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MICHIGAN LAW REVIEW

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THE PREMISES OF THE JUDGMENT AS RES JUDICATA IN CONTINENTAL AND ANGLO-AMERICAN LAW

Robert Wyness Millar *

I

INTRODUCTORY [1]

THAT every judicial judgment, whatever its character, consists of premises and conclusion is a fact sufficiently obvious. In our system, especially, expression of the premises must very often be sought outside the actual judgment-order and collected from other parts of the judicial

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[1] Principal abbreviations used in citation of Continental literature:

CHIOVENDA, ISTITUZIONI—CHIOVENDA, ISTITUZIONI DI DIRITTO PROCESSUALE CIVILE (1935)

CHIOVENDA, PRINCIPII—CHIOVENDA, PRINCIPII DI DIRITTO PROCESSUALE CIVILE, 3d ed. (1923).

GLASSON, TISSIER & MOREL, TRAITÉ—GLASSON, TISSIER ET MOREL, TRAITÉ THÉORIQUE ET PRATIQUE D'ORGANISATION JUDICIAIRE, DE COMPÉTENCE ET DE PROCÉDURE CIVILE, 3d ed. (1925-36)

HELLWIG, SYSTEM—HELLWIG, SYSTEM DES DEUTSCHEN ZIVILPROZESSRECHTS (1912)

JAPIOT, TRAITÉ—JAPIOT, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE ET COMMERCIALE 2d ed. (1929).

KELLER, LITIS CONTESTATION—KELLER, UEBER LITIS CONTESTATION UND URTHEIL NACH CLASSISCHEM RÖMISCHEM RECHT (1827)

MENESTRINA, PREGIUDICIALE—MENESTRINA, LA PREGIUDICIALE NEL PROCESSO CIVILE (1904)

MOREL, TRAITÉ—MOREL, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE (1932)

MUNCH-PETERSEN, RETSPLEJE—MUNCH-PETERSEN, DEN DANSKE RETSPLEJE, 2d ed. (1923)

OERTMANN, GRUNDRISS—OERTMANN, GRUNDRISS DES DEUTSCHEN ZIVILPROZESSRECHTS, 2d and 3d ed. (1927)

ROSENBERG, LEHRBUCH—ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESS, 2d ed. (1929)

SAVIGNY, SYSTEM—SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS (1840-49)

record or even from evidence *aliunde* of what took place at the hearing.[2] But the legal nature of the relation between premises and conclusion is independent of the particular structure of the record and the mode of ascertaining what those premises were. Given satisfaction of the requirements of the law with respect to identity of parties, it is true everywhere that the rule of res judicata[3] applies to the conclusion, but as regards its effect upon the premises wide differences exist between the Anglo-American law and the Continental. The present inquiry is directed to a brief consideration of these differences in the scope of res judicata with respect to the subject-matter involved: we leave out of view any question as to the persons affected. In other words, to borrow from Continental phraseology, what we are concerned with relates to the *objective limits*[4] of res judicata (scope as to subject matter) as distinguished from its *subjective limits*[5] (scope as to parties).

It is to be noted that the Continental approach to any inquiry into the objective limits of res judicata is not quite the same as our own. At the threshold there stands the conception of *prejudicial questions*.[6] In modern times[7] the conception thus expressed is simply that of the questions whose decision is a condition precedent to the decision in chief

SKEIE, CIVILPROCES—SKEIE, DEN NORSKE CIVILPROCES (1929)

SPERL, LEHRBUCH—SPERL, LEHRBUCH DER BÜRGERLICHEN RECHTSPFLEGE (1930)

WREDE, Z. P. R. SCHWED.—WREDE, ZIVILPROZESSRECHT SCHWEDENS UND FINNLANDS (1924)

WEISMANN, LEHRBUCH—WEISMANN, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTES (1903, 1905)

[2] In the Continental systems generally the formulated judgment expresses the grounds (*motifs, Entscheidungsgründe*) of the decision, the ordering part being known as the "dispositive" (*dispositif, Tenor, Urtheilsformel, Urtheilsspruch*). France, CODE DE PROCÉDURE CIVILE, art. 141; Italy, CODICE DI PROCEDURA CIVILE, art. 360; Germany, ZIVILPROZESSORDNUNG, § 313; Austria, ZIVILPROZESSORDNUNG, § 417.

[3] Fr. *chose jugée*; Ital. *cosa giudicata, re giudicata*; Sp. *cosa juzgada*; Germ. *Rechtskraft*; Norw. and Dan. *retskraft*; Swed. *rättskraft*.

[4] Germ. *objektive Grenzen*; Ital. *limiti oggettivi*.

[5] Germ. *subjektive Grenzen*; Ital. *limiti soggettivi*.

[6] Fr. *questions préjudicielles*; Ital. *questioni pregiudiciali*; Germ. *Präjudizialfragen, Vorfragen*; Swed. *präjudicielfragor*. MENESTRINA, PREGIUDICIALE 26, distinguishes between "prejudicial questions" and "prejudicial points," according as the matter has or has not been the subject of contest—a distinction followed by CHIOVENDA, PRINCIPII 1158; I ISTITUZIONI 352.

[7] In the Italian doctrine of the Middle Ages the case was otherwise; by *praejudicialis quaestio* was understood a question "whose investigation and decision were calculated to render every other question superfluous." PLANCK, MEHRHEIT DER RECHTSSTREITIGKEITEN IM PROZESSRECHT 473 (1844); see also MENESTRINA, PREGIUDICIALE 6.

and, with or without contest, enters into the premises of the ultimate pronouncement upon the concrete demand.[8] In this usage the expression retains the original sense of "pre-judicial" and is without the further connotation ordinarily attaching to the English word "prejudicial." As said by Chiovenda, the term implies "one of the questions which the court encounters in the chain of its reasoning and which are the logical antecedent of the final question."[9] Suppose, for example, that the plaintiff is suing for the amount of an interest coupon, representing an installment of interest due upon a principal bond not yet matured. Manifestly, the validity of the principal bond may here come in question; manifestly, also, apart from considerations relating to the independent negotiability of the coupon, a judgment in favor of the plaintiff is based upon certain elements which include either the assumption or the finding of the validity of the principal bond. In such a case, therefore, the validity of the principal bond would be a prejudicial question. The expression has no precise equivalent in our own legal language. We can speak of "the premises of judgment" or the "grounds of judgment": so, indeed, do the Continentals; but here we, as they, are painting on a wider canvas. When, therefore, the Continental jurist asks whether the rule of res judicata in a given system is such that it extends to the prejudicial questions, he is putting a query which is unfamiliar to us only in sound, but one which the terminology of our own law does not allow us to propound so succinctly.

What precisely is the compass of the conception thus denoted by "prejudicial question"? It is agreed on all hands that it embraces every premisory question as to the existence of a right, or, to speak of the case from a different point of view, as to the existence of a jural relation. In this connection, the jural relation is accordingly termed a "prejudicial jural relation." But, by what appears to be the better view, the conception may include questions as to the existence of "jural facts."[10] Jural facts in this sense are defined as "facts from which is derived the existence, the modification or the cessation of a concrete will of the law, and as such are distinguished from simple facts or grounds, which have legal

[8] In the French law, however, the term *questions préjudicielles* is often used with a narrower meaning. Here it signifies "questions whose determination is preliminarily necessary to the rendition of judgment, but whose cognizance does not appertain to the court of the pending suit, and which, therefore, require distinct and separate decision by another judicial tribunal or another authority." 1 GLASSON, TISSIER & MOREL, TRAITÉ 742.

[9] CHIOVENDA, PRINCIPII 1158.

[10] MENESTRINA, PREGIUDICIALE 96-97; CHIOVENDA, PRINCIPII 1159; 1 CHIOVENDA, ISTITUZIONI 353.

importance only so far as they serve to prove the existence of jural facts." Instances are the fact of a loan, of payment, of release, of fraud. Such facts are not pure facts but represent a result of a preponderatingly factual character arrived at by the application of principles of law to items of pure fact.[11] The Anglo-American lawyer will at once think here of our distinction between ultimate and evidentiary facts. Certainly the two distinctions have much in common, although unquestionably not identical. In any event, the prejudicial question must be one involving some element of application of law to pure or evidentiary facts.[12] An evidentiary fact alone cannot be its subject any more than an abstract principle of law.

We may further clear the way by noting that the present inquiry relates to the case where the rule of res judicata is invoked in a second suit involving a claim or cause of action different from that involved in the first suit. For, where the second suit is based upon the identical claim or cause of action involved in the first suit, the Continental law agrees in general with the Anglo-American in holding that the res judicata affects both premises and conclusion. So long as the cause of action in the second suit is the same as in the first, the plaintiff in the second suit is foreclosed from presenting new evidence, the defendant from presenting new defenses, to much the same extent as with us. It may be added that the question of identity in respect of what we thus speak of as the "cause of action"[13] is on the Continent attended with no less difficulty than in our own law. But with this question we are not here concerned. The point is that for the Continental law, as for our own, the relevance per se of the premises of the judgment, with respect to res judicata, is confined to the case where the cause of action in the second suit is other than that in the first.

At the risk, perhaps, of overstepping our field of inquiry, a preliminary word, also, may be in order as to the facets of res judicata. It is basic doctrine with us that the res judicata works, on the one hand, by way of preclusion (or as commonly said, by way of estoppel) and, on

[11] CHIOVENDA, PRINCIPII 266.

[12] MENESTRINA, PREGIUDICIALE 96-97.

[13] *Causa actionis* or *causa petendi* in the Roman and Continental systems signifies only the ground of action, as distinguished from the matter of parties and object (albeit "ground of action" in an ampler sense than the one in which we commonly use this expression), whereas the "cause of action" of Anglo-American law embraces within its conception all three of these elements, namely, ground, parties, and object. Where we thus speak of "identity of the cause of action," Continental terminology would require reference to the "identity of the demand" or "identity of the action."

the other, by way of merger.[14] Apart from the question of its scope, this function of preclusion cannot but find recognition in the Continental law.[15] Where, however, Continental legal science is willing to entertain a conception corresponding at all to our merger, it would, by utilization of the Roman law term, speak of *consumption*; the right of action would be looked upon as consumed, exhausted, by the rendition of judgment.[16] But it is a subject of some debate as to whether, from a theoretical standpoint, the modern judgment can be regarded as consuming the right of action.[17] Moreover, recognition of consumption as attendant upon the judgment does not mean that the consumption in the law of today is regarded as a phase of res judicata; on the contrary, it is deemed a distinct though historically related principle, operating within its own limits to the same end as res judicata.[18] Again, in our law, the existence of res judicata may be invoked by a party either as an obstacle to the prosecution of a claim against him or as support for a claim which he, himself, is prosecuting:[19] in the terms of a time-honored dictum, it is available in the one case "as a plea" or "a bar," in the other "as evidence."[20] The same defensive and offensive operations, by direct inheritance from the Roman law, are likewise present in the Continental systems.[21] But we must not be tempted to confuse either of the foregoing distinctions with the one which in the Continental doctrine is taken between the *negative* and *positive* functions of res judicata. This distinction, based upon that identified by Keller in 1827,[22] with reference to the functions of the *exceptio rei judicatae* in the classical Roman

[14] "Every *res judicata* operates both as an estoppel, and also as a merger." BOWER, THE DOCTRINE OF RES JUDICATA 1 (1924).

