IDENTITY AND *RES JUDICATA*

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The notion of *res judicata* is usually described in terms of identity. As a matter of principle a final judgment[1] prevents[2] the courts from deciding again about the *same* subject matter (or at least from deciding about it in another way). The question whether the subject matter of an earlier judgment is the same as the subject matter of a later suit is perhaps the most debated topic in the doctrine of *res judicata*. In this paper I propose (i) to comment on the fact that in certain situations it can reasonably be said both that identity is present and that identity is not present and (ii) to draw attention to some situations in which terms such as identical, the same, etc., are used in a rather peculiar manner.

It should here be pointed out that my views are stated against the background of Swedish law, and the situations adduced in this paper are chosen accordingly. In the English legal system there are concepts which differ from those of the Swedish (and the Continental) systems, and what is said to be identical (or not identical) may therefore not always be described in the same way in the English system as in the Swedish (and the Continental) systems. But this does not necessarily imply that what will be said here about identity in connection with *res judicata* in Swedish law has no bearing on English law. My statements about the use of such terms as identical, the same, etc., deal principally with very general characteristics, which are not confined to the use of these terms in legal situations, still less to their use in a certain legal system.

I

The fact that in certain situations where the question of *res judicata* arises it is possible to say (in one sense) that there is identity but also (in another sense) that there is no identity does not indicate that such terms as identical or the same have been used in an abnormal or special way. Terms

[1] This paper is confined to cases decided by judgment (the binding force of other kinds of procedural decisions will not be discussed).—The statement in this article that a judgment is final means that the time for ordinary remedies of review has expired.

[2] When it is said that a new suit is not allowed because of *res judicata*, this is not intended to exclude the possibility of new proceedings by virtue of rules on extraordinary remedies.

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like identical or the same are, as will be pointed out in what follows, used in a similar manner in more commonplace contexts. And the legal norm that the same subject matter ought not to be adjudicated a second time by the courts seems natural even to people who are not lawyers. On the whole there is no reason to believe that the concept of identity as part of the doctrine of *res judicata* differs essentially from ordinary common-sense ideas of identity. In certain situations which have bearing on *res judicata* one may be able to say both that identity is present and that identity is not present because it is possible without using the concept of identity in a special way to give different answers to the question of identity. This is done simply by applying the question to different kinds of things in the two instances. If in situations bearing on *res judicata* the subject matters of the two lawsuits are conceived of in one way, it is natural to say that there is identity; if the subject matters are conceived of in another manner it is natural to say that the subject matters of the two suits are different. To a certain extent, it is true, there is no controversy as to the construction of the subject matter, i.e. what is to be compared with respect to identity. The prevailing opinion is that the subject matters should, so far as ordinary civil procedure is concerned, at least in principle be legal rights (or relations) or questions about such rights (or relations)[3] and, so far as criminal procedure is concerned, should be acts (allegedly) committed by the accused. But how the subject matters are to be conceived of in detail is still the subject of considerable discussion and so far, different opinions can be admitted as reasonable in many respects.

Now the conditions under which a matter is *res judicata* can of course be laid down in detail in a statute or established by precedents; but in the Scandinavian countries the courts are considered to have a comparatively free hand on questions of *res judicata*. This being so, the above-mentioned possibility of conceiving of the subject matter in different ways can be of importance. If the courts wish to allow a new suit, they can conceive of the subject matter in one way; if they do not wish to allow a new suit, they may instead choose to conceive of the subject matter otherwise. The subject matter is to a certain extent adaptable to the preferred outcome of a controversy about *res judicata*. Much of the work that Scandinavian (and Continental) scholars have bestowed on this legal principle aims at finding suitable subject matters, suitable in the sense that they support an arrangement of that legal principle which is considered convenient. In what follows (1–3), I propose to point to some methods that permit of the establishment of alternative subject matters.

[3] This implies that neither mere facts nor rules of law can be subject matters of the suits in question.

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(1) One possible technique is to manipulate the rules concerning the individualization of the subject matter of a litigation. Let us assume that X asserts that he is the lawful owner of a certain object, having acquired it from the late Z. Let us furthermore suppose that his alleged right to the object is contested by Y, who is Z's natural heir. X is of opinion that he has acquired the thing from Z in two ways, first by gift and then by bequest. In court he refers only to the bequest, hoping that this act will be easier to prove than the gift; but he loses the case. He then brings a new action against Y, this time citing the gift. If one assumes that the ownership to an object is individualized by the way in which the ownership has come into existence, one can in our example speak of two ownerships, one relating to the gift, another relating to the bequest. If, on the other hand, one assumes that ownership is not individualized by the way it originates, it is natural to say that there is in this case only one ownership, although the owner can quote two grounds for his (single) ownership.

