that they have more than a superficial similarity. These issues, then, are treated almost as suits within suits—subdemands related to the major demand of the entire suit. By dwelling on the real scope of the previous judgment, the courts arrive at issue preclusion, without specifically employing that term.[46]

An examination of relevant Louisiana jurisprudence reveals that the ideal evolved by the French is not as unknown to our jurisprudence as the court contends. The res judicata effect of implied judgments on *questions préjudicielle* has often been obliquely suggested in Louisiana opinions addressing the doctrines of res judicata and collateral estoppel, but there has not been a clear statement on the application of the underlying theory in Louisiana. The most notable suggestion was propounded by Justice Provosty in the form of two hypotheticals in the crucial majority opinion of *State v. American Sugar Refining Co.*[47] In the second hypothetical,[48] which is the clearer of the two, Justice Provosty considers the case of a defendant destroying a plaintiff neighbor's fence. In the resulting

43. *See* Kerameus, *supra* note 16, at 1162.

44. *Id.*

45. *See, e.g.,* Judgment of 13 juin 1966, Cass. civ., D.1966.J.714; Judgment of 19 mai 1965, Cass. ch. reun, D.1965.J.461 note Laroque; Judgment of 21 Nov. 1899, Cass. req., D.1900.1.18. 12 C. AUBRY ET C. RAU, DROIT CIVIL FRANÇAIS § 769, at 334-35 (6th ed. 1958); 1 G. RIPERT ET J. BOULANGER, TRAITÉ DE DROIT CIVIL D'APRÈS LE TRAITÉ DE PLANIOL nos 744-45 (1956).

46. Kerameus, *supra* note 16, at 1159.

47. 108 La. 603, 32 So. 965 (1902). The case involved the state's attempted recovery of certain license taxes, imposed on the sugar refiners of the state, for the years 1900-1902. In an earlier case involving these parties, American Sugar had raised the defense of exemption, citing a constitutional article exempting "manufacturers" from all license fees. In the first case, the issue was decided in favor of the state, holding that American Sugar was a refiner, and not a manufacturer of sugar. When the second case arose in 1908, American Sugar raised the same defense. In denying the state's request for preclusion of this defense, the court noted that American Sugar's business had changed in the intervening years. Therefore, a new question of law was presented to the court, *i.e.,* whether the new activities constituted "manufacture" within the constitutional exemption. Since this was a question of law, and not of fact, preclusion was not available. *Id.* at 607, 32 So. at 966.

48. However, the first is also worthy of note. Here, Justice Provosty hypothecates two suits for installments of interest on the same note. "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.*" *Id.* at 608, 32 So. at 967 (emphasis added). Kerameus comments:

suit, the defendant pleads the existence of a contract allowing him to destroy the fence, a defense that is rejected by the court. If the defendant breaks the fence again, Provosty properly concludes that res judicata would not apply to the suit. However, he feels that res judicata would apply to the contract defense. "[T]he reason would be that while urged as a defense, this claim of right would in reality be a demand brought by way of reconvention. The defendant should, pro hac vice, have ceased to be a defendant, and become a plaintiff."[49]

Kerameus comments that Provosty's ingenious but wholly artificial construction, raising a defense to the status of an independent suit, is really nothing more than issue preclusion of precisely the type explained previously.[50] In *California Co.*, the court embraced the concept of issue preclusion by declaring the issue of title to the property to be an incident of the previous litigation, which was necessarily decided by the court in that case.[51]

The mechanics of the civilian method of issue preclusion can probably be best understood by examining its application in the two suits involved in the *California Co.* litigation. (See chart below for a diagrammatic presentation.)

ISSUE A (ROYALTIES)

| | California Co. I | California Co. II |
|---|---|---|
| Parties: | State, Price-Beckwith | State, Price-Beckwith |
| Object: | to be declared owner of rental monies due on wells drilled pre-1951 | to be declared owner of rental monies due on wells drilled post-1951 |
| Cause: | valid lease to California Co. | valid lease to California Co. |

ISSUE B (LEASE)

| | California Co. I | California Co. II |
|---|---|---|
| Parties: | State, Price-Beckwith | State, Price-Beckwith |
| Object: | to be recognized as valid lessor under pre-1951 leases | to be recognized as valid lessor under post-1951 leases |

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. Kerameus, *supra* note 16, at 1160.