[15] See CHIOVENDA, PRINCIPII 910 ff.

[16] See, e.g., 1 HELLWIG, SYSTEM 257, 297.

[17] OERTMANN, GRUNDRISS 186.

[18] SCHMIDT, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS, 2d ed., 747 (1906); 1 HELLWIG, SYSTEM 257.

[19] Either "as a bar to his opponent's claim, or as the foundation of his own." BOWER, RES JUDICATA, 8 (1924). The word "bar," however, in view of its common-law connotation, does not seem sufficiently wide to describe the effect of res judicata as a shield.

[20] ". . . the judgment . . . directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court. . . ." Duchess of Kingston's Case, 20 How. St. Tr. 355 at 538 (1776), 3 SMITH, LEADING CASES, 9th Am. ed., 1998 at 1999.

[21] See MOREL, TRAITÉ 600. Here, as in 3 GLASSON, TISSIER & MOREL, TRAITÉ 93-94, these contrasting operations are termed the positive and negative effects of res judicata, but the generally accepted distinction between the positive and negative functions of res judicata is a different thing, as our text proceeds to explain.

[22] KELLER, LITIS CONTESTATION 197 ff.

procedure, contrasts the effect of res judicata, on the one hand, in foreclosing renewal of the action: *ne bis de eadem re sit actio* (negative function) with its effect, on the other, of shaping a new legal situation between the parties: *res judicata facit jus inter partes* (positive function).[23] The Roman res judicata originally had no other than a negative function; in other words, it depended upon the consumption worked by the litiscontestation and reinforced by the judgment,[24] and thus operated no bar except as against a renewal of the same action. So that, for example, the question of ownership of land, decided in a suit by *A* against *B*, could be relitigated in a suit by *B* against *A*, for the former proceeding had consumed only the claim of *A*, not that of *B*. But in the later development and before the close of the formulary period, the exception of res judicata was allowed to attach where the same question had been the subject of the prior judgment, whether or not the actual demand had been consumed in the previous proceeding.[25] And, with the subsequent disappearance of *jus* and *judicium* as separate stages, and the effacement of litiscontestation as a consuming agency, the positive function became all-dominant.[26] Accordingly, in the modern law, the distinction is merely a matter of legal analysis. By some it is held that res judicata in the law of today has only a positive function,[27] while others see the continued existence of both functions.[28] But when both functions are recognized, the one is always the correlative of the other.

A further distinction which should be mentioned lies in the con-

[23] I VON CANSTEIN, DAS ZIVILPROZESSRECHT 1010-1011 (1905); I HELLWIG, SYSTEM 768-769.

[24] In the classical Roman procedure the *actio* was consumed by the litiscontestation which admitted the claim to *judicium*; once litiscontestation had supervened there was a bar to renewal of the suit, whether the claim was prosecuted to judgment or not. Where judgment ensued, the case as to consumption may be looked upon as one in which the *actio* was consumed by the litiscontestation, while the ensuing right to trial and judgment was consumed by the judgment itself,—2 BETHMANN-HOLLWEG, DER CIVILPROZESS DES GEMEINEN RECHTS IN GESCHICHTLICHER ENTWICKLUNG 631 (1865); KELLER, LITIS CONTESTATION 199; or else as one in which the judgment simply confirmed or authenticated the consumption already worked by the litiscontestation—WENGER, INSTITUTIONEN DES RÖMISCHEN ZIVILPROZESSRECHTS 204 (1925). See, however, the radical view of COGLIOLO, TRATTATO TEORICO E PRATICO DELLA ECCEZIONE DI COSA GIUDICATA 60 ff. (1883).

[25] KELLER, LITIS CONTESTATION 221; 6 SAVIGNY, SYSTEM 265 ff.

[26] I HELLWIG, SYSTEM 769.

[27] I HELLWIG, SYSTEM, 769-771; I HEILFRON UND PICK, LEHRBUCH DES ZIVILPROZESSRECHTS, 3d ed., 717 (1921).

[28] I VON CANSTEIN, DAS ZIVILPROZESSRECHT 1010 (1905); CHIOVENDA, PRINCIPII 914; BETTI, DIRITTO PROCESSUALE CIVILE ITALIANO 598 (1936).

traposition of *formal res judicata* and *substantial res judicata.*[29] The former term signifies that the judgment is not or is no longer open to attack by appeal or other ordinary means. For this qualified incontestability of the judgment the Anglo-American law has no corresponding label. "Substantial res judicata," on the other hand, is simply res judicata in the ordinary sense, implying the binding effect of the judgment upon future controversies.[30] But in most of the Continental systems formal res judicata and substantial res judicata are always coincident: a judgment does not become res judicata in the substantial sense until it has achieved the quality of formal res judicata.[31] This *elegantia juris* is by no means present in our own system: with us a judgment becomes *res judicata* in the substantial sense as soon as rendered, regardless of whether or not it is open to appeal or other means of recourse; indeed, by what, perhaps, is the more general rule, the actual pendency of appellate proceedings is not deemed to affect operation of the judgment as res judicata.[32]

Not in point of phase but in point of legal nature is the distinction which is taken between *absolute res judicata* and *relative res judicata.* Res judicata is said to be absolute, when under the obtaining procedure the court may take cognizance of it independently of the act of the party in bringing forward the fact of its existence; it is said to be relative where the obtaining procedure suffers the party to control the action of the court by advancing or not advancing the fact of res judi-

[29] CHIOVENDA, PRINCIPII 911.

[30] In German legal terminology the distinction is between *formelle Rechtskraft* and *materielle Rechtskraft.* For the Roman law the substantial sense was emphasized by the term *auctoritas rei judicatae.* The French law differentiates between the authority of res judicata (*autorité de la chose jugée*) and the force of res judicata (*force de la chose jugée*). A judgment is said to have the authority of res judicata from the moment of its rendition, but does not attain the force of res judicata so long as it remains open to ordinary means of recourse. MOREL, TRAITÉ 602. This distinction, it will be seen, does not correspond to the distinction elsewhere taken between formal and substantial res judicata: both the French terms denote res judicata in a substantial sense, the one a qualified or provisional res judicata, the other a more definite res judicata. In the Swedish law, formal res judicata is denoted by a native expression, *laga kraft.*

[31] *Germany:* ROSENBERG, LEHRBUCH 481; *Austria:* 1 SPERL, LEHRBUCH 815; *Italy:* CHIOVENDA, PRINCIPII 911; *Denmark:* 2 MUNCH-PETERSEN, RETSPLEJE 403; *Norway:* 2 SKEIE, CIVILPROCES 224; *Sweden:* WREDE, Z. P. R. SCHWED. 258. Not so, however, in France. Here it is now settled that the judgment has the quality of substantial res judicata (authority of res judicata: see preceding note) from the time of its rendition, but this becomes suspended by the institution of appeal or other ordinary means of recourse. JAPIOT, TRAITÉ 420; MOREL, TRAITÉ 602.

[32] 2 BLACK, A TREATISE ON THE LAW OF JUDGMENTS, 2d ed., § 510 (1902); 2 FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS, 5th ed., § 722 (1925).

cata. Thus, in the Anglo-American law, res judicata is always relative: unless brought to the attention of the court by proper pleading or other appropriate procedural means, it does not come within the sphere of decision; whatever the practical considerations here operating, there is no legal check upon the party who does not desire to raise the question. The same is true of certain Continental systems, including those of France,[33] Italy[34] and Spain.[35] But the idea that we are here concerned with an interest which is primarily that of the State—*interest reipublicae ut sit finis litium*—has prompted perhaps a majority of the Continental systems to remove the matter from the control of the parties, as far as practicable, by requiring the court to take the fact of res judicata into consideration on its own motion.[36] This by the preponderance of opinion is the case in Germany;[37] it is a matter of apparently settled doctrine in Denmark[38] and Sweden[39] and of express statutory provision in Austria,[40] Hungary[41] and Norway.[42]

An idiosyncracy of the Anglo-American law is the current but erroneous subsumption of the preclusive effect of a judgment under the general head of estoppel by record, companioning thus estoppel by deed and estoppel *in pais*. This arises from the historical existence in the common-law courts of the principle of estoppel by record, a Germanic derivative, side by side with the Roman-derived principle of res judicata. But the course of events has in substance produced an assimilation of the two, so that there no longer is reason for conceding to this principle of estoppel a separate identity from the other.[43] Nevertheless, the common-law institution has influenced more than the terminology of the subject, and the peculiar character of the development in the present regard has contributed not a little to the confusion that reigns in

[33] 3 GLASSON, TISSIER & MOREL, TRAITÉ 95, 100.

[34] CHIOVENDA, PRINCIPII 914.

[35] PALACIOS Y HERRANZ & MIGUEL Y ROMERO, TRATADO DE PROCEDIMIENTOS JUDICIALES 529 (1925); MIGUEL Y ROMERO, PRINCIPIOS DEL MODERNO DERECHO PROCESAL CIVIL 398 (1931).

[36] This does not mean that the court is under any independent duty to unearth the fact of a previous judgment: it signifies only that when such a fact has come to the court's notice, it is to be availed of regardless of the action of the parties.

[37] OERTMANN, GRUNDRISS 187; 1 HELLWIG, SYSTEM 782; ROSENBERG, LEHRBUCH 490.

[38] 2 MUNCH-PETERSEN, RETSPLEJE 429.

[39] WREDE, Z. P. R. SCHWED. 259.

[40] ZIVILPROZESSORDNUNG, § 411.

[41] ZIVILPROZESSORDNUNG (Polgári perrendtartás), § 411.

[42] LOV OM RETTERGANGSMAATEN I TVISTEMAAL, § 163.

[43] See generally, Millar, "The Historical Relation of Estoppel by Record to Res Judicata," 35 ILL. L. REV. 41 (1940).

the Anglo-American law of res judicata. But of this development we shall speak later. For the present it suffices to note that no similar element of disturbance has affected the Continental law of the subject.