Now it is a rather debated question which is the more expedient way from a procedural point of view: to disallow the second lawsuit or to allow it. According to one opinion, it is more rational in a situation like this to dispose of both the question of the gift and the question of the bequest in a single suit. According to another opinion, a person ought not to be compelled to initiate a suit concerning a more extensive subject matter than he wishes to do (the more so as the other side is entitled to extend the litigation) and ought not to be exposed to the "unnecessary" loss which can be caused if the court in a second suit, conceiving the subject matter to be of the extensive kind, refuses to consider a ground which he has in good faith kept for a second action if needed.[4] If one holds the former view it is

[4] If instead X had mistakenly thought that the subject matter was of the extensive kind and he had therefore from the beginning referred not only to the bequest but also to the gift, he would normally not have been so badly off. But, of course, it could happen that X had little evidence in support of the gift at the time of the actual suit but was in possession of full evidence of the gift at the time of a second suit. If, owing to the mistake just mentioned, X prematurely brings up the matter of the gift, and if as a result of this the ownership emanating from the gift (as a subject matter joined with the ownership emanating from the bequest) is decided upon with binding force to his disadvantage, this can no doubt be a considerable drawback for X.

If the subject matter in the example above is given the lesser range (not involving ownership due to the gift), this implies that the binding force of the judgment so far is confined to what has "actually" been decided about, as the gift, which has not been referred to in the first suit, can in the second suit be considered as a ground for ownership of the object. To confine the binding force of a judgment to what has "actually" been considered by the court is, however, not always practicable. Let us suppose that A sues B in order to secure payment of a debt. B (who says nothing about having paid the debt) tries to prove that the claim is barred by limitation, but A wins the case. Then B initiates a new suit, contending that he is under no obligation to pay because he has already paid the debt. It is generally agreed that this suit should not be allowed, in spite of the fact that the court has not in the first suit "actually" decided about the alleged payment. Creditors' terms would otherwise be too unsatisfactory.

A conceivable way of arranging the binding force of the judgment in the question at issue

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quite natural to maintain that there is only one ownership, that this ownership has been finally adjudicated in the first suit and that a second suit should not be allowed. If one holds the second view, it might be natural to say that there are two ownerships, that only one of them has been finally adjudicated in the first suit and that the second suit about the other ownership should be allowed.

Or, to take another example, let us suppose that X asserts that Y owes him 1,000 Swedish crowns. In support of his claim he refers both to a sale (from X to Y) and to a later settlement (about this transaction) in which Y agrees to pay the said amount of money to X. In a first suit X cites only the settlement but loses the case. In a second suit X cites the sale as a ground for Y's debt. If one assumes that claims are not individualized by the way they originate it is natural to say that in this case there is only one claim (the more so as X only claims 1,000, not 2,000 Swedish crowns). If one assumes that a claim is individualized by the way in which it comes into existence, it is possible to speak of two claims, one relating to the sale, another to the subsequent settlement (the claims being interrelated in such a way that the payment of one extinguishes both of them). The former view can be taken by the courts if they are of the opinion that a new suit should not be allowed. The latter view can be chosen by them if they favour the idea that another suit ought to be allowed.

Yet another example—in a way a more trivial one—may be considered. On a certain occasion Y has inflicted injuries both on X's right arm and on his right leg. In a first suit X claims 1,000 Swedish crowns from Y. In this suit X cites his injured arm but says nothing about his injured leg. In a second suit he claims another 1,000 crowns, this time citing his injured leg (but not his injured arm). Here it is *a priori* possible to speak both of one claim (which X ought to have stated to amount to 2,000 crowns) and of two claims (one amounting to 1,000 crowns and another to 1,000 crowns[5]). If the courts are in favour of not allowing X a second suit in this situation, they can choose the first view. If they prefer to allow another suit, they can opt for the second view.

in our example so as to counteract mistakes of the parties as to the extension of the subject matter could, of course, be to give the subject matter of the first suit the extension which the plaintiff explicitly states. The Swedish rules concerning civil procedure do not, however, direct him to make such an explicit statement. The plaintiff has, it is true, to state his claim (for relief) and the circumstances upon which he founds it; but from these statements it is (as our example illustrates) not *a priori* possible always to infer what extension the plaintiff has wished to give the subject matter.