49. 108 La. at 613, 32 So. at 969.

50. Kerameus, *supra* note 16, at 1161.

51. 234 La. at 350, 99 So. 2d at 746-47.

| | | |
|---|---|---|
| Cause: | ownership of land and formalities observed | ownership of land and formalities observed |

ISSUE C (LAND QUESTION)

| | California Co. I | California Co. II |
|---|---|---|
| Parties: | State, Price-Beckwith | State, Price-Beckwith |
| Object: | to be recognized owner of the disputed land upon which the wells stand | to be recognized owner of the disputed land upon which the wells stand |
| Cause: | Price-Beckwith claims valid sale from state and state claims ownership of land through dominion | Price-Beckwith claims valid sale from state and state claims ownership of land through dominion |

ISSUE D (FORMALITIES QUESTION)

| | California Co. I | California Co. II |
|---|---|---|
| Parties: | State, Price-Beckwith | State, Price-Beckwith |
| Object: | to recognize the validity of the form of the leases covering wells drilled prior to 1951 | to recognize the validity of the form of the leases covering wells drilled after 1951 |
| Cause: | formalities observed in the confection of the leases | formalities observed in the confection of the leases |

It is readily apprehended that each issue addressed in the first suit raised incidental issues, the resolution of which was a prerequisite to the adjudication of the primary issues. The suit itself, which sought to determine ownership of certain royalties for specific wells, necessarily raised the question of the validity of individual leases. The question of the validity of those leases, in turn, was determined by the resolution of other issues, such as the ownership of the land and the observation of the proper formalities. Since it was necessary to consider and resolve these concomitant issues in the previous case, each issue should be considered an object of the judgment and, therefore, should be accorded preclusive effect if raised in a subsequent case. The purpose of the triple identity of article 2286, to ensure that the issues are indeed the same, is thereby satisfied.

If the court were to employ the civilian method of issue preclusion in considering the *California Co.* case, it would initially compare each issue in the first suit with those in the second suit to determine if the parties, causes, and objects are identical as to any two

issues. For example, it may be seen that the royalty issue (issue A) in each case does not fully correspond. Although the parties and the causes—the legal theories asserted in the case—are identical, the wells (elements necessary to the object of each suit) from which the royalties are demanded are not the same since they were drilled pursuant to different leases. Therefore, article 2286 cannot apply to preclude relitigation of issue *A*. Similarly, in issues *B* and *D*, the parties and causes are identical; however, since each case deals with different wells, the objects of the demands are not the same. In *California Co. I*, the two litigants are demanding that the court recognize as valid leases executed by them before 1951; in *California Co. II*, the parties are demanding that the court recognize as valid leases executed by them after that date.

However, it is evident that issue *C* is the same in both cases. The three identities match perfectly because the land involved is the same. If the court finds that this issue was necessarily decided in the first case (as it was, since one cannot grant a lease on property one does not own), it should be considered an object of the judgment; and, as such, further consideration of the issue is precluded. The purpose of the triple identity of article 2286, to ensure that the issues are indeed the same, is satisfied. The conclusion is that after the original decision, the Price-Beckwith group had every reason to believe it had the authority necessary to execute leases on the disputed property.

Since the *Welch* opinion is, for the most part, carefully couched in terms such as "common law" collateral estoppel, it need not be wholly repudiated in order to adopt the civilian method of issue preclusion. A broadened understanding and application of the terms "authority of the thing adjudged" and "object of the judgment" is all that is necessary. Such an approach would save valuable court time, maintain the integrity of the prior judgment, and promote certainty for the parties.

*Dennis K. Dolbear*

## INSANITY, INTENT, AND HOMEOWNER'S LIABILITY

The husband, defendant's insured, fatally shot his wife and committed suicide. The wife's parents brought a direct action against