II

THE CONTINENTAL LAW

A. *Developmental Considerations*

The texts of the Roman law relating to res judicata are such as tc leave room for controversy as to whether, in that system, the conclusive effect of the judgment attached to its premises.[44] In the mediaeval Italian doctrine these texts were so interpreted as to declare the affirmative.

> "In part through the influence of the Germanic law," says Chiovenda, "which . . . treated as a judgment every decision of a question, be it of merits or of procedure; in part because of the imperfect understanding of the Roman texts; and in part due to the scholastic tendencies dominating in the study of law, juristic thought in the study of res judicata took a wrong direction; it addressed itself particularly to the logical element of the proceeding and to the syllogism constituting the framework of the judgment rather than to the affirmation of will flowing from the conclusion. It saw in the proceeding, above all, a *quaestio*, a *disputatio*, a *diffinitio*; and since, in the procedural syllogism, the conclusion must necessarily be taken as true, it came to consider as true also the facts contained in the premises, introducing thus the idea of a formal or fictitious truth as opposed to the effective truth."[45]

This conception of res judicata profoundly affected the later development but was not all-controlling. In Germany, the opinion strongly set in among the eighteenth century jurists[46] that the quality of res judicata attached only to the dispositive part of the judgment,

[44] As given in 1 WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS, 9th ed., 660, note 21 (1906), the principal texts supporting the affirmative are : DIG. XVI, 2, l. 7, § 1; DIG. III, 5, l. 7 [8], § 2; DIG. XLIV, 2, l. 1; DIG. IV, 9, l. 6, § 4; cf. also, DIG. XII, 2, l. 13, § 2; and supporting the negative: COD. III, 8, l. 1; DIG. XXV, 3, l. 5, §§ 8, 9; DIG. XLII, 1, l. 15, § 4; DIG. XLIV, 1, l. 17; DIG. XLIV, 2, l. 23.

[45] CHIOVENDA, PRINCIPII 907-908. See also by the same author "Sulla cosa giudicata," in 2 SAGGI DI DIRITTO PROCESSUALE CIVILE 404-405 (1931). As indicated by the concluding words of the quotation, the present question is bound up with that of the fiction-of-the-truth theory of res judicata which is now being laid aside; see the essay last cited.

[46] For the particular writers, see 6 SAVIGNY, SYSTEM 388.

the *tenor sententiae*, and not to the *rationes decidendi*: at most, as held by Pufendorf,[47] the *rationes* were to be looked to only for the purpose of explaining the *tenor*. The view thus advocated left its impress upon the Prussian procedural legislation of 1781–95, which in terms declared that "mere grounds of decision should never have the force of a judgment."[48] In the so-called "common-law" procedure obtaining elsewhere in Germany, as well as in the distinctive procedure of Saxony, the opposite view, in its essence, was in the ascendant.[49] But, in the first half of the 1800's, the question became more strongly agitated and there arose a debate of extensive proportions, particularly as to the true sense of the Roman sources—a debate which is now one of the classic episodes of Continental procedural history. Foremost protagonist of the view which would attach the property of res judicata to the premises of the judgment was Savigny, whose theory, enunciated in his *System of Modern Roman Law*,[50] published in 1847, is commonly spoken of as that of the "conclusiveness of the grounds of decision" (*Rechtskraft der Entscheidungsgründe*). In this he distinguished what were ordinarily spoken of as the "grounds" of judgment into *objective* and *subjective*. The objective grounds were the concrete jural relations upon which the dispositive part of the judgment depended, the subjective the reasons which personally moved the judge to his conviction as to these jural relations. Res judicata was always to be predicated of the objective grounds, which, in this respect, the author more specifically termed the *elements of the judgment*. Thus, in his opinion, all prejudicial questions were embraced in the res judicata of the judgment, by the very fact that the conclusion in chief was conditioned by the conclusion as to these questions. And this, he maintained, represented the true interpretation of the Roman sources.[51] The victory, however, so far as regards practical consequences, was to lie with Savigny's opponents. The result of the debate, whether or not decisive as to the principle of the Roman law, was decisive, as we shall presently see, for the future course of Continental legislation.

Meanwhile, in France, the difference in procedure had produced a different approach to the practical problem. Under the traditional principle of pleading obtaining in the French system, emphasis has

[47] 1 OBSERVATIONES JURIS UNIVERSI, Obs. 155, p. 391 (1743).

[48] ALLGEMEINE GERICHTSORDNUNG, I, 13, § 38, cited 6 SAVIGNY, SYSTEM 395.

[49] MENESTRINA, PREGIUDICIALE 112, note 5, 113, note 1; WETZELL, SYSTEM DES ORDENTLICHEN CIVILPROCESSES, 3d ed., 593, note 94 (1878).

[50] SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS.

[51] 6 SAVIGNY, SYSTEM 358 ff.

always been laid upon the *conclusions* or formulated points of demand mutually advanced by the parties at the outset of the hearing. These *conclusions* "determine the terrain of the controversy by indicating to the court the points upon which it is to pronounce," [52] and thus delimit the matters as to which specific decision is invited. When, therefore, the question presented itself whether the court's result as to a prejudicial question was or was not part of the res judicata of a given judgment, it was natural enough to answer it by inquiring whether this question had been made the subject of an express *conclusion.* And this involved the concession that it lay in the power of the interested party, by means of such express *conclusion,* to bring the decision of the prejudicial question within the ambit of res judicata. In the *Répertoire* of Merlin we find the situation discussed with reference to a question of status (e.g., that of legitimate birth) upon which depends the relief sought by the plaintiff. Premising that it is the dispositive part of the judgment and not the grounds which constitute res judicata, it follows, says the author,

> "that before a judgment, which defeats the plaintiff's demand by supporting the defense that he was not vested with the status that he claims, can imprint upon this defense the character of res judicata, and prevent the prosecution of another demand with a different object, in respect of which this defense is equally relevant, it is necessary that the defendant have interposed this defense, not in the form of a simple exception, but in the form of an incidental demand: that is to say, he must have advanced *conclusions* expressly tending to have it declared that the status claimed by his adversary was not really his status." [53]

And in a decision of the Court of Cassation of June 5, 1821, cited in the same connection, it is distinctly stated to be in conformity not only with the Civil Code, but also with "time-honored principles," that:

> "to constitute res judicata on a given matter, there must have been *conclusions* advanced by the parties on the point and a dispositive provision of the judgment pronouncing their admission or rejection." [54]

[52] JAPIOT, TRAITÉ 355. See also Millar, "Some Comparative Aspects of Civil Pleading under the Anglo-American and Continental Systems," 12 A. B. A. J. 401 at 402 (1926).

[53] 26 MERLIN, RÉPERTOIRE DE JURISPRUDENCE, 5th ed., 260 (1827), *s. v. Question d'état.*

[54] Ibid. 260; 14 id. 275, *s.v. Chose jugée.*

In a more expanded form the rule so appearing is thus expressed by a later commentator of the same general period:

> "The dispositive part of a judgment has the authority of res judicata only with relation to the points therein decided and not to that which is merely indicated therein in the form of express mention (*énonciation*). Thus, for example, a judgment, which, in an action by a creditor, condemns the debtor to pay the interest accrued upon a capital sum of which the amount finds express mention, does not have the effect of res judicata as to the value of the capital sum. So, again, a judgment which awards a support-allowance (*alimens*) to the plaintiff as father or as child of the defendant does not possess the authority of res judicata as to paternity or filiation, when this question, not having been made the subject of *conclusions* respectively advanced by the parties, has not been submitted as prejudicial and decided by a special and explicit provision of the judgment.
>
> "But that which has been adjudicated incidentally upon formal *conclusions* advanced by the parties has the effect of res judicata, just as that which has been decided principally. Thus the judgment rendered upon the question of status, proposed incidentally as a prejudicial question, has the authority of res judicata quite as much as if the question had been raised by way of principal action."[55]

The merits of such a system are readily apparent. It is manifestly in harmony with considerations of economy in the administration of civil justice that the quality of res judicata should be allowed to attach to the premises of the judgment under proper conditions. These conditions were here satisfactorily met. As above appears, the French system, so far as regards the prejudicial points, placed the objective incidence of res judicata within the control of the parties. Moreover, it afforded a guaranty that the incidental question should receive, on the part of court and counsel, as adequate ventilation as the principal question itself. And, finally, with the express demand for decision of the prejudicial question, followed by express decision thereof in the judgment, it left no room for doubt as to the exact scope of the adjudication. It is not to be wondered at, therefore, that, as the event proved, the institution should commend itself to legislative acceptance elsewhere.[56]

[55] 5 ZACHARIAE, COURS DE DROIT CIVIL, transl. Aubry & Rau, 764-765 (1846).

[56] See the references to the French system in BEGRÜNDUNG DES ENTWURFS EINER CIVILPROZESSORDNUNG 226-227 (Deutscher Reichstag, 1874). To Menestrina, however, in his profound study before cited (LA PREGIUDICIALE NEL PROCESSO CIVILE) belongs the credit of making generally known to procedural science the relation between

B. *Particular Disciplines*

(*a*) *Germany*

When in 1877 there was adopted a uniform code of civil procedure (*Zivilprozessordnung*) for the German Empire, it embodied two results of the highest importance in the present connection. First, the opponents of Savigny's theory carried the day, and, secondly, among other evidences of French influence,[57] there was utilized to the full the benefits of the French system just described. In the one respect, the code provided, by what is now section 322, that:

> "Judgments shall be capable of res judicata only in so far as they decide the demand advanced by complaint or counterclaim."

In the other, the provision (now section 280) was:

> "Down to the end of the oral hearing on the basis of which judgment is rendered, the plaintiff by supplementary demand [literally, enlargement of his demand] or the defendant by interposition of his counterclaim, may pray that a jural relation as to which controversy has arisen in the course of the proceeding and upon the existence or inexistence of which the decision of the principal controversy wholly or in part depends, be made the subject of declaration by judicial decision."

Under section 280 it is settled that:

> "The res judicata of the judgment is restricted to the particular jural relation of the parties which has been made by the complaint the *immediate* object of the controversy: it does not extend therefore beyond the jural relation which has given rise to the demand in suit, still less does it embrace a jural relation which forms only the mediate precondition of that demand. Thus, when there is in a suit a particular demand arising out of the relation of landlord and tenant, as for an installment of house-rent, the res judicata of the judgment does not extend to the relation of landlord and tenant. No more does it extend to the question of ownership where the claim is for the surrender of a thing, or to the right to the capital where the claim is for interest. By a stronger reason, the res judicata of the decision does not affect the facts upon which the claim is founded or the evidence utilized to establish them,

the French device above described and the incidental declaratory action, as appearing in the Italian, German and Austrian systems. See especially 118, 184, 185.