[5] In all 2,000 crowns. This represents a marked difference compared with what was the case in the example above about the sale. In that example the plaintiff stood to get 1,000 crowns at most. There the grounds were alternative. In the present example they are not alternative but additive.

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It is, of course, not only in situations bearing on *res judicata* that one can assert in this way that identity exists and that identity does not exist. Such things can be done in more commonplace, non-legal contexts. In many cases, it is true, our use of terms such as identical, different, etc., is very fixed. The newborn child and the old man into whom the child has developed are, despite the obvious difference, said to be the same person; consciously to speak of them as two persons would be considered odd.[6] But in many other situations our usage of terms such as identical and the like is more unsettled. Let us suppose that a piece of jewelry has been remade in such a manner that it has been given an entirely new design although no material has been added or taken away. If the main emphasis is laid on the fact that the material is exactly the same after the change as it was before, it is easy to say that it has been the same thing all along. From a purely aesthetic point of view, however, it could equally well be said that it is not the same jewel before and after the alteration.

Now it is typical of the situations just mentioned that the actual object has undergone a change, something which is not, however, of relevance to most situations bearing on *res judicata*. But examples of another kind outside the legal domain can, of course, also be found. Let us think of a building consisting of a *corps de logis* with two detached wings. It is possible to speak both of one building (including both the *corps de logis* and the two wings) and of three buildings. This may be compared with the example above about an accident causing both an injury to an arm and an injury to a leg. Or let us suppose that I have on one occasion seen a building, but only from the front. I can say both that I have seen the front (alone) and that I have seen the house. This last example is of especial interest in a certain respect. It is, as I have just indicated, possible to say that I have seen the house, although "actually" (in a stricter sense) I saw only the front of the house. Something similar can be said in many situations bearing on *res judicata*. If, in the example above about the accident, the view is taken that the subject matter is the injury as a whole, a *res* is said to be adjudicated a "part" of which (the injury to the leg) has not been "actually" decided about.

(2) Against what has been said above about the possibility of finding alternative subject matters, it may be objected that in the earlier-mentioned example involving both a gift and a bequest it is not in accordance with

[6] Examples of a similar kind can be taken from the domain of law. A creditor's claim against his debtor is usually said to be the same from its generation to its extinction in spite of such changes as a reduction due to partial payment or to the maturation of the debt. (If, however, the original creditor is succeeded by a new creditor, it is natural to say both that it is the same claim and that there are different claims before and after the succession.)

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common usage to say that there are two rights (two ownerships). It could perhaps be maintained that it would seem as unnatural to speak here of two ownerships as to say that a person who on a certain occasion has contracted a cold from two other persons has got two colds. Now the answer to the question what is a natural and what is an unnatural use of notions and terms depends on the experiences and semantic habits of those whose attitudes are concerned. And perhaps lawyers, especially, could without too much resistance assimilate the view that there are two ownerships in the example just adduced. There is, it is true, a tradition (not always lived up to nowadays) in Scandinavian and Continental legal writing according to which there is only one ownership in this case, but according to the same tradition there are, in the above-mentioned example involving a sale and a settlement, two claims.[7] If one accepts that in this last instance there are two rights, this may perhaps by analogy reduce the resistance to the view that there are two ownerships in the example mentioned before, especially if it is taken into consideration that, when it comes to abstract and technical entities (such as legal rights), our intuitive reactions against unusual semantic patterns are not so strong as they are when more concrete and commonplace matters are concerned.

For those, however, who cannot accept the idea of two ownerships in the situation involving both a gift and a bequest but who nevertheless want to allow a new suit, the expedient suggested in (1) above—that of making the first suit concern the ownership emanating from the bequest but not the ownership emanating from the gift—is barred. But there is another way out if the subject matter is conceived of not as a legal right of some sort (e.g. ownership) but as a question. Now in all cases where it is possible to speak of a legal right as the subject matter of a suit it is, of course, also possible to speak of the question whether that legal right exists as a subject matter of the suit; so far it makes no relevant difference if one speaks of the legal right or of the question about that legal right as the subject matter. The point is, however, that the conception of the subject matter of a suit as a question can be used as a means of widening the range of acceptable subject matters. Let the subject matter of the first suit in our example be the question whether X has acquired ownership of the object by virtue of the bequest and the subject matter of the second suit the question whether X has acquired ownership of the object by virtue of the gift.