[57] The influence of the French procedure upon the existing German goes back to the installation of the former in the Rhine provinces through the events of war in the opening years of the 1800's, and the subsequent introduction of French institutions into various of the State codes of civil procedure.

or affirmative defenses (*Einwendungen, Einrederechte*) even when these have brought about rejection of the complaint."[58]

To this general rule was made a single exception, namely, in the case where the defendant interposed a purely defensive set-off (*compensatio, Aufrechnung*).[59] By the original terms of the present section 322, the decision as to the existence of the defendant's right in this regard was to constitute res judicata up to the amount thus sought to be set off against the plaintiff's demand. By an amendment of 1898, however, the statutory rule is now that the res judicata thus attaches only to a "decision that the claim of set-off does not exist." This provision has given rise to contrariety of view, but the opinion which latterly seems the more favored would interpret it as extending to a decision supporting the set-off, since, by the very fact of its allowance in reduction or cancellation of the plaintiff's demand, the claim of set-off has ceased to exist.[60]

Especially striking, however, is the form in which the French institution was taken over by the second provision above quoted, that of the present section 280. What this does is to place at the disposal of the party interested in obtaining a conclusive decision of the prejudicial point an action for *declaratory judgment* in the same suit. If it is the plaintiff who is thus interested, he proceeds by joining this declaratory action with his principal action through the medium of supplementary complaint;[61] if it is the defendant, the declaratory action forms the subject of a counterclaim. Such a counterclaim is known as a *declaratory counter-complaint* (*Feststellungswiderklage*) usually denominated as "interlocutory" (*Zwischenfeststellungswiderklage*), "incidental" (*In-*

[58] 1 WEISMANN, LEHRBUCH 233. To the same effect, 1 HELLWIG, SYSTEM 791-792; ROSENBERG, LEHRBUCH 494 ff.

[59] *Compensatio*—the set-off of the Roman and Continental systems—is solely a means of defense: it can never contemplate an affirmative judgment against the plaintiff as does our statutory set-off. If the defendant's right of set-off extends to an amount in excess of that of the plaintiff's demand, the right to the excess as a rule may be asserted in the same suit, but only by way of counterclaim in a manner variously regulated.

[60] STEIN-JONAS, DIE ZIVILPROZESSORDNUNG FÜR DAS DEUTSCHE REICH 935 (1928); ROSENBERG, LEHRBUCH 496-497; GOLDSCHMIDT, ZIVILPROZESSRECHT, § 63, p. 154 (1929), 2d ed., p. 207 (1932) [17 ENZYKLOPÄDIE DER RECHTS- UND STAATSWISSENSCHAFT]; OERTMANN, GRUNDRISS 189; SCHÖNKE, ZIVILPROZESSRECHT 259, (1938); MEYER-LORENZ, ANLEITUNG SUR PROZESSPRAXIS 337, note 22 (1931); BAUMBACH, ZIVILPROZESSORDNUNG MIT GERICHTSVERFASSUNGSGESETZ, 10th ed., 497 (1935). *Contra:* 1 HEILFRON UND PICK, LEHRBUCH DES ZIVILPROZESSRECHTS, 3d ed., 720 (1921); 1 WEISMANN, LEHRBUCH 235; 1 HELLWIG, SYSTEM 797; 1 SEUFFERT-WALSMANN, ZIVILPROZESSORDNUNG 535 (1933).

[61] *Zusatzklage:* 1 HELLWIG, SYSTEM 128.

zidentfeststellungswiderklage) or "prejudicial" (*Präjudizialinzidentwiderklage*). The judicial declaration comes regularly by way of a provision in the principal judgment but in the discretion of the court may take the form of a separate preliminary judgment (*Teilurtheil*).[6] In either case it passes *in rem judicatam.*

Thus the framers of the German Code accorded to the French institution a precision of theory and a scientific justification which it had never attained on its native soil. The French doctrine, untouched by the *Code de procédure civile* of 1806, simply went on the practical ground that either party by an appropriate *conclusion* might make the prejudicial question the subject of express decision and therefore of res judicata; it did not stop to inquire as to the juristic nature of the process involved. But the French postulate that the party must expressly ask for the decision of the prejudicial question necessarily implies the recognition of a right to judicial action falling outside the scope of the plaintiff's demand for judgment on the principal claim or the defendant's demand for acquittal in respect of that claim. And the only sphere in which this right to a judicial affirmation or negation of the theme presented by the prejudicial question is able to find an abiding place is that of the declaratory actions. It is to the lasting credit of the German Code that, through its identification of this fact, it fitted the borrowed institution into its true juristic niche.

(*b*) *France*

In the French law res judicata is dealt with in the Civil Code under the general head of "proof of obligations." Article 1351 of that code restricts the effect of res judicata to the subject matter of the judgment, and requires, for that effect, identity in respect of the thing demanded, the ground of action and the parties[63]—the so-called "three identities."[64] At first sight the requirement of identity of object might be thought to confine the invocation of res judicata to a situation in which the second suit involves precisely the same claim as the first, but from what has already been seen, we know that this is not the case. This

[62] ZIVILPROZESSORDNUNG, § 301; 1 WEISMANN, LEHRBUCH 488; ROSENBERG, LEHRBUCH 282.

[63] "A judgment has only the effect of *res judicata* as regards the subject-matter of the judgment. In order that a thing should be *res judicata,* the claim must be (1) for the same thing, (2) based on the same legal grounds, (3) be between the same parties, and brought by and against them in the same right." French Civil Code, art. 1351, transl. Wright (1908).

[64] 3 GARSONNET & CÉZAR-BRU, TRAITÉ THÉORIQUE ET PRATIQUE DE PROCÉDURE CIVILE ET COMMERCIALE, 3d ed. 412, note 2 (1913).

requirement, as interpreted, simply means that in both suits there must be contemplated "a recognition of the same right as to the same thing";[65] it "signifies in reality identity of the questions."[66] If a given question has been bindingly decided in one suit it cannot be relitigated in a second, whatever the character of the latter. In the case where the question is a prejudicial one in the first suit and the principal one in the second, identity of object is therefore deemed to be present, although here "implicit, and, so to speak, latent."[67]

Concerning the specific relation of res judicata to the premises of the judgment, the French law, unaffected by any legislation supplementing the code provision, remains substantially as we found it to be in the epoch preceding the adoption of the German Code of Civil Procedure. To quote a recent statement of the basic rule:

> "The authority of res judicata attaches only to the dispositive part of the judgment. It is not possessed by the *qualités*[68] of the judgment or its statement of the point of law or of fact or any declarations which it contains upon points upon which there has been no *contestation*,[69] or the grounds or reasons by which the court supports its judgment. But the grounds are to be taken into consideration to explain and interpret the judgment, in other words, to show the exact scope of the res judicata resulting from the dispositive part."[70]

Normally, moreover, the res judicata thus effected does not extend beyond the plaintiff's demand. Subject to what is later to be said, the decision of defensive exceptions does not, therefore, become binding in respect of a future controversy on a different claim. And this is true of the exception of *compensation* as of other exceptions.[71]

[65] Ibid. 420.

[66] Ibid., 422, note 9.

[67] Ibid., 422.

[68] The *qualités* consist of data furnished by the *avoués* (solicitors) of the parties, for insertion in the judgment, their principal component being the *conclusions*.

[69] *Contestation* exists only as to points in respect of which there has been an exchange of *conclusions*.

[70] JAPIOT, TRAITÉ 420-421. To the same effect: 13(2) BAUDRY-LACANTINERIE ET BARDE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL (3 Des obligations), 2d ed., § 2672 (1905).

[71] 1 GLASSON, TISSIER & MOREL, TRAITÉ 806, 738. The exception of *compensation* is in order only where its subject is a so-called "liquid" debt and a debt cannot be liquid in this sense unless its existence as well as its amount is certain. Hence, if the existence of the debt set up by the exception is seriously contested, the exception fails. The defendant is still entitled to rely upon his claim in the same suit, but it now becomes the subject of a counterclaim (*demande reconventionelle*) which may be con-

Where, however, *conclusions* are advanced as to prejudicial questions, their determination is lifted out of the field of mere grounds of judgment, to enter into the sphere of res judicata. For, as formerly,

> "the authority of res judicata attaches not only to that which has been adjudicated principally, but also to that which has been adjudicated incidentally upon the *conclusions* taken by the parties. . . . The authority of res judicata attaches to the judgment which determines subsidiary *conclusions*, as to that which pronounces upon the principal *conclusions* of the parties." [72]

But owing to considerations of jurisdiction (*compétence*) and the right of appeal [73] rather than to those of procedural theory, the question has been discussed whether the *conclusions* of the defendant, in order to make the prejudicial question the subject of binding adjudication, must not assume the form of a counterclaim (*demande reconventionnelle*), instead of a defensive plea (exception). Although there appear certain holdings of the Court of Cassation to the effect that the "existence or validity of a title" may be put in question for this purpose by exception alone, the weight of its decisions lies in the opposite direction, namely, in requiring, says Tissier, that:

> "the defendant, by way of counterclaim, extend the object of the litigation, through calling upon the court to pronounce, by express decision, in the dispositive part of its judgment, upon the existence, the validity or the scope of the contested title, to the end that the decision constitute res judicata upon the point and fix the legal situation between the parties for both present and future." [74]

Commenting upon the question, the same author observes that "it is doubtless not indispensable that the defendant state formally that he

stituted by his supplementing the exception with appropriate *conclusions*. 13(1) BAUDRY-LACANTINERIE ET BARDE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT DE CIVIL (3 Des obligations), 2d ed., §§ 1830 ff, 1888 (1905). 3 DALLOZ, NOUVEAU CODE CIVIL 253, nos. 145, 146 (1903-15). And the decision of this counterclaim obviously is governed by the ordinary rules of res judicata.

[72] 2 LABORI, RÉPERTOIRE ENCYCLOPÉDIQUE DE DROIT FRANÇAIS 712, no. 47 (1889), *s.v. Chose jugée.*

[73] The question whether there is present a pure defense or an affirmative counterdemand becomes relevant from the standpoint of competence since, under the rule that "the judge of the action is judge of the exception," both the Justice of the Peace and the Tribunal of Commerce are competent to pass upon numerous matters presented as defenses which would fall outside their competence if presented by way of counterclaim. Moreover, the same question becomes relevant in determining the value involved from the standpoint of the right to appeal. 1 GLASSON, TISSIER & MOREL, TRAITÉ 734 ff., 783 ff.

[74] Ibid., 741.

is proceeding as counterclaimant; but it must result from his *conclusions* that he has raised the issue as to title directly and principally and is seeking a decision on the point."[75] And he adds that some of the adverse decisions may be reconciled on the ground that the exception dealt with implicitly contained what was in essence a counterclaim. "It is possible," he says, "that under the appearance of a means of defense, the case has exhibited a counterclaim, if in reality it results from the *conclusions* advanced that the defendant desires to obtain not only rejection of the principal demand, but also acknowledgment by the court of his own affirmative claim."[76]

But one will search in vain even the later French doctrine for recognition of the fact that what is presented, either by such a counterclaim on the part of the defendant, or by a corresponding subsidiary *conclusion* on the part of the plaintiff, is the institution of a conjoined declaratory action.

(*c*) *Italy*

In Italy, as a consequence of the invasion of French legal principles, both substantive and procedural, at the outset of the 1800's, the positive law of the present subject stands for the most part on the same basis as that of France. Here, also, res judicata is dealt with in the Civil Code, and the relative provision (article 1351) is an exact rendering of the French provision.[76a] The provision in question is interpreted in the same way as its original in that, despite its literal terms, it permits res judicata to be invoked whenever the same question is sought to be relitigated between the same parties. "The first two conditions," says Mattirolo, "which the law requires before the exception of res judicata can be supported—identity of the thing demanded and identity of the *causa petendi*—merge into a single identity, namely, that of the question presented and decided."[77] Res judicata is constituted by the dispositive part of the judgment and not by the grounds which the judgment assigns, although these may often be of importance in ascertaining

[75] Ibid., 740-741.

[76] Ibid., 809.

[76a] The code in question dates from 1865. A new civil code, however, is in process of attainment. Parts of this have already been adopted and put into effect. As to the matter covered these displace the corresponding provisions of the code of 1865, but in other respects leave the latter in force. So far as we are advised, the provision above in reference (art. 1351) thus remains, at least for the time being, unaffected by the new legislation.

[77] 5 MATTIROLO, TRATTATO DI DIRITTO GIUDIZIARIO CIVILE, 5th ed., 61 (1905).

the range of the dispositive part; [78] normally there is no binding adjudication of the premises.

> "That which . . . determines the objective limits of res judicata is the party's demand on the merits. . . . Object of the adjudication is the *ultimate* conclusion of the court's reasoning and not its premises; the last and immediate result of the decision and not the series of facts, of jural relations or of jural situations which in the mind of the court constitute the presuppositions of this result. . . . In particular, res judicata does not extend to exceptions adjudicated in the judgment which are presented, be it understood, as simple exceptions. . . ." [79]

This is the view most generally followed by the doctrine. But the course of judicial decision is to the effect "that the res judicata extends to the grounds of decision if these form the logical and necessary premise of the dispositive." [80] And, similarly, Carnelutti, in his notable *System*, considers that the res judicata

> "is not limited to the questions expressly resolved in the decision . . . in particular, if the solution of a question supposes, as a logical *prius*, the solution of another, this question also is contained, *per implicito*, in the decision (so-called implicit res judicata). To be precise, there are implicitly resolved all the questions whose solution is logically necessary to arrive at the solution expressed in the decision." [81]

In any event, as in France and Germany, it is open to either party by proper means to bring about a binding decision of a prejudicial question. Italian procedural science, more advanced than the French, has no hesitation in identifying this means as an incidental declaratory action (*demanda d'accertamento incidentale*), in agreement with the theory of the German Code. Regarding the precise form in which this means is to manifest itself, there exists, however, a diversity of opinion. As in France, the question becomes important from jurisdictional considerations, since a court may be competent as to a given matter where this is put forward defensively, but not where it is put forward by way of attack. For Mortara the means may reside in mere defensive allega-

[78] Ibid., 23; CHIOVENDA, PRINCIPII 917.

[79] CHIOVENDA, PRINCIPII 917, 918; see also I CHIOVENDA, ISTITUZIONI 359-360. *Accord*: BETTI, DIRITTO PROCESSUALE CIVILE ITALIANO 602 (1936); HEINITZ, I LIMITI OGGETTIVI DELLA COSA GIUDICATA 205 (1937) and literature cited at p. 204.

[80] HEINITZ, supra, note 79, at 204-205.

[81] I CARNELUTTI, SISTEMA DEL DIRITTO PROCESSUALE CIVILE 271-272 (1936).

tion: to enable the decision of the prejudicial question to attain to res judicata it suffices that the question has been actually contested and decided. His position seems to be that the defensive allegation in this case may be considered as inherently embodying a demand for affirmative declaration.[82] Mattirolo, on the other hand, considers that a formal prayer (*formali conclusioni*) is always necessary.[83] The view of Chiovenda, again, is that formal expression is unimportant and that it comes to a matter of ascertaining from all available circumstances whether or not such a declaratory decision was desired. The court, however, "for the purpose of avoiding future uncertainty as to the extent of the res judicata would do well to elicit express statement on the part of the litigants, if the nature of the proceeding permits;" and in case of subsequent doubt it ought to be held that the court has pronounced *incidenter tantum*, that is to say, not bindingly, on the prejudicial question.[84]

But, whether or not an express prayer for the decision is held to be necessary, the regimen of the institution is definitely established.

> "The claim for incidental declaration may be made by the plaintiff as well as by the defendant. In both cases it has the nature of an action, and, like the declaratory action advanced independently of another proceeding, an action to obtain, by means of adjudication, judicial certainty as to the existence or inexistence of a concrete will of the law. The characteristic of the incidental declaratory action consists in this, namely, that the action-interest is given by the contestation of a prejudicial point arising in a pending suit. When moved by the defendant, it may be called a counterclaim (*riconvenzione*), but the name of counterclaim is usually reserved for cases in which the defendant advances a condemnatory or constitutive[85] action, while here he limits himself to seeking a binding declaration, whether positive or negative."[86]

With reference to the defense of *compensation* (*compensazione*), a special principle should be noted. So long as the existence of the

[82] 2 MORTARA, COMMENTARIO DEL CODICE E DELLE LEGGI DI PROCEDURA CIVILE, 2d ed., 118-119, and note 2 to p. 118; 1 MORTARA, MANUALE DELLA PROCEDURA CIVILE, 9th ed., 153 (1929).

[83] 1 MATTIROLO, TRATTATO DI DIRITTO GIUDIZIARIO CIVILE, 5th ed., 838, note 2 to p. 836 (1902).

[84] CHIOVENDA, PRINCIPII 1175.

[85] In the Continental law the *constitutive* action is one which contemplates a judgment changing the legal situation previously existing between the parties, such as an action for the rescission of a contract or the dissolution of marriage—in the German terminology, *Rechtsgestaltungsklage*.

[86] CHIOVENDA, PRINCIPII 1175-1176.

alleged credit, as distinguished from its admissibility, is not contested, the defendant's claim remains simply an exception and, following the general rule, does not enter into the res judicata of the judgment. But, as a consequence of a provision of the Code of Civil Procedure (article 102) contest of the existence of the credit is deemed to originate a distinct but connected action involving the whole amount of the credit. This, also, though requiring nothing more for its manifestation than the fact of contest, is regarded as an incidental declaratory action. Specifically, it is regarded as an action in which the plaintiff is seeking a binding declaration as to the claim of set-off, and its decision, accordingly, becomes res judicata as to the existence of the alleged credit in its entirety.[87]

(*d*) *Austria*

In the Austrian law, under the régime of the Josephine Code (*Allgemeine Gerichtsordnung*) of 1781, which remained in force until 1895, the exact relation of res judicata to the premises of the judgment seems to have been more or less unsettled. On the one hand, we meet the view that res judicata extended only to the concrete demand of the plaintiff (or counterclaimant) and not to prejudicial questions, and that it embraced defenses only in so far as their non-recognition was perforce implied in the recognition of the plaintiff's right, to the exclusion of positive rights asserted by the defendant.[88] On the other, it was held that res judicata attached to so much of the grounds of a decision as involved the determination of affirmative defenses, replications, etc. (*Einrede—Replik—u.s.w. Ansprüche*).[89] But the argument was set at rest by the Code of Civil Procedure (*Zivilprozessordnung*) of 1895, which provided (section 411) that the judgment should acquire the effect of res judicata

> "only in so far as its decision is upon the demand advanced by complaint or counterclaim or upon a jural relation or right which has come in question in the course of the proceeding and in respect of which a binding declaration as to its existence or inexistence has been sought pursuant to § 236 or § 259."

By virtue of this provision res judicata attaches to the decision of the demand manifested by complaint or counterclaim, necessarily as

[87] Ibid., 562, 919, 1171. For other cases of statutory incidental declaratory actions, see ibid. 1167 ff.

[88] 2 UNGER, SYSTEM DES OESTERREICHISCHEN ALLGEMEINEN PRIVATRECHTS, 4th ed., 639-640 (1876).

[89] 2 VON CANSTEIN, LEHRBUCH DER GESCHICHTE UND THEORIE DES OESTERREICHISCHEN CIVILPROZESSRECHTES 546, 550 (1882).

colored and identified by the facts established. But it does not touch the factual ascertainment per se or the decision per se of any question of law. Nor apart from the case of the interlocutory declaratory prayer referred to, does it affect prejudicial questions, or, except for the case of *compensation*, positive rights asserted by the defendant, in the course of his defense.[90] With respect to compensation it is provided by a further clause of the same section (section 411) that the decision as to the existence of the claim shall become res judicata only up to the amount for which it is sought to be allowed against the plaintiff's demand.[91]

As appears from the quoted provision, Austria has followed the example of Germany in according a welcome to the French mode of dealing with the situation. Section 236, above in reference, provides as follows:

> "The plaintiff, independently of the consent of the defendant, and down to the close of the oral hearing upon the basis of which judgment is rendered, may petition that a given jural relation which has come in question in the course of the proceeding, and upon whose existence or inexistence the decision as to the prayer of the complaint wholly or in part depends, be made the subject of a binding declaration, either in the principal judgment or in a preliminary judgment."

And by the other section above in reference (section 259) the same right is extended to the defendant.

> "During the oral hearing of the cause, the defendant, without the consent of the plaintiff, may interpose a petition in the sense of § 236."