[7] This view concerning the claims probably has to do with the fact that here the object (of the legal right) is a generic thing (money) and with the consequential difficulty of describing the claim by means of the object. If it is supposed that claims (for money) were individualized by their objects, the description "X's claim against Y, amounting to 1,000 crowns" is not correct if X has two claims against Y, each amounting to 1,000 crowns. This difficulty is avoided if instead claims are individualized by virtue of their different origins.

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Even if the view is not accepted that there are two ownerships involved in the actual situation, there is thus no difficulty in saying that the two suits have different subject matters (and that the second suit should not be barred because of *res judicata*). It should not be concealed, however, that this expedient implies a breaking up of the doctrine of subject matter in its orthodox shape, as the subject matter is no longer confined to being a legal right (as a "whole") or the question of the existence of a legal right (in its "totality"). Much the same can be said about the example involving both a sale and a settlement, if it is supposed that the courts wish to allow a second suit but are not inclined to accept the view that two claims are involved.

(3) A third method making it possible to choose a suitable subject matter makes use of the special circumstances in situations which may be called "two-version cases".

Let us go back to the situation referred to above,[8] in which X, in order to get a sum of money, asserts in a first suit a settlement and then in a second suit a sale. This situation can be described as a one-version case. What X asserts in the first suit is not inconsistent with what he asserts in the second. X is of the opinion that both these transactions have taken place; and it can thus be said that X gives only one version of what has happened. This situation may be compared with another. X and Y, who have been involved in complicated transactions, are at variance as to what has really come out of them; but X contends that Y in any case owes him 1,000 Swedish crowns. In a first suit X asserts in support of his claim that he gave Y that amount of money in order that Y should perform a commission, which however Y did not carry out. Having lost this case X sues again, this time pleading that he lent the money to Y. What X asserts in the first suit in support of his claim is inconsistent with what he asserts in the second suit; in the first suit he gives one version, in the second another version. This situation can therefore be characterized as a two-version case.

To say that the two suits just mentioned are about different subject matters is natural if one stresses the point that the subject matters are described in different ways in the two suits: in the first suit as a claim based on a neglected commission, in the second as a claim based on borrowing. But it is also easy to say that the suits are about the same subject matter if instead one emphasizes the fact that the two suits can reasonably be said to relate to the same subject matter, although this was incorrectly described in the first suit. The courts can adopt the first or the second point of view according to whether they wish to allow or to disallow the second suit. Let us assume that the courts wish to adhere to the traditional opinion that

[8] P. 164.

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claims are individualized by the way in which they have originated (so that *in abstracto* there are two claims in this situation) and yet not allow a second suit. It is then easy to say that in another sense there is only one subject matter, the two different descriptions of subject matters referring to one and the same entity.

This example involved—in so far as two subject matters were concerned therein—two claims, i.e. rights of the same kind. But of course other situations can be found. Let us suppose that X in a first suit pleads that he is the owner of an object but loses the case. Asserting that he has now realized that his right is not one of ownership but is a right only to use the object, he then sues about this last-mentioned right. It is natural to say that there are different subject matters in the two suits, if the main emphasis is laid on the fact that the subject matter is described in one way in the first suit and in another way in the second suit. It is equally natural to say that the subject matter is the same in the two suits, if instead what is stressed is the fact that both suits can plausibly be held to relate to the very same matter, although it has been wrongly described in the first suit. Examples of this kind can, of course, also be given with reference to criminal procedure. A person P has been prosecuted for theft but found not guilty. After some time the prosecutor comes to the conclusion that P did not steal the object but instead received it from a thief; he then institutes fresh proceedings, this time demanding that the accused shall be convicted for receiving stolen goods. To say that the subject matter of the first trial and the subject matter of the second trial are not identical is easy if it is emphasized that the descriptions as such of what has happened are rather different. To say that the subject matter of the first trial and the subject matter of the second trial are identical is easily done if stress is laid on the fact that the two descriptions of the subject matter, although in a sense rather different, can plausibly be taken to relate to the same occurrence, the matter which the investigation aimed at throwing light upon. The close connection between the two descriptions could also be expressed in the following way. If the prosecutor, when he initiated the first suit, had known what he knew when he took action the second time, he would have laid this before the court from the very beginning. To apprehend different phenomena as being identical is, of course, something that can also happen in situations of a non-legal, more commonplace kind. Suppose I perceive at some distance a person whom I at first think to be X but whom, on coming nearer, I recognize as Y. I can say that I have seen different things, having at first had an unclear and wrongly interpreted perception, and later a more distinct and correctly interpreted one. But I can also say that I have all the time seen the same thing, i.e. Y, albeit unclearly at first.

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graver a crime than causing another's death). If this view is accepted, terms of identity are here used in a peculiar, asymmetrical way. Let *a* stand for the subject matter of a charge of murder and *b* for the subject matter of a charge of causing another's death. It could then, as in our example, happen that, although in one context *a* is said to be identical with *b*, in another context *b* is said to be not identical with *a*.

There is, however, no need to think that this reflects a view of identity that is really different from the usual one. It is easy to see that in our example *a* in one context may not refer in the same way to a matter as in the other; and that can also be said with respect to *b*. When *a* and *b* are said to be identical, this can be due to the fact that *a* and *b* relate to the same ("ultimate") occurrence. (Cf. the comment above about so-called "two-version cases".) When *a* and *b* are said not to be identical, that can be because they relate to acts which in themselves[2] are rather different. It could then be considered that what seems exceptional in our example chiefly has to do with the way of referring here used. Now it can reasonably be maintained that this way (involving an unnatural asymmetrical use of terms of identity) ought to be avoided, and that it would be conducive to clarity to compare *a* and *b* with respect to identity in the same manner in the two cases involved in our example. One alternative would be to say that, both in the situation where the first action is about *a* and the second about *b* and in the situation where this order is reversed, the subject matter is the same. If, however, the second action in the second situation is nevertheless to be allowed, this could be arranged by means of a special rule involving an exception from the general rule about *res judicata*.[3] Another alternative would be to say that both in the situation where the first action is about *a* and the second about *b* and in the situation where this order is reversed, the subject matter is not the same. If then the second action in the first situation is not to be allowed, this can be arranged by means of a special rule involving an addition to the general rule just mentioned. But against both of these expedients it could, of course, be objected that in a sense they involve a complication of the system of rules bearing on *res judicata*.[4]

What has just been said refers to criminal procedure. Some remarks concerning civil procedure may also be made. Let us, then, suppose that X in a first suit against Y claims 1,000 Swedish crowns, asserting that Y has

[2] *In abstracto.*

[3] The general rule being, of course, that, if a subject matter is already adjudicated in a first action, a second action about a subject matter which is identical with that just mentioned will not be allowed.

[4] One expedient which has not even this disadvantage would, of course, be the barring of the second action (about murder) succeeding the action about causing another's death.

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neglected his duty to perform a commission. Having lost this case, X sues Y again for the money, this time stating that he was mistaken about the ground for his claim in the first suit and that Y in fact borrowed the money from him. It is to be supposed that, if in this situation the subject matter of the two suits is said to be the same, this is also said if X in the first suit cited the borrowing and in the second the neglected commission. The term the same is here used symmetrically. Or let us assume that X, who is of opinion that he is the owner of an object both by virtue of a gift and by virtue of a bequest, in a first suit cites only the bequest and then, having lost this case, in a later suit the gift. It is to be supposed that, if in this situation the subject matter is said to be the same, this would also be said if the gift had been cited in the first suit and the bequest in the second. Here, too, the identity term is used symmetrically. But cases pertaining to civil procedure can be found where such terms are not used in that way.