Thus, in its regulation of the whole matter, except as to compensation, the Austrian Code is seen to tread very closely in the footsteps of the German. It is to be remarked, however, that the Austrian legislation does not expressly put the petition of the plaintiff for this incidental declaration on the procedural basis of a supplementary complaint or speak of the defendant's petition as a counterclaim. This has been proclaimed as a step in advance. Menestrina is of the opinion that the petition under discussion has nothing to do with supplementation of the complaint, in the one case, or with the counterclaim, in the other; that

[90] 2 POLLAK, SYSTEM DES ÖSTERREICHISCHEN ZIVILPROZESSRECHTES 491, 493 (1906); see also 1 SPERL, LEHRBUCH 821 ff.

[91] It will be noticed that this regulation of res judicata with respect to compensation differs from that of the present German law and agrees with the rule of the German Code which was in force prior to the amendment of 1898. See supra, p. 14.

it is a new institution with an individuality of its own, and that it would have been a mistake to engraft it "upon the traditional stem of procedural technique."[92] On the other hand, Ott, in spite of the variation in the language of the Austrian provision, fits the petition squarely into the German mould. By availing himself of the instant right, says this author, "the plaintiff is supplementing his original complaint, but the defendant is interposing a counterclaim," and there is cited, as rather convincing evidence touching the latter half of this statement, section 96 of the statute regulating the organization and jurisdiction of the courts (*Jurisdictionsnorm*) which in terms refers to a "*counterclaim* for a binding declaration in respect of a prejudicial relation or right which has come in question in the course of the proceeding" etc.[93] But, in the prevailing terminology, the incidental action, whether on the part of the plaintiff or on the part of the defendant, is usually spoken of as a "petition for binding declaration" (*Feststellungsantrag*) as distinguished from a principal declaratory action (*Feststellungsklage*). Some there are, however, who refuse to see in this incidental demand an action at all. Says Sperl:

> "Neither in its form nor in its object is it an action . . . it is a simple petition (*Antrag*) dependent upon the progression of the proceedings in chief, calling, to be sure, for the decision of the court upon the question which it presents. This petition may be freely withdrawn at any time; if the suit, on the basis of a procedural objection or on the court's own motion, is dismissed because of the absence of some procedural precondition or for some other reason . . . the interlocutory petition for a binding declaration falls with it."[94]

The liability to terminate with the premature termination of the principal action is not an adequate reason for denying that we have here to do with an *action*; if, for example, a given system permits dismissal of the principal action to carry with it dismissal of a counterclaim, this would be no reason for arguing that the burden of the counterclaim was not an action. The institution here in question has all the characteristics of an action, involving, as it does, demand, defense and decision. In

[92] MENESTRINA, PREGIUDICIALE 189, 190.

[93] Ott, "Die Feststellungsklage" in GERICHTS-ZEITUNG 44 (1899). That the reference in JURISDICTIONSNORM, § 96, is to the defendant's petition under § 236 appears also from 1 POLLAK, SYSTEM DES ÖSTERREICHEN ZIVILPROZESSRECHTES 313 (1903).

[94] 1 SPERL, LEHRBUCH 315; see also what is said in MENESTRINA, PREGIUDICIALE, 190-191.

most cases, indeed, this very demand could, in the Austrian law, be the subject of an independent declaratory action.[95] To treat it as other than an action would go far toward depriving it of its scientific justification and would seem only to tend to confusion. If, therefore, we take it to be an action, in accordance with the weight of opinion—and Menestrina here is in thorough agreement[96]—it is difficult to subscribe to the view of the latter dissociating it from the idea of complaint and counterclaim. On the part of the plaintiff, it is an action supplementarily joined to the action already on foot; on the part of the defendant, it is an action seeking something affirmatively against the plaintiff. Correspondingly, it is natural to think in the one case of an enlargement of the scope of the original complaint, in the other of a counterclaim as the apposite procedural vehicle. For the Anglo-American lawyer, at least, the German legislative treatment of the case would appear as the more logical and certainly the more convenient from a practical standpoint.

(*e*) *Hungary*

Normal exclusion of the premises from the res judicata of the judgment is also the express rule of the Hungarian Code of Civil Procedure (*Zivilprozessordnung, Polgári perrendtartás*) of 1911–1915. Its provision in this regard (section 411)[97] is that:

> "A judgment on the merits is capable of res judicata only so far as it contains a decision of the right adduced by the complaint. This provision does not prevent the attaching of res judicata with respect to the necessary consequences of the decision."[98]

From the enacted restriction is excepted, as in Germany and Austria, the defense of *compensation,* but in a different manner from either. As opposed to the German rule (which recognizes res judicata, in this case, up to the amount for which the set-off was advanced, only when the existence of the claim of set-off is denied by the judgment) and the Austrian (under which the recognition up to that amount is present whether the existence of the claim is affirmed or denied by the judg-

[95] See 1 POLLAK, SYSTEM DES ÖSTERREICHEN ZIVILPROZESSRECHTES 9 (1903).

[96] MENESTRINA, PREGIUDICIALE 190 ff.

[97] UNGARISCHE REICHSGESETZSAMMLUNG (1911), 196.

[98] The purpose of this latter clause apparently was to settle certain questions which had arisen under the German and Austrian law in reference to the case where the conclusion bindingly decided in the first suit constituted a precondition of the demand in the second suit. See 50 ENTSCHEIDUNGEN DES REICHSGERICHTS IN CIVILSACHEN 416 (1902); ROSENBERG, LEHRBUCH 496; KLEIN-SCHAUER-HERMANN, ZIVILPROZESSORDNUNG UND JURISDICTIONSNORM, 8th ed., 769, note 15 (1930).

ment), the Hungarian rule (section 412)[99] permits res judicata to arise only when the set-off has been sustained and then up to the amount allowed in the judgment.

But in Hungary, also, the transformed French institution has found acceptance. The relative provision of the code (section 189)[100] is that, down to the close of the oral hearing and without the necessity of meeting the specific requirements for a declaratory action:

> "Complaint or counterclaim, according to the case, may be advanced for the purpose of obtaining a binding judicial declaration of the existence or inexistence of a jural relation, brought in question, upon which the decision of the controversy in whole or in part depends."

As regards the character of the procedural instrumentality contemplated in the present connection, it is significant that the German idea has here overcome the Austrian: the demand, by the express terms of the law, is the subject of *complaint* or *counterclaim*, and not of an unassimilated petition. And, by the same token, the code adopts what seems to be the correct view, that it is dealing here with a declaratory *action* in the true sense of the term.

(*f*) *Denmark*

The Dano-Norwegian law,[101] as it existed prior to the present codes of civil procedure—that of 1916–1919 for Denmark and that of 1915–27 for Norway—had shared in the controversy regarding the objective scope of res judicata, but had come in general to the position that the res judicata of the judgment in respect of the plaintiff's demand did not carry with it the res judicata of the premises. It seems, however, to have been usually agreed that where the judgment specifically decided a prejudicial question, res judicata would attach here also. Apparently more stress was laid in Norway than in Denmark upon the formal signification of the interested party's desire for such a decision.[102]

[99] UNGARISCHE REICHSGESTZSAMMLUNG (1911), 196.

[100] Ibid., 91-92.

[101] The civil procedure of the two countries prior to the codifications mentioned was substantially uniform. See Millar, "The Joinder of Actions in Continental Civil Procedure," 28 ILL. L. REV. 26 at 56-57 (1933).

[102] Hagerup, "Om Udstrækningen af en doms forbindende kraft i civil sag," 50 NORSK RETSTIDENDE 264 ff. (1885) and references to Danish writers therein contained; 1 HAGERUP, FORELÆSNINGER OVER DEN NORSKE CIVILPROCES, 2d ed., 641-642 (1903); 2 MUNCH-PETERSEN, RETSPLEJE 417-419. See also NELLEMANN, FORELÆSNINGER OVER DEN ORDINAIRE CIVILE PROCESMAADE 2d ed., 806 (1869), cited in

The Danish Code (*Lov om Rettens Pleje*)[103] contains no express provision on the subject of res judicata. The basic doctrine, therefore, remains substantially unchanged. "In order that a judgment concerning a given jural relation have operation as res judicata," says Munch-Petersen, "it is necessary that this jural relation have been actually decided by judgment." Emphasis is to be laid upon the judgment's conclusion, although the premises are not without importance, especially as serving to explain the conclusion. Mere facts entering into the premises do not ordinarily attain to res judicata, and even

> "if it be a jural relation," he continues, "which constitutes the court's point of departure in the judgment, as, for example, where the court, without investigation, has taken as the basis of its judgment, the plaintiff's allegation that he is entitled to a thing as heir or as owner, such a presupposition on the part of the court as to a prejudicial relation has no binding force. This is now entirely clear in so far as there has been no controversy between the parties concerning the prejudicial relation referred to; where a point has not been raised at all, it cannot be said to have been decided by the judgment."[104]

But what if there has been controversy on the point? Here, it will be recalled, under the German and Austrian systems the mere fact of controversy will accomplish nothing towards the creation of res judicata, in the absence of an incidental declaratory action. The Danish Code makes no reference to such an action. It cannot be said, however, that for the Danish law the fact of controversy is here sufficient. Even if the point is raised, it may be that all the circumstances indicate that it has been dealt with by the parties only for the purposes of the pending suit. But

> "where, on the other hand, a party—as is usually open to him—has expressly formulated a prayer for the recognition (*Anerkendelse* = declaration) of his right to its full extent, the decision in this regard will be binding in all suits in relation to any demand which has as its immediate basis the jural relation thus in view. And the possibility of such a general recognition coming about by implication is not to be denied, although in this regard the party ought to exact all that he is entitled to and not content himself with

Broomé, "Ett och annat om exceptio rei judicatae i var ordinära civilproces," [1876] NYTT JURIDISKT ARKIV, Afd. II, No. 9, at p. 9.

[103] This code deals with both civil and criminal procedure, as well as with the organization and jurisdiction of the courts.

[104] 2 MUNCH-PETERSEN, RETSPLEJE 416-417.

anything short of a decision which must clearly be given the extended operation in question. In cases of doubt it is assuredly best to consider the res judicata as not attaching. . . ."[105]

Accordingly, the situation presented by the Danish law strongly resembles that of the Italian, as interpreted by Chiovenda, in its lack of insistence upon any formal invitation of the court to decide the prejudicial question, and in looking, instead, to the intent of the party as collected from all the surrounding circumstances. The Danish law, however, probably goes farther than the Italian so far as it concedes that the prejudicial question may sometimes be the subject of res judicata without express decision in the judgment. In any event, from the standpoint of theory, the Danish prayer for decision of the prejudicial question, whether explicit or implicit, manifestly involves an invoking of the judicial power by means of what is in essence, although not in form, an incidental declaratory action.

In Denmark, as in other quarters, the defendant's claim of *compensation* (*Kompensation*) in reduction or satisfaction of the plaintiff's demand is attended by qualification of the basic rule of res judicata. Here res judicata attaches in respect of the decision of the claim up to the amount for which it was advanced, but only when the claim has been allowed: the denial of the claim imports no such effect.[106] This was true under the older law[107] in which the claim was treated as a defensive exception (*Indsigelse*). By a stronger reason it is true under the code, which exhibits a tendency to place this claim on the more logical basis of an actual cross-demand, assimilating it in certain regards to the case of a counterclaim (*Motsøksmaal*) for affirmative judgment against the plaintiff.[108]

(*g*) *Norway*

No more than in the Danish legislation is any express delimitation of the objective scope of res judicata to be found in the Norwegian Code (*Lov om rettersgangmaaten for tvistemaal*). But there is no question that the pre-existing rule basically excluding the premises of the judgment is the one that it has in view.[109] Notably does it follow the German and Austrian legislations in making definite provision for an incidental declaratory action. By section 54 it authorizes the declaratory

[105] Ibid., 417-419.
[106] Ibid., 419.
[107] See 2 SKEIE, CIVILPROCES 259.
[108] LOV OM RETTENS PLEJE, §§ 279, 280, 340, 363, 391.
[109] 2 SKEIE, CIVILPROCES 255.

action in general, on the part of one with a legal interest, for the purpose of obtaining a pronouncement as to "the existence or inexistence of a right or as to the genuineness or lack of genuineness of a document." Then, by section 58 it recognizes as one of the admissible means of altering the basis of a suit or counter-suit, the interposition of "a claim (*krav*) for a binding declaration according to section 54, when the action or defense wholly or in part depends upon the jural relation and this has been controverted in the cause." Under the last mentioned provision, as explained in the recent work of Skeie:

> "When a right or jural relation is a precondition of the plaintiff's demand (either for a judgment capable of execution [*fullbyrdelsedom*] or for a declaratory judgment concerning another right or jural relation) or is a precondition of the defendant's affirmative defense [*indsigelse*], the parties are entitled to claim in addition a binding judgment as to this precondition. . . . When the plaintiff's demand is for a constitutive[110] judgment, the defendant may petition that there be a decision as to the existence of the jural relation which is the precondition of that demand. Thus where *A* brings suit for divorce against *B*, the latter may ask that the marriage be declared invalid."[111]

It is apparent that there is thus present a full recognition of the incidental demand as the manifestation of an action for a binding declaration. But, as regards the mechanics of the situation, this manifestation is not identified, on the one hand, as a supplementation of the original complaint or counterclaim or, on the other, as a counterclaim in itself. In other words the Norwegian form of the institution falls into the Austrian rather than the German procedural mould.

Here, again, *compensation* (*motregning*) is treated as a special case with respect to the principle of res judicata. The obtaining rule is the subject of an express provision in the code (section 163) but is the same as the non-statutory Danish rule, namely, that res judicata attaches only to the affirmative decision of the claim and then only up to the amount for which the claim was advanced.[112]

(*h*) *Sweden*

So far Sweden has not joined in the procession of modern codes of civil procedure. Its system with which is substantially identical the system of Finland, still rests upon the scant provisions of the

[110] For constitutive judgment, see supra, note 85.
[111] 1 SKEIE, CIVILPROCES 460.
[112] Ibid., 495.

Code (*Rättegångsbalk*) of 1734; and the matter of res judicata is not the subject of statutory regulation. In Sweden as elsewhere, the question of res judicata in respect of the premises of the judgment has been a controverted one. Broomé, in an article published in 1876,[113] refers to the opinion of Schrevelius[114] that the res judicata of the judgment extends to its grounds (*skäl*), but cites two decisions of the Supreme Court (*Högsta Domstol*) holding the contrary. The first named is disposed to agree with the view advanced by the Danish writer, Nellemann,[115] to the effect that, while res judicata does not attach in respect of a matter treated in the judgment merely as a precondition of the instant jural relation, it does attach in respect of such a precondition when its determination is seen to be part of what we must suppose, from the judgment, the court has *willed* to decide—that the actual adjudication as it appears from the judgment is here controlling.[116]

The view thus expressed approaches closely to that which appears to be currently accepted, although the latter would seem to place more emphasis upon the intent of the parties. According to the recent work of Wrede, the res judicata of the judgment cannot extend beyond the limits fixed by the complaint, on the one hand, and the express pronouncement of the judgment on the other.[117] Consequently, the decision of a prejudicial question does not per se become res judicata. This result

> "rests principally upon the ground that the parties have not sought a decision in that regard and that the court has not had the purpose of bindingly pronouncing upon the question. It follows, however, that where the prejudicial question stands in so inseparable a relation to the plaintiff's demand that it forms part of the complaint and in this character is dealt with by the court, the res judicata extends also to this question. The complaint looking to adjudication of the plaintiff as heir of his father thus embraces also a complaint looking to a binding declaration of legitimate birth. In doubtful

[113] Broomé, "Ett och annat om exceptio rei judicatae i var ordinära civilproces," [1876] NYTT JURIDISKT ARKIV, Afd. II, No. 9 at p. 1.

[114] Citing SCHREVELIUS, LÄROBOK I SVERIGES ALLMÄNNA NU GÄLLANDE CIVILPROCES (1853).

[115] NELLEMANN, FORELÆSNINGER OVER DEN ORDINAIRE CIVILE PROCESMAADE 2d ed., 806 (1869), is here cited.

[116] Broomé article cited supra, note 113, at p. 9.

[117] WREDE, Z. P. R. SCHWED, 259. But with reference to the first mentioned limitation, the author concedes in accord with Nellemann (BROOMÉ, supra, note 116), that if the judgment transcends the prayers of the parties, this, while ground for setting it aside on proceedings for review, does not prevent it from attaining res judicata to its full extent. WREDE, supra, 260.

cases it is necessarily a matter for inquiry as to whether or not the court had also the purpose of deciding the prejudicial question."[118]

It is further the case that:

"The res judicata relates only to the decision as to what was prayed in the complaint and not to the conclusions of the court as to the matter presented in defense. Hence the fact that an exception was determined by the judgment to be founded or unfounded does not prevent the same question from becoming the subject of judicial inquiry in a second suit, and this even where the exception is based upon an independent right, if it has been put forward merely by way of defense."[119]

With what has just been said the extended treatment of the subject in the recent work of Kallenberg is in substantial agreement.[120] This makes quite plain, however, that it is always open to the party to bring about in the judgment a binding declaration as to the prejudicial jural relation much as in the German system.

"Obviously," says the author, "it is often to the party's interest that a jural relation, which, in a suit involving a given claim, is of prejudicial significance, should be ascertained not only from the standpoint of this significance, but also in such wise that its ascertainment shall be binding for the future. This is true of the plaintiff as regards a jural relation constituting a precondition of the claim in question, just as of the defendant in respect of an opposing right. If the party would bring about such an ascertainment, it is for him appropriately to demand it. The plaintiff must thus—to make our observations directly applicable to Swedish law—render the prejudicial jural relation a subject-matter of the proceeding through formal notice of complaint (*stämning*) and this complaint he can put forward either in combination with his complaint in chief, or later during the pendency of the action. Correspondingly, the defendant who alleges an opposing right has to make it a subject-matter of the action through counter-notice (*genstämning*)."[121]

Whether the decision of a claim in *compensation* (*kvittning*) falls within the normal non-admittance to res judicata of the judicial conclusion as to defensive allegations is a matter concerning which there is conflict of opinion. Kallenberg definitely takes the position that no

[118] Ibid., 261.

[119] Ibid., 261.

[120] 2 KALLENBERG, SVENSK CIVILPROCESRÄTT 1312 ff., especially 1338-1339 (1937).

[121] Ibid. 1328.

res judicata exists in respect of the claim whether it is allowed or rejected. He does not consider the claim to be in the nature of a counter-demand and the pronouncement upon it, is, for him, only one of the grounds of judgment. Since, if allowed, it becomes extinguished to the extent of its allowance, no res judicata is needed to protect the now plaintiff against its future advancement in the same or lesser measure. On the other hand, if it is rejected the defendant should be free to prosecute it in a later proceeding.[122] But by the view more commonly obtaining, the claim in compensation, being looked upon as an affirmative counter-demand, comes under the res judicata of the judgment. In this regard, it is governed by the distinctive rule that, if the claim is denied, the res judicata extends not merely to the amount for which the claim has been advanced, but to the claim as a whole, while, if the claim is allowed, it extends only to so much of the claim as has actually been set off by the judgment against the plaintiff's demand.[123]

(*i*) *Poland*

One of the most recent productions of Continental procedural legislation is the Polish Code of Civil Procedure of 1932.[124] To what extent its operation has been affected by the present German and Russian occupation we cannot say: in any case it claims our attention. Enacted for a territory previously divided under the rule, respectively, of Austria, Germany and imperial Russia, it was natural that it should lay under contribution the three systems formerly obtaining, as also the French, upon which the imperial Russian was principally based; and in view of the high reputation of the Austrian code, it was natural also that contribution of this should in general be the preponderant one.[125] But in the particular matter we are now considering neither the Austrian law nor the German has had as extensive an influence as might be expected.

[122] Ibid., 1359-1363.

[123] WREDE, Z. P. R. SCHWED. 261-262.

[124] The Code in question promulgated December 1, 1932, and in force January 1, 1933, combines, with the introduction of certain modifications, the partial Code of Civil Procedure of November 29, 1930 and the Execution Law of October 27, 1932. KANN, DIE POLNISCHE ZIVILPROZESSORDNUNG: ERSTER HAUPTTEIL, p. v. (1933). Kann's work contains the first part of the code in German translation with notes. Another German translation, and of the code as a whole, but unannotated, is that of MÜHRING and HELBIG, POLNISCHE ZIVILPROZESSORDNUNG (1933). An official French translation of the partial Code of November 29, 1930 appears in EXPOSÉ SOMMAIRE DES TRAVAUX LEGISLATIFS DE LA DIÈTE ET DU SÉNAT POLONAIS, Vol. V, fasc. 2, 1930, p. 47 (1932).

[125] Kann, supra, at p. v.

With relation to the scope of res judicata, the code in question (article 382) contains this provision:

> "A judgment has the effect of res judicata only as regards that, which taken in connection with the ground of action, has constituted the subject-matter of the decision, and, moreover, only between the same parties, except as may otherwise be provided by law."