According to Scandinavian (and Continental) law a distinction has to be made between an action for judgment directing the defendant to perform an act (e.g. to pay a sum of money) and an action for a judgment declaring whether or not there exists a legal relationship (e.g. a person's ownership of an object or a debtor's debt to a creditor). Now at times both actions (about a certain right) are in themselves allowed, but the situation becomes complicated if a plaintiff tries to initiate both of them. Let us suppose that X (the alleged creditor) initiates a claim for a judgment directing Y (the alleged debtor) to pay a sum of money and that this suit has resulted in a final judgment to that effect. If perchance X again went to court, this time initiating a claim for a judgment declaring that Y owes him the said money, this latter suit should not be allowed. But if the order of the suits is reversed, the effect may be different. If X begins with a claim for a judgment declaring that Y owes him the money and then, after having obtained a final judgment to this effect, initiates a claim for a judgment directing Y to pay the money, the second suit should not be disallowed on the ground of *res judicata*.[5] Now it has been maintained that the disallowance in the first case is due to the subject matters of the two suits being identical and the allowance in the second case to the subject matters of the suits not being identical. It could therefore—if the subject matter of the suits concerning judgment directing Y to pay is denoted by "a" and the subject matter of the suits for declaratory judgment by "b"—be said that although in the first situation a is identical with b, b is not identical with a in

[5] This does not mean, however, that the court in the new suit is not bound by the previous judgment about the existence of the debt. A judgment in the new suit must be founded on the judgment in the first suit.

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the second situation, which is an unusual asymmetrical use of the term identical.[6]

That the second suit is not allowed in the first situation but is allowed in the second is understandable. An action which aims at a judgment directing the defendant to perform an act has a wider range than has an action which aims at a judgment declaring that the claim at issue exists. The plaintiff can through a judgment in his favour of the first kind achieve all that he can get by a judgment in his favour of the second kind, but in addition to this he can secure the possibility of obtaining execution (the first but not the second judgment providing a basis for execution). In the first situation mentioned in our example, the plaintiff has already obtained a judgment directing the defendant to pay and he has then no reasonable interest in getting a judgment declaring the debt to exist. But in the second situation the plaintiff who has only a judgment declaring the debt to exist can have a reasonable interest in getting a judgment directing the defendant to pay, thereby achieving an enforceable judgment. This does not mean, however, that the unnatural use of terms such as identical, etc., ought to be accepted. It seems natural in this context to distinguish between the substantive right (or relation) which is the object of a (procedural) action and the action itself. If the subject matter of a suit is conceived of as being the substantive right or relation (or the question thereof) and nothing else, there ought to be no temptation to use the term identical in an asymmetrical way in our example. In this example the debt is (according to the suggested view on subject matters) the subject matter both of the suit aiming at a judgment directing the defendant to pay and of the suit aiming at a judgment declaring the debt to exist; and so it is irrespective of the order of the suits. It is then to be expected that if *a* is said to be identical with *b*, *b* is said to be identical with *a*. It is quite another matter that, if this view is accepted, the close connection between identity of subject matters and disallowance of a later suit is partially dissolved. If the subject matter is confined to being the substantive right or relation (or the question thereof), the question whether a second suit is to be allowed or not depends in certain cases not only on the identity of the subject matters of the actions involved but also on the kind and order of these actions. In the two situations compared in our example the subject matters (in the sense just suggested) of the first and the second suit are identical (the debt); yet in the second situation of our example the second suit is allowed. In order to understand this, it must be taken into consideration that in the second situation the earlier action aimed only at a judgment establishing the

[6] On this view the subject matter, whatever it is meant to be, is obviously not conceived as merely a substantial right or relation (or question thereof).

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existence of the debt, whereas the later action aimed at a judgment directing the debtor to pay. In a general way, the following may be said respecting situations of this kind. A new action about the same subject matter about which a court has decided by final judgment must not be allowed unless the first action aimed at an (unenforceable) judgment establishing the existence of the subject matter and the new action about this subject matter aims at an (enforceable) judgment directing the defendant to perform an act.[7]

The relation of identity, normally conceived, is however not only symmetrical: it is also transitive. If *a* is identical with *b* and *b* is identical with *c*, *a* is identical with *c*. Against this background, terms such as identical, the same, etc., will in this paper be said to be used in a *transitive* way if, when the subject matter *a* of a first suit is said to be the same as the subject matter *b* of a second suit and the subject matter *b* in one suit is said to be identical with the subject matter *c* of a later suit, the subject matter *a* of a first suit should be said to be the same as the subject matter *c* of a second suit. If, *ceteris paribus*, *a* in a first suit should not be said to be the same as *c* in a second suit, the terms in question are said to be used in an *intransitive* way.