The meaning apparently is that the binding force is confined to the demand in suit as identified by the grounds of law and fact adduced in its support.[126]

Here, however, the code stops. It has no provision answering to the German section 280 or the Austrian sections 236, 259, by which is extended to the party the right to institute an interlocutory action for the purpose of obtaining a binding declaration as to the prejudicial question. Whether such a decision can be had under the code it is difficult to say. The system of pleading (articles 136 et seq., 225) is perhaps sufficiently close to that of the French system to admit of a practice developing by which, under subsidiary prayers, the decision of the prejudicial question could be sought. And there is nothing in the above quoted provision to stand in the way of such a development. Nor is there any necessary deterrent in the rather conservative attitude[127] of the code toward the declaratory action as a principal one,—restricting this as it does (article 3) to cases where the plaintiff's right has been injured or is threatened with injury,—for the French law, itself,[128] admits the principal declaratory action only in a limited number of special cases.

(*j*) *Spain*

The Spanish law has followed the French in dealing with res judicata in the Civil Code as an element of the "proof of obligations." The doctrine which had antecedently developed on the basis of the *Partidas*, the *Fuero Real* and the *Novissima Recopilación*,[129] involving recognition of the traditional three identities, finds here expression in a form approximating that of the French Code. By the relative provision (article 1252) it is declared necessary to the operation of the pre-

[126] Ibid., 152, note to Art. 359.

[127] Ibid., 2-3, note 2 to Art. 3.

[128] 1 GLASSON, TISSIER & MOREL, TRAITÉ 431 ff.; Borchard, "The Declaratory Judgment—A Needed Procedural Reform," 28 YALE L. J. 1 at 15-16 (1918).

[129] MIGUEL Y ROMERO, PRINCIPIOS DEL MODERNO DERECHO PROCESAL CIVIL 393 (1931). The references are PARTIDAS III, Tit. 22, Ley 7, Tit. 34, Ley 34; FUERO REAL, Lib. II, Tit. 14; NOVISSIMA RECOPILACIÓN, Tit. 17.

sumption of res judicata that "between the case decided by the judgment and that in which it is presently invoked there exist complete identity in point of the subject-matter [*cosas*=things], the grounds, the persons of the litigants and the character in which they proceed." But as in France and Italy, where the second suit involves a cause of action[130] admittedly distinct from that of the first, the statutory requirement as to identity condenses into a simpler formula. In such case it is enough that the same question has been presented and decided between the same parties:[131] the presumption "applies when the juridical situation of the parties is the same in two different contentious proceedings."[132]

We encounter here in substance the same general rule that we have seen obtaining elsewhere, namely, that:

> "The dispositive part of the judgment, never its grounds, is what is capable of producing res judicata, although the grounds, and especially the factual grounds, are of importance in ascertaining the scope of the litigation adjudicated and the question of its identity, under art. 1252, with respect to a new suit."[133]

At the same time the Spanish law, unlike the French and Italian, recognizes the res judicata of the judgment as extending to defensive exceptions.[134] The exceptions of *compensation* (*compensación*) here falls under a rule resembling that of the French law. If the claim is allowed, the res judicata attaches to such part of it as is thus set off; its denial, however, has no binding effect, unless the existence, as distinguished from the admissibility, of the claim has been contested, in which case the result becomes res judicata.[135]

[130] We use here the term "cause of action" in the Anglo-American sense; see supra, note 13.

[131] Sentencia del Tribunal Supremo, 8 de Enero, 1902, 93 JURISPRUDENCIA CIVIL 33 (1902).

[132] Sentencia, 29 de Abril, 1927, 174 JUR. CIV. (II) 1051 (1929).

[133] 8 MANRESA, COMENTARIOS AL CÓDIGO CIVIL ESPANOL, 2d ed., 584 (1907).

[134] Ibid. 586. The pronouncement of condemnation or absolution ordinarily carries with it the decision of the exception. See citations to Supreme Court decisions in 2 MANRESA, COMENTARIOS Á LA LEY DE ENJUICIAMIENTO CIVIL, 2d ed., 105, 107, note 1 to p. 107 (1905).

[135] 3 id., 126. But adjudication of the existence of the credit can only be had under a counterclaim, for, as in the French law, the fact that the existence is actually disputed defeats the exception as such; see supra, note 71. The flexibility of the French system permits the exception to be turned into a counterclaim after the fact of contest is revealed. Not so in the Spanish system, which insists that no counterclaim shall be advanced after the answer on the merits (*contestación de la demanda*). Apparently, the course open to a defendant who expects the existence of the credit to be assailed, and who is desirous, in that event, of its adjudication in the same suit, is to

In accordance with the rule just mentioned as to the dispositive part of the judgment and subject to such qualification as may inhere in relation to the case of defensive exceptions, it would appear to be the normal principle that the premises of the judgment as such do not enter into its res judicata. Respecting the specific matter of prejudicial questions, a decision of the supreme court in 1918 is instructive on the point. So far as regards the present subject of inquiry, the case in its essentials was this: The illicit relation between *A* and *B*, his mistress, having been broken off in consequence of a dispute, *B* initiated against *A* a suit for slander. As a result, and apparently in contemplation of a resumption of the illicit relation, a contract was entered into between the two, whereby *B* renounced all actions against *A* and withdrew that already initiated, and *A*, on his part, undertook to pay *B* 250 pesetas per month for life. Later *B* sued *A* on this contract and obtained judgment for certain arrears found to be due. Still later *A* brought suit against *B* seeking to have the contract declared null or alternatively to have it rescinded. In this suit, *B* contested the demand and counterclaimed for further installments alleged to be due under the contract. The court of first instance gave judgment annulling the contract, as did the appellate instance, on the ground that the contract was based upon an illicit cause. On recourse in cassation it was urged that this result overlooked the effect of the previous judgment for arrears, under which, it was maintained, the validity of the contract had become res judicata. But this contention was negatived by the supreme court, which held the exception of res judicata to be unavailing because it was "founded upon a judgment which, although pronounced in respect of the same contract, limited itself to condemning the defendant to the payment of certain monthly installments pursuant to the terms of the contract, this being the only matter in controversy, and into which, as appears from the record, there nowise entered the elements which the court took into account in declaring the nullity of that contract."[136] The inference is strong that if the question, though only a prejudicial one, had been controverted and decided in the previous suit, the result would have been otherwise. Explicit decision, however, would have been necessary in view of the general rule restricting res judicata to the dispositive part of the judgment.

combine alternatively exception and counterclaim at the time of answering. See 3 id., 125-126.

[136] Sentencia, 8 de Marzo, 1918, 142 JUR. CIV. (I) 481, 490 (1921). But cf. Sentencia, 15 de Junio, 1899, 87 JUR. CIV. 497 (1899).

That the judgment may thus without strain include in its terms the decision of a prejudicial question, properly presented by the parties, seems to be clear. By article 359 of the Code of Civil Procedure (*Ley de enjuiciamiento civil*)[187] it is provided that "judgments must be . . . conformable to the demands and other pretensions of the parties and contain all the declarations necessitated by these, condemning or absolving the defendant and deciding all the litigated points which have been in controversy." A prejudicial question, decided in pursuance of the last clause, by explicit mention in the dispositive part of the judgment, would manifestly be the subject of res judicata.

In the *Treatise on Judicial Proceedings*[188] of Palacio y Herranz and Miguel y Romero, published in 1925, the authors incorporate from the Italian procedurist Chiovenda, a discussion of prejudicial questions, in the course of which it is said that "the contestation of a prejudicial point per se does no more than enlarge the task of the court; it does not normally suffice to bring about a prejudicial decision with the effect of res judicata. . . . For this is required a special norm of law or a voluntary act of the party."[189] We have seen how this doctrine operates in the Italian system in which the binding prejudicial decision is effected through the medium of an incidental declaratory action. But in the Spanish procedure, with its more rigid system of pleading by petition, answer, replication, etc.,[140] no identification appears of any such incidental action, and the authors do not undertake to relate the doctrine in question to their own system. Hence we cannot but conclude, as above, that presentation in the ordinary course of the pleadings is sufficient to bring the prejudicial question within the incidence of res judicata, if that presentation is followed by contest and explicit decision in the judgment. Theoretically, there is here involved, as more definitely in other systems, the incorporation into the suit of a subsidiary action for declaratory judgment *pro tanto*, but this theoretical aspect of the case finds no recognition in the Spanish literature, much less in its legislation or judicial decisions.

(*k*) *The Modern Roman Church*

The procedure of the Roman Church is today governed by the fourth book, *De processibus*, of the *Codex iuris canonici*[141] of 1918.

[187] This Code dates from 1881.

[188] TRATADO DE PROCEDIMIENTOS JUDICIALES.

[189] Ibid., 542. The original passage will be found in CHIOVENDA, PRINCIPII 1158.

[140] See Millar, "Some Comparative Aspects of Civil Pleading under the Anglo-American and Continental Systems," 12 A. B. A. J. 401 at 404 (1926).

[141] Official text, ed. Gasparri (1918).

In this are codified certain basic rules of res judicata, but none of these touches the question of its objective scope. The obtaining doctrine on the subject, however, is summed up by an authoritative commentator in this statement:

> "*Res iudicata tota continetur in parte dispositiva. Nec vis sententiae extenditur ad motiva, nec ad iudicis ratiocinationem, nec ad facta admissa, nec ad quaestiones praeiudiciales, nisi de iisdem expresse pronuntiatum fuerit, e.g., de qualitate heredis in quaestione hereditatis.*"[142]

Thus there is definite acceptance of the view that no part of the premises of the judgment is implicitly embraced in its res judicata. And as to prejudicial questions we are left in no doubt that, when these are made the subject of express pronouncement in the dispositive part of the judgment, res judicata attaches to their decision. But such a pronouncement obviously presupposes presentation by the party and contest, if only by absence of express admission of the presenting party's allegation. The code makes no provision for any step earmarked as the institution of an incidental declaratory action: it does regulate the matter of incidental causes (Tit. XI, *De causis incidentibus*, Can. 1837-1841) but the causes here in contemplation are of a different character.[143] The presentation, therefore, would find place in the ordinary course of the pleadings. In the example above instanced, that of the conditioning question of heirship, it would normally come by way of allegation in the plaintiff's *libellus introductorius;* and it is probably the case that no special prayer is required to bring the prejudicial question within this ambit of binding decision. So that, in substance, the regimen of prejudicial questions in the present regard, would appear to be much the same as in the Spanish system, and, as in that system, the incidental declaratory action, though present, is recognized as such neither in theory nor in practice.

[*The second part of this article, dealing with the Anglo-American law, will appear in a subsequent issue.*]

[142] 2 ROBERTI, DE PROCESSIBUS 251 (1926).
[143] See ibid., 120 ff.