It can be presumed that in connection with questions about *res judicata* terms such as identical, the same, etc., are used in an ordinary transitive way. Let us assume that if the prosecutor has taken proceedings against a person P for theft and then, later on, saying that he has become better informed, institutes an action against P for receiving stolen goods, the latter case is said to be about the same subject matter as the first one. Furthermore, if in a first action the prosecutor has charged P with receiving stolen goods and later on, after having been better informed, with

[7] Yet another construction of the subject matters at issue may be suggested, a construction which does not involve their always being confined to the substantive right or relation at stake (or the question thereof). In the first situation in our example, the subject matter of the second suit is to be considered as identical with only part of the subject matter of the first suit; in the second situation the subject matter of the first suit is to be considered as identical with only part of the subject matter of the second suit. *Res judicata* should then be said to be present not only if the subject matter of an earlier and the subject matter of a later suit are totally identical but also if the subject matter of the later suit is identical with part (in the sense suggested) of the subject matter of the earlier suit (the remaining part being the right to execution).

The idea of a subject matter constituting in the way just indicated a part of a more extensive subject matter is, however, not a view prevailing among Scandinavian (and Continental) legal writers. Ordinarily, subject matters of civil suits are (so far as judgments are concerned) supposed to be substantive rights or substantive legal relations (or questions thereof), but a right to execution (embraced by the more extensive subject matter in our example) is normally not considered to be a substantive right. And legal writers are not familiar with the possibility of dividing a subject matter into two parts which are not, both of them, possible subject matters of suits. On the whole it must be taken into consideration that the connection between identity and the notion of *res judicata* was moulded at a time when the complicated situation now discussed was not foreseen and provided for.

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fraud, the second action against P is considered to be about the same subject matter as the first. It can then be assumed that, if the prosecutor in a first action has accused P of theft and then, upon receiving better information, of fraud, the two actions are to be considered to be about the same subject matter. But let us instead suppose that in a situation where the prosecutor has charged P with causing another's death (x) and later on, after receiving further information, charges P with manslaughter (y), the two actions are said to be about the same subject matter. And furthermore that in a situation where the prosecutor has accused P of manslaughter (y) and then, upon further information, accuses P of murder (z), the second action likewise should be said to be about the same subject matter as the first. And let us also suppose that if the prosecutor in a first action has charged P with causing another's death (x) and later on, when he knows better, charges him with murder (z), the subject matter of the second action is not said to be the same as the subject matter of the first.[8] In that case terms such as identical and the same are used in an intransitive way.

It must not, however, be thought that this intransitive use of terms such as identical, etc., reflects a view of identity that is fundamentally different from the usual one. It could be that what is at issue in our example is strictly speaking not identity but similarity. Similarity is obviously not a transitive relation. If a is similar to b and b is similar to c, then a is not necessarily similar to c. It is not unreasonable to maintain that, although causing another's death is similar to manslaughter and manslaughter is similar to murder, causing another's death is not similar to murder. To restate the rules on *res judicata* in terms of similarity (new actions being allowed and disallowed in the same situations as now) would, however, be a rather intricate enterprise.

It could also be that the puzzling use in our example of terms such as identity, etc., is due to the fact that identity does not concern the same kind of things in all the three situations involved in the example. When x and y are said to be identical, this may be because they relate to the same ("ultimate") occurrence. And the same can be said with respect to the identification of y and z. But when x and z are said not to be identical, that may be due to the fact that x and z relate to acts which, as they (*in abstracto*) are described (causing another's death, murder), are different. It can, of course, be maintained that the decision as to identity or non-identity ought to be carried out in the same way in all the situations involved in the example. One alternative is to say that in this case there is identity not only between x (causing a person's death) and y (manslaughter) and between y

[8] Cf. p. 169 at note 1.

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and *z* (murder), but also between *x* and *z*, *x* and *z* being related to the same matter (what P really did). If it is desired that the second action in the third situation should be allowed (although *x* and *z* are said to be identical), this could be arranged by means of a special rule involving an exception from the general rule of *res judicata*. Another alternative would be to say that not only in the third situation but also in the first and the second situations the subject matter is not the same (*x*, *y* and *z* describing *in abstracto* different criminal acts). If it is desired that a second action in the first and the second situations should not be allowed (although *x* and *y* are said not to be identical and likewise not *y* and *z*), this could be arranged by means of a special rule involving an addition to the general rule of *res judicata* (an addition which forbids the second suit in the first and the second situations). But, of course, exceptions or additions of the kind mentioned above would involve a complication of the system of rules concerning *res judicata*.

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